

Marta Mackiewicz*

Compensation liability for antitrust damages caused by related companies – development of the concept of a single economic unit Case comment to the CJEU judgment of 6 October 2021 in case C-882/19 *Sumal SL v Mercedes Benz Trucks España SL*¹

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Summary

The subject of this case comment is the analysis and assessment of the judgment of the Court of Justice of the European Union (CJEU) issued on 6 October 2021 in case C-882/19, brought by *Sumal SL v Mercedes Benz Trucks España SL*. The *Sumal* judgment concerns an important issue in the area of competition law, both public and private (*private enforcement*) – determining the group of entities responsible for infringements of competition law operating within one economic body. Earlier CJEU case law in this regard focused primarily on determining the liability of the parent company within a group of companies. In the *Sumal* judgment, however, the CJEU raised the issue of the liability of subsidiaries in the event of a breach of competition law by the parent company. The CJEU has by no means crossed out its earlier case law on the *single economic unit*, but looked at the issue from the opposite direction and specified the liability conditions of subsidiaries. Such clarification was undoubtedly desirable. However, it calls into question the principle of liability of subsidiaries in a situation where they were not directly involved in the infringement, rather than only indirectly or informally.

Key words: *private enforcement*; *single economic unit*; determining the entities responsible for repairing the damage; infringement of competition law.

JEL: K21, K41, K42

* PhD in law, associated with the Kozminski University in Warsaw, advocate – of counsel at Rymarz Zdort Maruta. ORCID: <https://orcid.org/0000-0001-8005-2342>.

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I. Facts of the case and the subject of the case comment

The defendant Mercedes Benz Trucks España SL is a subsidiary of the Daimler group, of which Daimler is the parent company. In 1997–1999, the plaintiff – Sumal SL (hereinafter: Sumal) purchased two trucks from Mercedes Benz Trucks España SL.

On July 19, 2016, the European Commission issued *Decision C(2016) 4673 final* regarding the procedure provided for in Art. 101 of the TFEU and Art. 53 of the EEA Agreement (Case AT.39824 – *Trucks*), a summary of which was published in the Official Journal of the European Union of 6 April 2017 (OJ 2017, C 108, p. 6).

In the above decision, the Commission found that fifteen European truck manufacturers, including Daimler, had participated in a cartel involved in a single and continuous infringement of Art. 101 of the TFEU and Art. 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3), consisting in colluding arrangements for fixing prices and increasing gross prices of trucks in the territory of the European Economic Area (EEA) as well as the timing and cost-passing of the introduction of the emission technologies for the trucks required by the applicable standards. For three of the companies involved, the infringement took place between 17 January 1997 and 20 September 2010, and for the other twelve participating companies, including Daimler, between 17 January 1997 and on January 18, 2011.

Following that decision, Sumal brought an action before the Commercial Court of Barcelona against Mercedes Benz Truck España for damages in the amount of EUR 22 204.35, corresponding to the additional acquisition costs incurred by Sumal as a result of the cartel involving Daimler, the parent company of Mercedes Benz Truck España SL.

By judgment of January 23, 2019, the court rejected the above-mentioned lawsuit on the ground that Mercedes Benz Trucks España SL had no locus standi in this case, since Daimler, which is the only one affected by the Commission's decision, should be regarded as the sole entity responsible for the infringement in question.

In connection with the above decision, Sumal appealed against the judgment to the appellate court in Barcelona, which wonders whether actions for damages, brought as a result of decisions of competition authorities finding anti-competitive practices, may be directed against subsidiaries that are not affected by the decisions, but which are 100% owned by the companies directly indicated in the decisions.

In that regard, it points to divergences in the approach taken by Spanish courts. Some of them admit that such actions may be brought against subsidiaries, based on the single economic unit theory. Other courts oppose it because, according to them, the theory makes it possible to attribute civil liability for the behavior of a subsidiary to the parent company but does not allow the subsidiary to be prosecuted for the behavior of the parent company.

In such circumstances, the Barcelona Court of Appeal decided to stay the proceedings and refer the following questions to the CJEU for a preliminary ruling:

1. Does the theory of a single economic unit, which comes from the jurisprudence of the Court itself, justify the extension of the liability of the parent company to the subsidiary, or does the theory apply only to the extension of the liability of subsidiaries to the parent company?

