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The Theory of Economic Unit in Infringement of Competition. Commentary to the CJEU of 6 October 2021 (Sumal, Case C-882/19). Justice Enrique Sanjuán y Muñoz. (Senior Judge, Apellations Court Málaga).

Encabezado

THE THEORY OF ECONOMIC UNITY IN INFRINGEMENT OF COMPETITION.

Commentary to the CJEU of 6 October 2021 (Sumal, Case C-882/19).

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Abstract: The recent judgment handed down by the CJEU in the Trucks case, following a reference for a preliminary ruling, has once again highlighted not only the autonomous concept of undertaking deriving from the Treaty on the Functioning of the European Union, but also the need to interpret state rules in accordance with articles 101 and 102 of the said treaty. This entails a new development of the Theory of Economic Unity, which now has a bearing on who its components are and against whom it is possible to claim for the damage suffered in the private sphere.

Resumen: La reciente sentencia dictada por el TJUE en el asunto camiones, tras el planteamiento de una cuestión prejudicial, ha puesto de manifiesto, una vez más, no solo el concepto autónomo de empresa (undertaking) que deriva del Tratado de Funcionamiento de la Unión Europea, sino de la necesidad de interpretar las normas estatales conforme a los artículos 101 y 102 de dicho tratado. Esto conlleva un nuevo desarrollo de la Teoría de la Unidad Económica que incide, ahora, en el ámbito de quienes son sus componentes y frente a quienes se puede reclamar por el perjuicio sufrido en el ámbito privado.

1. Introduction.

The Judgment of the Court of Justice of the European Union (CJEU) of 6 October 2021 (Case Sumal - C-882/19) responds to a question referred for a preliminary ruling in a case heard by the Barcelona Provincial Court (Section 15), in which the plaintiff filed a claim for damages arising from an infringement of competition against a subsidiary of the Daimler group (Mercedes Benz Trucks España), given that it had acquired two trucks from that subsidiary through Stern Motor SL, which in turn is a concessionaire of the same group. This not only raises the possibility of extending the liability of a parent company sanctioned by a competition authority to its subsidiary, but also questions the validity of article 71.2 of the Law on the Defence of Competition of Spain, insofar as it adapts EU Directive 2014/104 to our law (RDL 9/2017, of 26 May), stating that such liability would be in respect of the subsidiary to the parent company and not the other way around.

The entire question raised focuses on the concept of "undertaking" or economic unit and on the Theory of Economic Unity developed by the European Court over more than ten years [see RUIZ PERIS,J.I. "Undertaking and single economic doctrine of the European Court of Justice in sanction or damages liability cases, for infraction of the articles 101 and 102 TFEU." 26.07.2021 en https://lnkd.in/g53Fg2U (id.)]. But it also includes a request for criteria, applicable regime and requirements that would make it possible if this extension (from top to bottom) were possible together with the one that is taken for granted (from bottom to top), by virtue of the rule that is interpreted in this second case.

Before analysing that decision and its answers (in accordance with the approach of the Advocate General's Opinion of 15 April 2021) we should ask ourselves two questions:

1º. On the one hand, the starting point is the so-called Trucks Case, the decision of which is dated 19 July 2016, in which the European Commission adopted Decision C(2016) 4673 final, relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.39824), a summary of which was published in the Official Journal of the European Union of 6 April 2017 (OJ 2017, C 108, p. 6) and which our legislation was not adapted to the Damages Directive until its transposition on 26 May 2017, although it should have been at the end of 2016. This has led many Courts to establish that the said Directive and its incorporation into Spanish law was not applicable and that therefore Article 1902 Cc (Código Civil) should be applied (an issue discussed by two rulings of the Court of Appeal of Malaga, Section 6 of 1 July 2021). However, the Court of Appeal of Barcelona, Section 15, raised the issue and considered its application to be valid, although this approach could be qualified in the end. In fact, the idea of Article 1902 Cc must be discarded in a full interpretation, since, as stated in paragraph 73 of the judgment *'...if the referring court were to consider that it cannot interpret Article 71(2) of the Law on the Protection of Competition in accordance with the interpretation of Article 101(1) TFEU, set out in paragraph 67 of this judgment, it would be incumbent upon it to discard the application of that national provision and apply Article 101(1) TFEU directly to the main proceedings*.'

