Case C-724/17 Skanska: the journey or the destination?

Private enforcement – liability for damages – the concept of undertaking – economic succession of undertakings – coherence of enforcement – EU and national law demarcation

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Introduction*

On 14 March 2019 the Court of Justice of the EU handed down a preliminary ruling in case Case C-724/17 *Skanska*,[1] only five weeks after Advocate General Wahl issued his last opinion of his mandate.[2] This is the second preliminary ruling case dealing with the private enforcement of the EU antitrust rules after Directive 2014/104/EU was issued:[3] on 17 January 2019, Advocate General Kokkot issued her opinion in Case C-673/17 *Cogeco Communications v. Sport TV Portugal, Controlinveste-SGPS & NOS-SGPS*.[4] As encouraging as this may seem for the emergence of actions for damages in the EU, unfortunately these cases do not answer questions which directly relate to the interpretation of the Private Damages Directive's provisions. This is because the facts of these cases took place before the expiration of the Directive's implementation deadline (27 December 2016); therefore, the Directive does not apply *rationae temporis* to these cases. Nevertheless, first, one cannot help but appreciate that actions for damages based on EU antitrust infringements are being brought before the national courts, which signals that the Private Damages Directive indeed encourages victims to claim compensation. Second, despite the inapplicability of the Directive, these cases provide valuable opportunities to clarify the scope of important enforcement elements through the lens of EU law. Specifically, in *Skanska*the question of whether (economic) successors of EU antitrust infringers may be held liable to pay damages to the parties injured by the behaviour of companies which in the meantime were dissolved is discussed. This is a highly relevant question not only with regard to the victim's right to receive full compensation for the injury suffered, but also for establishing whether the concept of economic continuity as perceived in the public enforcement of Articles 101 and 102 TFEU may be transposed to private law actions for damages. Furthermore, it is equally important to understand whether identifying the persons liable to pay such compensation is a matter flowing directly from EU law,

or whether this matter continues to rest within the Member States domestic procedural autonomy.

Brief note on the setup of liability in EU antitrust enforcement

It is important to first understand how liability is interpreted in connection with EU antitrust enforcement. As far as public enforcement is concerned, Regulation 1/2003[5] does not identify which legal or natural person is held responsible for an infringement or liable to be punished by the imposition of a fine. Article 23 simply allows the Commission to impose fines on undertakings and association of undertakings. It is common knowledge by now that the concept of undertaking is broadly interpreted in the case-law of the Court as any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed.[6] This means that this concept covers an economic unit even if in law that economic unit consists of several persons, natural or legal.[7] In *AKZO Nobel,* the Court made it clear that when such an economic entity infringes the competition rules, it is for that entity, according to the principle of personal responsibility, to answer for that infringement. That conduct must nevertheless be able to be imputed unequivocally to a legal person on whom fines may be imposed. The Court decided that the unlawful conduct of a subsidiary may be attributed to the parent company because, although having separate legal personalities, the parent company and its subsidiary form a single economic unit and therefore a single undertaking for the purposes of EU competition law. In this respect, the Court essentially created a rebuttable presumption that that parent company actually exercises a decisive influence over its subsidiary.[8]

While this discussion refers strictly to parental liability for paying public law fines, in later case-law,[9] the Court pointed out that an entity that is not responsible for the infringement can nevertheless be penalised for that infringement, if the entity that has committed the infringement has ceased to exist, either in law or economically. This happens when the assets of the infringer are transferred to independent undertakings. Therefore, the restructuring (via whatever means) of the infringing companies' structure does not necessarily create a new undertaking that is free of liability for the conduct of its predecessor, where, from an economic point of view, the two entities are identical. This seems reasonable, since otherwise companies could escape penalties and this would jeopardise the objective of suppressing conduct that infringes the competition rules and preventing its reoccurrence.[10]

In such public enforcement circumstances, succession is therefore established, and liability follows those assets. To bring clarity to this discussion, Article 13(5) of the recent Directive 2019/1 empowering NCAs to become more effective antitrust enforcers,[11] codifies this case-law by stating that for the purpose of imposing fines on parent companies and legal and economic successors of undertakings, the notion of undertaking applies. All in all, in public enforcement of the EU antitrust rules, the matter seems to be (at least somewhat) clear: parental liability and liability of economic and legal successors exists and it is strongly embedded in EU law.

