Case C-882/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

3 December 2019

Referring court:

Audiencia Provincial de Barcelona (Spain)

Date of the decision to refer:

24 October 2019 (clarified and expanded on 12 November 2019)

Applicant:

Sumal, S. L.

Defendant:

Mercedes Benz Trucks España, S. L.

Subject matter of the main proceedings

Reference for a preliminary ruling to ascertain whether national subsidiaries are liable for the liability incurred by their parent companies as a result of anti-competitive conduct and, if so, what the necessary conditions are. The proceedings concern, in particular, the capacity of a subsidiary of one of the undertakings ruled to be part of a cartel to be made a defendant when the subsidiary in question was not a party to the earlier administrative procedure undertaken by the Commission.

Subject matter and legal basis of the request for a preliminary ruling

The large number of civil actions for damages that follow a finding of unlawful anti-competitive conduct, particularly in transnational cases, and the difficulties involved in serving notice on the parties found liable for the infringement in the administrative infringement procedure, because they are domiciled in a country other than that of the proceedings, have led to actions for damages being brought against the national subsidiaries of parent undertakings penalised under the

administrative procedure, rather than directly against the parent companies themselves.

As a general rule, the subsidiaries are wholly owned by the offending parent companies, which use them to market the goods involved in the infringement, which is why the subsidiaries could be considered in some way to have benefited from the infringement.

The subsidiaries often defend the case by arguing that they do not have the capacity to be made a defendant, and there are conflicting rulings from the various national courts of first instance on this point:

(a) Some courts consider that a subsidiary's defence of lack of capacity to be made a defendant cannot be allowed, because they are of the view that the doctrine of the single economic or business unit established by the case-law of the Court of Justice in similar cases applies, even if that doctrine addresses the extension of liability from the subsidiary to the parent.

(b) Other courts, however, consider that the doctrine, which has its counterpart in national law in Article 71(2)(b) of the Ley de Defensa de la Competencia (Law on the Protection of Competition), should be interpreted more narrowly and cannot be applied in reverse (in order to extend liability from the parent to the subsidiaries), because the premise on which the doctrine is based — namely the existence of control or the ability to exercise decisive influence over the subsidiaries' decisions — is not satisfied.

There are good reasons in support of both of those positions which, in any event, require consideration by the Court of Justice of the European Union in a preliminary ruling. Indeed, the Court of Justice has an appeal pending before it that was lodged on 28 February 2019 by Biogaran against the judgment of the General Court (Ninth Chamber) of 12 December 2018, T-677/14, *Biogaran* v *Commission*, which raises the issues of breach of the proportionality principle and failure to satisfy the aims of Article 101 TFEU by extending the liability established for a concerted practice from the parent to the subsidiary.

Separately, the Court itself has found that this is not a matter solely for the national law of each State, but something which affects all EU law.

Moreover, the significance of the issue is not limited to this specific case: the Court's opinion will be very relevant to the outcome of many other proceedings. This prompts us to extend the scope of the questions in order to address not only matters of substance but also matters of procedure that may affect the ability to serve notice on the offending parent company through its subsidiaries.

Questions referred

(A) Does the doctrine of the single economic unit developed by the Court of Justice provide grounds for extending liability from the parent company to the subsidiary, or does the doctrine apply solely in order to extend liability from subsidiaries to the parent company?

(B) In the context of *intra*-group relationships, should the concept of single economic unit be extended solely on the basis of issues of control, or can it also be extended on the basis of other criteria, including the possibility that the subsidiary may have benefited from the infringing acts?

(C) If it is possible to extend liability from the parent company to the subsidiary, what would be required in order for it to be possible?

(D) If the answers to the earlier questions support the extension of subsidiaries' liability to cover acts of the parent company, would a provision of national law such as Article [71(2)] of the Ley de Defensa de la Competencia (Law on the Protection of Competition)[,] which provides only for liability incurred by the subsidiary to be extended to the parent company, and then only where the parent company exercises control over the subsidiary, be compatible with that Community doctrine?

