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Concept of Undertaking in the Service of Legal Documents? The AG Opinion in the Transsaqui Case

Stefan Tuinenga (Lindenbaum) · Wednesday, March 13th, 2024

In an opinion delivered on 11 January 2024, Advocate General Szpunar concludes that the concept of 'undertaking' cannot be invoked to determine the parties that can be served legal documents in antitrust damages claims. He clarifies that the concept of undertaking applies to substantive competition law only – to determine the parties who may be held liable for competition infringements – and not to procedural provisions outside of competition law *strictu sensu*.

Background of the case

The case concerns the follow-on damages claims of a Spanish transport company, Transsaqui, which had purchased two Volvo trucks in 2008. In 2016, AB Volvo was an addressee of a European Commission ("**Commission**") settlement decision establishing that, *inter alia*, the Swedish company participated in a cartel among European truck manufacturers. In 2018, Transsaqui filed a claim for damages against AB Volvo before the Commercial Court of Valencia, seeking to recover overcharges due to the trucks cartel established by the Commission.

In the writ of summons for AB Volvo, Transsaqui indicated as the address for the service the address of AB Volvo's Spanish subsidiary, Volvo Group España, in Madrid. AB Volvo's registered office, however, was in Gothenburg, Sweden. The Commercial Court of Valencia allowed the action to proceed, even though AB Volvo did not appear in the proceedings. The court then awarded the claim by default, and ordered AB Volvo to pay damages in the amount of EUR 24,420.69.

AB Volvo filed an application with the Spanish Supreme Court to revise the judgment. It argued that where the defendant company is established in another EU member state, service of documents must be made in accordance with Regulation 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (the "**Service Regulation**"). The Service Regulation provides for personal service of judicial documents, and its application cannot be evaded by serving the writ of summons on a local subsidiary. Although Volvo Group España and AB Volvo are part of the same undertaking, each has a separate legal personality, and the former is not authorized to accept service on behalf of the latter.

The Spanish Supreme Court decided to stay the proceedings and refer questions on whether the

documents were properly served to the Court of Justice of the European Union ("**CJEU**").

The opinion of AG Szpunar

In his opinion, AG Szpunar first assesses whether EU law, specifically the Service Regulation, is applicable to the question whether documents should be served abroad, or whether this is a matter of national law. Second, he assesses whether the concept of undertaking can be expanded to the service of legal documents in antitrust damages cases.

Service Regulation determines whether documents should be served abroad

On the first question, AG Szpunar notes that the Service Regulation deals primarily with *the way* in which documents are transmitted for service abroad, and does not contain specific provisions on the question *when* service abroad is required. In the *Alder* case, the ECJ ruled that the Service Regulation does apply to the latter question. In that case, the ECJ ruled that when the person to be served resides abroad, the service necessarily comes within the scope of the Service Regulation. The ECJ considered that leaving it to the national legislature to determine when service abroad should take place would prevent the uniform application of the Service Regulation. Furthermore, since the recitals and the provisions of the Service Regulation make references to specific situations when the Service Regulation does not apply, it should *a contrario* apply to all other circumstances, including the questions when service abroad is required.

AG Szpunar agrees with the *Alder* judgment, and considers that it can be safely assumed that the general principle underlying the Service Regulation is that if a defendant is domiciled in a member state different from that where the proceedings are initiated, the documents must be served according to the procedure in the Service Regulation.

Concept of undertaking does not apply to the service of documents

AG Szpunar considers that the Service Regulation provides for the personal service of documents. The right to be served personally with the document instituting proceedings is a fundamental right to a fair trial, and the Service Regulation guarantees the rights of defendants who have not appeared in proceedings. In such a situation, the court must stay the proceedings until it is verified that the document was served in accordance with the Service Regulation.

Transsaqui argued the document initiating proceedings had been personally served on the 'undertaking' of AB Volvo. Transsaqui drew on the CJEU's judgment in *Sumal*, which clarified that a subsidiary can be held liable for a cartel infringement for which its parent company is addressed in a Commission infringement decision if the subsidiary forms one economic entity with the parent company and a close link exists between the subject matter of the cartel and the subsidiaries activities. Transsaqui inferred from the judgment that the concept of undertaking should also be applicable to procedural matters such as the service of documents, and that service on Volvo Group España should be considered proper service on its parent company AB Volvo, as the subsidiary formed one economic entity (or 'undertaking') with the parent company.

AG Szpunar disagrees and concludes that the cartel prohibition in Article 101 TFEU and the right to an effective remedy do not call into question the principle in the Service Regulation that documents addressed to a defendant domiciled in another member state must be served personally on the defendant in that member state. The judgment in *Sumal* does not lead to a different conclusion. The reasoning in *Sumal* was limited to considerations of substantive law. AG Szpunar considers that in substantive law it is customary to provide for a certain flexibility to that victims can seek appropriate redress. The economic entity doctrine aligns legal reality with economic reality and precludes a defendant from transferring capital from a parent company to a subsidiary and vice versa. However, when it comes to the service of documents, any ambiguity should be avoided, as this is a fundamental aspect of the rights of defence in civil proceedings.