How about private enforcement? Does the same rationale apply when it comes to compensating for damages resulting from EU antitrust infringements? This matter has not surfaced in the Court's case-law until the *Skanska*case. The classic setup of EU antitrust private enforcement entails substantive prohibitions that are embedded in EU law and procedural frameworks for the actual enforcement that are to be designed by the Member States, in absence of EU law on the matter, virtue of their domestic procedural autonomy,[12] and under the 'control' ensured by the EU principles of effectiveness and equivalence.[13] Of course, in private enforcement one could argue that the harmonising effect of the Private Damages Directive bypasses the 'absence of EU law on the matter' discussion, if the Court were to conclude that the liability discussion is part of the procedural rules of the Member States. However, parental liability and liability of economic and legal successors are not dealt with *per se* in the Directive. It is true that Article 11(1) of the Directive provides that the Member States shall ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law. But does this mean that it is for the legal system of each Member State to determine, in accordance with the principles of equivalence and effectiveness, the entity which is to compensate for that damage? I will come back to this question in the following sections.

Facts of the case and preliminary questions asked

The *Skanska*case originated in Finland, where several undertakings engaged in a price-fixing and bid-rigging cartel between 1994 and 2002, which was liable to affect trade between the Member States. Some of these cartelists were restructured, starting with the year 2000: they were wound up following voluntary liquidation procedures, while their shares and/or commercial activities being transferred to the parties in the domestic case at hand (SIS & others). In 2004 the competent administrative court imposed fines, at the proposal of Kilpailuvirasto (the Finnish

NCA), on the (remaining) cartelists and their successors, for the latter in accordance with the economic continuity test recognised by the case-law of the Court. The city of Vantaa started actions for damages on the basis of this judgment, since it was a customer of the companies engaged in this cartel. While the District Court ordered damages to be pay by the successors of the cartelists, since otherwise it would be practically impossible or unreasonably difficult for the injured party to obtain compensation for the damage suffered, under Finnish civil liability and company law. In other words, the District Court held that, in order to ensure the effectiveness of Article 101 TFEU, the economic continuity test must be applied to the determination of liability for damage in the same way as that for the imposition of fines. The Court of Appeal disagreed and argued that the imposition of fines cannot be applied to actions for damages in the absence of detailed rules or more specific provisions. Then, the Supreme Court observed that Finnish law does not lay down rules on the attribution of liability for damage caused by an infringement of EU competition law and acknowledged only a limited possibility to use the corporate law doctrine of lifting the corporate veil. The rules on civil liability in Finnish law are based on the principle that only the legal entity that caused the damage is liable. Furthermore, the Supreme Court stated that the EU case-law does not provide an answer eitheras to whether the persons who are required to provide compensation for such damage must be determined by direct application of Article 101 TFEU, or whether the detailed rules laid down by the domestic legal order of each Member State are applicable, in accordance with the principle of effectiveness.[14]

In this light, the Supreme Court asked preliminary questions to the CJEU, which may essentially be summarized as follows: must Article 101 TFEU be interpreted as meaning that successors of cartelists may be held liable for the damage caused by that cartel? Should the concept of undertaking be the key in the determination of the persons liable? Should the concept of single economic unit and economic continuity play the same role when establishing liability in actions for damages, as they play when determining the entities liable in cases concerning fines? Or should the liable entities be determined on the basis of national provisions and the EU principle of effectiveness, and if so does this principle also require, among other aspects, an evaluation of any fraudulent activity meant to avoid liability?[15]

