Kluwer Competition Law Blog

MTB/Heineken and the Liability of the Undertaking: Another Round

Stefan Tuinenga (Lindenbaum) · Wednesday, May 31st, 2023

Introduction

The MTB/Heineken case concerns the question of whether a claimant in EU antitrust follow-on damages proceedings can use a parent company that is not addressed in an authority's fining decision as an anchor defendant for jurisdiction under the Brussels Ibis Regulation. The Dutch Supreme Court intends to refer preliminary questions on this topic to the European Court of Justice (**CJEU**).

The MTB/Heineken case

Background

Under the main jurisdictional rule of the Brussels Ibis Regulation, a defendant can be sued in the country where it is domiciled (Article 4 of the Brussels Ibis Regulation). Article 8(1) of the Brussels Ibis Regulation adds that if there is a close connection between multiple defendants, they can all be sued before the court in the country where one of them (the 'anchor defendant') is domiciled.

Heineken's 98.8% Greek subsidiary Athenian Brewery (**AB**) was fined by the Greek competition authority for abuse of dominance. Heineken (i.e., the parent company) was not separately listed as an addressee in the Greek competition authority's fining decision.

Macedonian Thrace Brewery ("**MTB**") alleged that it suffered harm as a result of AB's abuse of dominance and that Heineken was jointly and severally liable with AB for the damage caused. Heineken was jointly and severally liable according to MTB on the basis of parental liability following its decisive influence over AB. MTB filed a damages claim against AB and Heineken in the Netherlands, using the Dutch parent company Heineken (which is established in the Netherlands) as the anchor defendant.

MTB argued that Heineken could serve as an anchor for jurisdiction for both claims due to the close connection between the claims against AB and Heineken. The close connection consisted of the fact that they were jointly and severally liable for the same abusive behaviour.

The District Court's and the Court of Appeal's judgments

The District Court of Amsterdam rejected jurisdiction of the claim on the basis that MTB had insufficiently substantiated Heineken's involvement in the infringement, and that it was not foreseeable for AB that it would be summoned before a Dutch court, instead of a Greek one.

The Court of Appeal of Amsterdam overturned the District Court's decision and accepted jurisdiction. The Court of Appeal considered that MTB's claims against AB and Heineken were identical and that the facts were also the same for both claims. In the Court's terms, in a situation where a parent company holds (almost) 100% of the shares of a subsidiary, there is also a degree of influence by the parent company on the subsidiary. It could, therefore, not be excluded that Heineken was jointly and severally liable with AB for the harm suffered by MTB. If a Greek court would rule on the claim against AB, and a Dutch court on the claim against Heineken, there would be a risk of irreconcilable decisions. Therefore, the court concludes that there is a close connection between the claims and that the claims should be decided on jointly. The question of whether Heineken actually exercised a decisive influence on AB and would therefore be liable for the harm suffered by MTB was, according to the Court of Appeal, a matter to be decided in the proceedings on the merits.

The Court of Appeal rejected AB's argument that MTB's reliance on Heineken as the anchor defendant was abusive under procedural law. The court ruled that there is no abuse of procedural law if it cannot be excluded that the anchor defendant is liable for the infringement on the basis of parental liability. It was also foreseeable for AB that it would be summoned before the Dutch court as it was part of the Dutch Heineken group.

The Supreme Court's referral

AB and Heineken appealed the Court of Appeal's judgment to the Dutch Supreme Court. The Supreme Court found that there can be reasonable doubt about the application of the Akzo presumption of decisive influence in the jurisdictional phase of civil proceedings, and that it intends to refer preliminary questions to the CJEU.

In the Akzo case, the CJEU ruled that in the situation of a 100% shareholding of a parent company in a subsidiary (in later case law this was expanded to cover "*almost*" 100%), a parent company can exercise decisive influence over the subsidiary, and a rebuttable presumption applies that the parent company actually exercised decisive influence (and is, therefore, part of the same undertaking as the subsidiary and liable).

The Supreme Court noted that if the presumption were to apply in the jurisdictional phase of civil proceedings, parent companies can usually be used as anchor defendants for jurisdiction and Article 8(1) of the Brussels Ibis Regulation would have a broader scope in antitrust damages cases. The question would then be how the legal test of the CJEU cases Kolassa and Universal Music should be applied.

