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One for all, and all for one! The Sumal decision specifies the scope of the notion of undertaking to facilitate private actions

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Resume: *In its long awaited Sumal decision, the European Court of Justice (ECJ), sitting as a Grand Chamber, states that the victim of an anticompetitive practice can bring an action for damages, without distinction either against a parent company who has been punished by the Commission for that practice in a decision or against a subsidiary of that company which is not referred to in the decision, where those companies together constitute an undertaking at the moment of the infringement. This decision specifies in an unprecedented way the scope of the notion of undertaking to contribute to the development of private actions. Nevertheless, the proof that the subsidiary belongs to the parent company will rest on the victim, and the rights of the defence of the subsidiary being sued will have to be respected.*

ECJ, Grand Chamber, oct. 6th 2021, Case C-882/19, *SumalSL c/ Mercedes Benz Trucks España SL*

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1. "One for all". The parent company sanctioned by the Commission makes virtually liable all the legal entities forming with it an undertaking at the time of the infringement… "And all for one!": these legal entities, even though they have not been referred to by the decision in the public enforcement procedure, can subsequently be subject to a private action and held liable for the damages caused by the undertaking to the victims of the infringement. At first sight, the solution might seem surprising. How not to be disconcerted by the idea that a subsidiary which did not materially participate to the infringement can then be held civilly liable for the behaviour of its parent, *a fortiori* after a decision of the Commission in which it is not referred to has become final? Yet, after an in-depth study, very few objections can be made to the Court's reasoning.

2. Background. In 2016, following a leniency procedure and a settlement, the Commission sanctioned fifteen truck manufacturers for a cartel perpetrated from 1997 to 2011[1]. While the case is a classic one, its judicial follow-up will be remembered. This summer, one of them, from Madrid, has already given rise to a first notable preliminary ruling[2]. It is again on Spanish territory that our dispute begins. Between 1997 and 1999, Sumal purchased two trucks from Mercedes Benz Trucks España (MBTE), a subsidiary of the Daimler group. The purchaser was thus subjected to the fraudulent price increase resulting from the cartel that Daimler was engaged in during that period. The victim therefore intended to obtain compensation for the additional costs unduly paid, based on the Commission's decision. The battle seemed to be well underway. But is seems that when it comes to private actions, there is always a "but". Instead of bringing the German parent company before the competent Spanish court, Sumal sued its subsidiary MBTE. This subsidiary was not included in the Commission's decision. This is the crux of the problem. MBTE naturally stepped into the breach, arguing before the Barcelona Commercial Court that it could not be held civilly liable for the consequences of the infringement for which only its parent company Daimler had been condemned by the Commission. Accepting the argument, the court of first instance dismissed the plaintiff's complaint. Sumal appealed against the judgement to the Barcelona Provincial Court which, noting that the Court of Justice had never ruled on this point, decided to stay the proceedings in order to formulate several questions for a preliminary ruling.

The Court's response was eagerly awaited. The issue is not only thorny, but also far from being new. Several national courts have already had to deal with it, and their solutions are sharply different. In Spain, some courts have upheld actions against a subsidiary not covered by an infringement decision, while several have rejected them[3]. In other Member States, the assumption seems to be accepted[4], but the criteria differ. In France, we remember the *JCB* case[5], in which the Cour de cassation called for an assessment of the

[1] EU Comm., 19th Jul. 2016, C(2016) 4673 final, AT.39824.

[2] CJEU, 1st ch., 15th Jul. 2021, aff. C-30/20, *RH v. AB Volvo*, see D. Bosco, "Précisions sur la compétence internationale et territoriale en matière d'actions privées", *CCC*, oct. 2021, nº 10, comm. 153.

[3] Para 14 of the *Sumal* decision.

