The uniform application of Competition Law in the EU: an alternative consideration to the Sumal Case (C-882/19)

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Abstract

With the Sumal judgment, the CJEU has clarified the possible applications of the theory of economic unity as a standard of liability in the field of Competition Law. Numerous commentators have been quick to highlight the importance of this ruling, which establishes for the first time a basis for assessing the liability for damages of a subsidiary company that is not the addressee of the fine and in relation to the infringement committed by its parent company, if the links defining an economic unit with an impact on the commission of the infringement can be reproduced between the two companies. Before that, however, the judgement is also important for listing the conditions that serve to ensure the uniform application of Competition Law in the EU. And it is here where the Court emphasises the complementary relationship between the public and private enforcement of Competition Law and the requirements deriving from the principle of the binding effect of the decisions of the competition authorities, all in connection with the later exercise of follow-on actions. Having established these assumptions, the broad discretional power of the judges to conduct the damage liability trial in private enforcement proceedings begins to operate.

The less obvious at Sumal

Last October 6, 2021, the Sumal judgment (CJEU, Grand Chamber, Case C-882/19) was published in answer to a preliminary ruling submitted by the Barcelona High Court in the context of a proceeding following after the Commission's decision of July 19, 2016 (Case ATP-39824, trucks).

As is well known, the reasons justifying the raising of the question concerned, fundamentally, the possible applications of the theory of economic unity as a criterion for the imputation of liability in the field of Competition Law. In particular, at Sumal, an action for damages had been brought against the Spanish subsidiary of Daimler AG, the addressee of the decision, but not simultaneously that subsidiary, which had nevertheless been involved in the distribution in Spain of the products affected by the infringement sanctioned by the competition authority. For this reason, the Barcelona High Court wanted to inquire into the admissibility under the theory of economic unity of liability to the Spanish subsidiary company. Also, on the compatibility of the literal diction of articles 61 and 71 LDC -in other words, of our notions of infringer and civil liable person- with the requirements of articles 101 and 102 TFEU and the doctrine that has interpreted them.

Other issues were included in this question about the interference of European law with national law and, also, with some solutions more closely rooted in tort law or corporate law than with the specialties of Competition Law. As was to be expected, the commentators who

have most immediately approached the analysis of this landmark judgment have focused on its most relevant aspect for both the future public and private application of Competition Law: the possibility of imputation of liability to a subsidiary company that is not the addressee of the sanctioning decision and the delimitation of the economic unity concept in the context of corporate conglomerates.

However, at an intellectual stage prior to all of this, the judgment is also interesting when it examines one of the main premises of the private enforcement of Competition Law, according to its most common typology through the exercise of follow-on actions: its complementary and interdependent relationship with a previous phase of public enforcement of the same law. Analysing the scope of the complementary relationship between the public and private sides of Competition Law, which is resolved in the development of the principle of binding effect, is also important in order to appreciate the richness of damages actions. Because with respect to any facet of prosecution that is not affected by the requirements of the binding effect to what has been previously decided by the competition authority, the very broad discretionary powers of the judge shall follow in the determination of the inseparable requisites to satisfy the judgment of liability for damages.

In this brief commentary I will avoid the review of the Court's decision in the modulation of the doctrine of economic unity because, on the contrary, I wish to assess its importance from that perspective of alternative analysis. Then, with the appropriate systematic separation, I will allude to the complementary relationship between the public and private facets of Competition Law, I will introduce the requirements derived from the principle of binding effect of a competition authority's decision on damages actions and, in particular, according to the new developments of the CJEU in Sumal and, finally, I will refer to the discretion of the judge of private enforcement of Competition Law in his task of prosecuting a damages action.

