



THE COURT OF JUSTICE'S *SUMAL* JUDGMENT: CIVIL LIABILITY OF A SUBSIDIARY FOR ITS PARENT'S INFRINGEMENT OF EU COMPETITION LAW

CHARLOTTE REICHOW*

ABSTRACT: The judgment of the Court of Justice in the *Sumal* ECLI:EU:C:2021:800 case charts new territory in the application of the concept of the “economic unit” in EU competition law. In addition to the established principles regarding the liability of the economic unit for fines imposed by the European Commission, the Court has found that the concept may also serve as a basis for damage claims against a subsidiary of a parent company that has been found to infringe EU competition law. The application of these principles regarding the liability of a subsidiary for its parent's conduct warrants an adjustment of the criteria that determine the existence of the single economic unit. In the case of downward liability, the exercise of decisive influence of the parent company over the subsidiary is not enough. Additionally, to establish a uniform market conduct the subsidiary needs to be involved in the specific economic activity of the economic unit. Based on this new judgment, victims of infringements of EU competition law will no longer be limited to bringing actions for damages against those companies punished by the Commission. They may also hold liable any subsidiary of the parent company belonging to same economic unit – even though it is not named in the Commission's decision – and may benefit from the binding effect of this decision, joint and several liability, and additional fora.

KEYWORDS: EU competition law – antitrust damages – concept of economic unit – joint and several liability – parental liability – liability of a subsidiary for its parent company's infringement.

I. INTRODUCTION

In its judgment of 6 October 2021 in the *Sumal* case, the Court of Justice of the European Union (CJEU) has helped to clarify whether, and if so under which conditions, the “single economic entity doctrine” justifies extending a parent company's liability for infringement of EU competition rules to its subsidiary.¹ The principles which have already shaped the liability of companies for antitrust fines since the CJEU's decision in *Akzo Nobel*,² have now

* Policy Officer at the Federal Ministry of the Interior and Community, charlotte.reichow@bmi.bund.de. The views expressed in this *Insight* are the author's own and do not represent the views of the German Federal Ministry of the Interior and Community.

¹ Case C-882/19 *Sumal* ECLI:EU:C:2021:800.

² Case C-97/08 P *Akzo Nobel and Others v Commission* ECLI:EU:C:2009:536.



been further developed in the context of civil liability for antitrust damages. In this context, the CJEU clarified that the concept of the economic unit, in addition to bottom-up or “upward” liability of the parent company where the object of attribution is the anticompetitive conduct of a subsidiary, in principle also allows top-down or “downward” liability, *i.e.*, a subsidiary can be held civilly liable for the anticompetitive conduct of its parent company. With this ruling, the CJEU agreed with Advocate General (AG) Pitruzzella’s main arguments, delivered in his Opinion of 15 April 2021.³ The possibilities thus created regarding the choice of defendant and jurisdiction will henceforth make it considerably easier for the victims of an anticompetitive practice to assert their claims in courts at home.

II. THE ECONOMIC ENTITY’S LIABILITY FOR DAMAGES UNDER EU COMPETITION LAW

The following facts gave rise to the CJEU’s findings.

Sumal, S.L. (Sumal), a Spanish company manufacturing roll containers, brought an action against Mercedes Benz Trucks España, S.L. (MBTE), a Spanish subsidiary of Daimler AG (Daimler), before a Spanish court. Sumal claimed damages for additional costs resulting from the “Truck cartel” when it acquired two trucks from MBTE. In its decision, which was addressed to Daimler but not to MBTE, the European Commission (EC) had found that Daimler, among others, participated in collusive arrangements on pricing and gross price increases for trucks, thereby infringing art. 101 TFEU.

The Spanish first instance court dismissed the claims, as only Daimler was mentioned in the EC’s decision and only Daimler was held responsible for the infringement. The Spanish appeal court, having found that the Spanish courts were split on the issue, decided to stay the proceedings and request a ruling from the CJEU on whether art. 101(1) TFEU must be interpreted as meaning that an action for damages resulting from an illicit cartel could be brought either against a parent company which had been fined by the EC for anticompetitive practices in a decision, or against a subsidiary of that company not referred to in that decision, where both companies formed a single economic unit. Furthermore, the Spanish appeal court inquired as to the criteria that should apply in the context of intragroup relationships if liability under the concept of single economic unit is extended from the parent company to the subsidiary. Finally, the Spanish appeal court questioned the compatibility of a provision of national law in line with the single economic unit doctrine, 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.