The Advocate General's opinion

The Advocate General starts answering the question of how and on what legal basis should the determination of the persons liable to pay damages take place, by

acknowledging that the answer may very well entail that EU law dictates how liability ought to be attributed in private law actions for antitrust damages instigated before national courts.[16] In answering this question, the broader context is first evaluated: what is private enforcement all about? Is it about compensation, deterrence, or both? While in EU competition law, actions for damages arguably fulfil both functions,[17] the Advocate General engages in a systematic and thorough analysis, which stresses that in light of the idea of full effectiveness of EU competition law, particular emphasis is placed on the deterrence function: the right to claim damages strengthens the effectiveness of EU competition law by discouraging undertakings from engaging in anti-competitiveness.[18] The consolidation of this function as an objective of actions for damages, forms the basis of the Advocate General's answer to the question: which issues regarding actions for damages are governed by EU law and which are, instead, governed by the domestic laws of the Member States? With reference to the *Kone* judgment, the Advocate General observes that the domestic rules ensuring the enforcement frameworks, while in keeping with the principles of effectiveness and equivalence, may not jeopardise the effective application of Article 101 TFEU. Importantly, in par. 38 *et. seq.* of the opinion, the Advocate General suggests that this requires something more than an assessment based on the principles of equivalence and effectiveness, namely an assessment of the compatibility of the contentious domestic rule in the light of the full effectiveness of Article 101 TFEU. This observation ensures the demarcation between EU and domestic law, demarcation which essentially is built around the concepts of application of the right to claim compensation (governed by domestic law and effectiveness and equivalence) and of constitutive conditions of that right (governed by EU law and the principle of full effectiveness of that law). While criticizing (somehow) the *Kone* judgment for not being daring enough in defining causation between infringement and damages as part of EU law, the Advocate General concludes that the focus of private damages actions on deterrence, as it stems from *Kone*, is warranted for at least two reasons: public enforcement alone cannot get the job of effective enforcement done and the types of loss that anti-competitiveness may cause often go beyond only economic loss.[19] Either way, the Advocate General concludes that the compensatory function of actions for damages remains subordinate to the deterrent function.

When considering the preliminary questions, the Advocate General returns to the 'application v. constitutive condition' demarcation mentioned above. He argues that the determination of the persons that may be held liable to pay compensation is not a question regarding any details of the concrete application of a claim for

compensation, or a rule governing the actual enforcement of the right to claim compensation. It is actually the other side of the coin of the right to claim compensation. The existence of a right to claim compensation based on Article 101 TFEU presupposes that there is a legal obligation that has been infringed, and that there is a person liable for that infringement.[20] This determination affects the very existence of a right to claim compensation, and as such, constitutes a question of fundamental importance, on par with the right to claim damages itself. Therefore, it is a constitutive condition of liability, which should be determined on the basis of EU law. Such conditions must be uniform throughout the EU, otherwise the effective enforcement of EU competition law would be at stake, since different conditions in the domestic jurisdictions may result in different treatment of economic operators, and in forum shopping. This would affect not only the very existence of a right to claim compensation, but also the deterrent function of actions for damages.[21]

When discussing whether the principle of economic continuity is to be applied in determining the persons liable to pay compensation in the context of a private action for antitrust damages, the Advocate General's arguments are equally strong, in my opinion. The principle of economic continuity developed in the context of public enforcement is an expression of the broad definition of an undertaking in EU competition law, and the various types of restructuring of legal entities cannot call into question the reach of this concept, and neither the personal responsibility for the infringement of the law.[22] Having in mind the role that actions for damages serve primarily, namely deterrence, the Advocate General argues that public and private enforcement of EU competition law together form a complete system of enforcement, albeit with two limbs, that should be regarded as a whole. This is why, if deterrence is to be ensured, there is no reason why the notion of undertaking, and the concept of economic continuity should be viewed similarly in the context of these two enforcement mechanisms.[23] Furthermore, the Advocate General believes that the application of the principle of economic continuity to a claim for damages upends the private law logic of such claims.[24] In this context, one should not forget that liability is attached to assets, rather than to a particular legal personality. From an economic perspective therefore, the same undertaking that committed the infringement is held liable for both public sanctions and private law damages. Considering that public and private enforcement are complementary and constitute composite parts of a whole, a solution whereby the interpretation of undertaking would be different depending on the mechanism employed to enforce EU competition law would simply be untenable.[25]

Having these arguments in mind, the Advocate General proposed that Article 101 TFEU must be interpreted as meaning that, in determining the person liable to pay compensation for harm caused by a breach of that provision, the principle of economic continuity is to be applied so that, in a private law action for damages before a national court, an individual may seek compensation from a company that has continued the economic activity of a cartel participant.