Provisions of EU law relied on

Article 267 TFEU

Judgment of the General Court of 12 December 2018, *Biogaran* v *Commission*, T-677/14, [EU:T:2018:910,] particularly paragraphs 218 and 223

Judgment of the Court of Justice of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204

Judgment of the Court of Justice of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314

Judgment of the Court of Justice of 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio*, C-217/05, EU:C:2006:784, paragraph 40

Judgment of the Court of Justice of 10 September 2009, [*Azko Nobel and Others* v Commission], C-97/[08], [EU:C:2009:536]

Provisions of national law relied on

Article 71(2)(b) of the Law on the Protection of Competition

Article 214(1) of the Ley de Enjuiciamiento Civil (Code of Civil Procedure)

Brief summary of the facts and the main proceedings

1 Sumal, S. L. lodged a claim under the ordinary procedure against Mercedes Benz Trucks España, S. L. ('MB Trucks') for the sum of EUR 22 204.35 for damages arising from an infringement of competition rules of which it accuses that company. The infringement took the form of a breach of Article 101 TFEU due to price-fixing which took place from 1977 until 2011 in the European Economic Area between the main truck manufacturers (the so-called truck cartel), which included Daimler, the defendant's parent company.

2 The defendant, in its defence, rejected the claim, arguing, inter alia, that it did not have the capacity to be made a defendant, since it considered that the only person liable for the illegal conduct cited was the parent company Daimler AG, which is a separate legal person from the defendant.

3 The decision under appeal dismissed the claim on the grounds that the defendant lacked the capacity to be sued and that the sole party that was liable was the parent company, which was the only entity mentioned in the earlier administrative procedure in which the EU competition authority imposed penalties on the cartel.

4 In its appeal, the applicant argues that in ruling that the defendant subsidiary lacked capacity to be sued, the decision under appeal made an error in law; the applicant insists that the subsidiary does have capacity to be sued, and it requests that the substance of the claim be examined and that judgment be given in the applicant's favour.

5 The defendant opposes the appeal, arguing that the first ground, concerning its capacity, is inadmissible.

6 A stay of proceedings was ordered, and the parties were allowed five days in which to submit their observations on whether a reference should be made to the Court of Justice of the European Union for a preliminary ruling on the issues raised concerning the capacity of the subsidiary of one of the undertakings ruled to have been part of the cartel to be made a defendant, when the subsidiary was not a party to the earlier administrative procedure undertaken by the Commission.

7 The defendant, MB Trucks, opposed the reference, arguing that the proposed questions had not been part of the subject matter of the proceedings, that there was no need to refer the question on the possible extension of liability to the subsidiary because the issue was clear (in that the answer was in the negative) and because the questions it was proposed to refer had not been addressed in the underlying proceedings.

8 The applicant, however, was in favour of referring the question for a preliminary ruling.

Main arguments of the parties to the main proceedings

9 The applicant stated that between 1997 and 1999 it had acquired two Daimler group (Mercedes Benz) trucks from the defendant company via Ster Motor, S. L., a dealership, under a leasing contract. It then went on to argue in its claim that the Commission Decision of 19 July 2016 (or 'the Decision') found that there had been an infringement of Article 101 TFEU as the result of illegal price-fixing that took place from 1977 to 2011 in the European Economic Area between the main truck manufacturers, including Daimler AG, the defendant's parent company. From this, it concludes that as a result of the infringement it incurred additional costs, which it calculates at 20% of the purchase price.

10 For its part, the defendant argued that the applicant had not had any form of contractual relationship with MB TRUCKS (or DAIMLER), since the trucks at issue in the proceedings were purchased from a dealership, which was a separate entity from MB TRUCKS (and DAIMLER), and the final price was not determined by MB TRUCKS — still less by DAIMLER — but was the result of the individual negotiations that would have taken place with the dealership that sold the trucks, namely STERN MOTOR S. L.