2. Should the extension of the concept of an economic entity to intra-group relationships be made solely on the basis of control criteria, or can it also be based on other criteria, including the fact that the subsidiary may have benefited from the infringing conduct?
3. If it is found possible to extend the liability of the parent company to the subsidiary, under what conditions would it be possible?
4. If the above questions are answered positively, indicating the possibility of extending the liability for the actions of parent companies to subsidiaries, is the national provision, Art. 71 sec. 2 of the [Act on Competition Protection] in accordance with such jurisprudence, as it provides only for the possibility of extending the liability of the subsidiary to the parent company, provided that the parent company exercises control over the subsidiary?

After a detailed analysis of the above issues against the background of the existing case law of the CJEU regarding the single economic unit, the CJEU in the judgment in case C-882/19 *Sumal SL v Mercedes Benz Trucks España SL*² assumed as follows:

- 1) Article 101(1) 1 of the TFEU must be interpreted as meaning that the victim of an anti-competitive practice by an undertaking may bring an action for damages against a parent company on which sanctions have been imposed by the European Commission in relation to that practice, or against a subsidiary of that company which is covered by the decision if together they form an economic unit. The subsidiary concerned should be able to effectively exercise its rights of defense in order to demonstrate that it does not belong to that undertaking, and where the Commission has not taken any decision pursuant to Article 101 of the TFEU, it also has the right to challenge the veracity of the alleged unlawful conduct.
- 2) Article 101(1) 1 of the TFEU must be interpreted as precluding national legislation which provides that liability for the conduct of one company may be imputed to another company only where the second company controls the first company.

II. Juridical analysis

Jurisprudence of the CJEU on the basis of claims based on violation of Art. 101 of the TFEU, in the context of determining the perpetrator of the infringement, has long developed the concept of a *single economic unit*.³ The concept is derived from the interpretation of the concept of “entrepreneur” infringing competition law.

In the jurisprudence of the CJEU, the term “entrepreneur” is defined primarily as an economic unit, not a legal one. Recognition of an “enterprise” in economic, and not strictly legal terms, enables assigning liability to entities which, in the light of the law, do not constitute a separate entity to which such liability can be attributed. This is the case with a group of companies, it consists of

² Judgment of the CJEU of October 6, 2021 in case C-882/19 *Sumal SL v Mercedes Benz Trucks España SL* (hereinafter: the judgment in the *Sumal* case).

³ In the judgment of 12 December 2007 in the case T-112/05, *Akzo Nobel NV and others against the Commission of the European Communities* (hereinafter: the *Akzo* case), the CJEU definitively decided that the parent company could be held liable for an act committed by its subsidiary. The Court accepted that Akzo Nobel, the parent company of the Akzo group, was responsible, together with several other subsidiaries, for the participation of one of them in a cartel involving the production of choline chloride. The Court held that the parent company together with the other companies in the group constituted a single undertaking. Another important case in this matter was the judgment of 12 July 2011 in case T-132/07, *Fuji Electric Co. Ltd v European Commission* T-132/07, EU:T:2011:344 (hereinafter: *Fuji Electric* case). In the issued judgment, the CJEU emphasized that it is permissible to attribute liability for an act of unfair competition to the parent company when it is proved that the parent company had a decisive influence on the operation of such a subsidiary, and it does not matter what part of the shares it holds in share capital of that company. A similar conclusion can be drawn from the judgment of 9 September 2015 in case T-104/13, *Toshiba Corp. v European Commission*, EU:T:2015:610 (hereinafter: the *Toshiba* case). The Court found that Toshiba could be held liable for the operation of the joint venture, even though it held only 35.5% of the share capital in it. The rationale for this is that Toshiba had a veto right that went beyond the normal powers of minority shareholders to control the joint venture.

several companies with separate legal entities, but from the economic perspective it often constitutes the so-called one economic organism (e.g. Opalski, 2012; Błaszczuk, 2013; Wajda, 2017). In groups of companies, there is often one managing center, which is the parent company, while other companies – subsidiaries are subordinated to a uniform group strategy. Implementation of a uniform strategy is also often related to the existence of a certain group interest to which the subsidiaries submit themselves.

