Kluwer Competition Law Blog

MOL (C-425/22) – The "Undertaking" (Art. 101, 102 TFEU) As An Applicant: New Forum Shopping in Competition Law?

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In the *MOL* (C-425/22) case, the Hungarian court requests a preliminary ruling on whether the concept of an economic unit can be applied on the applicant's side. This would allow to establish the forum of jurisdiction at the registered office of the parent company in the sense of Article 7(2) of Regulation (EU) 1215/2012 (Brussels Ia). For this to work, the jurisprudence establishing an economic unit between a parent company and its subsidiaries needs to apply, so that every unit of an economic unit, in this case, the parent, has standing for any damage suffered by one of its subsidiaries.

Firstly, even though the treaty notion of "*undertaking*" only applies towards the defendant, the concept of the economic unit can reasonably be applicable on the applicant's side. In general, the application of the notion of "*undertaking*" in the sense of an economic unit is justified by a joint market activity from which all units – parent company and subsidiaries – profit. In case of a shared market activity between parent and subsidiary during which one of them is damaged by the defendant, the concept also seems to fit.

Secondly, the parent company's liability or the subsidiaries' liability for the wrongdoing of the other respectively can only be justified on the grounds of creating welcomed deterrence effects amongst all entities. Any applicant – be it the parent company or the subsidiary – could, at least in the majority of cases, not have prevented the competition law infringement of the defendant. *Individual* deterrence effects cannot justify the application of the economic unit on the applicant's side. Nevertheless, the applicability of the concept of the economic unit on the applicant's side is justified as it increases the likelihood of the damage being claimed. The parent company typically possesses more resources to file a complaint than the subsidiary does. It thereby increases the deterrent effect of competition law enforcement.

The *MOL*-Case: The economic unit to create a forum of jurisdiction

Trucks [1] is again on the agenda. The European Commission found that, amongst others, the defendant Mercedes-Benz Group AG had participated in a cartel. *MOL* Group, the applicant, holds a number of exclusively controlled subsidiaries – either by the majority of shareholders or by contractual control rights – which directly purchased trucks from the defendant during the time of the infringement. [2]

The subsidiaries suffered economic losses due to an increase in the price of the products purchased, the parent company didn't. [3] Still, the parent company has a genuine interest in claiming the losses its subsidiaries suffered in order to increase its own value by the -then- increased value of the subsidiaries.

Due to procedural considerations, it is of course preferable for the parent company to proceed at the court of its registered office. Art 7(2) of the Brussels Ia Regulation allows for such a forum as long as the centre of economic and financial interests of the group of companies can be allocated to the place of the registered office. The critical question is whether the – prima facie indirect – loss of the parent company is sufficient to claim the losses suffered by the subsidiary. In general, indirect losses are irrelevant under Art. 7(2) Brussels Ia. [4]

However, under the premise of applying the concept of the economic unit on the side of the applicant, the loss of the subsidiary also becomes a – direct – loss of the parent company. If agreed, it remains to be answered whether Art. 7(2) of the Brussels Ia Regulation allows to apply of the economic unit as a concept of competition law.

The economic activity as the main requirement to establish an economic unit: Applicants and defendants alike

The economic unit governs the liability of corporate groups in competition law. Its main requirement is shared market activity. Corporate groups on the applicants and on the defendant's side alike can share such market activities.

The economic unit is not defined by treaties but has been decisively shaped by cases in the European Court of Justice (CJEU), including *Skanska* (C-714/19), *Goldman Sachs* (C-595/18), and *Sumal* (C-882/19). According to the CJEU's jurisprudence, it is the common market activity with regard to Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) that assigns a subsidiary of one corporate group to the economic unit along with the parent company.

The attribution of liability among entities within the so-defined economic unit, however, no longer requires control of the non-infringing entity over that entity in breach of competition law as long as both entities form part of the same economic unit. This is remarkable, as it not only allows for the liability of the parent company for breaches of competition law committed by the subsidiary but also applies the other way around.

The jurisprudence of the CJEU regarding the economic unit was shaped by the *Skanska* decision (C-714/19), which defined the economic unit as an autonomous concept of European primary law, distinct from Member States' corporate law. This was groundbreaking, especially because even the Antitrust Damages Directive (Directive 2014/104/EU) does not contain provisions governing group liability. In the event of a violation of competition law, the entities liable within a corporate group are now defined according to Articles 101 and 102 of the TFEU. The contours of the economic unit are thus derived from the concept of the undertaking used therein. The entities that comprise the economic unit are linked by their shared market activity with regard to Articles 101 and 102 of the TFEU, whereas market activity is defined as any offering or demand of goods and services on the market. This activity is shared if the parent company controls the economic activity of its subsidiaries, resulting in uniform market activity.

