Chapter 7

The concept of 'undertaking' as means to ascertain liability for an infringement of EU competition law

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1. Introduction

An infringement of competition law inevitably carries the risk that certain individuals may suffer damages. For instance, one could incur financial loss due to an overcharge resulting from a price-fixing cartel. Since the Opinion of Advocate General Van Gerven in the *Banks* judgement,[1] the CJEU has repeatedly been invited to rule on matters concerning the right to compensation for damages resulting from an infringement of EU competition law.[2] Nowadays, it is firmly established that there is an EU right to claim damages resulting from an infringement of competition law. Administrative law, therefore, necessarily meets private law. Consequently, questions arise as to the applicability of competition law concepts in private law. One of these questions is whether the principle of economic continuity, which entails the administrative liability of the economic successor of an infringer, applies not only in competition law, but also in private law as a means to ascertain liability in damages actions.

In the *Skanska* judgment the CJEU ruled that the determination of the entity which is required to provide compensation for damages caused by the infringement of Article 101 TFEU,[3] is directly governed by EU law.[4] Competition law addresses undertakings, i.e. economic entities, not legal persons. This means that, for instance, the afore-mentioned principle of economic continuity should apply in private law, even though the private law of a Member State might not be familiar with such a concept.[5] The judgment makes sense, as it

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[1] Case C-128/92 *H. J. Banks & Co. Ltd v British Coal Corporation*, ECLI:EU:C:1993:860.

[2] Case C-453/99 *Courage v Crehan*, ECLI:EU:C:2001:465; Joined Cases C-295 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*, ECLI:EU:C:2006:461; Case C-199/11 *Europese Gemeenschap v Otis and Others*, ECLI:EU:C:2012:684; Case C-557/12 *Kone and others v ÖBB Infrastruktur AG*, ECLI:EU:C:2014:1317.

[3] The same is true for Article 102 TFEU.

[4] Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:204.

[5] For example, the concept of 'undertaking' differs significantly from concepts known and used in the private law of the Member States, since in private law the principles of separate legal personality and limited liability are deeply rooted. See inter alia, P. Voet van Vormizeele, 'Die EG-kartellrechtliche Haftungszurechnung im Konzern im Widerstreit zu den nationalen Gesellschaftsrechtsordnungen' (2010) WuW 1008; R. van Leuken, 'Parental liability for cartel infringements committed by wholly owned subsidiaries' (2016) 24 ERPL 513; M. J. Frese, 'Civil liability for single and continuous

would seem an odd manoeuvre to treat the concept of 'undertaking' differently in public and private enforcement. After all, both enforcement systems deal with the same area of law. At the first glance, the *Skanska* judgment seems rather straightforward. However, it raises questions with regard to private damages actions. To establish civil liability the concept of 'undertaking' has to be relied on. This is, however, hard because the concept of 'undertaking' as means to ascertain liability in the administrative procedure has not yet been fully developed.[6] Most, if not all, case law on the concept of 'undertaking' focuses on parental liability and successor liability, which are concepts resulting from the fact that the undertaking is the addressee of EU competition law. The concept of 'undertaking' is, however, a much broader concept than it has showed itself in the case law up until now. There is uncertainty as to what further extent the concept of 'undertaking' could work as means to ascertain liability in the administrative procedure. With the *Skanska* judgment this uncertainty reveals itself in private law as well. This uncertainty stands in the way of the development of the system of private enforcement.

The CJEU could and should elaborate in more detail on the competition law concept of 'undertaking' as means to ascertain liability and due regard for its private law ramifications, in particular in respect of damages actions, is called for.[7] To argue this, firstly the importance of legal personality and the principle of separation between legal persons is explained. Secondly, it is discussed why the concept of legal personality does not suffice in competition law and why, thus, the concept of 'undertaking' was introduced. As mentioned earlier, the way in which this concept is used as means to establish liability is subject to criticism. Therefore, this criticism will also be discussed. Afterwards the recent *Skanska* judgment is commented upon and it is explained how this judgement raises difficulties with regard to private damages actions. There still is a great deal of uncertainty with regard to civil liability for an infringement on EU competition. Lastly, I will argue that those difficulties and uncertainty can be overcome if the CJEU were to elaborate in more detail on the doctrinal foundation of liability for an infringement of EU competition law.