The concept of a single economic unit has a strong legal and ethical justification. As far as the formal aspect of this concept is concerned, simple moral intuition, characteristic of both criminal and civil law, requires the responsibility and sanction for a violation of the law to be imposed on the entity actually responsible for the violation. Thus, if an apparently independent entrepreneur implements decisions made within the decision-making center located in one economic organism, the entire economic organism should bear moral and thus legal responsibility for its actions. The concept of a *single economic unit* assumes a similar justification in its material aspect, consisting primarily in no illegality of anti-competitive “agreements” concluded within a single economic unit. Since entrepreneurs belonging to one economic organism do not have market autonomy, they are not competitors, and therefore any “agreement” between them cannot be described as anti-competitive. After all, competition law should not interfere with “intra-organizational” activities of two companies.

The existence of an independent (one) economic organism is evidenced by control (decisive influence) and a sufficient (or insufficient) degree of economic integration. Economic control and integration result, for example, from contractual or capital links between entities imposing rights or obligations on the entities, which may indicate a lack of economic independence. Circumstances allowing the separation of one economic entity in practice may also concern costs and risks transferred by potential members of the company. Moreover, the circumstances allowing to prove the existence of one organism can be understood not so much in a static (structural) way, i.e. by examining the existence of the above-mentioned capital and contractual relationships (and the above-mentioned costs and types of risk, as long as the risks result from specific capital and contractual relations), but in a dynamic (behavioral) way, i.e. to study how individual entities behave on the market (and what risks and costs they actually incur).

Already in 1971, in the case of *Béguelin Import*,⁴ the CJEU found that the daughter company and the parent company constitute one economic organism, in a situation where the daughter company “does not enjoy any economic independence”. Three years later, the same court added in the *Centrafarm* case that a daughter company should be treated in the same way when it “has no real freedom to determine its course of action in the market”.

The formal aspect of the concept of a single economic unit consists in extending responsibility for infringement of competition rules to all entities belonging to the “single economic unit”, and thus the possibility of imposing sanctions on each of the entities. In the context of the formal aspect of the concept of a single economic unit, there is often talk of *attribution of liability* for infringement of competition law.

The latest case law of the CJEU in cases of claims for damages arising from infringement of competition law clearly shows that companies operating in a capital group are jointly and severally

⁴ Judgment CJEU of 25 November 1971. *Béguelin Import Co. against S.A.G.L. Import Export*, Case 22–71.

liable, regardless of which of them actually committed the infringement. This applies in particular to the situation of the parent company's liability.

In the judgment of the CJEU of 14 March 2019 in case C-724/17 *Vantaan kaupunki v. Skanska Industrial Solutions et al., NCC Industry Oy, Asphaltmix Oy* (hereinafter: the *Skanska* case), the CJEU approved a broad understanding of the term "enterprise" as the perpetrator infringement and ruled that the scope of the concept covers any entity engaged in economic activity, regardless of its legal status and the way it is financed, as well as an economic unit consisting of several natural or legal persons.⁵

In the above judgment in the *Skanska* case, the CJEU clarified that "the concept of 'enterprise' within the meaning of Art. 101 of the TFEU, is an autonomous concept of the EU law, it cannot have a different scope in the context of the imposition of fines by the Commission under art. 23 par. 2 of Regulation No 1/2003 and another in the context of actions for damages for infringement of EU competition rules".⁶ At the same time, it pointed out that the interpretation of the concept of "infringer" (determining who committed the infringement) should be made directly on the basis of the EU law (Article 101 of the TFEU), and not national law (see Nb 28 of the judgment in the *Skanska* case).

