# OPINION

# Subsidiary liability—the Provimi point answered?


## Aqeel Kadri

## Scott Campbell*


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In its judgment in *Sumal*,[1] the Court of Justice addressed the question of whether liability for infringements of EU competition law could be attributed to a subsidiary where its parent was the addressee of a European Commission Decision finding a breach of TFEU art.101 or 102. This article considers the Court's conclusions and the analysis in Advocate General Pitruzzella's Opinion,[2] and how these compare to the approach taken by the English courts in assessing the question of "subsidiary liability" to date.

The Judgment relates to a reference for a preliminary ruling from the Provincial Court of Barcelona in a case concerning a claim for damages arising from the *Trucks* Cartel. The claimant, Sumal, had sued the local subsidiary of Daimler, Mercedes Benz Trucks España; the first instance court dismissed the claim on the grounds that it was Daimler, as the relevant addressee of the *Trucks* Decision, that was properly answerable to the claim, and not its Spanish subsidiary. In considering Sumal's appeal, the Spanish Court submitted a number of questions to the Court of Justice.

It is well established that EU (and UK) competition law is addressed to "undertakings", which might loosely be defined as "commercial enterprises". The significance of the notion of "undertaking" is that it transcends the concept of separate legal personality so that multiple legal entities can be considered to form a single undertaking. This is significant not only in the context of attribution of liability for infringements, but also in the result that co-ordinated actions between members of the same undertaking do not amount to anti-competitive conduct (so where a parent directs the pricing of its subsidiary, the two are not engaged in a cartel).

Where the notion of undertaking may cause controversy is where it leads to the attribution of liability for the actions of one company to another within the same corporate group, on the basis that they form part of the same undertaking, or comprise a "single economic unit". In this way, liability is routinely attributed to the parent companies of participants in cartels and other infringements of competition law, such that the participant and parent are jointly and severally liable for the infringement (and any fine).

But what are the criteria for determining whether two legal entities form part of the same undertaking? This a topic that receives relatively little attention in decisions on infringements of TFEU arts 101 and 102 because, since the judgment of the Court of Justice in *Akzo*,[3] the Commission has been able to rely on a presumption that, where a parent holds all or almost all of the shares in a subsidiary, it can be presumed that the two form part of the same undertaking. That presumption arises from the analysis that it can be assumed that the parent exercises "decisive influence" over a wholly-owned subsidiary. Discussion of the specific elements that may support a finding that such decisive influence exists is beyond the scope of this article, but they have been discussed in cases such as *Toshiba v Commission*.[4] In any event, it is reasonable to think that in most cases where subsidiary liability is an issue, the subsidiary will be wholly owned by the relevant parent.

The Opinion in *Sumal* does though give some attention to the conceptual underpinning of the principle of "decisive influence". That being that attribution of liability is appropriate where the subsidiary does not conduct itself on the market autonomously, but essentially follows the directives of its parent company.[5] The Advocate General considered the resulting unity of market conduct to be the decisive factor in attributing liability to the undertaking as a whole rather than, for example, only the entity whose employees attended cartel meetings.

However, in almost all cases where the Commission has attributed liability to a company that has not participated directly in an infringement, this has been on the basis that the (usually) parent company exercised decisive influence over the participant infringer. The result is that discussion in the case law has focused on decisive influence as the significant factor in attributing

* Respectively Counsel and Partner at Hausfeld & Co. LLP, London. The views expressed herein are those of the authors alone.

[1] *Sumal SL v Mercedes Benz Trucks España SL* (C-882/19) EU:C:2021:800 (the "Judgment").

[2] *Sumal SL v Mercedes Benz Trucks España SL* (C-882/19) EU:C:2021:293 (the "Opinion").

[3] *Akzo Nobel NV v Commission of the European Communities* (C-97/08) EU:C:2009:536.

[4] *Toshiba Corp v European Commission* (C-623/15 P) EU:C:2017:21.

[5] Opinion at [34].

liability for competition infringements to non-participants. This is also reflected in some of the decisions of the English Courts discussed below.

No doubt mindful of this, the Advocate General posited two alternative theories for attribution of liability for competition law infringements[6]: (i) decisive influence over the conduct of another company, which would leave little room for extending liability to non-participant subsidiaries; or (ii) the unified conduct on the market of a group of companies, in which case there would be no objection in principle to holding a subsidiary liable, under the right conditions, for an infringement committed by its parent.