2. Separation between legal persons as a key concept of private law

Legal personality is a key concept of private law.[8] Legal personality provides a

infringements' (2018) 41 World Competition 179.

6 See, with further references, A. Jones, 'The boundaries of an undertaking in EU competition law' (2012) 8 ECJ 309, 309-310.

7 Sieburgh has repeatedly dealt in great depth with the importance of a substantive exchange between EU law and private law in her work. See inter alia, C. Sieburgh, 'Principles in private law: from luxury to necessity – multi-layered legal systems and the generative force of principles' (2012) 20 ERPL 295; C. Sieburgh, 'A method to substantively guide the involvement of EU law in private law matters' (2013) 21 ERPL 1165.

8 For a comparative overview, see Voet van Vormizeele (n 5), 1014-1015.

certain entity with the opportunity to operate as a legal subject. This entity has its own rights and liabilities, which are separated from those of its shareholder(s) (*Trennungsprinzip*), just like legal or natural persons to which this entity is not linked.[9] The idea of legal personality has a long history that is deeply rooted in private law. Since the beginning of the nineteenth century the idea of separation of identity between a company and its shareholders and the resulting principle of limited liability developed.[10] Limited liability does not limit the obligation of a legal person to pay its debts. If anything, it restates the rule that – like everyone else – a legal person is fully liable to its creditors. The principle of limited liability expresses the rule that a shareholder can only be liable for to the amount of the shares he owns: nothing more, but surely nothing less. Economists generally see both benefits and disadvantages in limited liability.[11] However, it seems that the benefits, e.g. arguments regarding efficient the allocation of risks and resources, and the possibility for future investors to make a well-informed investment decision, tipped the scales in company and private law.[12]

Rather than being organised as a single corporation, nowadays enterprises are likely to be organised in a corporate group; thus, creating multiple layers of limited liability. Although some economic and legal scholars are more sceptical towards the application of the principle of limited liability with respect to the legal persons operating within a corporate group,[13] we need to realize that such an organisation is not (at least not as a general rule) a trick to evade liability.[14] Companies (and society as a whole) have legitimate interests in acknowledging separate identities. Private law recognises those interests. A legal person only is liable for its own acts. The fact that a certain legal person is part of a corporate group does not change anything. For that reason, piercing the corporate veil is an *ultimum remedium*: 'veil piercing' only is possible in exceptional circumstances.[15] As Sieburgh articulates clearly, a balance has to be struck between the interests of two (or more) legal persons (and society as a whole) in acknowledging separate identities and the interests of third parties in not being victims of, *inter alia*, a lack of transparency and the abuse of corporate

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9 K. Vandekerckhove, *Piercing the corporate veil* (Kluwer Law International 2007), 3.

10 For an historical overview I refer to Vandekerckhove 2007 (n 9), 3-9. I also refer to R.C. van Dongen, *Identificatie in het rechtspersonenrecht* (Kluwer 1995), 3, in particular footnote 7. Van Dongen argues that the term 'exclusive liability' seems more applicable, because it expresses the principle that a shareholder is not liable for the debts of his company and *vice versa*. The term suggested by Van Dongen also has a less negative connotation than the term limited liability.

11 See, with further references: Vandekerckhove (n 9), 6-7.

12 These principles are clearly present in company and private law, but do play a role in other areas of law as well.

13 See among others, H. Hansmann and R. Kraakman, 'Toward unlimited shareholder liability for corporate torts' (1991) YaleLJournal 1879.

14 See in the same sense, C. Sieburgh, 'The attribution of acts: towards a principled assessment under EU and national private law' (2016) 24 ERPL 645, 668.

15 N.I. Pauer, *The single economic entity doctrine and corporate group responsibility in European antitrust law* (Kluwer Law International 2014), para 5.01; Van Leuken (n 5), 522-523.

constructions.[16] In the Netherlands, for example, this balance can be found in the possibility to identify a parent company and its subsidiary when there is an evasion of the law or when company law is abused.[17] But this approach is treated with great caution. Identification (i.e. 'veil peircing') is regarded as a 'blunt tool', because any difference between the two legal persons is completely removed. This blunt tool does not allow the identification of two corporations in one situation, but not in another. For example, once corporations A and B have been identified, they are to be regarded as one entity: one might say they *de facto* merge into the corporation now called 'AB': employees of A and employees of B are now colleagues working for the same corporation, and if a director of A orders pencils, the supplier is able to charge B's account. This is a far-reaching result and that result is, therefore, to be avoided.

