BRUSSELS À JOUR

A Topsy Turvy World: Children, Watch after your Parents!

The *Sumal* Judgment, Top-Down Liability and its Implications

Markus Röhrig reports on the latest developments from the European capital of competition law.

The Court of Justice's *Sumal* case[1] was ranking high on the watch list of private antitrust litigators. And the Court's judgment certainly lived up to the expectations. You may agree or disagree with the Court, but the notion that subsidiaries can be liable for antitrust violations committed by their parent entity, or possibly other companies of the same corporate group ("top-down liability") marks a major milestone for private antitrust litigation across the EU. However, Sumal may very well have significant implications also for the Commission's cartel enforcement and for M&A dealmakers. In this edition of Brussels à Jour, we explain why the all members of the antitrust community, not just private litigators, should consider what *Sumal* means for their business and the advice they provide to their (external and internal) clients.

Parental liability turned upside down: *Sumal* and top-down liablity

The notion of "parental liability" has long been a well-established part of the EU's antitrust laws. A parent company can be held liable for infringements committed by one of its subsidiaries, provided the subsidiary does not determine independently its own conduct on the market, but essentially carries out the instructions given to it by the parent company and, therefore, parent and subsidiary belong to the same "economic unit". Under the Court of Justice's *Akzo* ruling, a presumption to that effect applies where a parent company holds (almost) all of a subsidiary's equity.[2] In many ways, piercing the

1 Court of Justice, judgment of 6 October 2021, Case C-882/19, Sumal SL v Mercedes Benz Trucks España SL.

2 Court of Justice, judgment of 27 April 2017, Case C-516/15 P, Akzo Nobel v European Commission.

corporate veil has long been not the exception, but the rule under the EU antitrust rules. However, except in very specific circumstances,[3] it has been a one way street. Parent companies could be held liable for anticompetitive behavior of their subsidiaries, but not *vice versa*, as the General Court explicitly held in *Parker ITR*.[4] The Court of Justice's judgment in *Aristrain* was similarly clear with respect to sister companies, or so it seemed.[5] In that sense, *Sumal* is a game changer.

The *Sumal* case originated in the Spanish courts. In the late 1990s, *Sumal* bought two trucks from Mercedes Benz Trucks España, a subsidiary of Daimler. In 2016, the Commission adopted a decision holding that Daimler had been involved in collusive behavior in relation to certain trucks in violation of Article 101 TFEU. Subsequently, *Sumal* sued Mercedes Benz Trucks España, not an addressee of the Commission's decision, for damages, claiming that it had overpaid for the two trucks. The Spanish courts referred the case to Luxembourg.

According to the Court of Justice' holding in *Sumal*, any member of an economic unit can be held liable for the anticompetitive conduct of any other part of that same economic unit, thus confirming that subsidiaries may also have to answer for the conduct of their parent company. However, the Court recognized that there should be boundaries to the notion of "top down" liability. Therefore, the Court held that, where a plaintiff claims antitrust damages from a subsidiary based on anticompetitive conduct that its parent company was engaged in (but not the subsidiary), it is for the plaintiff to demonstrate (i) that both are in fact part of the same economic unit, considering their economic, organizational and legal links, and (ii) that there is a "specific link" between the subsidiary's business activities and the subject matter that the parent's infringement pertained to. In other words, the anticompetitive conduct must concern the same products as those marketed by the subsidiary.

The Court of Justice also held that, allowing plaintiffs to go after the subsidiary, did not disregard its procedural rights to an effective remedy and a fair trial, even though the Commission had addressed neither its statement of objections (*SO*) not the final decision to the subsidiary. If an addressee, the subsidiary would have been able to dispute both the infringement as such and the existence of an economic unit, if need be in court. That option is not available to the subsidiary if the SO and the decision are addressed to the parent company only. Nonetheless, when ruling on a follow-on damage claim, the Commission's decision is binding on the national courts pursuant to Article 16(1) of Regulation No 1/2003. Still, the Court of Justice found that the subsidiary's procedural rights were fully respected because it had been able to contest the Commission's decision "through" its parent company. It seems like *Sumal* effectively extends the notion of "economic unit" to the sphere of procedural rights. A broad reading of the judgment suggests that, if the parent company had sufficient opportunity to avail itself of its procedural rights, that will effectively count against other corporate entities which belong the same economic unit.

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3 For example, in Biogaran, the General Court ruled that the concept of joint liability could also apply if the anticompetitive infringement resulted not only from the subsidiary's conduct but from a combined behavior of both the parent company and the subsidiary. See General Court, judgment of 12 December 2018, Case T-677/14, Biogaran v European Commission.