[4] See, for example, in the Netherlands, the judgement of the Arnhem-Leeuwarden Court of Appeal of 26 Nov. 2019, comm. by C. Cauffman, "Beyond Skanska. The Court of Appeal of Arnhem Leeuwarden's latest decision in TenneT", 1st Jan. 2020, SSRN, available at: https://ssrn.com/abstract=3512364; in Germany, the judgement of the Dortmund court of 8th Jul. 2020, quoted by M. Araujo Boyd, "Should children pay for their parent's sins? The Sumal preliminary reference", 7th Sept. 2020, SSRN, available at: https://ssrn.com/abstract=3688438; in the United Kingdom, the High Court of Justice judgement of 2nd May 2019, *Media-Saturn Holding GmbH & Ors v. Toshiba Information Systems*.

[5] C. Cass., ch. com., 6th Oct. 2015, nº 13-24.854, comm. by G. Decocq, "Les fililales sont responsables civilement lorsque leur société mère est sanctionnée par la Commission européenne", *CCC*, 2016, nº 1, comm. 18, and R. Saint-Esteben, "La question de la

subsidiary's personal fault in order to deem admissible the private action directed against it. The British judges questioned the need for the victim to prove that the subsidiary had been aware of the infringement committed by its parent, and finally conclude that such proof was not necessary once it was established that the subsidiary was part of the company[6]. These contradictions made urgent harmonisation by the European judge.

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3. The issue: to favour private actions without undermining the unity of the concept of undertaking. One might have expected, given the abundant case law dedicated to the notion of undertaking since the 1970s, that the solutions adopted by national courts would be more uniform. However, this key concept of competition law still seems to be controversial. This is reflected in the wording of the preliminary questions formulated by the Spanish court and in the reasoning of the Advocate General. What they have in common is that they ask whether "the extension of the liability of the parent company to the subsidiary" is possible. We frequently find this type of expression in legal doctrine, where the possibility of engaging the liability of the parent company for the conduct of its subsidiary is traditionally discussed. The European judge himself has sometimes used such ellipses. However, in our opinion, reasoning from this point of view is misleading. The expressions "liability of the parent company for the conduct of the subsidiary", or henceforth "liability of the subsidiary for the conduct of the parent company", are a convenient shortcut, but are theoretically inappropriate. The Court has repeatedly stated that the subject of competition law, and the only entity personally liable, is the undertaking itself, not the legal entities that make it up[7]. The latter only come into play as a matter of practical necessity. Since the company does not have any legal personality, the communication of the procedural documents and the imposition of the sanction require a return to the legal person.

This reminder is of major importance for the *Sumal* case. Indeed, admitting "top-down liability" of the subsidiary for the conduct of its parent, as suggested by Advocate General Giovanni Pitruzzella whose reasoning was not taken up by the Court on this point, would give rise to legitimate criticism. In theory, this would amount to allowing a new perpetrator to be held liable for the fault of another person after a final decision has been taken by the Commission. Yet, while vicarious liability is allowed in tort law, this is

réparation du préjudice né de pratiques anticoncurrentielles préalablement sanctionnées par la Commission européenne", *AJCA*, 2015, p. 526.

[6] Case *Media-Saturn Holding*, paras 155-157 and quoted case law.
[7] Paras 39-42 of the *Sumal* case and quoted case law.

not the case in public competition law, which falls inside the sphere of criminal matters within the meaning of the European Court of Human Rights (ECtHR). This was both the challenge and the difficulty of the question asked by the Spanish Court. Since the *Skanska* decision[8], we know that the concept of undertaking must be interpreted uniformly in the context of public and private enforcement. Therefore, the Court could not limit its solution to private actions only. Nor could it recognize the existence of a case of vicarious liability, as this would have rendered the notion of undertaking incompatible with the principle of personal liability[9]. The situation is paradoxical: it was necessary, in order to maintain a theoretical unity, to reach a solution that respected the principles governing criminal law, even though in practice the solution was likely to be used mainly to support private actions, which are not subject to criminal law principles.

The Court thus had to engage in a subtle balancing game. As private actions are a complement to the Commission's enforcement of competition law[10], a teleological interpretation, of which the European judge is accustomed, required it to encourage their development by adopting such a solution; but at the same time, it had to be in line with the case law about the notion of undertaking. The test is successfully passed: the reasoning of the Court is remarkably skilful, but complex. Several steps are necessary to understand and to legitimize the solution.

