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The Road Ahead for Liability in Damages Actions: Case C-882/19 *Sumal*

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Judgment of 6 October 2021, *Sumal SL v Commission*, C-882/19, ECLI:EU:C:2021:800.

The Court of Justice of the EU ruled that a subsidiary company of an addressee of a Commission cartel decision was part of the undertaking that infringed competition law and could therefore be held liable for damages.

Key Points

- The CJEU's clear pronouncement that all entities within the same undertaking are liable 'without distinction' confirms that liability for damages within an undertaking can just as well extend downwards as upwards.
- When there is no link between the subject matter of the infringement and a subsidiary that subsidiary is not part of the same undertaking and cannot be held liable.
- The liability of non-addressee subsidiary companies within an undertaking provides victims of cartels with more optionality as to the jurisdiction in which to file a claim for damages.
- The CJEU clarified in Sumal that Commission decisions are binding not only against addressees of those decisions but also against subsidiaries that are part of the same undertaking.

I. Legal context

On 6 October 2021, the CJEU ruled on preliminary questions referred to it by the Provincial Court of Barcelona in a trucks cartel damages case filed by the transport company Sumal. The preliminary reference concerned the relevance and scope of the concept of 'undertaking' under Article 101 TFEU for purposes of establishing liability in follow-on damages litigation before national courts.

II. Facts

Between 1996 and 1999, Sumal purchased two trucks from Mercedes Benz Trucks España SL, a Spanish subsidiary of Daimler AG. In 2016, Daimler AG was an addressee of a Commission Settlement Decision establishing that Daimler AG participated in a cartel among European truck manufacturers. Sumal filed a damages claim against Mercedes Benz Trucks España SL despite the fact that the subsidiary was not itself an addressee of the Settlement Decision. Sumal claimed to have paid overcharges for the trucks it purchased because of the cartel.

The Commercial Court of Barcelona rejected the claim, finding that a non-addressee subsidiary cannot be held liable for a cartel perpetrated by its parent company. On appeal, the Provincial Court of Barcelona decided to refer questions to the CJEU regarding the scope of the concept of 'undertaking' in Article 101 TFEU. In particular, it asked the CJEU to clarify under what conditions (non-addressee) subsidiaries can be held liable for damages by virtue of their comprising the same undertaking as the entity that participated in the cartel (para. 15).

III. Analysis

The judgment of the CJEU confirms and builds on earlier case law which established that the EU competition law concept of 'undertaking' is decisive in establishing liability for damages before national courts (Section A). Another interesting point is that the CJEU confirmed that Commission cartel decisions have binding effect on entities within the undertaking which are not addressees of the Commission decision in subsequent damages proceedings (Section B).

A. Liability of the undertaking

The CJEU first confirmed its consideration in Skanska (Case C-624/17, EU:C:2019:204) that the concept of undertaking in Article 101 TFEU cannot have a different scope in (national) damages proceedings and in (EU) administrative proceedings (para. 38). Under Article 101 TFEU, it is an 'undertaking' that is the perpetrator of a cartel, not a 'company' or a 'legal person' (para. 39). It follows that if one legal entity within the undertaking

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infringes Article 101 TFEU, the whole undertaking is liable for that infringement (para. 42).

The CJEU recalled that the Commission has 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 (para. 63). 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 (para. 42).

The CJEU then set out the test for determining whether two entities form part of the same undertaking. It is established case law (dating back to the *Akzo* judgment (Case C-97/08, EU:C:2009:536)) that 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. The CJEU clarified in *Sumal* that where there exists a relationship of decisive influence among two entities, both entities will be jointly and severally liable for the direct participation in an infringement by any one of them (para. 43–44). That is, liability for damages within an undertaking can just as well extend downwards (from a parent company to a subsidiary, as in *Sumal*) as upwards (from a subsidiary to a parent company, as in *Akzo*).

The CJEU clarified that it is not the fact that a parent company exercises decisive influence over a subsidiary that renders it (indirectly) liable for damages caused by that subsidiary. If that were the case, then a subsidiary could never be liable for damages caused by its parent because it does not exercise decisive influence over it. Rather, it is the fact that two entities belong to the same undertaking under Article 101 TFEU which renders both entities liable for the cartel.

However, the CJEU made an exception in the test for establishing whether two entities belong to the same undertaking for 'conglomerate' companies that are active in several economic fields having no connection between them. The CJEU noted that the concept of undertaking is a functional concept in that it must be identified having regard to the subject matter at issue. The same parent company may be part of several economic units (or undertakings) depending on the economic activity in question (pars. 45–47). When there is no link between the subject matter of the infringement and a subsidiary, that subsidiary is not part of the same undertaking and cannot be held liable.

In conclusion, the CJEU confirmed that victims of a cartel infringement can hold a subsidiary of an addressee of a Commission decision (or by implication any other group company) liable if they form one undertaking.

B. Binding effect of Commission decision on non-addressees

The CJEU recalled that, per *Masterfoods* (Case C-344/98, EU:C:2000:689) and its codification in Article 16(1) of Regulation 1/2003, Commission decisions are binding in subsequent national proceedings. The CJEU clarified in *Sumal* that Commission decisions are binding not only against addressees of those decisions but also against subsidiaries that are part of the same undertaking. This means that the finding of an infringement in a Commission decision addressed to a parent company cannot be disputed by its subsidiary company in subsequent damages proceedings (para. 55). A subsidiary that is not an addressee of a Commission decision can still dispute that it forms part of the same undertaking as the parent company that was fined by the Commission (per the test set out in Section A above).

IV. Practical significance

The *Sumal* judgment, although mostly confirming or expanding on previous case law, is important in definitively putting to rest a number of debates among antitrust litigators. The CJEU's clear pronouncement that all entities within the same undertaking are liable 'without distinction' confirms that liability for damages within an undertaking can just as well extend downwards as upwards. The liability of non-addressee subsidiary companies within an undertaking provides victims of cartels with more optionality as to the jurisdiction in which to file a claim for damages.

At the same time, the CJEU's 'conglomerate' exception to the established test for determining whether two entities belong to the same undertaking will create new questions not only in the context of civil damages actions but also in Commission proceedings. It remains for future cases to clarify what 'specific link' is required between the subject matter of an infringement and the business activities of a subsidiary for that subsidiary to be part of the same undertaking. Selling the same products or services at issue in the Commission cartel decision is clearly sufficient following the *Sumal* judgment, and this likely also applies to the sale of products downstream or upstream of the cartelized product. However, the assessment becomes less clear when it concerns the provision

of administrative services for group companies or the sale of complementary products. Furthermore, it will be interesting to see in future appeals of Commission cartel decisions how the CJEU will deal with arguments that the turnover of specific subsidiaries should be excluded in the context of the 10 per cent cap on the maximum fine because those subsidiaries perform activities unrelated to an infringement.

To conclude, the CJEU has taken the discussion on liability and jurisdiction a major step forward with the *Sumal* judgment. At the same time, and as usual, the answers give rise to new questions that will without doubt be intensely debated in the coming years.

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