Second, the *Goldman Sachs* case (C-595/18, Tz. 35) clarifies that the economic unit can be established when it is clear that the parent company can influence the economic activity of the subsidiary in the market. To determine this, the CJEU attributed decisive importance to holding the majority of voting rights in the subsidiary, unless the parent company already holds the majority of the share capital. Contrary to the more traditional understanding of the control of the subsidiary using the parent's capital participation, it is rather the voting rights that are considered in the establishment of the economic unit and, consequently, the attribution of liability to the parent company for the subsidiary's breaches of competition law.

Third, and most recently, the *Sumal* case (C-882/19) attracted significant attention for its confirmation of the liability of subsidiaries for infringements of competition law by the parent company, a result mostly unknown in Member States' jurisdictions. The economic unit is still defined by the proposed standard of the common offering or sale of goods and services. To attribute liability between the parent company and its subsidiaries as parts of the economic unit, the parent and subsidiary are only required to share the market activity with regard to Articles 101 and 102 TFEU. Thus, where control cannot be established for the sake of attributing liability within the economic unit, the shared market activity can be used as a basis to establish the liability of the parent company for breaches of competition law committed by its subsidiary.

It is the last, and most far-reaching application of the concept of the economic unit that the parties to the *MOL* case applied. [5] However, the reference to the *Sumal* judgement would only be convincing if the subsidiaries wanted to claim damages from the parent company.

On the contrary, in the *MOL* case, the most basic application of the concept of the economic unit is enough: the parent company can be held liable for breaches of its subsidiaries, and it should also be able to claim its losses. It is only necessary that the parent and subsidiaries fulfil the general requirements of the economic unit. A fact that isn't disputed in the case at hand.

Justifying the broad concept of the undertaking: From deterrence to an increase in private enforcement

Grounds for justification are already difficult to find when applying the concept of the economic unit on the side of the defendant. The most critical one is the *Sumal* judgement. The main argument for justification is that the subsidiary's liability creates an additional *ex-ante* incentive to reduce risks of infringement of the parent company. The reason behind it is that the subsidiaries are not entitled to protectionary measures at the parent company's level, that the liability of a subsidiary for the parent company's infringement cannot create direct incentives to comply with competition law.

Still, the (additional) liability of a subsidiary creates a loss for that subsidiary, thereby reducing the value of the parent company's stake in it. This results in an indirect incentive for the parent company to prevent its own loss by monitoring its own conduct and thereby preventing wrongdoing effectively. [6]

This reasoning is, of course, inapplicable on the side of the applicant. The applicant is not to be deterred. The only possible justification lies in the battle against underenforcement in private competition law: should it be true, the parent company will have – usually – better means and more incentives to claim the damage of its own subsidiary. The parent company thereby increases its

own value because its share in the subsidiary is increasing should the damage be repaired. Furthermore, more than one subsidiary likely suffered from cartel prices purchasing goods (in *MOL* trucks) in different countries. Under this presumption, it is – for the corporate group as such – cost-effective, if the parent company enforces all the damages suffered. As a result, such an enforcement regime would enhance the overall effectiveness of private enforcement because it reduces the enforcement costs of all the damages suffered in the aftermath of a (cross-border) cartel.

Consequences for the application of Art. 7(2) Brussels Ia

This result of the competition law analysis should also be applicable under the Art 7(2) regime. The Hungarian court of the second instance [7] already pointed out that "*the economic unit theory is not recognized by the rules governing the allocation of jurisdiction*" [8] – true, so far. To serve the purpose of Brussels Ia the provisions need to be applied narrowly in order to prevent, at least restrict, forum shopping by applicants. Applying the concept of the economic unit would certainly increase the number of fori.

However, Brussels Ia also serves the purpose of providing a forum where a directly affected applicant sits. If the competition law tells us that the parent company and subsidiary are suffering from a competition law infringement, then international private law should embrace this idea and provide the forum at the registered office of the parent company as well as at one of the subsidiaries.

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[1] COMM. AT39.824.

[2] CJEU of 28th June 2022, C-425/22, Request for a preliminary ruling, Tz. 2 – *MOL*.

[3] CJEU of 28th June 2022, C-425/22, Request for a preliminary ruling, Tz. 2 – *MOL*.

[4] CJEU of 5th July 2018, C-27/17, Tz. 32 – *Lithuanian Airlines*; CJEU of 9th September 1995, C-364/93, Tz. 14 f. – *Marinari*.

[5] CJEU of 28th June 2022, C-425/22, Request for a preliminary ruling, Tz. 6 – *MOL*.

[6] *Fischer/Zickgraf*, Zeitschrift für das gesamte Handels- und Wirtschaftsrecht 2022, 125-189.

[7] CJEU of 28th June 2022, C-425/22, Request for a preliminary ruling, Tz. 6 – *MOL*.

[8] CJEU of 28th June 2022, C-425/22, Request for a preliminary ruling, Tz. 6 – *MOL*.

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This entry was posted on Thursday, October 20th, 2022 at 9:00 am and is filed under Source: UNCTAD“>Damages, European Court of Justice, Jurisdiction, Liability, Parental liability
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