The CJEU answered in the affirmative to the first question. In the event of an infringement of EU competition law, the victim of an anticompetitive practice by an undertaking may bring an action for damages, without distinction, either against a parent company

³ Case C-882/19 *Sumal* ECLI:EU:C:2021:293, opinion of AG Pitruzzella.

which has been punished by the EC for that practice, or against a subsidiary of that company, even if it is not referred to in that the EC's decision, provided the companies together constitute a single economic unit.⁴

II.1 THE VERY EXISTENCE OF THE ECONOMIC UNIT AS A BASIS FOR (CIVIL) LIABILITY

As a starting point for its reasoning, the CJEU refers to actions for damages for infringement of EU competition rules (private enforcement) as an integral part of the system for enforcement of those rules besides their implementation by public authorities (public enforcement), and an important means of deterring anticompetitive behaviour.⁵ As already stated in the CJEU's ruling in *Skanska*,⁶ the concept of "undertaking" within the meaning of art. 101 TFEU has the same meaning and scope with regard to the imposition of fines by the EC under art. 23(2) of Regulation 1/2003⁷ as compared to actions for damages for infringement of EU competition rules.⁸ According to settled case law of the CJEU, the concept of "undertaking" 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 defines an economic unit even if in law that economic unit consists of several persons, natural or legal. Such an economic unit requires a unitary organisation of personal, tangible and intangible elements, which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind in art. 101(1) TFEU.⁹ Moreover, it follows from the principle of personal responsibility that any entity within an economic unit may be held liable if it is established that at least one entity belonging to that economic unit has committed an infringement of art. 101(1) TFEU.¹⁰ Finally, the CJEU recalls that the same parent company may be part of several economic units made up, depending on the economic activity in question, of itself and of different combinations of its subsidiaries all belonging to the same group of companies.¹¹

From these considerations by the CJEU, it can be concluded that the same principles apply when establishing liability based on the "economic unit" concept, be it liability for a fine or damage resulting from infringements of EU competition law. It derives from the functional concept of an undertaking which implies, also in the context of actions for damages for infringement of EU competition rules, that an infringement is considered as the own conduct of the entire economic unit, for which all those companies are jointly and

⁴ *Sumal* cit. para. 67.

⁵ *Ibid.* para. 37 with further references.

⁶ Case C-724/17 *Skanska Industrial Solutions and Others* ECLI:EU:C:2019:204 para 45.

⁷ Regulation (EC) 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

⁸ *Sumal* cit. para. 38 with further references.

⁹ *Ibid.* para. 41 with further references.

¹⁰ *Ibid.* para. 42 with further references.

¹¹ *Ibid.* para. 45.

severally liable that are legal entities of the responsible undertaking.¹² Consequently, in the case of anticompetitive behaviour by a parent company, the victim of an anticompetitive practice is free, within the limits of the economic unit, to hold one of its subsidiaries civilly liable rather than the parent company.¹³ However, this possibility cannot automatically be available against every subsidiary of a parent company targeted in an infringement decision of the EC.¹⁴ Rather, it is necessary, but also sufficient, that the parent company and the subsidiary company form part of the same economic unit and can therefore be regarded as the undertaking responsible for the infringement of art. 101(1) TFEU.

