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Single economic unit members liability. Commentary to the Judgement of the Court of Justice (Grand Chamber) of October 06, 2021 in the Judgment in Case C-882/19 Sumal (ECLI:EU:C:2021:800).

by

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SUMMARY: 1. Undertaking, single economic unit and principle of personal responsibility. 2. Single economic unit and control. 3. Subsidiary liability. 6. Economic unit and control. 7. Some words about deterrence function of damages compensation. 8. ¿What about the ongoing process?

1. Undertaking, single economic unit and principle of personal responsibility.

In its recent judgments, the European Court of Justice codifies its previous doctrine about the single economic unity and derives new consequences from it. The Court has deal with the question also in relation of the principle of personal responsibility and the notion of undertaking, but these questions has long time been definitively decided by the court. As the Court constantly repeats for a long time undertaking, and not natural or legal person, is the addressee of European Competition prohibitions of articles 101.1 and 102.1 TFUE, the notion of undertaking as regards to the application of these prohibitions is an autonomous concept of the European Competition Law (Sumal 38, Skanska 47), and it is a functional concept, in that the economic unit of which it is constituted must be identified having regard to the subject matter of the agreement at issue (see, to that effect, judgments of 12 July 1984, Hydrotherm Gerätebau, 170/83, EU:C:1984:271, paragraph 11, and of 26 September 2013, The Dow Chemical Company v Commission, C□179/12 P, EU:C:2013:605, paragraph 57).

The decisive criterion is the existence of unity of conduct on the market, without allowing the formal separation between various companies that results from their separate legal personalities to preclude such unity for the purposes of the application of the competition rules (see, to that effect, judgments of 14 July 1972, Imperial Chemical Industries v Commission, 48/69, EU:C:1972:70, paragraph 140, and of 14 December 2006, Confederación Española de Empresarios de Estaciones de Servicio, C□217/05, EU:C:2006:784, paragraph 41).

As European autonomous concept undertaking is defined as a single economic unit.

As Sumal 47 resumes the concept of 'undertaking' covers any entity engaged in an economic activity, irrespective of the legal status of that entity and the way in which it is financed, and thus defines an economic unit even if in law that economic unit consists of several persons, natural or legal (see, to that effect, judgments of 10 September 2009, Akzo Nobel and Others v Commission, C□97/08 P,

EU:C:2009:536, paragraphs 54 and 55, and of 27 April 2017, Akzo Nobel and Others v Commission, C‑516/15 P, EU:C:2017:314, paragraphs 47 and 48).

That economic unit consists of a unitary organisation of personal, tangible and intangible elements, which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind in Article 101(1) TFEU (judgment of 1 July 2010, Knauf Gips v Commission, C‑407/08 P, EU:C:2010:389, paragraphs 84 and 86).

When such an economic unit infringes Article 101(1) TFEU, it is for that unit, in accordance with the principle of personal responsibility, to answer for that infringement (Sumal 42).

Sumal confirming Skanska 47 establish that the concept of 'undertaking', within the meaning of Article 101 TFEU, which constitutes an autonomous concept of EU law, cannot have a different scope with regard to the imposition of fines by the Commission under Article 23(2) of Regulation No 1/2003 as compared to actions for damages for infringement of EU competition rules. These rule has also a reverse effect, so the finding of the Court in Sumal shall be applied in relation of subsidiary liability for sanctions.

2. Identification of a relevant economic unit for the purpose to impute liability to its members for the conduct of the undertaking.

The requirements to identify the existence of a relevant economic unit between two or more companies are in continuous evolution in the recent jurisprudence of the Court.

In Sumal the Court abandon the light exigence of personal participation of all its members, even simply by omission, included in Skanska 39. Following Sumal its not need that the entities that form an economic unit have participated in the agreement or practice or in its implementation in any way.

All the members of an economic unit at the moment of the infringement of EU Competition law – attending the economic activity in question - are liable for infraction. A legal entity which is not designated in the decision as having committed the infringement of competition law may nevertheless be held liable on that basis due to conduct amounting to an infringement committed by another legal entity, where those two entities both form part of the same economic unit and thus constitute an undertaking which is the perpetrator of the infringement. The economic unit of which it is constituted must be identified having regard to the subject matter of the agreement at issue.

The liability of the subsidiary for conducts of the parent company in case of the existence of a relevant economic unit cannot however be invoked unless victim proves the links uniting both companies as well as the specific link between the economic activity of that subsidiary company and the subject matter of the infringement for which the parent company has been held responsible. The victim should in principle establish 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.