Rather than the blunt tool of identification, private law prefers to rely on the rules of tort instead. A corporation's *own* conduct might be unlawful.[18] When there has been an abuse of the difference in identity, that will qualify as an unlawful act and will in itself create the obligation to pay damages. But that obligation only arises towards the victims of this abuse. Another possible ground for liability may be, for example, the failure of a parent company to supervise its subsidiary, and, therefore, the failure in its duty of care towards parties injured by actions of the subsidiary. Again, the parent company only is liable if there was a duty of care towards a certain third party. Rehbinder expresses the difference between the liability of a legal person for its own unlawful conduct and identification vividly: "*Bildlich ausgedrückt: bei der bürgerlichrechtlichen Anspruchsgrundlage sieht der Wanderer den versperrten Weg und erreicht sein Ziel auf einem anderen Wege; beim Durchgriff durchbricht er die Barriere.*"[19] The approach preferred in private law (liability for *own* conduct), acknowledges the separation in liability: both legal persons have their own rights and duties. There might be situations in which the relationship between, for example, a parent company and its subsidiary raises a special duty for the parent company to take

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16 Sieburgh (n 14), 668.

17 See Van Leuken (n 5), 523, with reference to Vandekerckhove (n 9), 37: "*From the case law different factors may be deduced, that, mostly in combination with each other, may give rise to identification. Such factors are, among others, dominance of one corporation over another, intensive involvement in the management of a corporation, the creation of expectations vis-à-vis third parties, commingling of assets, close intermingling (consisting of, for instance, identity of shareholders and/or directors, identity of addresses, use of the same letterhead, et cetera).*"

18 See on this matter, *inter alia*, M.L. Lennarts, *Concernaansprakelijkheid* (Kluwer 1999), 242; S.M. Bartman, A.F.M. Dorresteijn and M. Olaerts, *Van het concern* (Wolters Kluwer 2016), para VIII.2; Sieburgh (n 14); Van Leuken (n 5).

19 E. Rehbinder, *Konzernaußenrecht und allgemeines Privatrecht. Einde rechtsvergleichende Untersuchung nach deutschem und amerikanischem Recht* (Verlag Gehlen 1969), 109. Also quoted in Vandekerckhove (n 9), 12. Roughly translated the quotation means the following. Figuratively speaking: when assessing a legal person's own unlawful conduct, the wanderer sees the blocked path and reaches his destination in a different way; when identifying two or more legal persons it simply breaks through the blockade.

the interests of its subsidiary's creditors into account. That special duty of the parent company still is its own. Ultimately, identification is possible where there is no reason to acknowledge separate identities because the difference between them is only abusively used to, for example, prevent anyone seeking recourse to any assets.

Summarizing, it can be said there are good reasons to acknowledge the separation between legal persons. The concepts governing liability of legal persons (even those affiliated with one another) in private law, are built on this basic principle. Starting from the separation between different legal entities, private law found a way to subtly solve issues where that starting point – taking all interests in account – leads to an unreasonable outcome. In doing so it provides both legal certainty and the necessary flexibility. This ultimately improves the predictability of legal decisions on the liability of one or more legal persons.

3. The undertaking as addressee of EU competition law

Taking legal personality as a starting point in competition law does not suffice. Competition law pre-eminently is an area where economics and law intertwine. This results in competition law having its own notions and mechanisms. Articles 101 and 102 TFEU are, therefore, addressed to undertakings, rather than to legal persons. An undertaking does not necessarily correspond with legal personality. After all *"the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of its legal status or the way in which it is financed"* (i.e. a single economic entity).[20] Competition law rules thus address different entities than rules elsewhere in the TFEU, e.g. Article 54 in combination with the Articles 49 and 56 TFEU, which are addressed to companies or firms, fitting the company law of the Member States. The question arises why competition law should be aimed at economic entities, rather than legal persons. The answer to this question is that competition law is aimed at activities that interfere with competition. Not all economic interactions between separate *legal* entities are able to exert a competitive force on a market.[21] Furthermore, it is possible for an entity to exert a competitive force on a market, without being regarded as a legal person in the company law of the Member States.