This justification of the CJEU is consistent with the considerations of AG Pitruzzella. After an in-depth discussion of the possible grounds for the upward liability of the parent company for anticompetitive behaviour of its subsidiary, he concludes that the mere existence of a single economic unit forms the basis for liability of each legal entity belonging to the same economic unit.¹⁵ In his view, this follows from the criterion of “decisive influence” as developed in the CJEU’s case law, which is an expression of the general relationship between the parent company and its subsidiary and which does not have to be related to the infringement of EU competition law.¹⁶ The CJEU referred to this argument in its own reasoning and clarified that both upward and downward liability result from the very nature of the undertaking as defined in EU competition law, but not from the concept of control or agency. Thereby, the CJEU rejects an understanding of the economic unit concept put forward by some authors according to which the “economic unit” serves as a tool to attribute liability among its legal entities considering that the parent company commits the infringement by exercising its decisive influence.¹⁷ Instead, the CJEU confirms positions taken in other parts of the literature to the effect that the liability of the group companies already follows from their affiliation to the economic unit as such, which is characterised by uniform economic action on the market.¹⁸

¹² *Ibid.* paras 43 and 44.

¹³ *Sumal*, opinion of AG Pitruzzella cit. para. 66.

¹⁴ *Sumal* cit. para. 46.

¹⁵ *Sumal*, opinion of AG Pitruzzella cit. para. 40.

¹⁶ *Ibid.* para. 44.

¹⁷ A Kalintiri, ‘Revisiting Parental Liability in EU Competition Law’ (2018) *ELR* 145, 155; O Odudu and D Bailey, ‘The Single Economic Entity Doctrine in EU Competition Law’ (2014) *CMLRev* 1721, 1747; S Thomas, ‘Guilty of a Fault That One Has Not Committed. The Limits of the Group-Based Sanction Policy Carried Out by the Commission and the European Courts in EU-Antitrust Law’ (2012) *Journal of European Competition Law & Practice* 11, 14 ff.; K Hofstetter and M Ludescher, ‘Fines Against Parent Companies in EU Antitrust Law: Setting Incentives for “Best Practice Compliance”’ (2010) *World Competition* 55 ff.

¹⁸ C Kersting, ‘Liability of Sister Companies and Subsidiaries in European Competition Law’ (2021) *European Competition Law Review* 125 ff.; H Schweitzer and K Woeste, ‘Die Haftung von Konzerngesellschaften im europäischen Wettbewerbsrecht’ (2020) *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 141 ff.; A López Usatorre, ‘Should Children Be Punished For the Acts of Their Parents? At Odds With the Single Economic Entity Doctrine – Towards a New Test on Group Liability?’ (2021) *Global Competition Litigation Review* 71, 75; J Kokott

II.2. CONDITIONS FOR DETERMINING THE RESPONSIBLE ECONOMIC UNIT

Considering the further questions of the referring court, the CJEU continues to explain the conditions required for the economic unit's liability for the infringement of art. 101 TFEU. The victim must prove the existence of an economic unit of the parent company and the subsidiary in two respects. First, it must prove that sufficient economic, organisational and legal links between those two companies exist. Second, it must prove that a specific link exists between the economic activity of that subsidiary and the subject matter of the infringement for which the parent company was fined.¹⁹

As long as the concept of the economic unit is used to extend liability from the subsidiary to the parent company, as was the case since *Akzo Nobel*, it is only necessary to establish that the parent company exercises decisive influence over the subsidiary in order to determine that these entities form an economic unit.²⁰ However, if the connecting factor for the allegation of an infringement is the participation of the parent company in the anticompetitive agreement, the determination of the economic unit between several companies is not simple. Within a group of companies there may well be several economic units, which always include the parent company but not necessarily all its subsidiaries.²¹ Therefore, the inclusion of a subsidiary in the liability of the economic unit requires an additional connecting factor for the operational implementation of this agreement, *i.e.*, a business activity in the cartelised market.²²

The CJEU clarifies that the subsidiary belongs to the same economic entity if (i) it is subject to the decisive influence of the parent company and (ii) it is active on the market on which the economic entity's infringement of EU competition rules took place. According to the CJEU, the latter condition is met if, in the present case, the victim can prove that the anticompetitive agreement concluded by the parent company, for which it has been punished, concerns the same products as those marketed by the subsidiary.²³ This interpretation makes sense: if the subsidiary is active in the product sector in which the agreements were made, corresponding price agreements are effectively applied through its sales activities. Under this condition, it is not necessary, and in fact irrelevant, that the subsidiary, as the Spanish first instance court suggested, is in some form responsible for

and D Dittert, 'Die Verantwortlichkeit von Muttergesellschaften für Kartellvergehen ihrer Tochtergesellschaften im Lichte der Rechtsprechung der Unionsgerichte' (2012) *Wirtschaft und Wettbewerb* 670, 672.