3. Subsidiary liability.

The previous case law from Sumal makes clear from that the conduct of a subsidiary may be attributed to the parent company in particular where, although having a separate legal personality, that subsidiary

does not determine independently its own conduct on the market, but essentially carries out the instructions given to it by the parent company, having regard especially to the economic, organisational and legal links between those two legal entities, with the result that, in such a situation, they form part of the same economic unit and, hence, form one and the same undertaking responsible for the conduct that constitutes an infringement (see, to that effect, judgments of 10 September 2009, Akzo Nobel and Others v Commission, C‑97/08 P, EU:C:2009:536, paragraphs 58 and 59, and of 27 April 2017, Akzo Nobel and Others v Commission, C‑516/15 P, EU:C:2017:314, paragraphs 52 and 53 and the case-law cited). But Sumal goes further and establish that relevant infringer is the undertaking, the economic unit, and all its members one time it is proved that one of the members of the single economic unit has infringed the prohibition.

As point 43 in fine of Sumal signal:

> *Where it is established that the parent company and its subsidiary are part of the same economic unit and thus form a single undertaking, within the meaning of Article 101 TFEU, it is therefore the very existence of that economic unit which committed the infringement that decisively determines the liability of one or other of the companies making up that undertaking for the anticompetitive conduct of the latter.*

As undertaking is European autonomous concept, the rules to determine its relevant members are also EU Law matter. So the determination of the entities which are required to provide compensation for damage caused by an infringement of Article 101 TFEU is directly governed by EU law.

Following Sumal the victim of an infringement of EU competition law committed by a parent company may seek compensation from that company's subsidiary for the resulting loss. To do so, it must prove that the two companies constituted an economic unit at the time of the infringement following the EU requirements.

First is need to prove that exists the economic, organizational and legal links relevant following the jurisprudence of the Court, as stated in paragraphs 37 to 40 Case C-90/09 P General Química. In this kind of cases exists a rebutable presumption – *iuris tantum* – of existence of a single economic unit in the cases in which the parent company owned the 100% of the capital or can exercise the 100% the rights of vote of the subsidiary - case *Goldman Sachs* 2021-. - links uniting companies requirement -.

All the members of an economic unit at the moment – temporal requirement - of the infringement of EU Competition law – attending the economic activity in question - are liable for infraction. A legal entity which is not designated in the decision as having committed the infringement of competition law may nevertheless be held liable on that basis due to conduct amounting to an infringement committed by another legal entity, where those two entities both form part of the same economic unit and thus constitute an undertaking which is the perpetrator of the infringement.

The actor shall prove that at least one entity belonging to that economic unit has committed an infringement of Article 101(1) TFEU, such that the undertaking constituted by that economic unit is to be treated as having infringed that provision, and that that fact is recorded in a decision of the Commission which has become definitive (see, to that effect, judgment of 27 April 2017, Akzo Nobel and Others v Commission, C‑516/15 P, EU:C:2017:314, paragraphs 49 and 60), or established independently before

the national court concerned where no decision as to the existence of an infringement has been adopted by the Commission.

The third requirement is that members of the cases' relevant single economic unit shall be linked to the same economic activity – activity requirement-.

As a logic consequence not all the members of the group are members of the relevant single economic unit but the same parent company may be part of several economic units made up, depending on the economic activity in question, of itself and of different combinations of its subsidiaries all belonging to the same group of companies.

In fact, the components of this relevant single economic unit may change from one case to other and shall be determine case by case.

Sumal 51 requires in addition the existence of a specific link between the economic activity of that subsidiary and the subject matter of the infringement for which the parent company was held to be responsible – special link requirement -. This requirement is not equivalent to the previous requirement of participation – Goldman Sachs Deutsche Telekomm -. Here the question is to determine that the member's activity is relevant in relation of the infringement conduct.

So, the claimant must prove the links uniting those companies as well as the specific link, referred to in the same paragraph, between the economic activity of that subsidiary company and the subject matter of the infringement for which the parent company has been held responsible.

The victim should establish 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. In so doing, the victim shows that it is precisely the economic unit of which the subsidiary, together with its parent company, forms part that constitutes the undertaking which actually committed the infringement found earlier by the Commission pursuant to Article 101(1) TFEU, in accordance with the functional interpretation of the concept of 'undertaking'.