Complementary relationships in Competition Law

Since the irruption of the Damages Directive in the immediate context of the proceedings for damages actions, a still unresolved discussion has arisen among Spanish judges on the determination of the law applicable to these proceedings and, in particular, on its autonomy and sufficiency. This can be explained by two reasons of different nature and importance. Firstly, a purely instrumental and insignificant one, due to the confusing rules of transitory law introduced in the Directive and the lazy conduct of the Spanish legislator in the incorporation of this rule into our national law. But also, secondly and much more importantly, because of a deficit in the perception of the European dimension of Competition Law, the complementarity of its possible applications, the specialities in matters of liability for damage and, finally, the vertigo caused by the fact that even the precepts of constitutional relevance in the TFEU do not constitute a sufficient rule of liability, due to their problematic interferences with the national regime of non-contractual liability. This last discussion is certainly recognisable in the more immediate experience of other European jurisdictions, because it describes a situation that does not correspond to a Spanish singularity. This second reason is transcendental to the extent that, if litigation for damages for infringement of Competition Law is reduced to a chapter of the general remedies of tort law, private litigation will be deprived of its true meaning. In addition, because the direct application of Articles 101 and 102 TFEU or the rules of the Damages Directive do not form a genuine and complete system of tort law.

From the 1980s on, as the developments of the Chicago School for an economic analysis of law were received in continental Europe, always driven by an aspiration for efficiency in the allocation of the resources committed by each of its rules, a certain functionally broader vision

was consolidated to recognise in tort law a purpose of preventing the number and intensity of harmful events. The economic formulation of this aspiration was evident: if the law does not prevent harmful events, economic agents will discount their foreseeable cost in the transactions of goods and services in which they are involved, making the market more inefficient. This view has since been strongly contested by the more conventional doctrine which considers that the purpose of tort law is much more modest and reduced to the search for compensation between the tortfeasor and the victim of the damage. But the specific dimension of liability for antitrust damages goes far beyond that. The purpose of Competition Law, in its constitutional and economic dimension in the Treaties, is to ensure that the citizens and companies of the EU benefit from a full and free market economy. That is why Competition Law imposes certain conducts, punishes those that do not conform to that standard and gives injured parties the opportunity to seek compensation for the damages suffered as a result of any of those transgressions. The contrast between sanction and compensation is the only one that explains the differences between public and private enforcement, but it does not alter their common purpose of deterrence.

In Sumal, the Court reminds us that this is precisely the meaning and value of damages litigation in Competition Law, in three different ways. Firstly (paragraphs 32 and 70-72 and quoting the Poplawski, Adeneler and BNP Paribas precedents), when it recalls that Article 101 TFEU produces direct effects in favour of all citizens of the Union and that national judges must protect those rights. In the same place, but alternatively, when, in contrasting Spanish legislation with Article 101 TFEU - the fourth question referred for a preliminary ruling - the Court states that national judges are obliged, by virtue of the principle of the primacy of EU law, to interpret their domestic law in a manner that complies with it and so far as the solution reached in the proceedings permits the effectiveness of the objectives laid down by the EU rules. The Court thus reproduces its long-standing case-law on the principles of primacy and interpretation in conformity. Thirdly (paragraphs 32-37 and quoting the precedents of Courage, Manfredi and Skanska), when it reiterates its doctrine on the economic dimension of compensation for the damage suffered as a result of the anti-competitive infringement: it is less a matter of compensating the injured party than of reinforcing the effectiveness of the competition rules, all in order to dissuade agreements or practices that restrict or distort competition. This is the useful effect of the prohibitions provided for in Articles 101 and 102 of the Treaty. Thus, explicitly for the Court, the reparation of the harm caused to the injured party is a means to a greater end and goes far beyond the satisfaction of the interests of the injured party. This is the most obvious manifestation of the complementary relationship between the public and private applications of Competition Law.

And this correspondence still determines two requirements that the Court recalls again in Sumal. The first of these is that the legal institutions affected by the public and private processes cannot have an alternative meaning (paragraph 38 and with a new citation of the Skanska precedent). It is precisely this ratio that will justify the most striking position taken in the judgment, on the possible applications of the theory of economic unity to tort actions. The second of these is that between public and private enforcement authorities there must be a cooperative relationship that allows for the achievement of the lofty objectives pursued by Competition Law. In the case of Sumal, the requirements of cooperation will be translated into the space recognised for the principle of binding the decisions of a competition authority to the discretion of the private enforcement judge of Competition Law, both explicitly and tacitly, as I will say below.