The Advocate General recognised that, in public enforcement, attribution of liability was almost exclusively vertically upwards to the parent of an infringer. Though there are rare examples of horizontal attribution of liability, this has still been on the basis of one entity being found to exercise decisive influence over the other. Moreover, there is little incentive for a competition authority to seek to identify every entity that could be considered to form part of the single economic unit that committed the infringement—its main concern will be to identify the party that will be able to pay the fine, and to ensure that deterrence operates at the highest level of the relevant organisation. Hence that fines may be increased to take account of the size of, or previous infringement by, a parent company addressee.

In the Advocate General's view, the latter of his two theories was to be preferred. He reached this conclusion based on an analysis of previous case law on decisive influence, from which he distilled certain principles[7]: the parent need not have directed the specific unlawful conduct of the subsidiary; it is not necessary to show that the parent failed to exercise proper oversight aimed at avoiding unlawful conduct by its subsidiary; the parent need not have been involved in the management of the subsidiary, but rather the existence of influence over commercial policy could be inferred by examining the legal and economic ties between the parent and subsidiary. The generality of these factors is consistent with the presumption that applies in cases of a wholly-owned (or near wholly-owned) subsidiary; indeed, as the Advocate General notes, it has proved extremely difficult to rebut that presumption. Adopting the language used by Advocate General Kokott in her Opinion in *Akzo*, the *Sumal* Opinion states that "the decisive factor is whether the parent company, by reason of the intensity of its influence, can direct the conduct of its subsidiary to such an extent that the two must be regarded as one economic unit".[8] Given that case law has repeatedly confirmed that it is not the fact of any involvement in the infringing conduct, but of unified conduct on the market that leads to the conclusion that two entities form a single undertaking, the Advocate General concludes that it is the characteristic of unified conduct on the market that is decisive for permitting attribution of liability among the constituent parts of the undertaking.[9]

In the Judgment, the Court agreed that it is unity of conduct on the market that underpins the notion of undertaking in EU competition law.[10] Indeed it is striking that the Judgment does not refer to the concept of "decisive influence" at all.

However, while liability for infringements of competition law can be imposed on an undertaking as a whole, it is nevertheless necessary to identify the legal entities that could be made answerable for that infringement. It is in this context that the issue of subsidiary liability really arises. But while decisive influence provides an appropriate framework for assessing whether liability should be imputed upwards, it is less obvious that merely being under the influence of a parent should result in a subsidiary being liable for the parent's conduct. The Advocate General appears to share this view in concluding as he did that liability should only be imputed "downwards" where the subsidiary was engaged in an activity essential to the realisation of the infringing conduct (for example selling the relevant goods), and specifically that the conduct of the subsidiary must have made possible the manifestation of the effects of the infringement.[11]

Whilst acknowledging that the EU courts had not at the time recognised the possibility of this downward imputation of liability, the Advocate General derived some support from the judgment of the General Court in *Biogaran*,[12] as well as from decisions of the English Courts discussed below.

In *Biogaran*, the General Court held the applicant liable with its parent Servier seemingly on the basis that one of the agreements at issue was entered into by Biogaran itself. Thus the *Biogaran* judgment (which is under appeal to the Court of Justice) appears to concern a situation where the subsidiary participates directly in the unlawful conduct. That conclusion is supported by the General Court's observation that it did not matter whether Biogaran was aware of its parent's conduct since it had not been held liable for an infringement by Servier but one it committed in its own right.[13] Nonetheless, the General Court went on to state that the decisive influence exercised by a parent over its subsidiary supports the presumption that the subsidiary acts in the name of and on behalf of its parent, and therefore the undertaking as a whole.[14] The General Court went on to say that, as a result, it was not necessary to show that the subsidiary

[6] Opinion at [37]–[38].
[7] Opinion at [43].
[8] [93] of the Opinion of AG Kokott in *Akzo Nobel v Commission* (C-97/08) EU:C:2009:262.
[9] Opinion at [44]–[45].
[10] Judgment at [41].
[11] Opinion at [59].
[12] *Biogaran v European Commission* (T-667/14) EU:T:2018:910.
[13] *Biogaran* EU:T:2018:910 at [222].
[14] *Biogaran* EU:T:2018:910 at [223].

was aware of the parent's conduct. The General Court drew support from previous case law of the Court of Justice to conclude that "the condition for the attribution of various anticompetitive acts constituting the cartel as a whole to all the parts of the undertaking is satisfied where each part of that undertaking has contributed to its implementation, even in a subsidiary, accessory or passive role".[15] However, that conclusion might be doubted since the case law relied upon by the General Court concerned the situation where multiple separate undertakings are held liable for common conduct and it seems clear that awareness of the other participants' conduct is an essential component of the test for finding liability in those situations. In any event, following *Sumal*, it would appear that liability may be attributed to a subsidiary company in circumstances that do not require knowledge of the infringement on the part of the subsidiary.