Competition law regulates activities, rather than specific entities.[22] Therefore, it is not tailored to other areas of law, like company law, where the entity rather than its activities plays a central role. Accordingly, difficulties arise. For example, when it is established that a certain activity is *economic*, it has to be determined which legal persons were carrying out that activity. After all, only entities with

[20] Case C-41/90 *Klaus Höfner & Fritz Elzer v Macrotron GmbH*, ECLI:EU:C:1991:161.

[21] See, e.g., O. Odudu and D. Bailey, 'The single economic entity doctrine in EU competition law' (2014) 51 CMLR 1721, 1725.

[22] O. Odudu, 'The meaning of undertaking within article 81 EC' (2005) 7 CYELS 211, 212.

legal personality can be held liable for an infringement of EU competition law. This follows, *inter alia*, from Article 299 TFEU: acts which impose a pecuniary obligation are only enforceable if they are addressed to legal persons.[23] It is asserted that the concept of 'undertaking' operates as means to ascertain liability.[24] For example, when a parent company and its subsidiary form part of the same undertaking, they both might be liable for an infringement committed by the subsidiary. Personal involvement of the parent company in the infringement does not have to be established.[25] After all, it is the undertaking (and therefore, all its separate parts) that is responsible. The foundation of the way the concept of 'undertaking' governs liability of legal persons is as follows: (i) it is the undertaking that infringes competition law; (ii) the undertaking is regarded as a single economic unit; (iii) it is possible for multiple legal persons to constitute such a single economic unit; (iv) since it is the undertaking, i.e. the single economic unit, which infringes competition law, all legal persons belonging to that economic unit are considered infringers; and (v) are, therefore, responsible for the infringement of EU competition law.[26]

4. Irregularities in the application of the concept of undertaking

The concept of 'undertaking' has not yet been fully developed. There are irregularities in the way the concept is applied in order to attribute liability to the legal persons belonging to the undertaking. These irregularities have led to criticism. Critics argue that the application of the concept of 'undertaking' is unconvincing and illogical (and might even be in breach of fundamental principles).[27] One of the issues frequently mentioned by critics is that the concept of 'undertaking' is applied inconsistently.

As mentioned above, the reasoning of the CJEU departs from the concept of 'undertaking'. The logical application of this concept (or, the single economic entity doctrine) leads to the conclusion that the anti-competitive conduct of one or more subsidiaries would not only be attributed to the parent company but

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[23] Case C-97/08 P *Akzo Nobel NV e.a. v Commission*, Opinion of AG Kokott, ECLI:EU:C:2009:262, para 37; Odudu and Bailey (n 21), 1742.

[24] See amongst others Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, Opinion of AG Jacobs, ECLI:EU:C:1999:28, para 206.

[25] Case C-97/08 P *Akzo Nobel NV e.a. v Commission*, ECLI:EU:C:2009:536, para. 59.

[26] See in the same sense: S. Thomas, 'Guilty of a fault that one has not committed. The limits of the group-based sanction policy carried out by the Commission and the European Courts in EU antitrust law' (2012) 3 JECL&P 11, 14.

[27] See *inter alia*, A. Scordamaglia, 'Cartel proof, imputation, and sanctioning in European competition law: reconciling effective enforcement and adequate protection of procedural guarantees', (2010) 7 CompLRev 5, 39-42; K. Hofstetter and M. Ludescher, 'Fines against parent companies in EU antitrust law: setting incentives for 'best practice compliance'' (2010) 33 World Competition 55; R. Burnley, 'Group liability for antitrust infringements: responsibility and accountability' (2010) 33 World Competition 595; Jones (n 6); Thomas (n 26); B. Leupold, 'Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability' (2013) 34 ECLR 570; Odudu and Bailey (n 21); Van Leuken (n 5).

also to any other legal person forming part of the same undertaking.[28] Since legal entities with a common owner (hereinafter: sister companies) will usually form part of the same undertaking,[29] sister companies could be fined. However, the competition authorities have confined themselves to fining only parent companies in addition to the infringing subsidiary. Attributing liability to sister companies is not common practice. It is comprehensible why this is the case. The amount of the fine is based on the undertaking's total turnover (Article 23(2) of Regulation 1/2003). There is a clear incentive for competition authorities to 'climb higher in the corporate tree', i.e. to fine parent companies. There is no such incentive when it comes to sister companies.