The Court's ruling

The Court's ruling is brief, something that was not unexpected. Par. 24-27 bring nothing new to the table. With a reference to only the *Kone* ruling (admittedly, the case-law cited therein too), the Court reiterates that: the EU antitrust provisions have direct effect; they create rights for individuals which national courts must protect; their full effectiveness would be put at risk if it were not open to any individual to claim damages for loss caused by their infringement; and, therefore any person is entitled to claim compensation for the harm suffered where there is a causal relationship between that harm and the infringement; lastly, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation, provided that the principles of equivalence and effectiveness are observed. So far, so good.

In par. 28, the Court makes a slight turn, by stating that the determination of the entity which is required to provide compensation for damage caused by an infringement of Article 101 TFEU is directly governed by EU law. It refers to the Advocate General's arguments, yet without mentioning at all that this determination is a constitutive element of liability. Instead, the core of the Court's argumentation in this judgment is built almost entirely around the notion of undertaking. In par. 29 *et. seq.* it states that: EU competition law applies to undertakings; such undertakings which infringe competition law must answer for the damages, this liability being personal in nature; undertakings are economic units, sometimes consisting of several natural or legal persons. Then, the Court explains briefly, and accurately in my opinion, that restructuring of an undertaking, either by winding up companies, or via takeovers,[26] does not contravene the principle of individual liability: restructuring does necessarily create a new undertaking free of liability for the conduct of its predecessor that infringed the competition rules, since both assets and liabilities carry through, including the liability for breaches of EU law.

The Court also sets aside the Commission's argument relating to Article 11(1) of the Private Damages Directive, which I mentioned above. Essentially, the Court states that the principle of joint and several liability does not apply to the definition of entities which are required to compensate for such damage, but to the attribution of liability between those entities. An argument strengthening this conclusion could have been provided also with reference to the *Areva & Alstrom* appeal judgment (dealing with attributability of unlawful conduct of subsidiaries to their parent companies in public enforcement):[27] the Court stated that joint and several liability cannot be used to force one company to bear the risk of the insolvency of another company, where those companies have never formed part of the same undertaking. The concept of undertaking seems to be thus a prerequisite to attribute liability. In my opinion, the concept of undertaking and the determination of who may be held liable to pay compensation, are both aspects of EU law, as the Advocate General rightfully argued. Yet, in the Court's reasoning in *Skanska*this rationale is unfortunately not present. The Court simply states that the Member States have no power to carry out the determination in question.[28] Actually, the Advocate General, in par. 65 of his opinion, inserted a hidden message to the Court, inviting it to rule clearly on this determination, by stating: "however, the fact that the Court has not had an opportunity to clarify this issue — or that the EU legislature has included a provision on joint and several liability of undertakings in [the Private Damages D]irective — says little about the normative basis on which the persons liable for damages ought to be determined, or indeed, the principles that are to be applied in determining those persons." Consequently, the determination in question is part of EU law, and not of domestic law; still, I find it regrettable that the Court was not more vocal about why this specific item belongs to EU law and not to domestic law.

The Court then moves to the discussing the arguments relating to the application of the rationale developed in the context of public enforcement fines, to actions for damages. It focuses again the discussion on the concept of undertaking, in making clear that this concept is to be perceived as applying in the same manner in both limbs of the enforcement system – public and private enforcement. The Court follows the argumentation of the Advocate General, while again, not diving too deep in the arguments. It simply reiterates what we already know, yet with minimal case-law references: the right to claim compensation for damage ensures the full effectiveness of the EU antitrust prohibitions and, in particular, their effectiveness; deterrence is the key aim of the enforcement system, in both its dimensions (public and private); and lastly, in light of this function of deterrence, the risk of escaping responsibility through restructuring should be avoided.[29] This is why, the concept of undertaking,

