Kluwer Competition Law Blog

Red pill or blue pill? The European Court of Justice makes its choice: subsidiaries can be held liable for the infringements of their parent companies (Case C-882/19 – Sumal)

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On 6 October 2021, the European Court of Justice (***ECJ***) issued its very much-awaited judgment in case C-882/19 *Sumal*, one of the most important cases in private enforcement of competition law of the last years.

For those of you that are new to the case, the facts are as follows. On 24 October 2019, the *Audiencia Provincial de Barcelona* (***APB***) faced a claim for damages by Sumal against Mercedes Benz Trucks España, a subsidiary of the German company Daimler AG to whom the European Commission's (***EC***) infringement decision in the *Trucks* cartel was not addressed. Under the single economic entity doctrine, parent companies can be held liable for their subsidiaries' anti-competitive behaviour. However, the question of whether a subsidiary can be held liable for the anti-competitive behaviour of its parent company was never addressed before, either in a public or private enforcement context. In this regard, the APB decided to suspend proceedings and refer the question to the ECJ for a preliminary ruling.

Advocate General (***AG***) Giovanni Pitruzzella issued his non-binding Opinion on the case in April 2021, which was already commented in a previous entry on this blog. Fundamentally, AG Pitruzzella concluded that whether subsidiaries can be held liable for the infringements of their parent companies or not depends on what the exact foundation of parental liability under EU competition law is: (i) the exercise of control or decisive influence over the infringing legal entity, or (ii) the mere existence of a single economic unit between the infringing legal entity and the one that is being held accountable.

Consequently, AG Pitruzzella put the ECJ in some kind of Morpheus' red pill or blue pill dilemma as regards the determination of the specific element that triggers joint and several liability between undertakings that form part of the same economic unit – until now.

The ECJ's judgment

The ECJ starts recalling the main case law in the field of private enforcement of competition law and the role of the latter as co-guardian – altogether with its public enforcement – of the full effectiveness of Article 101 TFEU. Indeed, as the ECJ ruled in *Skanska*, actions for damages for

infringements of competition law are an integral part of the system for its enforcement, and, thus, the concept of "undertaking", within the meaning of Article 101 TFEU, cannot have a different scope for this purpose as compared to public enforcement of competition law. The ECJ continues and highlights the intentional use of the concept of "undertaking" by the regulator not only in Article 101 TFEU, but also in secondary legislation such as Articles 23(2) of Regulation 1/2003 and 2(2) of Directive 2014/104/EU (***Damages Directive***), to further support the idea that EU competition law as a whole targets the activities of undertakings, understood as economic units (even if in law such economic unit consists of several persons, natural or legal) (paras. 39-41). Although there is nothing new in these statements, the ECJ (once more) clearly shows its willingness to ensure consistency between public and private enforcement of competition law as deterring tools against anti-competitive behaviours in the market.

It is right after this introduction when the ECJ's position regarding the APB's question starts materialising in the judgment text.

First and most importantly, the ECJ recalls that, when an economic unit infringes the rules on competition in the EU, it is for that economic unit to answer for such infringement. This purpose must prove that at least one legal entity within the economic unit has committed an infringement. Once this is done, the undertaking constituted by that economic unit of which the infringing legal entity forms part is to be treated as having committed the infringement. Consequently, the ECJ considers that it is not decisive influence or control over the infringer that triggers the application of joint and several liability amongst different entities, but the fact that they all belong to the same economic unit (paras. 42 & 44). With this statement, the ECJ rejects the need for any additional test to determine liability within an economic unit apart from the mere demonstration of the existence of a single economic unit.

Second, the ECJ confirms that it is in this determination of the existence of a single economic unit where any such test should apply. Indeed, regard must be had to the economic, organisational and legal links between the entities to determine whether two entities form part of the same economic unit. The existence of decisive influence or control over the infringer is just an additional non-essential element to prove this further (para. 43).

Thus, a claimant does not need to prove that a specific legal entity is liable for the damages caused by another entity part of the same economic unit, but the existence of this economic unit itself. While joint and several liability is an automatic consequence of being part of the same economic unit, it is precisely the existence of such economic unit what needs to be proven by the claimant. This is where the economic, organisation and legal links (such as decisive influence or control) come into play.

Finally, and notwithstanding the above, the ECJ realises that certain groups of companies are comprised of legal or natural entities that are active in different and unrelated economic activities. It would be unfair, in this regard, to expose any entity that operates in an economic field completely unrelated to that one in which the anti-competitive behaviour has materialised to potential actions for damages. Consequently, the ECJ introduces a new element to the formula to establish the existence of a single economic unit: there must be a link between the subsidiaries' economic activities and the subject matter of the anti-competitive conduct carried out by the parent company (paras. 46-47 & 51). By saying this, the ECJ is not only shaping further the concept of undertaking under Article 101 TFEU itself, but also establishing that a group of companies linked by control relationships can be comprised of several undertakings or economic units (instead of

one as it has traditionally been believed).

