

## UPSIDE DOWN LIABILITY IN ANTITRUST: THE SUMAL CASE PUTS SUBSIDIARIES OF ANTITRUST INFRINGERS IN THE SPOTLIGHT

This recent judgement rendered by the Court of Justice of the European Union ("CJEU") in Grand Chamber reshapes the notion of "undertaking", with important implications, not only for antitrust damages claims in the EU, but also in relation to other EU competition law areas.

### THE SINS OF THE PARENTS

In EU Competition Law, it has been established by the case-law of the Court of Justice of the European Union ("CJEU") that, despite having formal separate legal personalities, an antitrust infringement committed by a subsidiary may be attributed to the parent company if that subsidiary does not determine independently its own conduct on the market, but essentially carries out the instructions given to it by its parent company. In this respect, the CJEU considers that, taking into account the economic, organisational and legal links between the parent company and its subsidiary, they form part of the same "*undertaking*" for the purposes of Article 101 of the Treaty on the Functioning of the EU ("TFEU"), which prohibits anticompetitive agreements between undertakings.

Although this case-law generates controversy for conflicting with the general principles of individual imputation of liability, it has been used by antitrust authorities, both the European Commission ("**Commission**") and the national competition authorities ("**NCAs**"), to impose an automatic extension of liability for breaches of EU competition law from a subsidiary to its parent, on the presumption that the latter exercises a decisive influence over its subsidiary ("*bottom-up*" or "*ascendant liability*"). In particular, in its judgment in *Akzo*, the CJEU confirmed that there is a rebuttable presumption of such parental liability for companies that own all or almost all of the capital in a subsidiary, and in a recent judgment in *Goldman Sachs* the CJEU extended this presumption to the ownership of voting rights.

### The Sumal judgment

Now, by its judgment dated 6 October 2021, handed down in the case C-882/19, *Sumal S.L. v. Mercedes Benz Trucks España, S.L.* ("**Sumal**"), the CJEU has clarified that this liability between entities forming part of the same undertaking does not only go "*bottom-up*", but also "*top-down*" (or "*descendant liability*"). In other words, the conduct of the parent company may be attributed to its subsidiary, even if there is no evidence that the subsidiary

### Key issues

- Whilst bottom-up responsibility has been recognised by the CJEU in the past, the *Sumal* judgment opens the door to top-down responsibility, i.e. damages claims filed against a subsidiary for the infringement of its parent.
- When will this top down responsibility arise?
- The CJEU requires that "*economic organisational and legal links*" between parent and subsidiary exist and "*specific links*" between the economic activity of the subsidiary and the subject matter of the infringement for which the parent company has been declared responsible.
- This judgement leaves important questions unanswered and is expected to raise further litigation in the future.
- In the meantime, it is recommended that companies involved in antitrust damages claims review whether their current legal strategies may be impacted by this judgement.

participated in the infringement and the subsidiary has not been identified in a decision of the Commission as being liable for the infringement.

It is expected that this "*top-down*" liability will have a clear impact on damages claims for breaches of EU competition law and opens a controversial debate.

### **Background of the *Sumal* judgment**

The *Sumal* judgment arises from a referral sent by Section 15<sup>a</sup> of the Barcelona Provincial Court within the scope of a damages claim filed by Sumal against Mercedes Benz Trucks España after the Commission handed down its July 2016 decision on the Trucks Cartel. Sumal filed its damages complaint against Mercedes Benz Trucks España, although this company was not sanctioned by the Commission in that decision, but its parent company.

In a judgment in January 2019, the Commercial Court num. 7 of Barcelona dismissed Sumal's complaint on the basis that Mercedes Benz Trucks España did not have passive *locus standi*. Sumal appealed this decision before the Barcelona Provincial Court, which observed that the question of whether the conduct of a subsidiary could be attributed to its parent (which had also arisen in other damages claims related to the Trucks Cartel) had been decided in contradictory ways by different Spanish Courts.

Taking into account these discrepancies and having doubts as to the concept of an undertaking defined by the CJEU, the Barcelona Provincial Court decided, by a ruling dated 24 October 2019, to send a referral to the CJEU. In the event that the CJEU's reply support the extension of subsidiaries' liability to cover acts of the parent company, the Spanish Court requested whether a provision of national law such as Art. 71.2 of the of the Spanish Competition Act (Law 15/2007), which provides only for liability incurred by the subsidiary to be extended to the parent company, and only where the parent company exercises control over the subsidiary, would be compatible with Article 101 TFEU.