within the meaning of Article 101 TFEU, which constitutes an autonomous concept of EU law, cannot have a different scope with regard to the imposition of fines by the Commission under Article 23(2) of Regulation 1/2003 as compared with actions for damages for infringement of EU competition rules.[30] Indeed, unity of interpretation of the concept of undertaking is important, and reasonable, for that matter. Yet, the argumentation in par. 48 and 49 regarding the successor companies taking over all commercial activities of the cartelists, and therefore, from an economic point of view, these entities being the same (of course, depending on the national court's evaluation of all relevant evidence), does not bring about anything novel, as far as translating public enforcement rationale to private enforcement scenarios. What is more, the Court simply states in par. 50 that the successors have assumed liability for the damage caused by the cartel, as they have, as legal persons, ensured that those companies were able to continue their economic activities. The reasoning in this respect is again, to my mind, lacking.

Conclusions and discussion

Nevertheless, in my opinion, the Court reaches the correct conclusion: Article 101 TFEU must be interpreted as meaning that successors may be held liable for the damages caused by the cartelists. The cliché states: focus on the journey, not the destination. Of course, the judgment makes sense, at least from a competition law point of view. It would seem to me unreasonable to treat one and the same concept differently in the same area of the law. The destination is indeed, to my mind, something worth-while. However, the journey, or in other words, the manner in which the Court reached this conclusion, leaves a lot to be desired, especially when one compares the Court's argumentation to the Advocate General's systematic analysis in his opinion.

If we are to focus on the journey, rather than the destination, one could have welcomed some answers of use from the Court, as the Advocate General implicitly suggested the Court should provide. The Court could have explained more thoroughly why certain elements are part of EU law, or to the contrary, remain within the Member State's procedural domains. It could have created a road-map for a better understanding of this demarcation. For example, the Court could have addressed the intricacies of the effectiveness and equivalence v. full effectiveness of the EU prohibitions hierarchy suggested by the Advocate General. This is a missed opportunity in bringing clarity to the application v. constitutive condition dichotomy, when appropriating competition law concepts within EU law or domestic law.

Very much connected to this discussion of demarcating EU and domestic legal ambits when it comes to competition law concepts and frameworks, I cannot help but notice two trends which point in opposite directions. First, a Europeanisation of competition law: here I am referring to the Court's interpretation of competition law concepts as belonging to EU law. This is a trend that spans over decades. For example, it is common ground by now that the concept of undertaking is part of EU law. So is the concept of causation, which is part of the concept of the concerted practice notion.[31] And as we have just seen, so is the determination of entities liable to pay fines and to pay damages. I welcome such developments, since I am generally in favour of uniformity and certainty as far as the interpretation of the law is concerned. In this respect, I agree with the arguments relating to avoiding the risk of disadvantaging economic operators from different jurisdictions, the risk of avoiding liability, forum shopping, etc. What I do not appreciate, is that the Court continues to tread too carefully in interpreting competition law concepts one way or the other, especially when it has all the ingredients to do so. Instead, to my mind, the Court limits itself too often to interpreting what is strictly necessary in the case under consideration, as it did in *Kone*. Moving on, speaking of Europeanisation of competition law, I am also referring to harmonising domestic rules, relevant to both public and private enforcement. The recent Directives 2014/104 and 2019/1 level the enforcement playing field in the EU Member States, thus giving a European (uniform) meaning to administrative law, and (now) private law concepts and frameworks, previously resting solely within the national domains. I welcome this trend too, for the same reasons listed above. What I notice here though, is an erosion of the EU principles of effectiveness and equivalence, which become less relevant, the more EU law takes the leading role. In my opinion, there is nothing wrong with that. However, secondly, despite this European uniformization trend, one can also witness a greater reliance on domestic enforcement. In this context, the same Directives mentioned above are arguably fostering more enforcement in the national ambits. Civil law courts seem to be witnessing an increase in the number of private damages claims based on EU law, whereas NCAs, already handling the bulk of the public enforcement cases, are further empowered to become more effective enforcers. My take here is that while EU law attracts more control over the key concepts and frameworks used in competition law, the actual ground work is still done through domestic institutions. Can one maybe label this as the next level, or better yet, era of decentralisation? Time will hopefully tell, sooner rather than later.