Since competition authorities have discretionary power to attribute liability, one could say that there is no inconsistency. However, in the few cases that are available on this matter, the CJEU has exercised restraint when it comes to 'sister liability'. It does not, in principle, allow competition authorities to hold a sister company (of an infringing legal entity) liable for the infringement of EU competition law.[30] As it seems liability is usually attributed on the basis either that a legal entity directly participated in the infringement committed by an undertaking or that it exercised decisive influence over the infringing legal person, which indicates that it (at least presumably) it indirectly participated in that infringement.[31]

This approach is hard to reconcile with the way the concept of 'undertaking' is said to serve as means to ascertain liability. This might not directly lead to problems in public enforcement. After all, the competition authorities' fining policy deals with parental liability, for example, in a consistent way: it is possible, regardless how it exactly is construed. This functional approach has proven to be fruitful. The case law of the CJEU does, however, not give usable criteria to answer 'follow-on' questions that arise in civil litigation. The *Skanska* judgment (which is dealt with in the next paragraphs) stresses the importance of clarifying to what extent the concept of 'undertaking' could be used as means to ascertain liability.

5. *Skanska*: a textbook example of the mismatch between competition and private law

Private law focuses on (legal) entities, their actions and the rights and duties that arise from those actions. In competition law however, the attribution of the

[28] Odudu and Bailey (n 21), 1746-1747; Sieburgh (n 14), 666; Van Leuken (n 5), 518; C. Kersting, 'Haftung von Schwester- und Tochtergesellschaften im europäischen Kartellrecht' (2018) 8 ZHR 182.

[29] This view is also expressed in the Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements' (2011) OJ C11/1, para 11. See on this matter, *inter alia*, Odudu and Bailey (n 21), 1731-1733, 1740; Kersting (n 28).

[30] Case C-196/99 P *Siderúrgica Aristrain Madrid SL v Commission*, ECLI:EU:C:203:529, para 99.

[31] Odudu and Bailey (n 21).

activities to legal persons is considered an exercise of a purely practical nature.[32] As mentioned earlier, competition law addresses activities, rather than clear-cut (legal) entities. These different starting points collide with each other and cause friction. The *Skanska* case is an illustrative example of the mismatch of both approaches.

The facts of the *Skanska* case were as follows. In 2009 the Finnish highest administrative court imposed fines on several undertakings that had participated in a cartel in the asphalt market. Not only the corporations that were actually involved in the cartel were fined. At the time of the infringement decision, some of the cartelists no longer existed; they were dissolved due to voluntary liquidation procedures and their economic activities were continued by their parent companies. Such dissolutions happen frequently within the framework of corporate reorganisations. It is generally accepted in EU competition law, that those economic successors might be held liable for the infringement committed by their predecessors.[33] Accordingly this happened in *Skanska*.[34] A salient detail that should be mentioned is that the voluntary dissolution procedures of the subsidiaries were started around the date that dawn raids were conducted by the Finnish competition authority.

After the administrative procedure, the City of Vantaa brought damages actions against all the legal persons which were fined. Vantaa had concluded agreements with regard to asphalt works during the period in which the cartel was active. It claimed to have suffered damages due to an overcharge for these works. Among the defendants, were the economic successors. Claimants argued that the competition law principle of economic continuity applied in private law as well. The defendants argued that they were not responsible for the damage caused by their predecessors. After all, a (legal or natural) person can, in principle, only be liable for its own actions. The legal persons involved in the cartel were dissolved. Once dissolved, the corporation was wound up and its assets were to be liquidated. National company law is likely to have rules regarding this liquidation process. There is no obligation to pay damages if liability does not arise from these rules or from the general rules of tort (as was the case in *Skanska*), the defendants argued.

The Supreme Court of Finland (the *Korkein Oikeus*) referred questions to the

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[32] Case C-231/11 P *Commission v Siemens Österreich and others*, ECLI:EU:C:2014:256, para 55.

[33] See *inter alia* and with further references, A. Jones and B. Sufrin, *EU competition law: text, cases and materials* (Oxford University Press 2016), 136.

[34] *Skanska* concerned intra-group restructuring. Pursuant to the CJEU's case law competition enforcement authorities have 'been granted more leeway' to hold an economic successor accountable in intra-group restructuring, since in such case there are – almost certainly – structural links between the two, there is economic continuity. See A. Colombani, J. Kloub and E. Sakkers, 'Cartels' in J. Faull, A. Nikpay and D. Taylor (eds.), *Faull & Nikpay: the EU law of competition* (Oxford University Press 2014), para 8.545.