¹⁹ *Sumal* cit. para. 51.

²⁰ *Akzo Nobel and Others v Commission* cit. paras 58 and 59.

²¹ C Kersting and J Otto, "'Up and Down-stream' Liability Within the Economic Unit: Children Are Liable for Their Parents! Requirements of Liability" (2021) *Global Competition Litigation Review* 126, 127; B Freund, 'Reshaping Liability – The Concept of Undertaking Applied to Private Enforcement of EU Competition Law' (2021) *GRUR International (Journal of European and International IP Law)* 731, 741.

²² *Sumal*, opinion of AG Pitruzzella cit. para. 57.

²³ *Sumal* cit. para. 52.

or has knowledge of the anticompetitive practice. It follows from the logic of the “economic unit” that being part of the undertaking suffices to take part in the liability *vis-à-vis* victims.

Regarding downward extension of liability, the CJEU has thus created an important limiting principle. It allows groups of companies to avoid the liability of subsidiaries for an infringement of their parent company in a market in which these subsidiaries, while acting under the determining influence of their parent, are not active at all.²⁴ In the case of group-affiliated distribution companies, like MTBE in the present case, this criterion will frequently not be of any use.

At the same time, it remains unclear, how this test is to be applied beyond the situation of the present case. The CJEU did not explain in general terms the requirements for the specific link between the economic activity of the subsidiary and the subject matter of the infringement for which the parent company was held responsible. Further case law will have to show whether the subsidiary’s economic activity in the market in which the parent company has engaged in an anti-competitive manner is necessary, or whether it suffices that the subsidiary benefits from the infringement within the framework of intragroup asset transfers.²⁵ Whereas this judgment clarifies that marketing activities are sufficient, it remains unclear whether “economic activities” should always involve the service/product in the same relevant product market or whether this term can have a broader meaning.

II.3. EXTENSION OF LIABILITY TO FURTHER COMPANIES OF THE SAME ECONOMIC UNIT

By declaring the very existence of an economic unit to be the decisive factor for the determination of the liability of one or the other companies making up that undertaking, the CJEU shares the view of AG Pitruzzella that the decisive influence of the parent company over the subsidiary is only relevant to establish that an economic unit exists.²⁶ Therefore, it is to be expected that the allocation of liability under the economic unit concept is not limited to either parent companies being responsible for the infringements of competition rules of their subsidiaries, or subsidiaries being liable for their group “mothers”.²⁷ Both the justification for civil liability and the conditions for determining the economic unit indicate that, also in antitrust damages proceedings, the liability of the economic unit is characterised by the fact that the liability for a competition infringement of the perpetrator company can potentially be extended to all members of this economic unit.

²⁴ C Kersting and J Otto, “Up and down-stream” liability within the economic unit’ cit. 127; B Freund, ‘Reshaping Liability’ cit. 741.

²⁵ H Schweitzer and K Woeste, ‘Die Haftung von Konzerngesellschaften im europäischen Wettbewerbsrecht’ cit. 161.

²⁶ *Sumal*, opinion of AG Pitruzzella cit. para. 49.

²⁷ *Ibid.* para. 52.

Admittedly, the subject of the reference for a preliminary ruling under consideration here was a situation in which the subsidiary was held liable instead of the parent company that had committed the infringement. However, the fact that this liability was established by reference to the concept of an economic unit does not imply any restriction as to the direction of the extension of liability.²⁸ The CJEU confirmed this interpretation by its answer to the last question of the reference for a preliminary ruling, according to which national law may not make the possibility of extending liability dependent on one company exercising control over the other company.²⁹ This finding accepts that, in connection with the concept of the economic unit, liability can also extend to other situations in which certain companies of a group form an economic unit under the conditions mentioned above. Therefore, situations may arise in the future in which, *e.g.*, sister or sub-subsidiary companies will be held liable for damages due to infringements of EU competition law by their parent company or their parent's parent company.