As to whether a specific subsidiary could be held liable for an infringement committed by its parent, the Judgment acknowledged that not every subsidiary of a parent company infringer could be considered part of the infringing undertaking,[16] and expressly recognised that a parent company could be part of several undertakings engaged in separate economic activities, such that liability could not flow to a subsidiary engaged in an activity unrelated to the subject matter of the infringement.[17] In that regard, the Court agreed with the conclusions of the Advocate General.

However, the Court did not appear to go quite as far as the Advocate General in one important respect. As noted above, the Advocate General considered that the subsidiary would need to both be engaged in the economic activity concerned by the anti-competitive conduct at issue, and have made possible, by its conduct, the manifestation of the effects of the infringement. The Kudgment though expressed the requirement as being "a specific link between the economic activity of that subsidiary and the subject matter of the infringement",[18] which on its face appears to be a less stringent test than proposed by the Advocate General. That is confirmed by the Court's observation that, in the circumstances of the claim by Sumal (where the defendant is a wholly-owned subsidiary of the parent infringer), it would in principle be sufficient for Sumal to show that the infringement concerned the same goods as those marketed by the defendant. In the Court's analysis, the combination of economic, organisational and legal links (which would surely be assumed in the case of 100% shareholding) and the subsidiary marketing the product that is the subject matter of the infringement would establish that the subsidiary is part of the same undertaking as the parent infringer, and therefore in principle liable for damages arising from the infringement.

What is apparent from the Court's answer to the question from the Spanish referring court is that the issue of the subsidiary's economic activity is integral to the question of whether it forms part of the infringing undertaking, but there is no additional requirement for establishing liability in principle for the infringement. That contrasts with the Advocate General's apparent view that the subsidiary should have, by its own conduct, made a material contribution to the realisation of the infringement and the manifestation of its effects.

The practical significance of "subsidiary liability" lies of course in the ability of potential claimants to bring private actions against local subsidiaries of large multi-national businesses that have infringed competition law, notably where the parent but not the subsidiary has been found by a public authority to have infringed competition law. Although such claims are governed by national law, the court had no difficulty in concluding that same principles governing attribution of liability in the context of enforcement of EU competition law by public authorities applied to the attribution of liability in a private law context. That conclusion follows from the judgment in *Skanska*,[19] where the Court of Justice emphasised that arts 101 and 102 TFEU were addressed to undertakings,[20] and that accordingly it was the undertaking as a whole that was answerable for the damage caused by the infringement,[21] and liable to compensate claimants.[22] *Skanska* arose from a claim for damages brought against the successors to the insolvent addressees of a decision of the Finnish Competition Authority but, as others have argued,[23] its reasoning was expressed more broadly to the effect that, as the Judgment has now confirmed, liability can in principle flow to all constituent parts of the infringing undertaking.

The question of whether two or more legal entities in fact form part of the same undertaking is not always straightforward, however, and, before *Sumal*, little guidance was available outside the context of attribution of liability to parent and successor companies. The difficulties are perhaps well illustrated by the decisions of the English courts discussed below. In these cases, the issue of whether a UK-based subsidiary could be held liable for an infringement committed by its overseas parent was central to the question of whether the English courts could entertain jurisdiction over a claim. This was because, under the jurisdictional framework of the Brussels Regulations, claims against the overseas parties could then be tried together with the claim against the

[15] *Biogaran* EU:T:2018:910 at [225].
[16] Judgment at [46].
[17] Judgment at [47].
[18] Judgment at [51].
[19] *Vantaan kaupunki v Skanska Industrial Solutions Oy* (C-724/17) EU:C:2019:204.
[20] *Skanska Industrial Solutions* EU:C:2019:204 at [29]–[30].
[21] *Skanska Industrial Solutions* EU:C:2019:204 at [31].
[22] *Skanska Industrial Solutions* EU:C:2019:204 at [32].
[23] See for example A. Robertson, "Skanska Industrial Solutions: what does the Court of Justice's landmark judgment mean for cartel damages litigation?" (2019) 40(8) E.C.L.R. 347–353.

local entity. By contrast, defendants would have been able to effectively defeat the entire claim if they could persuade the court that there was no basis for the local entity to be held liable, as this would then remove the claim against the overseas entities from the jurisdiction of the English courts.

These cases gave rise to an argument on behalf of claimants, which has not to date been finally determined at trial, similar to that considered by the court in *Sumal*, namely whether a subsidiary that has "implemented" anti-competitive conduct without knowledge of the infringement committed by its parent can be held liable for the same—the so-called "*Provimi* point".

