Does the single economic unit theory work the other way around?

Analysis of the Judgment of the Court of 6 October 2021. Sumal, S.L. v Mercedes Benz Trucks España, S.L. Request for a preliminary ruling from the Audiencia Provincial de Barcelona. Case C-882/19.

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The Case

Mercedes Benz Trucks España, SL is a company owned by the Daimler group, whose parent company is Daimler AG. Between 1997 and 1999, Sumal, SL, a Spanish company dedicated to manufacturing roll containers and metal containers, acquired two trucks from Mercedes Benz Trucks España through a Daimler group dealership.

As a result of an investigation by the European Commission, it was found that fifteen European truck producers, including Daimler, had participated in a cartel, with the conclusion of collusive agreements on truck pricing and the passing on to customers of the costs of compliance with stricter emission rules, amongst other matters.

In the light of these facts, Sumal brought an action for damages against Mercedes Benz Trucks España, seeking compensation for the additional cost it bore in the acquisition of the trucks because of Daimler's collusive practices.

The relevant national law concerning compensation for the damage caused by practices that restrict competition, article 71 of the *Ley 15/2007 de Defensa de la competencia*, stated, in the version applicable to the facts in question, that those responsible for infringements of competition law were liable for the loss and damage caused by their conduct (paragraph 1). In paragraph 2, Article 71 clarified that the conduct of an undertaking could also be attributed to the undertakings or persons controlling it, except where its economic conduct was not determined by any of them (article 71(2)(b)).

The court rejected the action claiming that Mercedes Benz Trucks España could not be sued because the company referred by the Commission's decision was not the subsidiary but Daimler, its parent company and, as such, Daimler should be held solely responsible for the infringement in question. Following this decision, Sumal decided to bring an appeal before the *Audiencia Provincial de Barcelona.*

The *Audiencia Provincial* acknowledged that, regarding the acceptance of actions brought against subsidiary companies, there were different positions adopted by the Spanish

Courts. That being said, the court decided to stay the proceedings and send a referral to the Court of Justice (CJ) for a preliminary ruling (article 267 TFEU). In essence, the *Audiencia Provincial* asked whether Article 101(1), TFEU should be interpreted as meaning that the injured party of an anticompetitive practice may bring an action for damages either against a parent company which has been punished for that practice in a decision of the Commission, or against a subsidiary of that company, which is not referred to in such decision, where those companies constitute a single economic unit.

The Court's Ruling

It is CJ's settled case-law that liability for the conduct of a subsidiary may be imputed to the parent company where, although having a separate legal personality, that subsidiary does not determine its conduct independently on the market (economic unit theory). In fact, this corresponded to what article 71(2)(b) of Ley *15/2007 de Defensa de la competencia* stated. But the question posed by the referring court was different: does the single economic unit theory provide ground for extending liability from the parent company to the subsidiary?

Suppose it is true that the economic unit traditionally operated only in order to allow the imputation to the parent company of the subsidiary's acts. In that case, the Court recalls that it had already held that it was possible to impute the aggravating factor of repeated infringement to a parent company in cases in which that company had not been subject to any previous proceedings. In other words, the CJ upheld that it was possible to hold a parent company liable as a repeated offender for its subsidiaries' conduct on the grounds of proceedings brought only against the subsidiaries if, at the time of the first infringement, the two companies already formed a single undertaking. This means that the possibility for a national court to hold a company liable cannot be excluded simply because the Commission has not adopted any decision regarding that company.

Based on this reasoning, the Court states that "[...] in circumstances where the existence of an infringement of Article 101(1) TFEU has been established as regards the parent company, it is possible for the victim of that infringement to seek to invoke the civil liability of a subsidiary of that parent company rather than that of the parent company [...]"[1]. However, the judges clarify that this possibility cannot automatically be available against every subsidiary of a parent company.

[1] Paragraph 51 of the Judgment of the Court of 6 October 2021. Sumal, S.L. v Mercedes Benz Trucks España, S.L. Case C-882/19.

First, the subsidiary can only be held liable if it forms, alongside its parent company, a single economic unit as a consequence of the existence of an actual relationship between the economic activity of the subsidiary and the subject matter of the infringement for which the parent company has been held responsible. This means that the injured party of an anticompetitive conduct must prove that the anticompetitive agreement concluded by the parent company, for which it has been punished, concerns the same products as those marketed by the subsidiary.

Otherwise, as the Court points out, since the same parent company may be part of several economic units, an automatic liability of the subsidiary for the conducts of its parent company would mean that said subsidiary could be held responsible for infringements committed in the context of economic activities without any connection with its own activity and in which it was not involved.

Additionally, in an action for damages brought against the subsidiary, it is essential to guarantee that the subsidiary is able to defend its rights in accordance with the principle of respect for the rights of the defence and must have all the means necessary for the exercise of those rights. This means that the subsidiary must be able to refute its liability for the alleged damage by relying on any ground that it could have raised if it had participated in the proceedings brought by the Commission against its parent company.

However, suppose the action for damages relies on a Commission's decision addressed to the parent company for infringements of Article 101(1) TFEU. In that case, the subsidiary will not be able to challenge the existence of those infringements before the national Court (article 16(1) of Regulation No 1/2003). Nevertheless, if the infringing conduct has not been the subject of a decision by the Commission, the subsidiary will, of course, have the possibility to challenge not only its belonging to the same undertaking as to the parent company but also the existence of the alleged infringement.

In conclusion, with this Judgment, the CJ established that Article 101(1) TFEU must be interpreted as meaning that an injured party may bring an action for damages against a subsidiary for the anticompetitive practices adopted by its parent company, where together they form an economic unit. The subsidiary must benefit from all the necessary rights of defence and, in particular, the possibility of claiming that it does belong to the same economic unit. This means that article 101(1) must be interpreted as precluding a national law (such *as Ley 15/2007 de Defensa de la competencia*) which provides only for the possibility for an injured party to

hold the parent company liable for the acts of the subsidiary whilst preventing it from holding the subsidiary liable for the conduct of its parent company.