11 It also argued that it lacked capacity to be made a defendant, since the Commission Decision was not addressed to MB TRUCKS and made no mention of the company. In its view, the only company in the Daimler Group that was liable for the conduct that had been penalised, which involved the exchange of certain information between the manufacturers' head offices (and, from 2002, between some German subsidiaries), was DAIMLER AG. In particular, recital 11 of the Decision establishes that 'the legal entity of Daimler that is liable for the infringement is Daimler AG (hereinafter referred to as "Daimler"), with its registered office in Stuttgart, Germany'. MB TRUCKS therefore concludes that it is not liable for the conduct that was penalised and lacks capacity to be made a defendant in the action brought by the applicant for damages arising from that conduct.

12 Lastly, MB TRUCKS argued that the action for non-contractual liability in the claim was time-barred and that the Commission was accusing the Decision's addressees of involvement in an illegal exchange of information. MB TRUCKS therefore maintained that, in accordance with the requirements laid down in the rules on damages, the applicant ought to have provided evidence of the existence and extent of the alleged damage and loss, and the causal link between the infringement and the damage sustained. It concluded by stating that the exchange of information did not affect the net prices paid by customers for trucks sold by MB ESPAÑA dealerships

Brief summary of the reasons for the request for a preliminary ruling

13 The Audiencia Provincial de Barcelona (Provincial Court, Barcelona, Spain) starts from the premiss that, if liability can be extended from the parent to its

subsidiaries on the grounds that the principle of the single business unit can be interpreted as applying both from the top down (from the parent to the subsidiaries) and from the bottom up, then it would be possible to bring a follow-on action against a subsidiary that was not held to be involved in the earlier administrative infringement procedure, provided that the subsidiary and the parent company could be considered to be a single undertaking for the purposes of responding to the anti-competitive practices. It considers that that possibility is evident from the doctrine established by the judgment of the Court of Justice of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17 (EU:C:2019:204). While that case concerns something very different from a group of undertakings, the referring court does not consider that this is a barrier to applying the same doctrine to the circumstances at issue.

14 The Court of Justice has repeatedly stated in various decisions that the authors of the Treaties chose to use the concept of 'undertaking' to designate the perpetrator of an infringement of Article 101 TFEU (judgments of 27 April 2017, *Akzo Nobel*, C-516/15 P, and of 14 March 2019, cited above). The referring court considers that what the Court meant by this is that that concept covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. It has also been stated that, under that approach, liability attaches to the economic assets (the undertaking, in its economic sense) rather than to a particular legal personality.

15 In the same vein, the Court of Justice has also stated that, in the same context, the term 'undertaking' must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (judgment of 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio*, C-217/05, EU:C:2006:784, paragraph 40).

16 However, when the Court has applied that doctrine to cases involving groups of undertakings, it has always done so in order to extend liability to the parent company for actions attributed to the subsidiary, which is what occurred in the two judgments concerning the Azko group (judgments of 27 April 2017 and of 10 September 2009, C-97/[08 P]). The justification for that application of the doctrine lies in the parent company's power of control in order to exercise decisive influence over the subsidiary's conduct; it is unlikely that such power of control could also exist in the opposite direction, that is, that the subsidiary would be able to exercise control over the parent. Consequently, if that were the only justification for applying the doctrine of the single economic unit, the referring court considers it doubtful whether it would be reasonable to extend liability in the present case, where there is no evidence that the Spanish subsidiary has power of control over the German parent.

17 The judgment of the General Court (Ninth Chamber) of 12 December 2018 (Case T-677/14, *Biogaran*) justifies extending liability in both directions when it states, in paragraph 218 that:

‘If it is possible to impute to a parent company liability for an infringement committed by its subsidiary and, consequently, to make both companies jointly and severally liable for the infringement committed by the undertaking which they comprise, without infringing the principle of personal responsibility, the same applies *a fortiori* where the infringement committed by the economic entity comprising a parent company and its subsidiary results from the combined conduct of both those companies.’