2º. The second issue that must be clarified is that this approach has led the European Court to resolve many more questions, including not only a claim against the subsidiary not included in the subjective scope of the infringement sanctioned by a competition agency (in this case the European Commission) but also the possibility of joinder of follow-on and stand-alone actions and the jurisdiction applicable to these cases. As stated in paragraph 61 of that judgment, '*It should also be pointed out, further to what has already been stated in paragraph 51 of this judgment, that, as the Commission stated in reply to a written question put by the Court of Justice and as the Advocate General pointed out in point 76 of his Opinion, the possibility for the national court to decide on the application of the rules of jurisdiction in the case of follow-on and stand-alone actions is not limited to the national court, but also to the national courts, the possibility of the national court in question finding that the subsidiary company may be liable for the damage caused is not precluded merely by the fact that, where appropriate, the Commission has not adopted a decision or that the decision in which the Commission found that there had been an infringement did not impose an administrative penalty on that company*. '

Perhaps it is time to understand it (with a European legal mentality) when the CJEU itself has been reiterating that (paragraph 32) Article 101(1) TFEU produces direct (DIRECT) effects in relations between private individuals and creates rights in favour of individuals which the national courts must protect (CJEU of 30 January 1974, BRT and Société belge des auteurs, compositeurs et éditeurs, 127/73, EU: C:1974:6, paragraph 16, and 14 March 2019, Skanska Industrial Solutions and others, C-724/17, EU:C:2019:204, paragraph 24 and case law cited). And that (paragraph 34) ,any person is entitled to seek compensation for the damage suffered where there is a causal link between that damage and the agreement or practice prohibited by Article 101 TFEU (CSTJ of 13 July 2006, Manfredi and Others, C-295/04 to C-298/04, EU:C:2006:461, paragraph 61, and of 14 March 2019, Skanska Industrial Solutions and Others, C-724/17, EU: C:2019:204, paragraph 26 and the case-law cited), it should be noted that the determination of the entity required to make good the damage caused by an infringement of Article 101 TFEU is directly governed by EU law (CJEU of 14 March 2019, Skanska Industrial Solutions and Others, C-724/17, EU:C:2019:204, paragraph 28). It is, as we will see later when determining the subjective scope, an autonomous European law that stems from the Treaty on the Functioning of the European Union (or the Treaty establishing the European Community before it) and which the Damages Directive has come to shape in a uniform manner, but drawing, in most cases, on the interpretations - as could not be otherwise - that the CJEU itself had been giving in the interpretation of the aforementioned articles as the true interpreter of the Treaties.

2. The concept of undertaking as an autonomous European concept: the theory of economic unity.

As we have emphasised, the concept of 'undertaking' within the meaning of Article 101 TFEU is - in the view of the CJEU - an autonomous concept of Union law (see Martí Miravalls, J., "Acciones de daños por infracción del derecho de la competencia: responsabilidad conjunta y prescripción", *Actas de derecho industrial y derechos de*

autor, vol. 37, Marcial Pons, pp. 37-39). This means that it cannot have a different scope in the area of the Commission's imposition of fines under Article 23(2) of Regulation No 1/2003 and in the area of actions for damages for infringement of EU competition rules (CJEU of 14 March 2019, Skanska Industrial Solutions and Others, C-724/17, EU:C:2019:204, paragraph 47).