CJEU. It was established that there was no abuse of the difference in identity between the cartelists and their successors. So, it was not possible to establish civil liability of those successors. The questions referred concern the earlier mentioned mismatch between the (Finnish) private law approach in establishing liability and competition law concepts: how should the persons liable to pay damages for an infringement of competition law be determined?

In earlier case law, like *Manfredi* and *Kone*,[35] a national rule (on limitation of damages actions, respectively causality) was compared with the EU principles of effectiveness and equivalence. If the CJEU had done so, it would have reached the conclusion that Finnish private law rendered it practically impossible to exercise the right to damages the City of Vantaa derived from EU law. A solution could then be found within the boundaries of private law: starting from the principle of separation of identities. Inspiration for this might be found in Dutch private law. In accordance with the principles explained in paragraph II, Dutch private law does not allow a tort victim to claim damages from anyone other than the actual tortfeasor. So, in principle it is not possible to claim damages from the legal person who bought (a part of) the assets of a dissolved tortfeasor. It is likely the tort victim would try to reach out to linked legal entities, like successor companies, if the dissolved tortfeasor provides no opportunity for redress. In exceptional circumstances it is possible to identify the successor company with the dissolved tortfeasor.[36] Yet, as mentioned earlier, it is more likely a situation like *Skanska* could be solved via general rules on tort. A shareholder might act unlawful through a decision to voluntarily dissolve its corporation. An example of how that might work, is to be found in a case before the Amsterdam Court of Appeal.[37] In this case, the assets of a corporation were transferred (through an intermediary) to another corporation (both controlled by the same natural person). No price was paid for those assets. This 'transaction' took place right before a claim of a third party was allowed. By the time that third party sought recourse, its debtor turned out to be an empty shell. The third party claimed damages from the successor corporation. The Amsterdam Court of Appeal ruled that the court of first instance properly held the successor liable, because this transaction was to be regarded as an abuse of the difference in identity.[38] In view of the lack of a price paid for the assets, the Court of Appeal ruled it was logical for the successor to furnish proof to the contrary. The successor company was not able to do so in this case. In the end this approach will find a balance between the interests of two (or more) legal persons (and society as a whole) in acknowledging separate identities and the interests of third parties in not being victims of, *inter alia*, a lack of transparency and the

[35] Joined Cases C-295 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*, ECLI:EU:C:2006:461; Case C-557/12 *Kone and others v ÖBB Infrastruktur AG*, ECLI:EU:C:2014:1317.

[36] It must be noted that it is not entirely clear what those exceptional circumstances are.

[37] Gerechtshof Amsterdam, 11 June 2013, NL:GHAMS:2013:1737.

[38] Rechtbank Amsterdam, 2 May 2012, NL:RBAMS:2012:BW7116.

abuse of corporate constructions.[39]

Advocate General Wahl, however, supported a different approach. According to him there should be a clear distinction between "*detailed rules governing the exercise of the right to claim compensation before national courts*" and "*constitutive conditions of the right to claim compensation*". The determination of the persons liable to pay compensation for harm caused by an infringement of competition law, belongs to the latter, Wahl argues.[40] Where the first category is left to be solved by national law (in accordance with the principles of effectiveness and equality), the latter is directly governed by EU law: Articles 101 and 102 TFEU. The CJEU does not explicitly elaborate on the distinction made by Wahl. Despite the fact that the CJEU's ruling is brief, it states clearly that the determination of the person liable to pay compensation for harm caused by an infringement of EU competition law, is directly governed by Articles 101 and 102 TFEU.[41] This is fundamentally different from the way the CJEU used to deal with the difficulties arising from the confrontation of national private law and EU competition law in earlier case law, like *Manfredi* and *Kone*.

