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‘Buyer Beware’: Liability of Successor Companies in Anti-trust Damages Actions in the EU

European Court of Justice rules that successor companies may be held liable for damages caused by infringements of EU competition rules by their predecessors where the latter have ceased to exist

On 14 March 2019, the European Court of Justice (‘ECJ’) decided in Vantaan kaupunki v Skanska and Others1 that companies cannot escape liability for damages caused by an infringement of EU competition rules by making use of corporate restructurings to change their identity.

Background

The case concerned a cartel in the asphalt market in Finland which took place between 1994 and 2002. The cartel included, amongst others, Sata-Asfaltti, Interasfaltti and Asfalttineliö. All three participants were subsequently acquired and wound up due to voluntary liquidation procedures, in the course of which their businesses were transferred to Skanska Industrial Solutions (‘SIS’), NCC Industry (‘NCC’) and Asfaltmix, respectively. In 2009, the Finnish Supreme Administrative Court fined several companies, including, inter alia, SIS for the conduct of Sata-Asfaltti, NCC for the conduct of Interasfaltti and Asfaltmix for the conduct of Asfalttineliö.

Following the infringement finding, the City of Vantaa brought an action for damages against, amongst others, SIS, NCC and Asfaltmix, as it had contracted asphalt works from one of the cartel members during the cartel period. The District Court held, with basis on the economic continuity test, that the successor companies were liable for the damages caused by their predecessors. However, the Court of Appeal held that the economic continuity test, well established in relation to the imposition of fines for EU competition law infringements, cannot be applied vis-à-vis actions for damages. On appeal, the Finnish Supreme Court decided to stay the proceedings and refer the case to the ECJ for a preliminary ruling.

Key issues

The key issues in the Skanska case were (i) whether acquiring companies may be held liable for cartel damages caused by acquired companies if the latter have been dissolved and their businesses transferred to successor companies and (ii) whether this determination should be made by EU or national law.

The ECJ ruling

The ECJ did not follow the reasoning of the Finnish Court of Appeal. Rather, it took the view that Article 101 TFEU directly governs the determination of the entity that is required to provide compensation for damage caused by an infringement of the prohibition laid down in that provision. In other words, the ECJ ruled that the entities liable for cartel damages are determined by EU law and are the ‘undertakings’ which perpetrated an infringement of Article 101 TFEU.

With regard to other rules governing the exercise of the right to claim compensation for cartel damages, the ECJ reiterated that, in the absence of EU rules, it is then for the national law of each Member State to lay down specific rules, provided that the principles of equivalence and effectiveness are observed. Additionally, the ECJ emphasized that this view is in line with the Damages Directive2, as such Directive applies only to the attribution of liability between entities required to compensate for damages (‘jointly and severally liable’) and not to the definition of those entities.

The ECJ recalled its previous case law, according to which the concept of ‘undertaking’ within Article 101 TFEU comprises any entity engaged in an economic activity, irrespective of

1 ECJ, Judgment of 14 March 2019, C-724/17 (‘Skanska’).
2 EU Damages Actions Directive 2014/104/EU.
its legal status and of how it is financed. It also looked back on its judgment in *Akzo Nobel v Commission*, in which ‘undertaking’ was understood as designating an economic unit, even if such economic unit is composed of several separate legal entities. The ECJ further recalled that when an entity that infringes EU competition law is subject to legal or organizational restructurings the successor will not be free of liability for the conduct of its predecessor that infringed competition rules if both are identical from an economic perspective.

With this in mind, the ECJ reasoned that imputing liability to successor companies for EU competition law infringements committed by their predecessor companies, where the latter have ceased to exist, not only ensures the full effectiveness of Article 101 TFEU but also guarantees the ultimate enforcement objective of suppressing infringing conduct and preventing its recurrence through deterrent penalties. Therefore, the ECJ ruled that the concept of ‘undertaking’ under Article 101 TFEU should have the same scope in the context of actions for damages for infringement of EU competition rules as it has in relation to the imposition of fines under Article 23(2) of Regulation 1/2003.

**Comment**

The crux of the ECJ’s reasoning in the *Skanska* ruling lies in the concept of ‘undertaking’, considered ‘an autonomous concept of EU law’ that, according to the ECJ, should be interpreted in the same way in either public or private enforcement of EU competition rules. This statement also implies that the economic continuity test applied in the context of public enforcement will, from now on, also be applied in the area of private enforcement.

In practical terms, such spillover effect of public enforcement on private enforcement of EU competition law means that the concept of ‘undertaking’ and the economic continuity test will be applicable in actions for damages under national law for infringements of Article 101 TFEU. To illustrate, if an action for damages caused by a cartel within the meaning of Article 101 TFEU is brought before a German court, the German court must ultimately hold a successor company liable for the infringement of competition law committed by its predecessor. Likewise, following a similar logic, parent companies would also be held liable for infringements committed by their subsidiaries.

The ruling also confirmed the importance of private enforcement of competition law via actions for damages as an integral part of the enforcement system and effectiveness of EU competition law rules.

Moreover, by confirming that EU law directly governs the determination of which legal entities are liable for cartel damages, the ECJ excluded the application of non-uniform national law provisions. In the case at hand, for instance, if Finnish rules on civil liability had been applicable, only the legal entity that caused the cartel damage would be liable, and piercing the corporate veil would only be possible if there had been evidence proving that the group structure was used in an artificial manner to avoid legal liability.

All in all, the *Skanska* judgment represents an expansion of the competition law risks that acquirers are exposed to when engaging in M&A transactions and reinforces the need of conducting a thorough due diligence. It displays fundamental differences between EU law and German law on damages actions. However, the judgment will also have to be observed for actions based on a violation of §1 German Act against Restraints of Competition, as this provision is modelled after Article 101 TFEU and, therefore, the ECJ is primarily responsible for its interpretation.

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3 ECJ, Judgment of 27 April 2017, C-516/15 P.
4 It is worth noting that the deterrence purpose of damages is not acknowledged under German law.