By interpreting the notion of an, "enterprise" as the perpetrator of the damage and linking it to the concept of a single economic unit, the CJEU emphasized the significance of the principle of equivalence and effectiveness of the EU law. It pointed out that in the absence of regulations in Community law, establishing the rules for exercising the right to claim compensation for damage resulting from the agreement or practice prohibited in art. 101 of the TFEU is up to the Member State, ensuring that the principles of equivalence and effectiveness are respected.⁷ In the opinion of the CJEU, "the full effect of art. 101 of the TFEU and, in particular, the effectiveness (*effet utile*) of the prohibition laid down in par. 1 would be called into question if any person could not claim compensation for damage caused to them by a contract or conduct capable of restricting or distorting competition".⁸

Indication that the subsidiary did not commit the act or liquidation/dissolution or transformation of companies in the group in such a way as to formally eliminate the responsible entity is a perfect example of evasion of liability within a group of companies (one economic entity). For this reason, the CJEU has developed a broad interpretation of the concept of an entrepreneur who infringes (the concept of a single economic unit) and clearly indicated in the above-mentioned judgment in the *Skanska* case that the determination of the entity – the perpetrator of the infringement of competition law is made on the basis of European law (Article 101 of the TFEU). Relying on national law would narrow down the category of the perpetrator of the damage to legally separate economic entities that could be held liable.

In the context of the above analysis, it should be stated that the judgment in the *Sumal* case does not in any way invalidate the uniform and well-established case law of the CJEU regarding a single economic unit and joint and several liability of companies forming such an organism for

⁵ Ibidem, point 37.

⁶ Judgment CJEU of 14 March 2019, *Vantaan kaupunki v Skanska Industrial Solutions et al., NCC Industry Oy, Asphaltmix Oy*, C-724/17, 2018/C 083/21, point 47.

⁷ Ibidem, point 27.

⁸ Ibidem, point 25. The CJEU refers to the judgment of 5 June 2014, *Kone et al.*, C-557/12, point 21, as well as the case law cited therein.

infringement of competition law. The judgment in the *Sumal* case only specifies the conditions for holding companies from the group liable for damages, pointing to three key issues expressed in recitals 42, 51 and 51 of the justification of the judgment:

“(42) (...) in order to attribute liability to a given legal entity belonging to an economic unit, it is necessary to provide evidence that at least one legal entity belonging to that economic unit has infringed art. 101 sec. 1 of the TFEU in such a way that an enterprise set up by that economic unit has infringed that provision.”⁹ [in principle, therefore, the aggrieved party may seek compensation from the subsidiary, even if the infringement was proven on the part of the parent company or another group company – footnote by the author].

“(51) Thus, in circumstances where the existence of a breach of art. 101 sec. 1 of the TFEU has been established on the part of the parent company, the aggrieved party may claim civil liability of that parent company’s subsidiary rather than liability of the parent company, in accordance with the case-law cited in point 42 of the judgment. [as a rule, the aggrieved party may seek compensation from the subsidiary, even if the infringement was proven on the part of the parent company – footnote by the author]. However, the liability of that subsidiary can arise only if the injured party proves either on the basis of a decision previously issued by the Commission pursuant to Article 101 of the TFEU, or otherwise, in particular where the Commission is silent on that point in the decision or has not yet adopted a decision, that, first, because of the economic, organizational and legal links referred to in points 43 and 47 of the judgement, and, secondly, the existence of specific links between the economic activities of the subsidiary and the subject-matter of the infringement for which the parent company was responsible, the subsidiary formed an economic unit with the parent company”.

“(52) It follows from the foregoing considerations that such an action for damages brought against a subsidiary presupposes that, in order to establish the existence of an economic unit between the parent company and the subsidiary within the meaning of points 41 and 46 of the judgment, the applicant proves the existence of links between the companies mentioned in the previous point of the judgment, as well as the actual link, referred to in the point, between the economic activities of that subsidiary and the subject-matter of the infringement for which the parent company was found liable. Thus, in circumstances such as those at issue in the main proceedings, the aggrieved party must, in principle, demonstrate that the anti-competitive agreement entered into by the parent company for which it was penalized relates to the same products sold by the subsidiary. Thus, the injured party demonstrates that it is the economic unit to which the subsidiary belongs together with its parent company that constitutes the enterprise which actually committed the infringement previously found by the Commission pursuant to art. 101 sec. 1 of the TFEU, in accordance with the functional understanding of the term ‘enterprise’ adopted in point 46 of the judgment”.