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4. The subsidiary is liable because it is part of the undertaking. The authors of competition rules[11] have taken the view that the concept of undertaking should be used to designate the perpetrator of the infringement[12]. It follows that the latter is personally liable, regardless of whether it is legally structured into various companies[13]. The undertaking is also a functional concept, *i.e.* characterized by an imprecise and unstable definition, which role is to ensure the effective implementation of competition law. Considering the economic unit beyond the legal structures prevents undertakings escaping justice, in particular by means of restructuring. However, until now, the path was always taken in the same direction: the subsidiary was the material perpetrator of the infringement, and one sought to reach its

[8] CJEU, 14th March 2019, Case C-724/17, para 47; quoted in para 38 of the *Sumal* case.
[9] Recalled in para 42 of the *Sumal* case and in para 39 of the opinion of the Advocate General, which simultaneously mentions the principle *nulla poena sine culpa*.
[10] The Court begins its reasoning with this reminder, paras 35-37.
[11] Whether in the TFEU, or in Regulation nº 1/2003 and Directive nº 2014/104/EU.
[12] Paras 39 and 40 of the *Sumal* case.
[13] The solution goes back to the ECJ decision of 14th Jul. 1972, Case 48/69, *ICI*, para 140 ; quoted by the Court in para 41.

parent company by demonstrating the control of the latter over the former. In the *Sumal* case, the reasoning is reversed. The parent company is the material perpetrator of the offence, and it is its subsidiary that is being held responsible. It goes without saying that the subsidiary does not exercise any control over its parent. Does this mean that we are facing a deadlock? Certainly not, if we recall the two criteria for identifying an undertaking: economic activity and autonomous behaviour on the market[14]. To characterize an economic unit, it is only important to be faced with legal entities that do not act independently[15]. In the present case, the subsidiary did not participate in the cartel, but implemented it by passing on the price increase resulting from the infringement committed by its parent. It therefore did not behave autonomously, from which it follows that it can be considered to be part of the undertaking. And since it is established in the case-law that all legal entities forming part of the undertaking are jointly liable[16], there is no real obstacle to recognizing that the subsidiary is liable too. In sum, the reasoning is not innovative. It is simply applied to a new hypothesis. What may seem more unusual, however, is the fact that a legal entity not referred to by a decision that has become final can be included in the undertaking *a posteriori*. Here again, the Court is no short of arguments.

5. The scope of the undertaking is not definitely determined by the Commission's decision. It should be borne in mind that the choice of the legal persons prosecuted by the Commission is a matter of discretion. The Commission has the power to pursue all legal entities belonging to the undertaking, and therefore has a choice: to pursue the parent company, to pursue the subsidiary, or both jointly[17]. From a practical point of view, this opinion is fully justified by an imperative of efficiency: when, as in the present case, fifteen undertakings are taking part in a cartel, it is understandable that the Commission may choose to limit itself to prosecuting the parent companies, which were the material perpetrators of the infringement[18]. To include all the subsidiaries involved in the proceedings would generate a substantial workload, which could slow down the proceedings. The rule to be deduced from this is that the delimitation of the undertaking's perimeter is not definitely determined by the Commission's decision,

[14] A. Decocq, G. Decocq, *Droit de la concurrence*, L.G.D.J., 7th ed., 2016, nos 25 and seq.
[15] Para 41 of the *Sumal* case.
[16] Para 44 and quoted case law.
[17] ECJ, 24th Sept. 2009, Case C-125/07 P, *Erste Group Bank*, para 82; see D. Bosco, C. Prieto, *Droit européen de la concurrence*, Bruylant, 2013, p. 350, no 382.
[18] It should be mentioned that in this case, the Commission prosecuted the subsidiaries of certain parent companies, but not those of Daimler, even though they had, together with their parent company, submitted an application for leniency, see point 34 of the above-mentioned Commission decision.

even if it has become final[19]. In other words, when the Commission pursues a legal entity belonging to the undertaking, all other legal entities which can be considered as belonging to the undertaking at the time of the infringement, provided of course that they contributed to its commission, are virtually co-responsible. The reasoning is not entirely new: the *Versalis* case[20] here serves as a precedent. In that case, a first infringement had been imputed to the subsidiary of a group by a decision that had become final. Subsequently, a new infringement was committed by another subsidiary of the group, and the aggravating circumstance of recidivism was applied to the parent company, although it was not a party to the first proceedings. The justification is that the parent company was part of the undertaking at the time of the commission of the first infringement which was not *imputed* to it, but which was *imputable* to it[21]. Given that in such a case the Commission does not include in its decision any proof that the subsidiary belongs to the undertaking, this burden of proof will logically rest on the victim.