The principle of binding effect

Although it is true that the typology of private enforcement of Competition Law admits purely contractual actions and stand-alone actions to seek for the existence of an infringement, the EU law design of damages actions seems predetermined to consecutive litigation in respect of a prior administrative process of investigation and sanctioning of an anti-competitive infringement. In order to ensure uniformity in the application of Competition Law throughout the EU, the Court has, since the Masterfoods case, consolidated a doctrine that brings together the principles of legal certainty and cooperation between EU and national authorities. In particular, the Court considered that national courts cannot adopt decisions that are incompatible with those that have been the subject of a decision by the European Commission and that, in the event that the Commission has not yet ruled on an ongoing investigation process, the national court must suspend a simultaneous procedure. The Court's doctrine, although initially oriented towards the discrimination of competences between the Commission and the national courts for the application of competition rules, intervened as the first step in the configuration of the principle of binding effect and found its implementation in the subsequent Article 16 of Regulation 1/2003. Later, Article 9 of the Damages Directive has established complementary rules with regard to the less full binding effect of a decision of a national competition authority.

Since then, there has been discussion on the material scope of the binding effect, if limited to the operative part of the decision or to the specific arguments that lead to it in the body of the decision in each case, on the discretion of the private enforcement judge in the quantification of damages and on the possible extension of the subjective and objective scope of the competition authority's decision by those judges.

The solution in the Sumal case was particularly problematic not only in terms of the choice between the various possible applications of the theory of economic unity, but also because of the need to answer the previous question about an alleged negative or restrictive effect of the principle of binding effect. At the same time as the preliminary ruling of the Barcelona High Court, most of Spanish courts had considered, in cases exactly like the one which had motivated the raising of the question, that liability could not be attributed to the same subsidiary company as far as it had not been mentioned among the addressees of the decision, while the Commission could have decided to include it expressly in that place (v. gr. SAP Valencia, 9ª, numb. 253/2020, Feb. 24th, ECLI: ES:APV:2020:1166; SAP Zaragoza, 5ª, numb. 393/2021, March 31th, ECLI: ES:APZ:2021:753; SAP Pontevedra, 1ª, numb. 378/2020, June 29th, ECLI: ES:APPO:2020:1243). In other words, it was not only the positive dimension of the principle of binding effect that was at issue, but also the exclusionary and limiting dimension of the possibilities of liability for damage, with or without economic unity. In Sumal it was also a question of determining from where and how far the discretion of the private enforcement judge extends. What the competition judge cannot ignore, what he cannot contradict and where are the unavoidable limits for an action for damages followed by a public enforcement procedure. Although it should be noted that the best doctrine had already pointed to the need to provide - and that it was sufficient - an additional justification for all decisions extending the scope of the Commission's decision.

Prior to Sumal, the Court had ruled that the purpose of the action for damages is to establish their existence, their causal link with the infringement and any quantification. Certainly, with the Otis I judgment, the Court established a particular content for the rule of binding effect, admitting that the prohibition on the national court to adopt decisions incompatible with a Commission decision did not affect its freedom to decide on the concurrence of the elements inherent for the tort liability rule. The only thing that the national court could not do was to

ignore the existence of the infringement and its nature or to contradict the Commission's specific rulings. As recital 34 of the Damages Directive would later specify, the scope of the binding effect is limited to establishing the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority. What still had to be resolved is what and how the private enforcement judge can add to all these categories.

Sumal news

As I have pointed out above, the novelty of the Sumal case lies mainly in the development of the theory of economic unity as an imputation criterion in Competition Law to a new application among the possible ones. Together with the precedents of the Akzo Nobel and Skanska cases, which extended liability to the parent company for the damage caused as a result of the infringement imputed to its subsidiary by virtue of its powers of supervision and control over the subsidiary or in scenarios of transfer of companies, the Sumal case develops a new rule of liability, based on the possibility of delimiting membership of the infringing economic unit by the role of the subsidiary in the propagation of the effects of the infringement in the market. But the Court was aware that the solution to the case was not exhausted by the reformulation of the theory of the economic unit, but required an additional look at the principle of binding effect and also at the possibilities of contradiction and defence of this subsidiary company.