A last remark, again connected to my previous note, relates to the overarching discussion of what competition law enforcement should be about. I welcome

Advocate General Wahl's unambiguous categorisation of private enforcement and public enforcement as two (separate, but I hope equal) limbs of the same EU antitrust enforcement system. I think viewing this matter as such does justice to the long-underestimated private enforcement system in the EU. What I struggle with though, is the Court's, and the Advocate General's strong emphasis on deterrence (only) being the *key* goal of the enforcement system as a whole. By relegating compensation as a goal of private enforcement, to a subsidiary function, two messages are conveyed: first, the public enforcement, as much boosting as it can take, will never be sufficient to deter anti-competitiveness. It will always require an additional private enforcement mechanism to better achieve its aim. Second, after decades of underdevelopment, and considerable efforts to foster private enforcement in the EU, the consumers are still perceived, first as the vigilant parties contributing with their actions for damages to deterring cartelists and monopolists from engaging in anti-competitive behaviour, and only second, as subjects hurt in their economic interest by such anti-competitiveness, in need of some sort of compensation. It is true that deterrence ensures a properly functioning market, which, at the end of the day, should deliver welfare to consumers, but is it really right to state then, that competition law enforcement is still all about the consumer?

* Many thanks to my colleagues, Marc Veenbrink and Sander van Dijk, for sparring ideas with me, which pushed me to write this blog post.

[1] ECLI:EU:C:2019:204.

[2] ECLI:EU:C:2019:100.

[3] Directive 2014/104/EU 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, OJ L349/1, 05.12.2014.

[4] ECLI:EU:C:2019:32.

[5] Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1, 04.01.2003.

[6] Case C-41/90 *Höfner & Elser v. Macrotron*, ECLI:EU:C:1991:161.

[7] Case C-516/15P *Akzo Nobel & others* v. *Commission*, EU:C:2017:314, par. 48.

[8] *Ibid,* par. 47 *et. seq.*

[9] Case C-280/06 *ETI & others*, EU:C:2007:775; case T-531/15 *Coveris v. Commission*, ECLI:EU:T:2018:885.

[10] Case T-531/15 *Coveris v. Commission*, par. 42.

[11] Directive 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L11, 14.01.2019.

[12] Essentially repeated in all relevant cases. See e.g. case C-453/99 *Courage & Crehan*, ECLI:EU:C:2001:465, par. 29; case C-295/04 to C-298/04 *Manfredi v. Lloyd Adriatico Assicurazioni SpA & others*, ECLI:EU:C:2006:461, par. 64; case C-557/12 *Kone & others v. ÖBB Infrastruktur AG*, ECLI:EU:C:2014:1317, par. 24.

[13] Case 33/76 *Rewe-Zentralfinanz eG & Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188; case 45/76 *Comet BV v. Produktschap voor Siergewassen,* ECLI:EU:C:1976:191.

[14] See so far par. 6-21 of the *Skanska* ruling.

[15] *Skanska,* par. 22-23.

[16] AG Opinion, par. 24.

[17] *Ibid,* par. 28.

[18] *Ibid,* par. 29-31.

[19] *Ibid,* par. 46-50.

[20] *Ibid,* par. 61.

[21] *Ibid,* par. 66-69.

[22] *Ibid,* par. 73-75.

[23] *Ibid,* par. 76.

[24] *Ibid,* par. 79.

[25] *Ibid,* par. 80.

[26] *Skanska,* par. 40.

[27] Joined cases C-247/11P and C-253/11P *Areva & Alstrom*, ECLI:EU:C:2014:257, par. 132 *et. seq.*

[28] *Skanska,* par. 34.

[29] *Ibid,* par. 43-46.

[30] *Ibid,* par. 47.

[31] See case C-8/08 *T-Mobile & others,* ECLI:EU:C:2009:343, par. 52.