The *Provimi* point takes its name from *Roche Products Ltd v Provimi Ltd*,[24] a claim arising from the European Commission Decision on the *Vitamins* cartel. It was there argued that liability could be imputed to a subsidiary that implemented an anti-competitive agreement entered into by its parent with other undertakings, without it needing to be shown that the subsidiary had any "concurrence of wills" with the other cartelists, this by virtue of the fact that it formed part of the same undertaking as its parent. The claimants pleaded that the UK subsidiaries of Roche and Aventis had breached EU competition law by virtue of their "implementing" the cartel infringement by selling the cartelised products. It was not pleaded that the local subsidiaries had any knowledge of the cartel arrangements. The defendants sought to strike out the claim. Aikens J found it to be arguable that, where a local subsidiary formed part of the same undertaking as the addressee of the Decision, and implemented the infringement, that local subsidiary infringed EU competition law. It was therefore not necessary to plead any knowledge of the infringement by the subsidiary. Aikens J did not need to reach any firmer conclusion since he was only concerned with whether the claim was liable to be struck out.

Whilst Aikens J's conclusion now appears well aligned with that of the court in *Sumal*, it had been doubted in several later English cases. In *Cooper Tire v Shell Chemicals UK*[25] the High Court (Teare J) refused to strike out a similar claim to that in *Provimi*; notably he was unpersuaded by the argument that imputation of liability on the basis argued for in *Provimi* would lead to a supposedly extreme result, namely that a small sale in one country would allow the local subsidiary to be sued for the entire damage caused by the cartel as a whole, on the basis that the local entity was jointly and severally liable with all the other cartelists. On appeal,[26] the Court of Appeal upheld the decision not to strike out but on the basis that the claimants had pleaded an alternative case that the local subsidiary had knowledge of the cartel and implemented it (so-called "knowing implementation"). Accordingly it was not necessary to consider the *Provimi* point, however Longmore LJ expressed the view that whilst he agreed that the *Provimi* point was arguable, it was just as arguable the other way. He highlighted that liability was attributed to parents on the basis of decisive influence and the Commission's practice had been (and indeed remains) to impute additional liability only to parent companies. He also posed the question of whether an entity that did not deal in the cartelised product could be held liable (a point which did not arise on the pleadings). Longmore LJ's conclusion was that, had the court been required to decide the *Provimi* point, it would have made a reference to the Court of Justice on the issue.

Yet further consideration was given to the *Provimi* point, again obiter, in *KME Yorkshire v Toshiba Carrier*.[27] The primary issue for the court was the argument that "knowing implementation" was not a valid basis for establishing liability. The court concluded that a plea that a subsidiary knowingly implemented a cartel infringement did amount to a valid allegation of a breach of EU competition law, albeit on a stand-alone basis.[28] However, Etherton LJ made various significant observations on the *Provimi* point. In his view, it was settled that liability for infringements of EU competition law could only be imputed to another entity where it exercised decisive influence over the infringer. His lordship cited in particular the case of *Aristrain*,[29] in which the Court of Justice had found that liability for an infringement could not be imputed to another entity that was said to form part of the same undertaking by virtue of having a common parent company. A similar analysis was followed by the Competition Appeal Tribunal in *Sainsbury's v MasterCard*,[30] which found further support for the view that decisive influence was the crucial factor for attributing liability in the General Court's judgment in *Jungbunzlauer*[31] and in the Opinion of Advocate General Mengozzi in *Commission v Siemens*.[32] It should be noted though that in *Media-Saturn Holding GmbH v Toshiba Information Systems (UK) Ltd*,[33] Barling J, who chaired the Tribunal in *Sainsbury's v MasterCard*, sought to distinguish its analysis when considering the application of the principles to a claim for damages arising from a cartel.

24 *Provimi Ltd v Aventis Animal Nutrition SA* [2003] EWHC 961 (Comm).
25 *Cooper Tire & Rubber Co Europe Ltd v Shell Chemicals UK Ltd* [2009] EWHC 2609 (Comm).
26 *Cooper Tire & Rubber Co Europe Ltd v Shell Chemicals UK Ltd* [2010] EWCA Civ 864.
27 *Toshiba Carrier UK Ltd v KME Yorkshire Ltd* [2012] EWCA Civ 1190.
28 Analysis of the Court's conclusions on this point is beyond the scope of this article, but the Court's reasoning was based on the notion that "knowing implementation" amounted to a concerted practice with the main cartel.
29 *Siderurgica Aristrain Madrid SL v Commission of the European Communities* (C-196/99 P) EU:C:2003:529.
30 *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2016] CAT 11. The point arose in the context of MasterCard seeking to deploy an illegality defence, on the grounds that the claimant formed part of the same undertaking as Sainsbury's bank, which was a party to the unlawful agreements that gave rise to the claim.
31 *Jungbunzlauer AG v Commission of the European Communities* (T-43/02) EU:T:2006:270, where liability was attributed to a "sister" company on the basis that it exercised decisive influence over the infringer.
32 Opinion of AG Mengozzi in *Siemens AG v European Commission* (C-231/11 P) EU:C:2013:578, in particular at [80]–[81].
33 *Media-Saturn Holding GmbH v Toshiba Information Systems UK Ltd* [2019] EWHC 1095 (Ch).