There is also no need to expand the concept of undertaking to the service of documents to provide an effective remedy to claimants. It is not excessively difficult for parties to comply with the Service Regulation, and Transsaqui had not even attempted such service in this case.

For these reasons, he concludes that the concept of undertaking cannot be applied to the service of documents.

Commentary

Under Article 101 TFEU it is "undertakings" that are subject to the cartel prohibition, and not companies or legal persons. The concept of undertaking covers any entity engaged in economic activity, irrespective of its legal status and the way in which it is financed. Parent companies and subsidiaries can therefore form part of the same undertaking, and if one of them infringes Article 101 TFEU, the other can also be liable for that infringement in administrative proceedings and civil damages proceedings (see the ECJ's judgments in Skanska and Sumal). The question in *Transsaqui* is whether this concept of undertaking should also be applied to procedural provisions of the Service Regulation. The answer of AG Szpunar is a resounding no: after determining that the Service Regulation applied to the case, he considers that the concept of undertaking should apply to substantive competition law, but not to procedural provisions.

The approach followed by AG Szpunar is a sensible one. The case-law on the concept of undertaking relates to the substantive application of Article 101 TFEU, more specifically the question of *who* can be considered the subject or perpetrator of the cartel prohibition. The answer of the CJEU to this question has been that the undertaking is liable as the perpetrator. At the same time, the undertaking itself cannot be addressed in the decision for the payment of fines or in damages proceedings, as it does not have legal personality. Practically and procedurally, it is therefore not the undertaking itself but every legal entity within the undertaking that can be addressed for the payment of the fine and for damages in civil proceedings. For this reason, the Commission addresses the legal entities that are held liable for the fine in the operative part of fining decisions, and for this reason civil damages claims should be addressed to specific legal entities.

AG Szpunar rightly notes that blurring the lines between the legal entities in the application of procedural rules could lead to ambiguity and legal uncertainty. The requirement to serve the writ of summons personally on AB Volvo also does not withhold Transsaqui from an effective remedy. As AG Szpunar correctly notes, Transsaqui did not make clear why the service of documents via the

Service Regulation would be impossible or excessively difficult and should be corrected by the principle of effectiveness of Article 101 TFEU or the right to an effective remedy of Article 47 of the Charter of Fundamental Rights. The mere condition of translating a document (if even necessary) is not sufficient to lead to such far-reaching conclusion.

Shortly after AG Szpunar's opinion, AG Emiliou also had the opportunity to issue an opinion about the application of the concept of undertaking outside the scope of the substantive application of Article 101 TFEU. AG Emiliou opined in the MOL case about the question of whether the concept of undertaking can be applied on the claimant's side to establish jurisdiction. More specifically, the ECJ was asked whether the registered office of a parent company can be considered as the place where the harmful event occurred in the sense of Article 7(2) Brussels I-Bis Regulation, in a situation where subsidiaries within its economic entity purchased cartelized products, but it did not purchase such products itself. Like AG Szpunar, AG Emiliou also advised against the application of the concept of undertaking outside the substantive application of Article 101 TFEU (i.e. the attribution of liability).

AG Emiliou does not find a basis in the case-law or the antitrust damages directive for the expansion of the concept undertaking to the claimants' side and does not see a policy objective that would be served by such an interpretation. He refers to the Antitrust Damages Directive, which describes the infringer as an 'undertaking' that has committed an infringement, while the injured party is described as 'a person' that has suffered harm. He also considers that the place where the damage occurred is considered an appropriate forum on grounds of proximity and the ease of taking evidence. The place of establishment of the parent company, however, does not provide such a meaningful link to the place where the damage occurred, as the parent company only indirectly suffered harm. The place where its subsidiaries purchased the cartelized products would therefore be a more appropriate forum or, alternatively, a claimant could revert to the place where the defendant is established (the main rule of Article 4 Brussels I-Bis Regulation).

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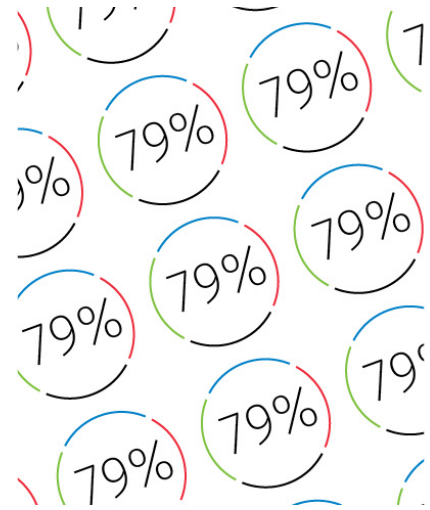

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