4 General Court, judgment of 17 May 2013, Case T-146/09, Parker ITR v European Commission.

5 Court of Justice, judgment of 2 October 2013, Case C-196/99 P, Aristrain.

Knock-on effects on the Commission's cartel enforcement

Sumal originates from the private antitrust litigation space and, given the strategizing around venue and choice of law issues that is peculiar to that space, this is likely where the Court of Justice's judgment is likely to have to greatest impact. However, there is little doubt that the judgment will have spillover effects on the Commission's public cartel enforcement. The Court explicitly finds that term "undertaking" cannot have one meaning for purposes of private damage claims and an entirely different meaning when it comes to imposing fines for anticompetitive behavior. Applying *Sumal* to cartel enforcement would enable the Commission to prosecute subsidiaries for their parent (or even sister) company's anticompetitive conduct if they form an economic unit and operate in the same industry that the anticompetitive conduct pertain to, without having to prove that the subsidiary was involved. Although the Commission will in most cases be inclined to address its decision to the entity that was immediately involved and its ultimate parent (which may have deeper pockets), there may be exceptions. Therefore, the issue is unlikely whether the Commission could hold a subsidiary liable for anticompetitive conduct that its parent company—or a sister company—was involved in, but in which scenarios the Commission might find it useful to avail itself of its "new" powers. A few scenarios come to mind (there may be others, too).

International cartels. Where cartels span the entire globe, it is not uncommon that all or at least some of the cartel members are companies located outside of the EU. Obviously, the Commission has power to address decisions to and impose fines on non-EU companies, and it has made frequent use of that power in recent years. However, enforcement of these decisions outside of the EU will be difficult if (in exceptional cases) a non-EU company refused to pay the fine. In international cartels, the Commission might therefore be inclined to add the non-EU parent's subsidiaries in the EU to the list of addressees, or simply enforce the decision addressed to the non-EU parent against a subsidiary in the EU. The Commission might also be increasingly inclined to address request for information to EU-based subsidiaries in an effort to collect information that is controlled by its non-EU parent.

Sister companies. In the past, the Commission has at times struggled to establish liability between sister companies, or where several corporate entities are *de facto* under joint management without there being a common parent entity. In these cases, *Sumal* could make the Commission's life much easier.

Repeat offenders. Under its Fining Guidelines, the Commission may increase the fine imposed for anticompetitive behavior if the same perpetrator has previously committed a similar infringement. While it is well-established that the notion of "same perpetrator" refers to the economic unit rather than the specific corporate legal entity, *Sumal* might still make it easier for the Commission to "mark up" fines for a repeated offenses, particularly in light of the Court of Justice's proposition that procedural rights also apply to economic units rather than individual legal entities.

Challenges for M&A dealmakers on the horizon

Antitrust risks are significant and, if known to the parties (notably the acquirer) can easily become deal breakers. Unfortunately, hardcore cartels typically involve covert conduct that is unknown to the acquirer and that is unlikely to be discovered in a standard due diligence process—and a full-fledged antitrust compliance audit, which may or may not uncover cartel behavior, in most cases is not a feasible option pre-merger. Therefore, the parties need to deal with antirust risks in their transaction documents. While the devil might have been in the details, the existing rules provided fair guidance as to where the risk is and who is responsible, subject of course to any diverging rules that the parties might agree between themselves. Obviously the target has to answer for any anticompetitive conduct that it is directly involved in. The seller is jointly and severally liable with the target for that target's anticompetitive conduct up until closing, not the acquirer (except in very specific circumstances where the seller ceases to exist). If the target continues the infringement post-closing, the acquirer is liable alongside the target for the conduct as from the closing date. What that means is that acquirer can focus on investigating any antitrust risks associated with the target company's business and seeking warranties and indemnities to cover these risks. *Sumal* changes these dynamics.

Under *Sumal*, the target company could be held liable—by the Commission, or a court of law in private litigation—for anticompetitive conduct that it was not involved in, but (only) the seller or another legal entity that belongs to the seller's group. In theory, the acquirer would have to extend its due diligence to the seller's group, at least to the extent that the seller or entities which belong to its group will retain activities that pertain to the same or similar markets that the target is doing business in (the "specific link" under the *Sumal* test). The acquirer would also need to seek corresponding warranties and/or indemnities for the seller's conduct. In practice, that seems utterly unrealistic, even more so in a buyers' market!

There is some hope that the Commission might not prosecute target companies for the anticompetitive conduct of their former parents. Private plaintiffs may show less restraints. If target companies are held liable post-merger, the target will need to assess whether it has recourse against its former parent, for example whether it can claim contribution (partially or even fully) under the rules for joint and several liability. Ultimately, it may be for the Court of Justice to consider whether and how to limit the worst side effects of the new *Sumal* doctrine.

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