In Kolassa and Universal, the CJEU ruled that an obligation to conduct a comprehensive taking of evidence in the jurisdictional phase risks prejudicing the assessment of the substance. At the same

time, the court should be able to examine its international jurisdiction in light of all the information available to it, including, where appropriate, the defendant's allegations. The Supreme Court, therefore, wants to know from the CJEU to what extent a defendant should be able to try to rebut the Akzo presumption (if applicable) in the preliminary phase.

As a result, the Dutch Supreme Court's decided that it intends to refer the following preliminary questions to the CJEU:

- Does the presumption of decisive influence, which applies in competition law, also apply when assessing jurisdiction under Article 8(1) Brussels Ibis Regulation?
- If so, how should the legal test of the CJEU cases Kolassa and Universal Music be applied? Is there jurisdiction if it cannot be excluded that the parent company exercised decisive influence?

The court gives the parties the opportunity to provide their views on the draft questions, and later it will decide on the final questions to be referred.

Commentary

The CJEU has ruled on jurisdiction in antitrust damages cases before in the seminal CDC/Akzo case, amongst others. The CJEU's ruling in CDC/Akzo stated that if multiple undertakings, who were found to have participated in the same antitrust cartel infringement according to a European Commission decision, are jointly sued in damages cases, then the case can be filed in the country where any one of them is domiciled. According to the CJEU, this avoids the risk of irreconcilable judgments resulting from separate proceedings against the same individual undertakings.

In the MTB/Heineken referral decision, the Dutch Supreme Court considers that the case is different from CDC/Akzo because Heineken was not addressed by the Greek competition authority as an infringer in its fining decision (neither as a direct participant nor on the basis of parental liability). This is relevant according to the Dutch Supreme Court because:

- The liability of the parent company had not yet been established;
- This raises questions about the application of the Akzo presumption of decisive influence; and
- If the presumption applies, the question is to what extent there is room to rebut this presumption in the jurisdictional phase.

Akzo, Skanska and Sumal, and civil liability of the undertaking

In the MTB/Heineken case, MTB argues that the close connection between AB and Heineken is based on their joint and several civil liabilities as part of the same undertaking.

The test for determining whether two entities comprise part of the same undertaking follows from established case law dating back to the Akzo judgment: a parent company forms part of the same undertaking as a subsidiary if the former exercises decisive influence over the latter. In such a scenario, the two entities form part of one economic unit (or undertaking) and the parent entity can be held liable for the conduct of its subsidiary.

In the Skanska and Sumal judgments, the CJEU clarified that the joint and several liability of the undertaking also applies in civil proceedings and that civil liability for cartel infringements is not limited to the legal entities addressed by the competition authority's decision. Rather, all legal entities that form part of the 'undertaking' that committed the infringement are liable.

In Skanska, the CJEU confirmed that the concept of undertaking in Article 101 TFEU cannot have a different scope in private enforcement proceedings than in public enforcement proceedings. The cartel prohibition of Article 101 TFEU defines an "*undertaking*" as the perpetrator of a cartel, not a "*company*" or a "*legal person*". It follows that if one legal entity within the undertaking infringes Article 101 TFEU, the whole undertaking is liable for that infringement.

In Sumal, the CJEU considered that the Commission had the discretion to hold liable any legal entity within an undertaking that infringed Article 101 TFEU. For this reason, it cannot be inferred from the addressees of a Commission decision which legal entities are liable in damages proceedings. The finding of an infringement of Article 101 TFEU in a Commission cartel decision is definitive for all legal entities that form part of the undertaking, as it is for the economic unit that has committed the infringement to answer for it.

In the referral decision, the Dutch Supreme Court, in my view, overstates the difference between MTB/Heineken and CDC/Akzo by highlighting that Heineken was not an addressee of the fining decision and did not participate in the infringement itself. These two factors should have no relevance for civil liability and jurisdiction, as the finding by a competition authority of a cartel infringement is a finding of an infringement by the undertakings (in other words: the undertaking is the perpetrator) and is not limited to a finding of an infringement by the legal entities addressed in the fining decision. As the CJEU put it in Siemens, a fining decision must necessarily be addressed to legal entities, but this limitation is of a purely practical nature.