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6. The victim has the burden of proving that the subsidiary belongs to the company. The Court sets out two cumulative criteria[22]. The victim must prove that the subsidiary belongs to the undertaking and that there is a concrete link between the economic activity of the subsidiary and the object of the offence. The classic criteria will apply here. This is to be welcomed, as it will help to limit divergent application of the solution at national level. Regarding the first criterion, the shareholding presumption can be used. The second criterion is based on the well-known rule that the scope of the undertaking is defined according to the infringement in question. Thus, in case of conglomerates, groups within which companies are active in different sectors, it will not be possible to act against any subsidiary, but only against those which activities are linked to the infringement. The judgement provides an example: in the present case, it will be sufficient for the plaintiff to show that the trucks it bought from the subsidiary were identical to those which were object of the cartel in which the parent company engaged. The proof is easy: the victim is not required to prove that the subsidiary had knowledge of the infringement committed by its parent. This may surprise the reader, but in view of the recent case law of the ECtHR, this evidential facility appears to be in line with the principle of the individual nature of penalties.

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[19] Para 63 of the *Sumal* case.
[20] CJEU, 5th March 2015, C-93/13 P, para 91; quoted by the Court in para 49.
[21] For a detailed study of the *Versalis* case, see L. Bernardeau, *La récidive en droit de la concurrence*, Bruylant, 2017, pp. 61-66.
[22] Paras 45 to 52.

7. The solution is consistent with the principle of personal liability. If, by force of habit, the competition law specialist is no longer surprised by the intellectual acrobatics of asserting that the company is personally liable even though it has no legal personality, it is legitimate for the fundamental rights expert to remain more circumspect. Indeed, it is established that only natural or legal persons are holders of fundamental rights. However, the *Sumal* case makes it possible to convict a subsidiary without requiring proof of any fault on its part, or even *a minima* of its knowledge of the infringement committed by its parent. From the strict point of the subsidiary company, it therefore seems specious to claim that the principle of personal liability is fully respected. Indeed, when it is the parent company that is sanctioned while the material author of the offence is its subsidiary, the solution is generally justified by considering that the parent company has at least committed a fault of abstention in the supervision of the subsidiary. The reasoning does not work the other way round, if it is the subsidiary that is to be held liable. The problem is addressed only half-heartedly by the Court, as it is often the case in competition law when it comes to fundamental rights[23]. However, on closer inspection, the *Sumal* case does not violate the principle of personal liability for two reasons. Firstly, the path recently taken by the ECtHR is that of the autonomy of the principle of personality of penalties recognized for companies. Indeed, it is now established that it applies more flexibly to legal persons that to natural persons. In *Carrefour v. France*[24], the ECtHR held the principle of personality of penalties to be compatible with the theory of economic continuity[25]. A reasoning by analogy with the present case is permitted. The transferee of a company that committed an offence before the transfer did not, by definition, have control over the offending company at the time of its commission, so that this is not the criterion to be taken into account. Secondly, although considered a general principle of Union law, the principle of personal liability is not contained in the text of the European Convention on Human Rights neither in the EU Charter of Fundamental Rights. It is linked to the presumption of innocence and is therefore belonging to the matter of the rights of the defence. Therefore, the fact that the subsidiary belongs to the company can be analysed as a presumption of guilt, to which

[23] For a critical approach to the case law of the EU judges on the respect of the principle of personal liability in competition law, see T. Bombois, *La protection des droits fondamentaux des entreprises en droit européen répressif de la concurrence*, Larcier, 2012, pp. 100-116.