Besides these implications for private enforcement of competition law, the CJEU's indications may have a considerable impact on public enforcement. So far, the EC regularly only fined those legal entities which directly participated in the infringement or exercised decisive influence over the directly involved companies.³⁰ Accordingly, in the procedures before the CJEU leading to the ruling in *Sumal*, the EC had initially submitted that the current case law did not allow the imposition of a fine on the subsidiary for the anticompetitive conduct of the parent because it did not exercise decisive influence over the parent company's market behaviour.³¹ In the further course of the proceedings, the EC suggested that the liability of the subsidiary be made dependent on the condition that its conduct is related to the infringement of its parent company. This statement indicates that, according to the EC's view, subsidiaries of a parent company that has been found liable for anticompetitive practices can only be fined if it had some deliberate involvement in the infringement itself. If the EC were to apply the principles of *Sumal* this might change the future practice of selecting addressees of fines. For example, the ruling may encourage the EC to extend its decision to an innocent subsidiary which has not participated in anticompetitive conduct of its parent company but unknowingly implemented the anticompetitive agreement through its business activities. Of course, the EC has to be able to prove the specific link between the two companies, but this proof will be easy to provide if only an economic activity in the affected market has to be proven.

²⁸ C Kersting and J Otto, 'Up and down-stream' liability within the economic unit' cit. 127.

²⁹ *Sumal* cit. para. 75.

³⁰ H Schweitzer and K Woeste, 'Die Haftung von Konzerngesellschaften im europäischen Wettbewerbsrecht' cit. 157.

³¹ *Sumal*, opinion of AG Pitruzzella cit. para. 21.

III. THE SUBSIDIARY AS DEFENDANT IN DAMAGE CLAIMS FOR EU COMPETITION LAW INFRINGEMENTS

According to general principles of civil procedure, it is for the applicant to demonstrate and prove the existence of an economic unit. In this context, it will make a substantial difference from the plaintiff's perspective whether it can provide this evidence on the basis of a decision adopted by the EC under art. 101 TFEU or whether, if the EC has remained silent on the point in its decision or has not yet been called upon to adopt a decision, it has to resort to any other means.³²

III.1. FRAMEWORK FOR THE EXERCISE OF THE SUBSIDIARY'S RIGHTS OF DEFENCE

If an action for damages is based on an infringement of art. 101(1) TFEU that is subject to a decision of the EC addressed to the parent company of the subsidiary, the CJEU finds that the subsidiary cannot challenge the existence of this infringement before the national court. It cites art. 16(1) of Regulation 1/2003, which provides, inter alia, that where national courts rule on agreements, decisions or practices under art. 101 TFEU which are already the subject of an EC decision, they cannot take decisions running counter to the decision adopted by the EC. This binding effect of the EC's decisions considerably facilitates damage claims brought by victims of infringements of EU competition law.³³

At the same time, this binding effect results in a tension with the principle of safeguarding the subsidiary's rights of defence. On the one hand, the CJEU considers that it is necessary to ensure that the subsidiary in question is able to exercise its rights of defence properly in order to prove that it is not part of the same economic entity as the parent company. On the other hand, in favour of a uniform application of EU competition law, this possibility only applies as long as the EC has not made a finding of conduct amounting to an infringement in a decision adopted under art. 101 TFEU. Only then is the subsidiary of an accused parent company entitled to dispute not only that it belongs to the same economic unit as the parent company but also the existence of the alleged infringement.³⁴

Moreover, in this context, the CJEU does not address the case where the EC, in a decision addressed to the parent company of the defendant subsidiary, has found an infringement of art. 101(1) TFEU and that the subsidiary was part of the responsible undertaking, but did not impose a fine on the latter. Presumably, in this case, in addition to denying the infringement, the subsidiary will also be prevented from denying its affiliation to the undertaking as part of the finding of this infringement.³⁵ In this regard, the CJEU considers it irrelevant whether the subsidiary subsequently held liable under civil

³² *Sumal* cit. para. 51.

³³ HM Wagener, 'Die wirtschaftliche Einheit als Schuldner im Zivilprozess: Eine für alle und alle für eine?' (2021) *Neue Zeitschrift für Kartellrecht* 238, 241.