The consequences flowing from the explicit application of the principle of binding effect required the identification (paragraph 55) of everything that cannot be disputed again in the private enforcement process, by reference to what had previously been decided in the public enforcement process and in the manner in which the Commission had declared it to be so. Because one of the main defences put forward by the subsidiary in the case was that it had not been personally involved in the public enforcement proceeding, so that it had not received the statement of objections and had no concrete opportunity to make allegations in the absent scenario of its indictment as an infringer. However, in the application of the principle of binding effect, the Court recalls that the subsidiary could not dispute in the subsequent private enforcement proceedings the existence of the infringement found by the Commission and the decision addressed to its parent company. On the contrary, the compatibility of this positive dimension of the principle of binding effect, in so far as it constituted a prior and unalterable condition for the damage’s proceedings, with the subsidiary's rights of defence was clear from the Court's own doctrine (Versalis case). If the subsidiary was part of the same economic unit considered to have infringed, it was not necessary for it to participate in the previous public enforcement proceeding. Moreover, without infringing Article 27 of Regulation 1/2003, the Commission has a wide margin of discretion in determining which companies are identified by name as the addressees of the fine imposed in a public enforcement procedure. The legal entities specifically targeted by public enforcement proceedings must be capable of being declared infringers, as without such a declaration no fine can be imposed on them. But the Commission does not have to list among the addressees of its sanctioning decision all legal entities that are part of the economic unit found to be infringing.

What is also new in Sumal is the special consideration of the absence of a negative or exclusionary dimension of the principle of binding effect on the decision of the competition authority and on a subsequent action for damages, in relation to the absence of the inclusion of a specific legal entity among the addressees of the public sanction. And this can be noted in two different ways. First, as a consequence of what was stated above (paragraphs 48 and 61),

when one notices the possibility for the private enforcement judge to declare the liability of the subsidiary company for damages even when no decision has been taken or when the decision taken does not include that legal entity among the addressees of the administrative sanction. Second (paragraph 60), when the extent of the possible intervention of that subsidiary in such a damage proceeding is modulated in order to contest, in scenarios where no decision has been taken, the existence of the alleged infringement or, in scenarios where the infringement has already been established, its membership of the infringing economic unit or the existence and quantification of the damage.

A conclusion: the discretion of the damages judge

Therefore, what is important in Sumal is everything that the Court concedes, perhaps tacitly, with respect to the broad discretion of the private enforcement judge in the prosecution of actions for damages. Because its work is not limited, or even hindered, by circumstances beyond those required by respect for the Commission's previous decisions and in accordance with the provisions of Article 16 of Regulation 1/2003.

The question then is to determine when, in first place, the damage judge can extract direct considerations from the vestiges found during the public application of Competition Law proceeding and the specific pronouncements gave by the Commission. Afterwards, an attempt will also be made to establish a specific threshold of evidentiary demand for the purposes of the private process, participated in a contradictory manner by all the parties and to satisfy the demands of the damages trial. Precisely all of this is also referred to by the Court in Sumal (paragraph 52) when it makes some recommendations on how to conduct an appropriate evidentiary activity to demonstrate the membership of a subsidiary company that is not the addressee of the decision to the same economic unit declared as infringing in the public application procedure. And it is equally interesting to consider that, in those same recommendations, the evidentiary rigor of the Court does not seem exorbitant, but rather affordable for the proof capabilities of any injured party in a similar private process.

That still may have some additional conclusions for the rest of the categories included in the tort liability rule and which a tort proceeding needs to see attended to. Because if the damages judge enjoys a wide discretion in the determination of the persons who can be considered liable for the damage, by evoking the notion of infringer, and if in order to satisfy this judgement the evidential requirements to be addressed to the injured party and plaintiff must be accessible, in the same way the judge of private enforcement of Competition Law must have a wide margin of discretion in the quantification of the damage suffered by this injured party and without the evidential requirements being insuperable in this case as well. Because awarding and quantifying damages is the purpose of private enforcement. And this view is not precisely revolutionary: for decades, the CJEU has been interpreting the effectiveness of the right to compensation of the injured party for an anti-competitive infringement in this particularly stable manner. This case law has been the forerunner of all EU legislation in this area.

The law is now a little clearer. It is to be expected that, in the future, there will be no major legal controversies on questions such as the determination of the legal regime applicable to a follow-on action, the fixation of jurisdiction, limitation periods or the extent of the discretionary powers of the private enforcement judge. Instead, all the attention will be focused on the truly important element in a follow-on action: the deterrence of unlawful conduct and the full operation of the competition rules through the compensation of damages caused by an anti-competitive infringement.