It is for that reason that the determination of the entity required to make good the damage caused by an infringement of Article 101 TFEU is governed directly by EU law (judgment of 14 March 2019, Skanska Industrial Solutions and Others, C-724/17, EU:C:2019: 204, paragraph 28), it contributes to the maintenance of effective competition (see, to that effect, Case C-453/99 Courage and Crehan, EU:C:2001:465, paragraph 27, and judgment of 14 March 2019, Skanska Industrial Solutions and Others, C-724/17, EU:C:2019: 204, paragraph 44 and the case-law cited) and, beyond the actual compensation for the harm alleged, contributes to the achievement of the deterrent objective (see, to that effect, Joined Cases 100/80 to 103/80 Musique Diffusion française and Others v Commission, EU:C:1983: 158, paragraph 105), which is intended to remedy not only the direct damage which the person concerned claims to have suffered, but also the indirect damage caused to the structure and functioning of the market, which has not been able to display its full economic effectiveness, in particular for the benefit of consumers.

The judgment under discussion makes a foray into the real reason for its establishment as such in the Treaty rules. It states that the authors of the Treaties chose to use this concept of "undertaking" to designate the author of an infringement of competition law and not other concepts such as "company" or "legal person". The Union legislature (paragraph 39) also used the same concept of 'undertaking' in Article 23(2) of Regulation No 1/2003 (judgments of 10 April 2014, Areva and Others v Commission, C-247/11 P and C-253/11 P, EU:C:2014:257, paragraphs 123 and 124, and of 25 November 2020, Commission v GEA Group, C-823/18 P, EU:C:2020:955, paragraphs 62 and 63).

The Advocate General's report of 15 April 2021 will therefore state that, in EU law, the concept of 'undertaking' has a meaning and a scope which are inherent in the legislation in which it is incorporated and in the various objectives which that legislation is intended to achieve. It therefore has a functional perspective in two senses:

1º. Firstly, it focuses on the type of activity carried out rather than on the characteristics of the agents that carry it out. Competition, it continues, is constituted and influenced by economic activities, so that the law that seeks to protect it can only be fully effective if its rules and prohibitions apply to economic entities. For this reason, Articles 101 TFEU and 102 TFEU refer generically to "undertakings", avoiding any reference to their legal structure. If an activity has an economic character, those who carry it out are subject to the provisions of those articles, irrespective of their legal form or the form and modalities of financing to which they are subject in a given Member State. (Advocate General's Opinion in Cases C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2003:304, point 25. (Opinion of the Advocate General in Cases C-264/01, C-3064/01, C-3054/01 and C-354/01, EU:C:2003:304, point 25); and Cases C-41/90 Höfner and Elser (EU:C:1991:161), paragraph 21; C-159/91 and C-160/91 Poucet and Pistre (EU:C. 1993:63), paragraph 17; C-159/91 and C-160/91, EU:C. 1993:63),

paragraph 17: 1993:63), paragraph 17; of 22 January 2002, Cisal (C-218/00, EU:C:2002:36), paragraph 22; and of 1 July 2008, MOTOE (C-49/07, EU:C:2008:376), paragraph 21.)

2º. Secondly, the classification of an activity as an economic activity - and, therefore, of an entity as an undertaking - for the purposes of the application of competition law, depends on the context analysed. Likewise, the identification of the entities which fall within the scope of the undertaking depends on the subject-matter of the infringement complained of (CJEU of 1 July 2008, MOTOE (C-49/07, EU:C:2008:376), paragraph 25).

It is in the Advocate General's report that the theory of 'economic unity' was developed around the 1970s and has been used by the Court of Justice both to exclude intra-group agreements from the scope of application of the prohibition in the current Article 101 TFEU and to impute, within a group of companies, the anti-competitive conduct of a subsidiary to the parent company, initially in situations where it was claimed that the Commission did not have jurisdiction to sanction the parent company, since the latter had not acted directly within the Community (see originally CJEU ICI, paragraph 140). Similarly, see judgment of 14 December 2006, Confederación Española de Empresarios de Estaciones de Servicio (C-217/05, EU:C:2006:784).