³⁴ *Sumal* cit. para. 60.

³⁵ Cf. case C-344/98 *Masterfoods and HB* ECLI:EU:C:2000:689 paras 50 and 51.

law has been involved in the proceedings by the EC against the parent company.³⁶ The fact that the EC's decision refers to the subsidiary itself is thus not a prerequisite for the binding effect of art. 16 of Regulation 1/2003. Consequently, just as the affiliation to the economic unit results in an obligation to pay damages, it also entails that the exercise of the rights of defence by at least one company that is part of the responsible undertaking is also effective regarding the other companies.³⁷

III.2. CIVIL PROCEDURAL IMPLICATIONS OF THE EC'S FINDINGS IN ADMINISTRATIVE PROCEEDINGS

As just mentioned, the extent to which the EC has stated that the company in question belongs to the responsible economic unit in the context of the established infringement influences the extent to which the economic unit needs to be proven. In this regard, the question of which companies the plaintiff can identify as legal entities of the economic unit does not depend on the fact that the EC's decision also refers to them.³⁸ Thus, the selection made by the EC to address certain companies with a fine does not imply either a procedural bar or a presumption that only those companies belong to the same economic unit.³⁹ If the victims succeed in proving this – even without recourse to the findings of the EC's decision – nothing prevents the liability of the economic unit from being extended to these companies. Consequently, the different possibilities to prove that a company is liable as part of the economic unit potentially enlarges the number of companies a victim could seek to hold liable.

The fact that in the present case a claim for antitrust damages was brought against the subsidiary instead of the parent company, against which no fine was imposed, shows that, in addition to the availability of assets to recover damages from the company and the prospects of proving a claim, the choice of forum can also play an important role. In the present case, the plaintiff company chose the place where it had incurred the additional costs based on artificially high prices imposed by the truck manufacturer on the authorised dealers, which the latter had passed on to the end users. The CJEU considered this jurisdiction admissible under art. 7(2) of the Brussels I Regulation.⁴⁰ Additionally, in cross-border cases the victim could sue the subsidiary in the state of its domicile under art. 4(1) and art. 63(1) of the Regulation. By choosing a specific place of jurisdiction, the victim is able to influence the applicable law under the relevant law of the *forum* (e.g., art.

³⁶ *Sumal* cit. para. 59.

³⁷ See the critical remarks of M Araujo Boyd, 'Should Children Pay For Their Parent's Sins? The *Sumal* Preliminary Reference' (2021) *Journal of European Competition Law & Practice* 25, 32.

³⁸ *Sumal* cit. para. 63.

³⁹ *Sumal*, opinion of AG Pitruzzella cit. para. 73.

⁴⁰ *Sumal* cit. para. 66; Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

6(3)(b) Rome II Regulation),⁴¹ and to initiate court proceedings in its “home” jurisdiction provided that a domestic subsidiary of a parent company is domiciled there.⁴²

Applying the same principles to liability for administrative fines and to civil liability will also pose challenges for the courts of the Member States. Whereas the imposition of fines for punishing infringements of EU competition law is largely harmonized by EU rules,⁴³ civil liability resulting from an agreement or practice prohibited under art. 101 TFEU is largely governed by national legal systems.⁴⁴ Therefore, a claim for cartel damages must in principle be assessed by the national courts applying national laws on civil liability.⁴⁵ It is however due to the uniform objective of both areas of law that art. 101 TFEU alone determines which party is liable to pay compensation for the damage caused by anticompetitive conduct. With regard to subsidiaries that were not involved in the administrative proceedings of the EC giving rise to a statement of objections and a decision, the courts of the Member States will have to decide on this concept autonomously without being able to rely on the EC’s findings.⁴⁶

IV. JOINT AND SEVERAL LIABILITY OF THE LEGAL ENTITIES OF THE ECONOMIC UNIT

It follows from the liability of the economic unit that each company being part of it is jointly and severally liable for the damage suffered by a victim due to the infringement of EU competition rules committed by any company within this economic unit. According to the view of the CJEU, the origin of this joint and several liability is the economic unit itself.⁴⁷ Therefore, the only decisive factor for the establishment of joint and several liability is whether the companies formed a single enterprise within the meaning of art. 101 TFEU at the time of the infringement.⁴⁸

⁴¹ Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

⁴² HM Wagener, ‘Die wirtschaftliche Einheit als Schuldner im Zivilprozess: Eine für alle und alle für eine?’ cit. 239; M Araujo Boyd ‘Should Children Pay for Their Parent’s Sins?’ cit. 27.

