

# Kluwer Competition Law Blog

## Jurisdictional Ruling against Google Confirms Sumal's Liability Test: Setting a Precedent?

Ruben Elkerbout, Eline Grondman, Simon Boersen (Stek) · Wednesday, June 28th, 2023

In a recent [judgment](#) of 31 May 2023, the Amsterdam District Court (the District Court) accepted jurisdiction to adjudicate a damages case against Google Netherlands B.V. (located in Amsterdam) as well as against Google LLC and Alphabet Inc., two US-based entities that were fined by the European Commission in the Google Shopping case for abuse of a dominant position.

One may wonder: why is this relevant? Because the District Court – amidst a host of legal battles concerning jurisdiction in a variety of follow-on damages cases (see also this recent [KCLB post](#)) – now applied the test articulated by the ECJ in the [Sumal judgment](#), to positively conclude that Google Netherlands B.V. is part of the same undertaking as Google's US entities. This establishes a sufficiently close connection between the claims for the District Court to establish jurisdiction based on the anchor defendant's domicile. The judgment and specifically the application of the Sumal test deserves attention and may provide a litmus test for judgments in other private-enforcement cases.

### Background

Remember, back in 2017, the European Commission found that Google prioritised its own shopping comparison service (Google Shopping) in search results, thereby disadvantaging competitors in the market for comparison shopping services. As a result, the Commission fined Google LLC and Alphabet Inc. for an abuse of their dominant position. Following this [decision](#), competing comparison shopping services initiated legal follow-on proceedings to seek compensation for the damage suffered as a result of the abuse.<sup>[1]</sup>

### The judgment

Because Google LLC and Alphabet Inc. are US based entities, the general rule of jurisdiction based on the defendant's domicile does not confer jurisdiction over them. In order to adjudicate the claims against these foreign defendants, the District Court needs to assess whether the special jurisdictional rule of Article 7(1) of the Dutch Code of Civil Procedure (the Dutch equivalent of Article 8(1) of the Brussels I-bis Regulation) can govern jurisdiction. This provision stipulates that a defendant may be summoned before the court of another defendant's domicile in a Member State

(the anchor defendant), provided that the claims have such a close connection that there is a risk of ‘irreconcilable judgments’ if those claims are adjudicated separately.

While Google LLC and Alphabet Inc. are directly addressed in the European Commission’s decision, making their liability for the abuse a given, this is not the case for Google Netherlands B.V. Referring to the [Sumal judgment](#), the District Court assessed whether the Dutch entity can be held liable for damages as part of the same undertaking as the addressees. In Sumal, the European Court of Justice (ECJ) determined that an entity – which is not an addressee of an infringement decision – can be liable for the damage caused by the infringing behaviour of another entity if it forms part of the same undertaking. This attribution of liability can either go up (from subsidiary to parent company) or down (from parent company to subsidiary). The ECJ however emphasised that not every subsidiary within a group is automatically liable for the damage caused by the conduct of parent company. According to the ECJ, the liability of the non-fined subsidiary also appears to require a concrete link between the subsidiary’s economic activity and the subject matter of the infringement for which the parent company was held to be responsible.

Although Google did not contest that Google Netherlands B.V. is legally, economically and organisationally connected to the Google enterprise, it did dispute the existence of a concrete connection between the economic activity of the subsidiary and the subject matter of the infringement. Specifically, Google asserted that Google Netherlands B.V. is not involved in (the adjustment of) search algorithms, which is the focal point of the infringement, and has not committed any violation itself.

This argument is however rejected by the District Court, stating that it is not necessary for the subsidiary itself to commit or be involved in the infringement perpetrated by the parent company. Instead, the focus is on the *subject matter* of the infringement, which the District Court explains is different from the infringement itself.

To demonstrate this, the District Court applies an analogy with the Sumal judgment. Just like in the Sumal case, where the defendant was not directly engaged in the cartel agreements (the infringement) but participated in the sale of potentially overpriced trucks in Spain (the *subject matter* of the infringement), Google Netherlands B.V. is similarly not directly involved in favouring Google Shopping in its search algorithm (the infringement). However, Google Netherlands B.V. is involved in the sale of Google Shopping Ads through the provision of supporting services, which constitutes the subject matter of the infringement.