The essential idea, therefore, is the existence of a unity of conduct on the market (subsidiary or parent company, whether or not interposed), without the formal separation between different companies, resulting from their separate legal personality, being capable of precluding such unity for the purposes of the application of the competition rules (see, to that effect, Case 48/69 Imperial Chemical Industries v Commission, EU: C:1972:70, paragraph 140, and Case C-217/05 Confederación Española de Empresarios de Estaciones de Servicio, EU:C:2006:784, paragraph 41). Paragraph 41 of the judgment, in fine, summarises it as follows: *'The concept of "undertaking" therefore 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 designates an economic unit even if, from a legal point of view, that economic unit consists of several natural or legal persons (see, to that effect, Case C-97/08 P Akzo Nobel and Others v Commission, EU: C:2009:536, paragraphs 54 and 55, and Case C-516/15 P Akzo Nobel and Others v Commission, 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 lasting basis, an organisation which may participate in the commission of an infringement within the meaning of 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)*'.

3. The unsanctioned subsidiary and the requirements for the extension of liability. (Follow-on /Stand-alone)

Paragraph 43 of the judgment states that the conduct of a subsidiary may be imputed to the parent company, in particular where, although it has separate legal personality, that subsidiary does not, at the time of the commission of the infringement, determine

its conduct on the market autonomously, but essentially carries out the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities. (see, to that effect, Case C-97/08 P Akzo Nobel and Others v Commission, EU:C:2009:536, paragraphs 58 and 59, and Case C-516/15 P Akzo Nobel and Others v Commission, EU:C:2017:314, paragraphs 52 and 53 and the case-law cited). By taking up the concept of economic unity and linking it to the concept of a subsidiary as a concept, it initially seems to leave out of consideration cases where it concerns independent operators who, as a result of contractual relations of any kind, would follow in the same direction those indications or that participation, although it is clear that if they form part of the economic unit (that structure) at the time of the commission of the infringement, they will be jointly and severally liable (see, in this regard, as regards joint and several liability for fines, the judgments of 26 January 2017, Villeroy & Boch v Commission, C-625/13 P, EU: C:2017:52, paragraph 150, and 25 November 2020, Commission v GEA Group, C-823/18 P, EU:C:2020:955, paragraph 61 and the case-law cited). It is then necessary to refer to the functional concept referred to above, so that the economic unit constituting that undertaking must be identified in the light of the subject-matter of the agreement in question (see, to that effect, Case 170/83 Hydrotherm Gerätebau v Commission, EU:C:1984:271, paragraph 11, and Case C-179/12 P The Dow Chemical Company v Commission, EU:C:2013:605, paragraph 57).

From there, the judgement goes on to resolve some of the most common core issues (paragraph 47) by considering that the same parent company can form part of several economic units made up (see Jugdment from the Juzgado de lo Mercantil N°. 3 de Valencia, nº 35/2019 de 20 Feb. 2019, Rec. 287/2018, LA LEY 11461/2019), depending on the economic activity in question, by itself and by different combinations of its subsidiaries, all of which belong to the same group of companies. In this case, a distinction must be made and the solution lies in assessing whether it is the legal entities that make up the economic unit, an expression used by the judgement to determine a broad and wide-ranging scope in all of this. Paragraph 51, to which we now refer, will include the existence of economic, organisational and legal links as assessable.

4. Jurisdiction of the European Courts in the scope of the 2015/2012 Regulation.

The essential idea of this concept of economic unity also leads us to the jurisdiction of the Courts at European level. Once again, and citing the rulings handed down to date, paragraphs 65 and 66 of the judgment contain two interesting statements, which we summarise below:

1º. An action of this type falls within the concept of ‘civil and commercial matters’ within the meaning of Article 1(1) of Regulation No 1215/2012 and is therefore included in the scope of application of that Regulation. In that reference, account must be taken of Article 7(2) of that regulation and the expression 'place where the harmful event occurred'; that refers both to the place where the damage occurred and to the place of the causal event giving rise to that damage, so that the action may be brought,

at the plaintiff's choice, before the courts of either of those two places (judgment of 29 July 2019, Tibor-Trans, C-451/18, EU:C:2019:635, paragraphs 24 and 25 and the case-law cited).

