Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-882/19
Sumal, S.L. v Mercedes Benz Trucks España S.L.

**According to Advocate General Pitruzzella, a national court can order a subsidiary company to pay compensation for the harm caused by the anticompetitive conduct of its parent company in a case where the Commission has imposed a fine solely on that parent company**

*For that to be the case, the two companies must have operated on the market as a single undertaking and the subsidiary must have contributed to the achievement of the objective and the materialisation of the effects of that conduct*

By a decision issued in 2016, [1] the Commission imposed fines on a number of companies in the automotive sector, including Daimler AG, in respect of collusive arrangements on the pricing of trucks.

Following that decision, the Spanish company Sumal S.L. asked the Spanish courts to order Mercedes Benz Trucks España S.L. ('MBTE'), a subsidiary company of Daimler, to pay it the sum of approximately EUR 22 000 in compensation. According to Sumal, that amount corresponded to the increased price paid by it to MBTE when purchasing certain trucks manufactured by the Daimler Group as compared with the lower market price that it would have paid in the absence of those collusive arrangements.

In that context, the Audiencia Provincial de Barcelona (Provincial Court, Barcelona, Spain), before which the case is being appealed, asks the Court of Justice, in essence, whether a subsidiary (MBTE) can be held liable for an infringement of the EU competition rules by its parent company (Daimler) and under what conditions such liability can arise.

In today's Opinion, Advocate General Giovanni Pitruzzella proposes that the Court should apply the **economic unit theory** – which has been used previously by the Court in order to impose penalties on a parent company for the anticompetitive conduct of its subsidiaries ('bottom-up' liability) – and **therefore rule that it is possible to find a subsidiary liable for harm caused by the anticompetitive conduct of its parent company ('top-down' liability).** [2]

The Advocate General notes that, in order to impose 'bottom-up' liability on the parent company, the Court's case-law is based on two separate factors. The first concerns the **decisive influence** which the parent company must exercise over its subsidiary, whereby the latter simply follows the instructions given to it by the former. The second relates to whether the parent company and the subsidiary constitute an **economic unit** and act jointly on the market in spite of the formal 'veil' of their separate legal personalities.

Accepting the decisive influence of the parent company over its subsidiary as the basis for 'bottom-up' liability does not make it possible, as such, to conclude that there can be 'top-down' liability, since, by definition, a subsidiary does not exercise a decisive influence over its parent company. Conversely, if that liability is based on the fact that they constitute an **economic unit, it is equally possible, on that same basis, to find that the subsidiary can incur a 'top-down' liability.**

[1] Commission Decision of 19 July 2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39824 – Trucks).
[2] The Advocate General discusses in detail the relevant judgments of the Court, starting with the 'ICI judgment' (judgment of 14 July 1972, *Imperial Chemical Industries* v *Commission*, 48/69).

The Advocate General finds that the basis of a parent company's liability for the anticompetitive conduct of its subsidiary lies in the unity of the economic activities of those companies: namely, in the fact that they constitute a single economic unit.

However, in the view of the Advocate General, **decisive influence is a necessary condition for the existence of an economic unit (in other words, a single undertaking in the functional sense)**. In that sense, the criterion of decisive influence and that of economic unity are two logically necessary steps in the process of attributing liability for anticompetitive conduct.

The Advocate General goes on to specify that liability for infringement of the competition rules is attributed, first, to the undertaking understood as being the economic unit within which the infringement was negligently or intentionally committed. That liability is then, specifically, allocated to the **individual companies** comprising the undertaking. Those companies alone should actually bear the **financial consequences of liability (such as fines or compensation)**. Indeed, only the companies constitute legal persons, whereas the undertaking, in a functional sense (namely the economic unit), does not.

The Advocate General observes that, in the case where it is the parent company that commits the infringement, the subsidiary's 'top-down' liability results not only from the decisive influence exercised by the parent company, but also from the fact that **the subsidiary's business is in some way necessary to give effect to the anticompetitive conduct (for example, because the subsidiary sells the goods that are the subject of the cartel). Therefore, in order for top-down liability to be incurred, the subsidiary must operate in the same area as that in which the parent company has engaged in anticompetitive conduct and must have been able, through its conduct on the market, to give effect to the infringement.**

The Advocate General stresses that **the liability of the companies comprising that same economic unit is joint and several**: therefore, **each of those companies may be required to pay the entirety** of the fine (in the case of public-law proceedings brought by the Commission) [3] or of the compensation (in the case of an action for damages brought by a private individual). [4] In the latter respect, **granting a private individual who has suffered harm the option of bringing an action against the subsidiary domiciled in that private individual's Member State avoids the practical difficulties** associated with the service abroad of the document instituting proceedings and the enforcement of any judgment. Moreover, allowing the injured party **to choose the company against which the action is brought increases the chances that the claims for compensation will be satisfied in full.**

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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*The full text of the Opinion is published on the CURIA website on the day of delivery.*

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[3] In the present case, owing to the joint and several liability of each of the companies comprising the economic unit (undertaking in the functional sense), the choice made by the Commission to pursue and impose a penalty only on the parent company does not preclude subsidiaries, which are equally liable, from also being pursued in respect of liability for the damage caused by the infringement.
[4] As recognised by the Court, 'private' and 'public enforcement' are both essential tools for strengthening the effectiveness of the policy of taking action against anticompetitive practices.