EXPERT COMPETITION LAW

WHEN PARENTS' CRIMES COUNT

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When can a subsidiary be held liable for a breach of competition law committed by the parent company under the recent judgment from the Court of Justice of the European Union (CJEU) in *Sumal SL v Mercedes Benz Trucks España SL*?
Art. 101(1) of the Treaty on the Functioning of the European Union (TFEU) prohibits, as incompatible with the internal market, all agreements and concerted practices between undertakings or associations of undertakings that may affect trade between EU member states, and which have as their object or effect the prevention, restriction, or distortion of competition within the internal EU market. Infringements of the competition law may be sanctioned under both public enforcement, such as decisions of the European Commission or national competition authorities; and private enforcement, such as judgments of national courts.
Decisions of competition authorities are binding for courts hearing subsequent actions for damages. Under Art. 16(1) of Council Regulation 1/2003, when national courts rule on infringements that are the subject of a decision issued by the European Commission, they cannot take decisions running counter to that decision.

THE CASE

In the judgment of October 6, 2021, C-882/19, *Sumal SL v Mercedes Benz Trucks España SL*, the CJEU answered the question of whether actions for damages following a decision of the European Commission finding anticompetitive practices involving a parent company may be brought against subsidiaries of the parent company which were not referred to in the decision but which were wholly owned by the company directly referred to in the decision. If so, is the court bound by the decision issued by the European Commission?
The concept of joint liability of groups of companies for infringements of competition law is not new in CJEU case law. The possibility of holding a parent company liable for infringements of a subsidiary is already well-established (*Akzo Nobel v Commission*, C-97/08 P, and C-516/15 P; *Team Relocations v Commission*, C-444/11 P; *Total v Commission*, C-597/13 P). However, the issue here is whether the subsidiary can be held liable for the actions of the parent company, and not vice versa.
Mercedes Benz Trucks España (MBTE) is a subsidiary of Daimler. Sumal acquired trucks from MBTE. A few years later, the European Commission issued a decision finding that European truck manufacturers, including Daimler, had participated in infringement of Art. 101 TFEU by concluding arrangements on pricing for trucks, as well as passing on costs for the introduction of required emission technologies. Following that decision, Sumal brought an action in a Spanish court for damages from MBTE, in the amount of the additional costs incurred by Sumal as a result of the cartel in which Daimler, the parent company of MBTE, had participated.
In a judgment issued in January 2019, the court rejected the action because MBTE lacked *locus standi*. According to the court, only Daimler, as the entity covered by the decision from the European Commission could be held liable for the damages at issue. Sumal appealed against that judgment, and the court of appeal sought a preliminary ruling from CJEU.

THE CONDITIONS

The CJEU answered that Art. 101(1) TFEU must be interpreted as meaning that the victim of an anti-competitive practice may bring an action for damages against either a parent company that has been punished by the European Commission for that practice or against a subsidiary of that company that is not referred to in the European Commission's decision, provided that those companies constitute a single economic unit. If the action for damages is based on the infringement found in the European Commission's decision addressed to the parent company, the subsidiary cannot challenge the existence of the infringement before the national court. However, it must be allowed to demonstrate that it does not constitute a single economic unit with the infringer.
To justify its decision, the CJEU first referred to the notion of "undertaking" used in Art. 101(1) TFEU.
This concept has not been uniformly defined in EU law. Nonetheless, the CJEU case law describes an "undertaking" as any entity engaged in economic activity, regardless of its legal status and the way it is financed, which constitutes an economic unit, even if that unit consists of several natural or legal persons (*Akzo Nobel v Commission*, C-97/08 P, and C-516/15 P). Such an economic unit must consist of a unitary organization of personal elements and pursue a specific economic objective on a long-term basis (*Knauf Gips v Commission*, C-407/08 P).
For liability to be attributed to a legal entity belonging to an economic unit, it is necessary to prove that at least one entity belonging to that economic unit has infringed Art. 101(1) TFEU. However, the right of the victim to claim damages from the subsidiary cannot be granted automatically. This is because the organization of groups of companies may vary. A group may be active in many economic fields without forming any direct links between particular subsidiaries.
Therefore, the liability of the subsidiary can arise only if the victim proves (*i*) economic, organizational, and legal links between the parent and the subsidiary, as well as (*ii*) direct links between the business activities of the subsidiary and the subject matter of the infringement for which the parent company was responsible. Otherwise, a subsidiary could be held liable for infringements committed in the course of business activities it was not in any way involved in, even indirectly. Such a situation would be unacceptable because it is contrary to the EU law principle of personal liability.

SUMMARY

The issue of joint liability of a group of companies for infringements of competition law has been controversial. Due to the parent's ability to exercise influence over a subsidiary, the liability of the parent company for the actions of its subsidiaries does not raise many doubts. Nevertheless, in the opinion of the Court of Justice, it is also possible to attribute liability in the other direction. As a result, a subsidiary may be held liable for the consequences of infringement by the parent company, provided that it has a relevant connection with the subject matter of the infringement.