The landmark ruling of the CJEU in the *Skanska* case seems logical as it would seem an odd manoeuvre to treat the concept of 'undertaking' differently in public and private enforcement. After all, both enforcement systems deal with the same area of law. By the direct application of the TFEU to determine the liable entity, the CJEU attributes the obligation to pay damages to the undertaking. Since the undertaking itself has no legal capacity, the concept of 'undertaking' determines the legal entities liable in private law. The CJEU put the parallelism between public and private enforcement first. After all, "*the concept of 'undertaking' cannot have a different scope with regard to the imposition of fines by the Commission […] as compared with actions for damages for infringement of EU competition rules.*"[42] However, as it remains unclear to what extent the concept of 'undertaking' is being applied as basis for administrative liability, difficulties now arise in civil litigation.

6. Follow-on difficulties

In *Skanska*, the parent companies which were regarded as economic successors, were fined. The CJEU made clear that those legal entities which were fined, were also liable in private law as they form part of one and the same undertaking. The concept of 'undertaking' has thus made its entry into private law. This seems like a clear rule, but it immediately raises questions in private law which did not come up in cases with regard to the assessment of administrative liability. What

[39] Sieburgh 2016 (n 14), 668.

[40] Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions and Others*, Opinion of AG Wahl, ECLI:EU:C:2019:100, para 55.

[41] Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:204, para 28.

[42] Ibid, para 47.

to do with corporate reorganisations after a fine has been imposed? To what extent does the principle of economic continuity apply then? In other words, does every (future) economic successor (and maybe even its parent company, subsidiary or siblings) have to take the possibility of civil liability into account? And what if a competition authority chooses (considering its discretionary power) not to fine all legal persons within one undertaking, but only a few?[43] Is it, under those circumstances, possible to claim damages from those legal persons belonging to the same undertaking (e.g. a subsidiary or a sibling), as those who have been fined?[44]

By linking civil liability to the competition law concept of 'undertaking' (in)consistency matters have been introduced into private damages cases as well. In private law, it is likely that these issues play a more central role. After all, the exposure to private damages claims is likely to be much bigger than the exposure to administrative fines. Unlike administrative liability, in private law there is no place for mitigating circumstances (like co-operation or negligence) or, in exceptional cases, reduction due to an undertaking's inability to pay, to 'ease the pain'.[45] Furthermore, a claimant is likely to deal with the competition law concepts in a creative way, for there is a significant chance it will not be the first in line to claim damages. Since in the context of liability the concept of 'undertaking' has not been fully developed and has been subject to profound criticism, the answers to above-mentioned 'follow-on' questions are unpredictable. The *Skanska* judgement has not solved these issues unequivocally. On the contrary, the judgment possibly even leads to more discussion. I will explain this through an example. At the end of November 2013 several traders of North Sea shrimps were fined by the European Commission for operating a cartel. One of the traders involved was Heiploeg BV (hereinafter: Heiploeg). Heiploeg was facing financial difficulties at that time and invoked its inability to pay the fine of €27 million under paragraph 35 of the 2006 Guidelines on Fines. This appeal was rejected; Heiploeg had to pay the fine imposed by the European Commission.[46] Within two months Heiploeg was declared bankrupt.[47] As it turned out, the fine was a financial setback, from which Heiploeg could not recover. Its assets were transferred to a third party as part of a so-called 'pre-pack'.[48] The third party continued the economic activities of Heiploeg. The

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[43] See, with further references, A. Colombani, J. Kloub and E. Sakkers (n 34), para 8.520.

[44] This was the question at hand in one of the follow-on cases in the Netherlands regarding the GIS-cartel: Rechtbank Oost-Nederland, 16 January 2013, *Tennet v ABB,* NL:RBONE:2013:BZ0403; Gerechtshof Arnhem-Leeuwarden, 2 September 2014, *ABB v Tennet,* NL:GHARL:2014:6766.

[45] Commission, 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition law laid down in Articles 81 and 82 of the Treaty' (2002) OJ C 210/2.

[46] See the Commission's press release (2013), available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_13_1175.

[47] W. Keuning, 'Heiploeg failliet, doorstart in de maak' (2014) FD 15.

