Looking but not Seeing the Economic Unit in Cartel Damage Claims – Opinion of Advocate General in Case C-425/22, MOL Magyar Olaj- és Gázipari Nyrt. v Mercedes-Benz Group AG

By Professor András Osztovits*

I. Introduction

The heart of European economic integration is the Single Market, which can only function properly and provide economic growth and thus social welfare if effective competition rules ensure a level playing field for market players. The real breakthrough in the development of EU competition policy in this area came with Regulation 1/2003/EC, and then with Directive 2014/104/EU which complemented the public law rules with private law instruments and made the possibility to bring actions for damages for infringement of competition law easier.

It is not an exaggeration to say that the CJEU has consistently sought in its case-law to make this private enforcement as effective as possible, overcoming the procedural and substantive problems that hinder it. It was the CJEU which, in the course of its case law, developed the concept of the economic unit, allowing victims to bring an action against the whole of the undertaking affected by the cartel infringement or against certain of its subsidiaries or to seek their joint liability.

The concept of an economic unit is generally understood to mean that a parent company and its subsidiary form an economic unit where the latter is essentially under the dominant influence of the former. The CJEU has reached the conclusion

in its case law that an infringement of competition law entails the joint and several liability of the economic unit as a whole, which means that one member can be held liable for the acts of another member.

II. The question referred by the Hungarian Supreme Court

However, there is still no clear guidance from the CJEU as to whether the principle of economic unit can be interpreted and applied in the reverse case, i.e. whether a parent company can rely on this concept in order to establish the jurisdiction of the courts where it has its registered seat to hear and determine its claim for damages for the harm suffered by its subsidiaries. This was the question raised by the Hungarian Supreme Court (Kúria) in a preliminary ruling procedure, in which this issue was raised as a question of jurisdiction. More precisely Article 7 (2) of the Brussels Ia Regulation had to be interpreted, according to which a person domiciled in a Member State may be sued in another Member State, 'in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur'.

The facts of the case were well suitable for framing and answering this question. The applicant is a company established in Hungary. It is either the majority shareholder or holds another form of exclusive controlling power over a number of companies established in other EU Member States. During the infringement period identified by the Commission in its decision of 19 July 2016, those subsidiaries purchased indirectly, either as owners or under a financial leasing arrangement, 71 trucks from the defendant in several Member States.

The applicant requested, before the Hungarian first-instance court, that the defendant be ordered to pay EUR 530 851 with interest and costs, arguing that this was the amount that its subsidiaries had overpaid as a consequence of the anticompetitive conduct established in the Commission Decision. Relying on the concept of an economic unit, it asserted the subsidiaries' claims for damages against the defendant. For that purpose, it sought to establish the jurisdiction of the Hungarian courts based on Article 7(2) of Regulation No 1215/2012, claiming that its registered office, as the centre of the group's economic and financial interests, was the place where the harmful event, within the meaning of that provision, had ultimately occurred. The defendant objected on the ground that the

Hungarian courts lacked jurisdiction. The courts of first and second instance found that they lacked jurisdiction, but the Curia, which had been asked to review the case, had doubts about the interpretation of Article 7(2) of the Regulation and referred the case to the CJEU.

III. The Opinion of Advocate General

In his Opinion delivered on 8 February 2024, Advocate General Nicholas Emiliou concluded that the term 'the place where the harmful event occurred', within the meaning of Article 7(2) of Regulation No 1215/2012, does not cover the registered office of the parent company that brings an action for damages for the harm caused solely to that parent company's subsidiaries by the anticompetitive conduct of a third party.