4. Economic unit, control and group of companies.

Although the Court decides in Sumal applying single economic unit doctrine reintroduces without any need in its reasoning the concept of group of companies in relation of conglomerates. This seems a wrong way to confront the question since the problem of the existence of subsidiaries acting autonomously can be solved from the logic of the economic unity doctrine, without the need to take into consideration the corporate doctrinal categorizations of group.

If a subsidiary act autonomously from its parent company, the economic unit simply does not exist. There is no need to know if that subsidiary was member of a conglomerate group or of a pyramidal one.

Sumal decides also about the compatibility of a national rule as article 71(2) LDC that stablish that the conduct of a company is also imputable to the companies or persons that control it, except when their economic behavior is not determined by any of them.

The Court decide that article 101(1) TFEU must be interpreted as precluding a national law which provides for the possibility of imputing liability for one company's conduct to another company only in circumstances where the second company controls the first company.

So if the referring court considered that it was not possible for it to uphold an interpretation of Article 71(2) of the Law on the protection of competition that was consistent with the interpretation of Article 101(1) TFEU set out in paragraph 67 of this judgment, it would be required to disregard that national provision and to apply directly Article 101(1) TFEU to the dispute in the main proceedings. Solution that we have defend in previous works.

5. **Some words about deterrence function of damages compensation**.

Jurisprudence of the Court has signal from its beginning the deterrence role of the compensation of damages actions, by all see the judgment of 20 September 2001, Courage and Crehan, C-453/99, EU:C:2001:465, paragraph 27.

The Directive on the other hand limits the damages compensation action role to the pure compensation of damages implicit excluding any connection with deterrence prohibiting overcompensation, whether by means of punitive, multiple or other damages (article 3.3) , ordering that National courts should have at their disposal appropriate procedural means, such as joinder of claims, also in cross-border cases, to ensure that compensation for actual loss paid at any level of the supply chain does not exceed the overcharge harm caused at that level.

The jurisprudence of the Court about the Directive keep going signaling the deterrence role of damages compensation actions, by all judgement of 14 March 2019, Skanska Industrial Solutions and Others, C-724/17, EU:C:2019:204, paragraph 44.

As points 35 to 37 of Sumal remarks, the right for any person to seek compensation for such harm strengthens the working of the EU competition rules, since it discourages agreements or practices, frequently covert, which are liable to restrict or distort competition, by contributing to the maintenance of effective competition in the European Union, reaffirming that private enforcement is an integral part of the system for enforcement.

> *36. Beyond the compensation itself for the harm alleged, the establishment of such an entitlement contributes to the objective of dissuasion, which is at the heart of task of the Commission, which is under a duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the FEU Treaty and to guide the conduct of undertakings in the light of those principles (see, to that effect, the judgment of 7 June 1983, Musique Diffusion française and Others v Commission, Joined Cases 100/80 to 103/80, EU:C:1983:158, paragraph 105). That entitlement is thus capable not only of providing a remedy for the direct damage alleged to have been suffered by the person in question, but also the indirect harm done to the structure and operation of the market, which was not able to reach full economic efficacy, in particular as regards benefits to the consumers concerned.*

> *37 It follows from the foregoing that, just as is the case for the implementation of the EU competition rules by public authorities (public enforcement), actions for damages for infringement of those rules (private enforcement) are an integral part of the system for enforcement of those rules, which are intended to punish anticompetitive behaviour on the part of undertakings and to deter them from engaging in such conduct (judgment of 14 March 2019, Skanska Industrial Solutions and Others, C-724/17, EU:C:2019:204, paragraph 45).*

Following the Court`s doctrine confirmed another time by Sumal, the right for any person to seek compensation for a harm strengthens the working of the EU competition rules, since it discourages agreements or practices, frequently covert, which are liable to restrict or distort competition, by contributing to the maintenance of effective competition in the European Union.

Actions for damages for infringement of EU Competition rules (private enforcement) are an integral part of the system for enforcement of those rules, which are intended to punish anticompetitive behaviour on the part of undertakings and to deter them from engaging in such conduct.

The divorce of the Court and Commission thinking on this point is evident.

This confrontation poses the question about how shall be teleological interpreted and applied the articles of the Directive 2014/104/UE and of the national rules transposing it to the national law of the member states in this point.

In my opinion National Courts shall have in mind the deterrence role of the damages compensation actions by dealing with these cases, discarding an exclusive compensatory role of the rules in its application.