### **The *Sumal* judgment confirms the "*top-down*" allocation of responsibility**

The concept of an undertaking is a notion of EU law, and in the *Skanska* case the CJEU had already stated that it should be applied consistently for both the public enforcement of EU competition law by competition authorities, and the private enforcement of that law through damages claims before national courts. Given its important implications, the case was allocated to the Grand Chamber.

The CJEU concluded that in EU competition law the principle of personal responsibility does not apply to individual legal entities within a corporate group, but to the entire "undertaking" of which they form part. Consequently, the CJEU stated that, where the Commission has identified a parent company as liable for an infringement committed by an undertaking, one or more of its subsidiaries may also be considered liable for this infringement if: (a) there are economic, organizational and legal links uniting the companies (*i.e.*, parent can exercise decisive influence over the subsidiary/ies, including the rebuttable presumptions established in the *Akzo* and *Goldman Sachs* cases); and (b) there are specific links between the economic activity of the subsidiary and the subject matter of the infringement for which the parent company has been held responsible.

The CJEU also clarified that the requirement for specific links between the activities of group companies implies that a corporate group may in fact

comprise a number of different undertakings, one for each set of unlinked activities that are carried out within the group.

The victim claiming damages has the burden of proving these two points above. The subsidiary can in turn contest that it belongs to the same undertaking. However, it cannot contest that there has been an infringement of the competition rules if such an infringement has been declared by a Commission decision.

### **Effect on national procedural rules in Spain**

Interestingly, in the framework of the transposition of the Damages Directive in Spain, a provision was included – not expressly contemplated in the Directive – that civil liability for the conduct of a company could be imputed to another company, only in circumstances where the second company "*controls*" the first, "*except where its economic conduct is not determined by any of them*". The national judge also questioned about the compatibility of such rule with EU law.

The CJEU confirmed that national rules that cannot be interpreted in conformity with the new test should be disregarded (at least to the extent that EU competition law is being applied to that case). Thus, according to the CJEU, Article 101 TFEU would preclude a national law according to which the possibility of imputing liability for one company's conduct to another company would only be possible in circumstances where the second company "*controls*" the first company.

### **What are the implications of the *Sumal* judgment?**

This important and far-reaching judgment reshapes the notion of undertaking.

The judgment does not appear to have changed the test for "*bottom-up*" situations. Ascendant responsibility is still subject to the decisive influence test.

However, as regards "*top-down*" liability, the judgment leaves important questions unanswered and further litigation is expected in this respect. For example, how much of a concrete link between activities is needed for companies to be considered part of the same undertaking? Must they sell the same products as those involved in the infringement, or is it enough to be active in the same product market, or even vertically-related (upstream or downstream) markets? And could this broad concept be used to extend the liability between the companies forming part of the same undertaking not only "*top-down*" (from the parent company to its subsidiary), but also *side-by-side*, between different subsidiaries that form part of the same "*economic unit*"?

The *Sumal* case should be considered by buyers of businesses in order to avoid unforeseen liability for damages derived from infringements committed by the parent company.

It is also unclear whether the CJEU's innovation is also applicable in other areas of EU competition such as the determination of an undertaking's turnover for the purposes of assessing the maximum amount of fines or application of the EU Merger Regulation, or the application of the "intra-group" exception from the Article 101 TFEU prohibition.

The CJEU reasonings in the *Sumal* case would give rise to further debates and litigation in the coming months.

## CONTACTS

**Fernando Irurzun**  
Partner

**T** +34 91 590 4120  
**E** fernando.irurzun  
@cliffordchance.com

**Ignacio Díaz**  
Partner

**T** +34 91 590 9441  
**E** Ignacio.diaz  
@cliffordchance.com

**Rais Amils**  
Associate

**T** +34 93 344 2262  
**E** rais.amils  
@cliffordchance.com

**Daniel Harrison**  
Associate

**T** +44 20 7006 4136  
**E** daniel.harrison  
@cliffordchance.com

**Belen Irissarry**  
Associate

**T** +34 91 590 7519  
**E** belen.irissarry  
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

[www.cliffordchance.com](http://www.cliffordchance.com)

Clifford Chance, 10 Upper Bank Street,  
London, E14 5JJ

© Clifford Chance 2021

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street,  
London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to [nomorecontact@cliffordchance.com](mailto:nomorecontact@cliffordchance.com) or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing •  
Brussels • Bucharest • Casablanca • Delhi •  
Dubai • Düsseldorf • Frankfurt • Hong Kong •  
Istanbul • London • Luxembourg • Madrid •  
Milan • Moscow • Munich • Newcastle • New  
York • Paris • Perth • Prague • Rome • São  
Paulo • Shanghai • Singapore • Sydney •  
Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.