In his analysis, the Advocate General first examined the jurisdictional regime of the Brussels Ia Regulation, then the connecting factors in the context of actions for damages for infringements of Article 101 TFEU, and finally the question of whether the place of the parent company's seat can be the place where the damage occurred in the case of damage suffered by a subsidiary. He recalled that, according to the relevant case-law of the CJEU, rules of jurisdiction other than the general rule must be interpreted restrictively, including Article 7. He pointed out that 'the place where the harmful event occurred' within the meaning of that provision does not cover the place where the assets of an *indirect victim* are affected. In the Dumez case, two French companies, having their registered offices in Paris (France), set up subsidiaries in Germany in order to pursue a property development project. However, German banks withdrew their financing, which lead to those subsidiaries becoming insolvent. The French parent companies sought to sue the German banks in Paris, arguing that this was the place where they experienced the resulting financial loss. According to the Advocate General, the applicant in the present action is also acting as an indirect victim, since it is seeking compensation for damage which first affected another legal person.

Recalling the connecting factors in actions for damages for infringement of Article 101 TFEU, the Advocate General pointed out that there were inconsistencies in the case law of the CJEU, which needed to be clarified in a forthcoming judgment.

Both types of specific connecting factors (place of purchase and the victim's registered seat) could justify the application of the rule of jurisdiction under Article 7(2) of the Regulation. The Advocate General referred to the Volvo judgment, where the CJEU qualified 'the place where the damage occurred' is the place, within the affected market, where the goods subject to the cartel were purchased. The Court has simultaneously reaffirmed, in the same judgment, the ongoing relevance of the alleged victim's registered office, in cases where multiple purchases were made in different places. According to the Advocate General, the applicant seeks to extend the application of that connecting factor to establish jurisdiction in relation to its claim in which it seeks compensation for harm suffered solely by other members of its economic unit.

The Advocate General referred to the need for predictability in the determination of the forum in cartel proceedings, although he acknowledged that when it comes to determining the specific place 'where the harm occurred', the pursuit of the predictability of the forum becomes to some extent illusory in the context of a pan-European cartel.

In examining the Brussels Ia Regulation, the Advocate General recalled that it only provides additional protection for the interests of the weaker party in consumer, insurance and individual contracts of employment, but that cartel victims are not specifically mentioned in the Regulation, and therefore, in its interpretation, the interests of the claimants and defendants must be considered equivalent. Even so, the parent company has a wide range of options for claiming, the victim can initiate the action not only against the parent company that is the addressee of the respective Commission decision establishing an infringement but also against a subsidiary within that parent company's economic unit. That creates the possibility of an additional forum and may therefore further facilitate enforcement. The victim also has the option of bringing proceedings before the court of the defendant's domicile under the general rule of jurisdiction, which, while suffering the disadvantages of travel, allows him to claim the full damages in one proceeding. In these circumstences, the Advocate General failed to see in what way the current jurisdictional rules fundamentally prevent the alleged victims of anticompetitive conduct from asserting their rights.

IV. In the concept of economic unit we (don't) trust?

Contrary to the Advocate General's opinion, several difficulties can be seen which may prevent the victim parent companies from enforcing their rights if they cannot rely on Article 7(2) of the Brussels Ia Regulation. The additional costs arising from geographical distances and different national procedural systems may in themselves constitute a non-negligible handicap to the enforcement of rights, although this is true for both parties to the litigation. However, the aim must be to minimise the procedural and substantive obstacles to these types of litigation, whose economic and regulatory background makes them inherently more difficult and thus longer in time. It is also true that the real issue at stake in this case is the substantive law underlying the jurisdictional element: whether the parent company can claim in its own name for the damage caused to its subsidiaries on the basis of the principle of economic unit. If so, then Article 7(2) of the Brussels Ia Regulation applies and it can bring these claims in the court of its own registered office. Needless to say, having a single action for damages in several Member States is much better and more efficient from a procedural point of view, and is therefore an appropriate outcome from the point of view of EU competition policy and a more desirable outcome for the functioning of the Single Market. The opportunity is there for the CJEU to move forward and further improve the effectiveness of competition law, even if this means softening somewhat the relevant jurisprudence of the Brussels Ia Regulation, which has interpreted the special jurisdictional grounds more restrictive than the general jurisdiction rules. The EU legislator should also consider introducing a special rule of jurisdiction for cartel damages in the next revision of the Brussels Ia Regulation at the latest.

The fullt text of the opinion is available here (original language: English)

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