To me, it seems that the only relevant difference between CDC/Akzo and MTB/Heineken is that in MTB/Heineken there was no binding decision by a competition authority on parental liability (because in CDC/Akzo the parent company was an addressee of the fining decision), and MTB, therefore, needed to substantiate that Heineken was liable as the parent company, or at least that it could, on the basis of a preliminary assessment, not be excluded that Heineken was liable.

The Akzo presumption and its application in civil proceedings

To substantiate that Heineken was liable as a parent company, MTB relied on the Akzo presumption of decisive influence on the basis of Heineken's 98.8% shareholding in AB.

In the referral decision, the Dutch Supreme Court asks the CJEU whether this presumption of decisive influence also applies in the preliminary jurisdictional phase of civil proceedings. Although this is not entirely clear from the decision, the Supreme Court already seems to assume that the presumption will apply in the merits phase, by specifically asking about the jurisdictional phase, and stating that the presumption applies "*in substantial competition law*".

In my view, it would be misguided to apply the presumption in merits proceedings, but not in the jurisdictional phase of proceedings. This would effectively create a higher bar for jurisdiction (if the presumption would not apply) than for liability. Such a higher bar is inappropriate, given that generally, a lower threshold applies in the preliminary stage when jurisdiction is determined.

Indeed, if the threshold would be higher in the jurisdictional stage, this could have the strange consequence that there is no jurisdiction, while there is joint and several liability.

More generally, it makes sense to apply the presumption in civil proceedings (both in the jurisdictional stage as the merits stage) because (i) a parent company with a (close to) 100% shareholding almost always does exercise decisive influence (e.g. via shareholders meetings and the appointment of directors); and (ii) all the evidence about the internal economic, organizational and legal links between the parent and the subsidiary is in the hands of the defending parent company. The defending parent company is best capable of providing evidence to rebut the presumption.

There is even more reason to apply the presumption in civil proceedings than in administrative proceedings because civil parties do not have the investigative powers of the Commission or NCAs. Not applying the presumption would also lead to different outcomes in administrative proceedings as opposed to civil proceedings, whereas, according to the CJEU's Skanska judgment, Article 101 TFEU should have the same scope in both types of proceedings.

Kolassa and Universal and the legal threshold in the jurisdictional phase

In its second preliminary question, the Dutch Supreme Court asks the CJEU to what extent – if the Akzo presumption applies in the jurisdictional phase of civil proceedings – the defendant has the opportunity to rebut this presumption in the light of the Kolassa and Universal judgments, in which the CJEU ruled that an obligation to conduct a comprehensive taking of evidence in the jurisdictional phase risks prejudicing the assessment of the substance (see above).

I believe that the test in the jurisdictional phase should be limited to whether, based on a preliminary assessment, it can be excluded that the parent company exercised decisive influence, despite an (almost) 100% shareholding. This will only be the case in exceptional circumstances because the whole reason for the creation of the presumption in EU competition law is that parent companies with (close to) a 100% shareholding generally exercise control and subsidiaries act in accordance with the wishes of their parent companies. It, therefore, makes sense to rely on the presumption so that a court can readily decide whether it has jurisdiction and the proceedings on the merits are not prejudiced. Whether the parent company actually exercised decisive influence (and is, therefore, liable) is a question for the merits proceedings.

Conclusion

The referral to the CJEU in MTB/Heineken shows that 4 years post-Skanska, courts still struggle with the application of the concept of liability of the undertaking in civil proceedings, in particular in relation to entities that are not addressed in a fining decision.

Since the Dutch Supreme Court issued its decision with the draft questions for referral, the Court of Appeal of Amsterdam has referred preliminary questions about the liability of the undertaking and jurisdiction in two other antitrust damages cases: the Italian cardboard cartel case Unilever/Smurfit Kappa c.s. and the Power cables case EWA Bahrain/Prysmian c.s. Further references show that this is an important issue in antitrust damages proceedings. The references

can hopefully provide some welcome clarification on the liability of the undertaking in civil damages cases and the scope of the Brussels I Regulation in antitrust damages cases.

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* The opinions manifested in the blog are solely the author's and do not correspond to those of Lindenbaum.

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