Thus an issue that has troubled the English Courts for more than 10 years now appears to have been resolved by the Court of Justice. The court's ruling in *Sumal* should mean claimants can sue a local subsidiary of the cartelists, at least where the local subsidiary supplied them the cartelised product, without needing to prove the local entity's awareness of the cartel. Whilst the English courts have developed a theory that allowed local subsidiaries to be sued in order to anchor a claim against multiple infringing defendants, that required alleging that the local entity had knowledge of the cartel. That approach was not available in all Member States.

One significance of being able to sue a subsidiary company on the basis that is part of the same undertaking as the parent infringer is that, at least under English law, the undertaking (and therefore, one must assume, the subsidiary) is considered jointly and severally liable for the entire infringement (which in the case of a cartel may have been committed by multiple corporate groups). Where the issue of subsidiary liability has arisen in the English courts, this has been in the context of applications to strike out a claim against a local "anchor defendant" in a claim brought against multiple corporate groups and their infringing parent companies based outside the jurisdiction. The claimants in those cases needed only to show that it was arguable that the anchor defendant could be held liable. Once the court had accepted jurisdiction over the claim, the issue of the local subsidiaries' liability effectively ceased to be live because the case would then also proceed against the actual addressees of the Decision. An exception to this arose in the *Media-Saturn* case,[34] where none of the defendants were addressees of the relevant European Commission Decision; had the claim proceeded to trial, the claimants would have had to show that the defendants had knowledge of the cartel, and had implemented it.

Whilst, following *Sumal* (and assuming the reasoning is adopted by English Courts), the knowledge requirement would be dispensed with, an issue perhaps remains as to what amounts to sufficient implementation. Although it seems clear that selling the cartelised product would be a firm indicator that the local subsidiary formed part of the infringing undertaking, the English Courts have considered situations where the local activities fell short of such an obvious link to the subject matter of the infringement. In *Cooper Tire*, it appeared to be common ground that a subsidiary selling shoe polish, rather than the cartelised rubber products, would not form part of the same undertaking as the cartelist parent (regardless of its being wholly owned by it) for the purpose of the analysis of liability in that particular case. Teare J found support for that analysis in statements in EU Court judgments to the effect that the term "undertaking" referred to an economic unit for the purpose of the particular economic activity under consideration (which is consistent with the ruling in *Sumal*). Later cases, dealing with knowing implementation rather than the *Provimi* basis for liability, have considered the extent to which the subsidiaries activities need be related to the cartel: in *Iiyama (LCD)*[35] Morgan J found that selling computer monitors incorporating cartelised LCD panels arguably amounted to implementation of the cartel; in *Media-Saturn*,[36] Barling J appeared to consider that invoicing and marketing services were sufficient to meet the arguability threshold for an allegation of implementation; in *Vattenfall*,[37] Anthony Elleray QC declined to strike out a claim against NKT's subsidiary despite the evidence showing only that it had provided some administrative support to other group companies that did sell cartelised cables, expressly rejecting that this was equivalent to the sale of "boot polish" because it had nothing to do with implementing the cartel.[38]

The conclusion that a local subsidiary selling the cartelised product implements the cartel is firmly in line with the judgment in *Sumal*; however, as recent English cases such as *Media-Saturn* and *Vattenfall* have trailed, there is still some scope for argument over what amounts to a sufficiently "specific link" between the activities of a subsidiary and the subject matter of an infringement. Nonetheless, it now seems clear that direct knowledge of the cartel will no longer be a relevant factor (at least in EU Member States) to establishing the liability of a subsidiary, which may pave the way for easier local enforcement by claimants.

[34] [2019] EWHC 1095 (Ch).
[35] *Iiyama (UK) Ltd v Samsung Electronics Co Ltd* [2016] EWHC 1980 (Ch).
[36] See fn.24 above at [196].
[37] *Vattenfall AB v Prysmian SpA* [2018] EWHC 1694 (Ch).
[38] *Vattenfall AB v Prysmian SpA* at [76]–[82].