Particularly so when, as justification for that extension, in paragraph 223 it states as follows:

‘… it should be recalled that the decisive influence which a parent company exercises over its wholly owned subsidiary supports the presumption that the acts of the subsidiary are carried out in the name and on behalf of the parent company and, consequently, of the undertaking which they comprise.’

18 However, the facts that provided the basis for those statements in that decision are not exactly the same as those in the case at issue.

19 The referring court is uncertain whether, for the purposes of extending the civil liability of the parent to the subsidiary, ‘participation in the infringement’ can be presumed on the basis that the subsidiaries were used by the parent merely as a tool to market the goods involved in the infringement and thus benefited financially from the infringing acts, or whether a more direct participation in the infringing acts is required.

20 Furthermore, the referring court does not consider that the idea of control, referred to by the Court in the case of groups of undertakings, constitutes the only possible ground for applying the doctrine of the single economic unit, as is demonstrated by the case-law of the Court of Justice itself in another group of cases that is well illustrated by its judgment of 14 March 2019. The case involves the succession of undertakings in the context of business restructuring. For the Court, when it comes to extending civil liability, it is more important to examine the business unit from a strictly economic perspective rather than a legal one. In that regard, the Court cites the judgments of 11 December 2007, *ETI and Others*, C-280/06, EU:C:2007:775, paragraph 42; of 5 December 2013, *SNIA* v *Commission*, C-448/11 P, not published, EU:C:2013:801, paragraph 22; and of 18 December 2014, *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraph 40.

21 Consequently, what that second group of cases demonstrates is that there is no one single ground for the doctrine of the single economic unit, nor does the doctrine rest solely on the idea of control, but instead appears to be broader and to be based on a conception of liability that is viewed from an economic perspective rather than a strictly legal one; under that approach, liability would exist where a party has benefited from the effects of the infringement. The referring court considers that that conclusion can be drawn from the Opinion of the Advocate General in

the case decided by the judgment of the Court of Justice on 14 March 2019 when he states that the aim of that extension is to deter undertakings from engaging in conduct harmful to competition, which is why liability should be attached to assets rather than to a particular legal personality.

22 However, legal personality plays an important part in legal certainty and good order, and is dispensed with only in exceptional circumstances, as demonstrated in the application of the doctrine of the lifting of the corporate veil (which, while clearly different from the doctrine under consideration here, displays some parallels with it). In our case, the referring court is uncertain whether the particular characteristics of the case are sufficient to justify making such an exception, or whether some additional factor is required, such as the impossibility or extreme difficulty of enforcing liability against those found liable for the infringement in the earlier infringement proceedings. The referring court considers that that idea is implicitly present in one of the two groups of cases in which the Court has applied the doctrine of the single economic unit, namely in cases involving succession of undertakings, but that it is not present in the cases concerning groups of undertakings, where the extension of liability to the parent was not made conditional on its being impossible to enforce liability by relying on the subsidiaries' assets.

23 If that additional ground were to be necessary, the question also arises whether the difficulty of serving notice on the parent companies in countries other than those where the proceedings are being heard, with the considerable delay (not to mention considerable cost) involved, would constitute sufficient grounds. In any event, the fact is that undertakings generally refuse to accept service of notice to appear in the country of the proceedings where it is effected via their subsidiaries or via the legal services that represent them in other similar proceedings.

24 In proceedings where the sums involved are not very large, those difficulties may pose a significant obstacle to commencement of proceedings by the injured parties, which may be forced to incur additional expenditure and to accept a considerable delay in proceedings. Furthermore, there is the additional difficulty they would experience in enforcing judgment if ultimately they had to apply to the courts of another State in order to have it enforced.