As a result, the ECJ concludes that a subsidiary can be held liable for an infringement committed by its parent company when (i) the existence of the above-mentioned economic, organisational and legal links has been established, and (ii) there is a specific link between its economic activity and the subject matter of the infringement for which the parent company was held to be responsible.

The ECJ then moves on to subsidiaries' rights of the defence in this particular situation and rules that, once the claimant has proven the existence of these links and thus the fact that the concerned entities form part of a single economic unit, these entities must dispose of all the necessary means to exercise their rights of the defence before the national courts and, in particular, contest that they belong to the same economic unit. What these subsidiaries cannot challenge before the national courts, though, in the specific context of follow-on actions, is the existence of an infringement of competition law, as this is expressly precluded by Article 16(1) of Regulation 1/2003 (para. 55). Conversely, the very same existence of the infringement could be challenged by these entities should there be no infringement decision from the competition authority (standalone actions).

The ECJ ends the discussion indicating that having regard to all the above and the primacy of EU law, national courts will be obliged to interpret their domestic law governing liability for infringements of competition law in a manner consonant with EU law and thus with the present judgement. To the extent that these provisions of domestic law do not leave scope for such interpretation (e.g. because they require the existence of control), national courts will be required to disregard them and directly apply Article 101 TFEU instead (paras. 71-73).

Conclusion

Be it red or blue, it will definitely be a hard-to-swallow pill for many. The ECJ's judgment in *Sumal* brings about some very much-needed clarity on not only the concept of undertaking under Article 101 TFEU, but also on the logic governing the extension of liability between entities that form part of the same economic unit.

With its judgment, the ECJ makes its choice: subsidiaries can be held liable for the infringements committed by their parent companies, even when they are not addressees of an infringement decision in the context of follow-on actions for damages, as long as they form part of the same economic unit in light of their economic, organisational and legal links, and the specific link between their economic activities and the subject matter of the anti-competitive behaviour. Consequently, it is not the existence of control, decisive influence or participation in the infringement that triggers such liability, but the mere fact that these subsidiaries form part of a single economic unit with the infringer.

Willingly or unwillingly, this statement opens the door to further potential implications of the judgment in not only private but also public enforcement of competition law.

On the one hand, nothing in the judgment seems to be indicating that joint and several liability can only be established vertically. Consequently, as long as the claimant proves the existence of those economic, organisational and legal links and the relationship between the economic activity of the defendant and the subject matter of the infringement, this liability can be extended horizontally to sister companies. The same would be applicable to the determination of the legal entity within the

economic unit on which the competition authority can impose a fine (although it is very unlikely that a competition authority would impose a fine on an entity that has neither directly nor indirectly participated in the alleged infringement).

On the other hand, the ECJ is basically establishing that groups of companies can be comprised of several economic units and thus undertakings, depending on their economic activity. Technically speaking, this does not contradict previous case law on the application of Article 101 TFEU to agreements between entities that form part of the same economic unit. However, one cannot ignore how this case law (see, C-73/95 *Viho*, C-201/09 P *Acelor Mittal*, or C-531/16 *Ecoservice*, amongst others) declared the inapplication of Article 101 TFEU in light of the decisive influence or control exercised by a parent company over its subsidiaries but did not consider the link between their economic activities and the subject matter of the agreement. With its judgment, the ECJ is clearly indicating that Article 101 TFEU can still be applicable to agreements between entities that form part of the same group (e.g. governed by a control or decisive influence relationship) but do not share related economic activities.

Additionally, with this ruling, the ECJ is making clear that Article 101 TFEU precludes any national law that provides for the possibility of establishing joint and several liability exclusively when some specific requirements are met (such as the existence of control or decisive influence). This is particularly interesting given that it is precisely the case of Spain. Indeed, Article 71.2(b) of Royal Decree-law 9/2017 expressly envisages the extension of liability from one entity to another that controls the former. Consequently, it will be for the APB to interpret this provision while respecting EU law and, in particular, the present judgment. Given the little scope for such interpretation in the case at issue, the APB is expected to apply Article 101 TFEU directly and disregard the domestic provision – although this remains to be seen.

Last but not least, the ECJ forgets to shed some additional light on what is it to be understood by "*the existence of a specific link between the economic activity of* [a] *subsidiary and the subject matter of the infringement for which the parent company was held to be responsible*". Although the commercialisation of the products that constitute the subject matter of the agreement (i.e. the trucks in the present case) might be clear enough, it is unclear where the limits of these links are.

A new era on the application of the single economic entity doctrine to both private and public enforcement of competition law is about to start, undoubtedly leading to controversial yet fascinating litigation processes where companies will fight over the existence of these links that the ECJ confirms are required for the establishment of joint and several liability within economic units.

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