⁴³ Cf. Regulation 1/2003 cit.

⁴⁴ Cf. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance; see also *Skanska Industrial Solutions and Others* cit. paras 27 and 28.

⁴⁵ HM Wagener, ‘Follow-up zu *Skanska* – Bisherige “Umsetzung” durch nationale Zivilgerichte’ (2019) *Neue Zeitschrift für Kartellrecht* 535 ff (for the English version see HM Wagener, ‘Follow-up to *Skanska* – The “Implementation” by National Courts So Far’ (14.01.2020) SSRN ssrn.com).

⁴⁶ B Freund, ‘Reshaping Liability’ cit. 737; M Araujo Boyd, ‘Should Children Pay for Their Parent’s Sins’ cit. 27.

⁴⁷ *Sumal* cit. para. 44 with further references.

⁴⁸ *Ibid.* para. 49 with further references.

IV.1. FINANCIAL RISKS OF THE JOINT AND SEVERAL LIABILITY FOR SHAREHOLDERS

As a consequence of this joint and several liability, a subsidiary which is not directly involved in the anticompetitive agreement must pay for the entire damage caused by this anticompetitive practice of the entire economic unit. If the parent company does not hold all the shares in the company concerned, this liability may considerably affect the interests of minority shareholders in the subsidiary and may raise complicated questions about claims for compensation by these minority shareholders, which have to be considered on the basis of national law.

In this regard, it will become even more important, for example in transactions for the acquisition of such companies, to consider potential liability scenarios, not only regarding the risk of fines but also with regard to civil liability for anticompetitive behaviour. As has been pointed out, in this context it must be closely examined whether existing shareholding relationships possibly fulfil the criteria for the existence of an economic unit.⁴⁹ According to the ruling in *Sumal*, the acquirer cannot rely on a forewarning of the civil liability risk by the existence of a previous decision of the EC referring to the acquired company.

IV.2. THE INTERNAL ALLOCATION OF THE DEBT FOR THE PAYMENT OF DAMAGES

Civil liability for illicit cartels results in two separate joint and several liabilities: the joint and several liability of the companies involved in the cartel among themselves and the joint and several liability of the legal entities of the responsible economic unit of each of the members of the cartel.⁵⁰ Within the framework of each joint and several liability, the respective joint and several debtors are obliged to compensate each other. Since a joint and several obligation extends to all members of an economic unit, the company against which a cartel damage claim is made can seek compensation for financial losses from the other members of the economic unit based on the principles relating to the internal allocation of the joint and several debt.⁵¹ Therefore, it will be important for that company to be able to assess the criteria determining the allocation of liability among the individual members from the perspective of their internal relationship.

It is not yet possible to foresee whether it will follow from the fact that joint and several liability within an undertaking forms a subset of the joint and several liability between the cartel participants that each legal entity within an undertaking can demand compensation from each legal entity within another undertaking participating in the infringement. The argument against this is that the allocation standard within the same economic unit is

⁴⁹ T Thiede, 'EUGH: Wirtschaftliche Einheit von Konzernmutter und Tochtergesellschaft in zivilrechtlichen Kartellschadensersatzverfahren' (2021) *Neue Zeitschrift für Gesellschaftsrecht* 1510, 1518.

⁵⁰ Cf. The German Bundesgesetzblatt, Act against Restraints of Competition of the 23 June 2013, section 33d on Joint and Several Liability.