[48] A pre-pack is a transfer of the assets prepared before the declaration of insolvency, with the consent of a prospective insolvency administrator, appointed by the court, and put into effect by that

question arises whether injured parties could claim damages from the economic successor, even though this economic successor was not an addressee of the infringement decision and fine.[49]

Since the parallelism between public and private enforcement played a central role in the *Skanska* judgment, it has been argued by some scholars that only those entities which are addressed in the infringement decision are also liable with regard to the private damages claims.[50] The answer to the question raised above, should in this view be negative. However, if this view is followed (too) strictly, one could avoid civil liability through reorganisation after a fine has been imposed. Therefore, one might take a different view. If competition law is infringed by an undertaking, anyone who suffered damages has a right to claim damages from the legal persons belonging to that undertaking. The undertaking has a dynamic nature. It may consist of multiple legal entities and it may be shaped differently from time to time. This right to claim damages requires no preceding fine (so called stand-alone damages actions are allowed). An injured party is – in those cases – allowed to claim damages not only from the legal person that was actually involved, but from any legal person the undertaking consists of. There is no good reason why claimants in stand-alone cases are free to seek recourse from any legal person within an undertaking (this includes economic successors) and claimants in follow-on cases are bound by an infringement decision. However, if this is allowed, the concept of 'undertaking' could be applied differently in private law than in administrative law which obviously would be contrary to the idea of parallelism between both areas of law. Furthermore, boldly applying the competition law concepts in all private damages cases will lead to unacceptably heavy and undesirable consequences. The application of the concept of economic continuity in a situation like *Heiploeg* would lead to liability of the successor company. It has to compensate the damages suffered by cartel victims. However, this approach disregards interests that might not be at stake in public enforcement. Inevitably the possibility of claims by third parties has a price-lowering effect. This leads to a disproportionate prejudice to other creditors in insolvency proceedings, in favour of the victims of a cartel. It may be deemed necessary to address the wish of society to maximize the bankrupt estate and therefore limit the application of the concept of economic continuity.

It seems like we have arrived at an impasse. However, the above-mentioned difficulties could be overcome by making a distinction between the application

administrator immediately after the declaration of insolvency.

[49] To the author's knowledge there had been no litigation on this matter at the time this chapter was finished.

[50] B.J. Drijber, 'Unierecht bepaalt welke vennootschappen aansprakelijk zijn voor kartelschade' (2019) Ondernemingsrecht 383; S.L. Boersen and S. de Jong, 'Skanska, de onderneming en de laedens: gamechanger of buitencategorie' (2019) Maandblad voor Vermogensrecht 279, 283-284.

of the concept of an undertaking for the purpose of establishing the infringement or to decide if intra-group arrangements fall outside the scope of EU competition law and its application as means to ascertain liability. When such a distinction is made, it is possible to elaborate on the doctrinal foundation of liability for an infringement of EU competition law in more detail. This will contribute to legal certainty and the predictability of legal decisions regarding the civil liability of one or more legal persons. In doing so, due regard for the private law ramifications of the concepts governing liability in a public enforcement context is called for. It is being said that although they are different, public and private enforcement impact upon each other[51] and, furthermore, that the interplay between EU law and the domestic laws of the Member States in regulating claims for antitrust damages based on an infringement of EU competition law is a fundamental aspect of private enforcement of EU competition law.[52] Private law concepts (as discussed in this chapter), thus, might even be a source of inspiration in further developing the way in which the concept of 'undertaking' functions as means to ascertain liability as they provide a certain amount of flexibility, necessary to meet all interests involved.

7. Conclusion

So far, the case law on the application of the concept of 'undertaking' as a means of establishing liability has not always been clear. This has often been criticised. Critics especially argue that the concept of 'undertaking' is applied inconsistently. With the *Skanska* judgment, the CJEU has introduced these (in)consistency matters in private law. It is unsure to what extent the concept of 'undertaking' is usable in a private law context. Therefore, the 'follow-on' questions that arise cannot be answered unambiguously. This stands in the way of the system of (effective) private enforcement being developed. This stresses the importance of critically evaluating, exploring and explaining principles of competition law.

Private law, and thus the enforcement of competition law, gains from well-considered, logical and consistently applied rules in competition law. Those rules should take into account their private law ramifications. The consequences for civil liability of an approach chosen in competition law must be thought through and (preferably) taken into account in the assessment of liability in the administrative law process. Therefore, more attention has to be drawn to the doctrinal foundation of competition law concepts. It is time to create a clear roadmap on how to ascertain liability when EU competition law is infringed.

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[51] A.S. Hartkamp, C.H. Sieburgh and W. Devroe (eds), *Cases, materials and text on European law and private law* (Hart Publishing 2017), 106.

[52] Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions and Others*, Opinion of AG Wahl, ECLI:EU:C:2019:100, para 22.