Because this requirement is fulfilled and Google basically confirmed that its Dutch subsidiary has legal, economic and organisational ties to the Google enterprise, the District Court concludes that Google Netherlands B.V., Google LLC and Alphabet Inc. form part of the same undertaking within the meaning of Sumal. Consequently, Google Netherlands B.V. may be jointly liable for the damage caused by the infringement. Referring to the [CDC/Akzo](#) case, which determined that joint liability for EU competition law violations establishes a sufficiently close connection under Article 8(1) of the Brussels-I Recast regulation, the District Court establishes jurisdiction to adjudicate the claims against Google’s American entities.

## Relevance

This judgment is the latest in a series of Dutch interim judgments that have dealt with the

application of the concept of liability in civil follow-on damages proceedings in the assessment of jurisdiction, especially when it comes to entities that are not mentioned in an infringement decision.

Following the *Sumal* judgment, claimants are (supposed to be) in a better position to seek out an entity within the responsible undertaking that is located in their desired EU Member State to establish jurisdiction for their claim. Nonetheless, and to a certain extent somewhat paradoxically, recent judgments suggest that Dutch courts are becoming more cautious about accepting jurisdiction over claims cases against affiliate entities that are not based in the Netherlands, at least in cases where there is insufficient genuine connection to the Netherlands.

In three of these recent cases – *the Greek Beer case (Heineken/MTB)*, the Italian Cardboard cartel case (*Unilever/Smurfit Kappa c.s.*) and the Power Cables case (*EWA Bahrain/Prysmian c.s.*) – Dutch courts intend to refer preliminary questions to the ECJ on the interpretation of Article 8(1) Brussels I-bis Regulation in competition litigation cases, specifically the concept of a “sufficiently close connection”. In the Italian Cardboard and in the Power Cables case, the Amsterdam Court of Appeal specifically asks for clarification on whether the claimants must directly or indirectly have purchased or received products from a co-defendant to use the anchor-defendant doctrine of Article 8 Brussels-I bis.

Although the anticipated preliminary ruling(s) in the above-mentioned cases will undoubtedly provide helpful guidance in the broader context of private enforcement of competition law, the District Court decided not to await the outcome of the preliminary proceedings before the ECJ and established jurisdiction over the claims against the Google’s US-based entities. In our view, the District Court’s reasoning aligns with the’ [Sumal judgment](#) and provides a fresh, but logical interpretation of the requirement of a close connection between the economic activity of a subsidiary and the ‘subject matter of the infringement’ in the Google Shopping case. We can only speculate as to whether more courts will follow this approach, but this judgment may serve as a reasonable frame of reference in other cases.

---

[1] Please note for transparency reasons that the contributors are involved in a damages case against Google.

---

*To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe [here](#).*

## **Kluwer Competition Law**

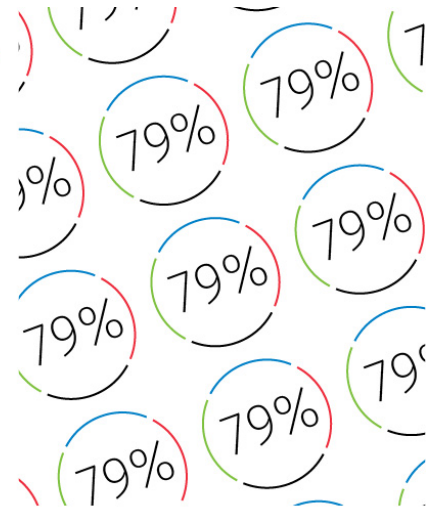
The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more

informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

**Discover how Kluwer Competition Law can help you.**  
Speed, Accuracy & Superior advice all in one.



2022 SURVEY REPORT  
The Wolters Kluwer Future Ready Lawyer  
Leading change

This entry was posted on Wednesday, June 28th, 2023 at 12:20 pm and is filed under [Source: OECD](#)“>Abuse of dominance, [Source: UNCTAD](#)“>Damages, Digital markets, Google, Jurisdiction, Netherlands, [Private enforcement](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.