2º. Where the market affected by the anti-competitive practices is in the Member State in whose territory the alleged damage allegedly occurred, the place where the damage materialised must, for the purposes of the application of Article 7(2) of Regulation No 1215/2012, be regarded as being in that Member State (see, to that effect, judgment of 29 July 2019, Tibor-Trans, C-451/18, EU:C:2019:635, paragraphs 30, 31 and 33).

The rule thus becomes objective and territorial jurisdiction (The Supreme Court of Spain will then have to change its decicions towards this criterion. For all see ATS, June 22th 2021, ROJ: ATS 8320/2021), which will be implemented through the rules of each state on the basis of the place where the damage has materialised and thus the place of purchase.

5. Action, proof and the burden of proof.

Although the penalty proceedings before the European Commission or the corresponding Agency and before the Courts are different, the judgment itself qualifies this in the same way, by placing the burden of proof on the victim to demonstrate, on the basis of a decision previously adopted by the Commission pursuant to Article 101 TFEU or by any other means - in particular, if the Commission has not ruled on this point in the said decision or if it has not yet adopted any decision - that, having regard, on the one hand, to the economic, organisational and legal links referred to in paragraphs 43 and 47 of the present judgment that, having regard, first, to the economic, organisational and legal links referred to in paragraphs 43 and 47 of this judgment and, second, to 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 has been held liable, that subsidiary constituted, with its parent company, an economic unit. The victim should, in principle and in accordance with paragraph 52, show that the anti-competitive agreement concluded by the parent company for which it has been found liable relates to the same products as those marketed by the subsidiary. The victim thus demonstrates that it is precisely the economic unit to which the subsidiary belongs, together with its parent company, which constitutes the undertaking which has actually committed the infringement previously found by the Commission under Article 101(1) TFEU, in accordance with the functional conception of the concept of 'undertaking' referred to in paragraph 46 of this judgment.

The curious thing about all this is that, by demonstrating that it is in that situation of joint and several liability, the initial exercise of the action appears to be a stand-alone action, but once it has been demonstrated that we are dealing with the same economic unit, it is in fact no longer necessary to demonstrate its participation as if this type of action were involved, but it is dragged along by the follow-on action on which it is based. This does not prevent it from using all the means of protection and

protection that it could have used in the proceedings from which it derives (except for the existence of the infringement), which in turn makes it a mixed figure between the first and the second.

6. Conclusions

In short, I could draw three conclusions [see Sanjuán E., "The Contamination of the Liability of the Parent Company to Its Subsidiaries in European Competition Law "(March 3, 2019). *Available at SSRN: https://ssrn.com/abstract=3345964 or http://dx.doi.org/10.2139/ssrn.3345964*]:

1.- If a court considers that it cannot interpret domestic legislation as a solution to a case of infringement of competition in accordance with the interpretation of Article 101(1) TFEU, it would be incumbent on it to disregard the application of that national provision and apply Article 101(1) TFEU directly to the main proceedings.

2.- The concept of 'undertaking' in the context of the Treaty on the Functioning of the European Union is an autonomous concept of European Union law. That means that it cannot have a different scope in the context of the imposition by the Commission of fines under Article 23(2) of Regulation No 1/2003 and in the context of actions for damages for infringement of EU competition rules (CJEU of 14 March 2019, Skanska Industrial Solutions and Others, C-724/17, EU:C:2019:204, paragraph 47).

3.- The conduct of a subsidiary company is understood as a structure related to economic, organisational and legal ties that must be assessed in order to consider its membership of the Economic Unit. Thus, even if it has a separate legal personality, when that subsidiary does not determine its conduct on the market autonomously at the time of the infringement, but essentially applies the instructions given to it by the parent company, it may be penalised for the same conduct.