[24] ECtHR, 1st Oct. 2019, nº 37858/14, paras 43 to 49. The case concerns the French law of restrictive practices, but the Court implicitly extends the solution to anticompetitive practices by referring to it in para 50.

[25] In French, the solution has even been accepted recently in the context of pure criminal law, see Cour de cassation, ch. crim., 25th Nov. 2020, nº 18-86955, comm. G. Beaussonie, "La fin de l'impunité des personnes morales absorbées et absorbantes", *Recueil Dalloz*, 2021, p. 167.

the ECtHR is not opposed[26]. However, this presumption must be rebuttable. Therefore, the wording of the *Sumal* case does not contravene the Strasbourg Court's case-law, since it clearly states that the subsidiary being prosecuted "must be able effectively to rely on its rights of the defence in order to show that is does not belong to the undertaking". It should be noted, however, that in the event of a decision finding an infringement previously issued by the Commission, the subsidiary will not be able to contest the existence of the infringement[27]. The fact that it was not a party to this first procedure does not infringe its rights because the idea – always the same – is that the undertaking was able to defend itself in the name of all the legal entities making up the undertaking. This solution has already been adopted in the *Versalis* case in the context of public enforcement. It is transposable *a fortiori* to the present case insofar as private enforcement is governed by the civil limb of the rights of the defence – the applicable guarantees being much less demanding[28].

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8. The scope of the *Sumal* case. The operative part of the judgement may be criticised for being imprecise: it would have been necessary to add that the subsidiary against which the victim may take action must be part of the company "at the time of the infringement", as this interpretation clearly follows from the rest of the decision. Nevertheless, it provides a useful clarification of the solution proposed by the Advocate General. By writing that the subsidiary "may be held liable", he suggested that welcoming the action of the victim was only an option open to the national judge. The wording of the decision clearly indicates that it is an obligation, which is more logical. Indeed, it is well known that the determination of the persons liable to pay damages is a condition of liability governed by Union law[29], and not a means of exercising the right to compensation governed by the domestic law of the Member States as are, for example, the rules on solidarity. It follows, in accordance with the principle of primacy, that domestic legislation which cannot be interpreted in accordance with the solution set out in the judgement must be set aside in favour of the direct application of Article 101 TFEU[30]. Moreover, as the decision concerns the undertaking, which is a concept common to cartels and abuses of dominant position, it seems to us that it is possible to extend the solution to Article 102 TFEU.

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[26] ECtHR, 7th Oct. 1988, nº 10519/93, *Salabiaku v. France*, para 28.
[27] Paras 53 to 55 of the case.
[28] The Court mentions this in paras 57 and 59.
[29] Since the enlightening opinion of Advocate General Nils Wahl delivered on 6th Feb. 2019 in the *Skanska* case, paras 59 *et seq*.
[30] Paras 70 to 75 of the *Sumal* case.

In sum, the *Sumal* case is a further illustration, if one were needed, of the functional nature of the concept of undertaking. By extending its scope further again, it will undoubtedly provoke resistance. This will be because our natural reflex is to adapt our traditional reasonings, forged for natural persons, to a subject of law that is anything but traditional. The same was true at the time when the recognition of the criminal liability of the legal persons was in question. Our concepts, including the undertaking, are sometimes like fictions. So let us not lose sight of their *raison d'être*, which is that of the law itself: to come up with fair solutions[31]. From the point of view of the subsidiary, the solution is not fundamentally unfair. The latter has certainly benefited from the infringement and, because it belongs to a group, the payment of damages may ultimately be borne by it. It also seems to us appropriate to seek to facilitate the victim's action by allowing her to sue a direct contractor located in his State. Admittedly, in this case, the plaintiff could have directly sued the parent company[32], and this would have been a much more relevant strategy, given that the procedures have been simplified within the European judicial area. However, this will not necessarily be the case for a future victim, especially if the only parent company convicted is located outside European borders.

While the solution is supposed to alleviate the difficulty of bringing an action against a foreign parent company, it increases the burden of proof on victims. Between one constraint or another, victims of anticompetitive practices are now free to make their choice!

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[31] Ch. Atias, *Épistémologie du droit*, PUF, 1985, p. 154.

[32] As the Court points out in para 64.