Opinion of Advocate General Szpunar of 11 January 2024 on the Scope of the Service Regulation in respect to service of process on a domestic subsidiary of a foreign defendant in cartel damages proceedings, C-632/22 – AB Volvo

This case, C-632/22 – *AB Volvo ./. Transsaqui SL*, arises from a reference for a preliminary ruling of the Supreme Court of Spain (Tribunal Supremo). The core question is whether a claimant may serve process on a domestic subsidiary of a defendant in another Member State. In principle, the answer is simply no (absent special arrangements), because the subsidiary is a self-standing legal entity. If it is the foreign mother company that is the defendant, process must be served on her.

The reason to put this into question was the ECJ's judgment of 6 October 2021, C-882/19 – *Sumal.* There, the Court held that private enforcement of cartel damages claims could be directed both at the parent company and its subsidiaries. To put it differently: The question was whether the *effet utile* of private enforcement of cartel damages would affect and alter the EU's procedural law in order to facilitate service of process for the claimant beyond what is offered to the claimant under the EU's Service Regulation. Therefore, the case must be seen in the context of a tension between strong policies of substantive law and the autonomous rationales of procedural law, not only in areas of the autonomy of the Member States' procedural law but also in areas of the EU's own procedural law. More often than not, this tension has been resolved in favour of the substantive policies. Not so here, according to the Advocate General's Opinion, and this is to be welcomed.

The facts were (summarised) the following: During 2008 the claimant (Transsaqui

SL, Spain) purchased two Volvo trucks. In its decision of 19 July 2016, the EU Commission found that a number of truck manufacturers had infringed Art. 101 TFEU and Art. 53 EEA by taking part in a cartel. Volvo was found to be one of the cartelists at the time. In July 2018, the claimant brought an action against Volvo at Valencia, Spain, claiming damages of approx. EUR 25,000.- Despite Volvo having its registered office in Gothenburg, Sweden, the claimant nevertheless indicated as Volvo's address its subsidiary, Volvo Group España SAU in Spain (Madrid). The subsidiary refused acceptance of the documents sent by postal mail. In the following hearing before the court at Valencia (*Juzgado de lo Mercantil nº 1*), the claimant submitted that the defendant holds 100% of the share capital of its Spanish subsidiary and that mother and subsidiary should thus be treated as a single undertaking, according to the principles of competition law as established by the ECJ in *Sumal*. The court at Valencia indeed ordered service on the subsidiary on these grounds, but all attempts failed, as the subsidiary refused accepting the documents. On 26 February 2020, the court issued a default judgment ordering Volvo to pay the claimed (approx.) EUR 25,000.- plus interest and costs. The cost order was likewise served on the subsidiary, whereupon Volvo filed an application for revision of the judgment before the Tribunal Supremo (ATS nº13837/2022, de 7 octubre de 2022). This is the proceeding where the reference arose from. The Tribunal Supremo framed the question as follows: (1) Would Art. 47 of the EU Charter of Fundamental Rights, in conjunction with Art. 101 TFEU, allow at all such serving of process on the domestic subsidiaries in cartel damages cases? (2) If so, would Art. 53 of the EU Charter allow higher standards under the domestic law of the Member State as assessed by the Spanish Constitutional Court[1] for service of process?

Advocate General Szpunar rightly referred to the principle under the EU Service Regulation that a defendant domiciled in another Member State must imperatively be served in that Member State (ECJ, judgment of 19 December 2012, C-325/11 – *Alder*, para. 25). National law cannot deviate from this principle by offering options for substituted service. Further, according to the Opinion, Article 101 TFEU as much as Article 47 of the Charter do not call into question this principle. Thus, primary EU law (in this constellation) does not set aside the EU's secondary law on service. This is all the more true as the judgment in *Sumal* relates to substantive (competition) law, whereas the Service Regulation forms part of the EU's legislation on judicial cooperation in civil matters, i.e. is procedural law. Very rightly, the Advocate General underlined that service of

process is a “sensitive issue” and that the defendant’s right to be heard and to defend must be carefully protected, and it is carefully protected, as Articles 45(1)b and 46 of the Brussels Ibis Regulation show. Indeed, “attenuating the provisions of [the Service Regulation] by allowing for the service of a document on another (legal) person (*in casu* a subsidiary) could ultimately amount to a lack of mutual trust in judicial cooperation. Mutual trust implies and is based on the assumption that procedural requirements – especially those stemming directly from EU law (*in casu* [the Service Regulation] – have been complied with and fulfilled when proceedings have been initiated” (para. 53).

There is nothing to add. It would be a strange result if the EU’s own law on service of process turned out to be “ineffective” under Article 101 TFEU for pursuing cross-border cartel damages claims. If that were the case, the same would probably have to be assumed for claims of consumers under EU consumer law and other areas of EU law implementing strong policies, which would push the Service Regulation into absurdity. Even if one considered to limit the impact of substantive policies on service to cartel damages proceedings (in light of the case of *Sumal)*, the extended possibilities of service would depend on rather complex considerations on substantive antitrust law, and the stage of proceedings for service are certainly not the right place to address these. Translation costs cannot be an argument. They are part of the balancing approach under the Regulation, and Article 8 (of the then applicable EU Service Regulation 1393/2007; now Article 9 of the Regulation 2020/1784) does not require translation under all circumstances but merely gives the defendant the right to reject acceptance of an untranslated document. In the case at hand, the claimant never had attempted to serve in Sweden based on documents in Spanish, nor did the claimant make any submissions as to the precise costs. Thus, the Opinion upholds and strengthens the “autonomy” of EU procedural law, and, as I said at the beginning, that must be welcomed.

On an abstract level, it is interesting to note that the concept of mutual trust, as employed by the Advocate General, does not only speak to the Member States amongst each other applying EU law on judicial cooperation but also to the EU itself vis-à-vis its Member States (as has been argued elsewhere, in other contexts, by the author of these lines), including its Court of Justice, and this Court must keep in mind predictability and reliability of agreed secondary legislation. “Adding to the provisions of [the EU Service Regulation] a combined

reading of Article 101 TFEU and Article 47 of the Charter would, in my view, not serve judicial cooperation, but constitute a small but significant step to de facto eradicating it" (para. 53 in fine). In my view as well.

[1] The Tribunal Supremo explicitly refers to STC nº 91/2022, de 11 de julio 2022 (BOE núm. 195 de 15 de agosto de 2022) – *Iveco S.p.A* where the Constitutional Court held that Iveco SpA's right to effective judicial protection had been infringed because service had not been effected at Iveco SpA's registered office in Italy, but had been attempted at the registered office of its subsidiary in Spain, Iveco España, SL.