Nor does it follow from the *Sumal* judgment that subsidiaries are to exist from the date of the first infringement of competition law by the parent company. The CJEU indicates in points 42–44 “(...) at the time of the infringement”, “(...) at the time of the infringement taking place”. In

⁹ Judgement in the *Sumal* case.

the case of continuous acts, **where the infringement of competition law is of a lasting nature and extended over time, the assumption that the subsidiary is to exist already at the time of the first infringement constituting the continuous act undermines the principle of effectiveness and the purpose of the developed concept of a single economic unit.** For this reason, on the basis of the statute of limitations for claims for infringement of competition law the following provision is assumed, following the judgment of the CJEU of 13 July 2016 in joined cases C-295/04 to C-298/04,

“a national provision on the basis of which the limitation period for bringing an action for damages runs from the date on which the agreements or concerted practice were put into effect could make it practically impossible to exercise the right to claim compensation for the harm caused by the agreement or prohibited practice, in particular if that national provision also provides for a short limitation period and provides that the limitation period cannot be suspended. In such a situation, in the case of continuous and repeated infringements, it cannot be ruled out that the limitation period will expire before the infringement has ceased, in which case persons who have suffered damage after the expiry of the limitation period have no possibility of bringing an action.”

It would be enough to liquidate the subsidiary and transform the parent company in the subsequent periods of infringement to avoid liability. As explained by the CJEU in the judgment in the *Skanska* case¹⁰ – such treatment is prevented by the concept of a single economic unit.

Using the analogy indicated by the CJEU in the *Sumal* judgment, “(52) (...) an anti-competitive agreement concluded by the parent company for which it was fined concerns the same products sold by the subsidiary” – if the parent company in the group, for example, Microsoft introduces a new computer and software on the world market in 2005, in the meantime (2007) the antimonopoly authority or a competitor accuses it of violating competition law in connection with the products, and then in 2010 a subsidiary is established in Poland that promotes and sells the computers and software, it cannot be assumed that Microsoft, a subsidiary in Poland, is not liable for the actions of the parent company in Poland.

In the *Sumal* judgment, the CJEU once again emphasized, following the well-established case law of the Court, that

“the behavior of a subsidiary may be attributed to the parent company, inter alia, when, despite having a separate legal entity, the subsidiary, at the time of the infringement, does not display autonomous behavior but complies with the instructions given to it by the parent company, taking into account, in particular, the economic, organizational and legal ties linking the two legal entities in such a way that, in such a situation, they form the same economic unit and thus form a single undertaking which is the perpetrator of the infringement found”.¹¹

¹⁰ Judgement CJEU of 14 March 2019 and opinion of Advocate General Nils Wahl of 6 February 2019 in case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions Oy, NCC Industry Oy, Asfaltmix Oy*.

¹¹ Judgment CJEU in the *Sumal* case, n.b. 43.

III. Summary

As indicated above, the judgment in the *Sumal* case specifies the conditions for holding companies from the group liable for damages. The CJEU does not in any way invalidate the existing case law of the CJEU on the *single economic unit*. The clarification was undoubtedly desirable. However, it calls into question the principle of liability of subsidiaries in a situation where they were not directly involved in the infringement, but indirectly or informally. Practice of the economic life provides many examples of such functioning of groups of companies, in which some subsidiaries function only as “settlement and cost” companies or provide administrative and marketing services – and this is usually the subject of activity entered in registration documents. In the light of the *Sumal* judgment, such companies would not be liable for the infringement as they are not directly involved in the “selling of the product”. However, they participate indirectly – as a settlement company that *de facto* issues a settlement document or by promoting the products of the parent company. The facts in the *Sumal* case were clarified against the background that in the light of the commented judgment, the liability of Mercedes Benz Trucks is beyond doubt (a direct seller of cars within the Daimler group). However, if Sumal were to acquire the cars under the influence of the successful marketing of a Daimler subsidiary (with a different name than the defendant), the question arises: is such a subsidiary involved in the infringement covered by the parent company decision? It seems, taking into account the previous jurisprudence of the CJEU, that the answer should be positive. However, the thesis of the CJEU contained in the *Sumal judgment* “(52) (...) *the anti-competitive agreement concluded by the parent company, for which it was fined, applies to the same products sold by the subsidiary*” excludes the liability of the subsidiary only promoting the products sold by another.

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