⁵¹ Case C-231/11 P *Commission v Siemens Österreich and Others et Siemens Transmission & Distribution and Others/Commission* ECLI:EU:C:2014:256 para. 58; *Akzo Nobel* cit. para. 61.

overlaid by group-specific factors such as profit transfer agreements, so that causation and fault contributions will not play a role on their own.⁵² Based on this assumption, a two-step approach would be conceivable. First, the specific company that has paid anti-trust damages will demand compensation in the internal relationship of the same economic unit. Since this damage was also caused by the agreement of the cartel participants, it would then be possible for the parent company to claim the amount assumed in the intragroup relationship with the subsidiary partly against the other cartel participants.

It remains to be seen how corporate practice will meet the requirements for an appropriate standard for the internal allocation of damages. In any case, it is certain that this ruling provides additional reasons to address the internal allocation of liability between affiliated companies and to find solutions not only for the distribution of fines but also for the distribution of civil damages.⁵³

V. CONCLUSION

The CJEU's judgment in *Sumal* further develops the concept of the economic unit doctrine and adds to the rich body of the CJEU's case law in this area. The decision introduces a new criterion to determine the scope of the economic unit. It remains to be seen how this criterion is to be applied in other situations. Future case law will need to clarify which specific conduct of a legal entity is necessary to assume its affiliation to the economic unit and to hold it liable for anti-competitive practices of other legal entities within the economic unit.⁵⁴

Taking into account that a functional concept of an undertaking applies both to public and private enforcement, it is not surprising that the CJEU transferred the principles underpinning the economic unit for the liability of fines to civil antitrust damages in order to establish the liability of all legal entities, irrespective of a reference to them in an infringement decision of the EC.⁵⁵ The clarification by the CJEU that the extension of civil liability from the parent company to the subsidiary is possible under this concept was welcomed as national courts often reject the liability of subsidiaries for antitrust infringements of their parent companies.⁵⁶ Although the *Sumal* case concerned the civil liability of a subsidiary not involved in the anti-competitive practices, it will presumably also have an influence on public enforcement of EU competition law. If subsidiaries share the same economic

⁵² As for the German jurisdiction, see Bundesgerichtshof judgment of 18 November 2014 KZR 15/12 *Calciumcarbid-Kartell II* para. 35.

⁵³ C Reichow, 'Kartellrecht: Gesamtschuldnerausgleich bei Geldbußen der Kommission' (2015) *Europäische Zeitschrift für Wirtschaftsrecht* 441 ff.

⁵⁴ H Schweitzer and K Woeste, 'Die Haftung von Konzerngesellschaften im europäischen Wettbewerbsrecht' cit. 160. The authors call this condition the "manifestation of the affiliation of the economic unit in the context of the specific infringement".

⁵⁵ *Ibid.* 141, 161.

⁵⁶ HM Wagener, 'Die wirtschaftliche Einheit als Schuldner im Zivilprozess: Eine für alle und alle für eine?' cit. 242 with further references.

activities with the parent company which, alone, participated in an anticompetitive agreement, these subsidiaries could be added to the list of companies to be fined by the EC.

In conclusion, it should be noted that with its present decision the CJEU has contributed to the further strengthening of EU competition law by broadening the possibilities for effective private enforcement of EU competition law. In the future, if it can be shown that a subsidiary held liable for an infringement of EU competition law by its parent company law is part of the same economic entity as its parent, the subsidiary will no longer be able to object to damages actions by simply arguing that only their parent companies are mentioned in a decision of the EC. From the perspective of the companies concerned, applying the concept of liability of the economic unit on civil antitrust liability could even be more far-reaching than applying it to the liability for fines imposed by the EC because it increases the number of possible liability scenarios. In the context of parental liability with regard to fines, it is the decision of the EC to determine which company is liable *vis-à-vis* the EC for the anticompetitive practices. However, in the context of civil liability, a party injured by a cartel may choose to hold liable any company belonging to the economic unit. Due to the greater attractiveness of actions for damages against subsidiaries domiciled in the home country, it becomes more likely that such an injured party will seek to hold companies liable that have not been included in the EC's decision imposing the fines. This risk is only mitigated by the fact that victims must succeed in proving that the local subsidiary belongs to the economic unit in each specific individual case. It remains to be seen whether this poses a considerable obstacle to holding those subsidiaries liable in court.

