CPI EU News Presents:

The EU Competition Law Notion "Undertaking" That Is Used To Determine Liability For Fines Is Also To Be Used When Determining The Entity That Is Liable For Damages

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Corporate restructuring of some of the parties to a Finnish cartel raises questions with regard to liability for damages

Between 1994 and 2002 a number of Finnish companies participated in a cartel. By the time the Finnish Supreme Court decided to impose penalties on the cartelists, some of the companies involved had been dissolved in voluntary liquidation procedures. However, their respective sole shareholders acquired their subsidiaries' assets and continued their economic activity.

Under EU and Finnish competition law, penalties for anticompetitive conduct can be imposed on the legal persons continuing the economic activity of the infringer, under the principle of economic continuity.

Subsequently, a private action for damages was brought before the competent District Court against the companies that had been ordered to pay penalty payments, including the companies that continued the economic activity of the cartelists. These companies then contested the claim that they were jointly and severally liable for the cartel damage, inter alia alleging that they could not be held liable for the harm caused by legally independent companies.

In the first instance, the District Court rejected this defense. It found that the effectiveness of Article 101 TFEU requires the attribution of liability for a penalty payment on the one hand, and the attribution of liability for damages on the other, to follow the same principles. Refusing the application of the principle of economic continuity in follow-on cases for damages could render it impossible or unreasonably difficult in practice for an individual to obtain compensation for harm caused by an infringement of competition rules. That in particular applies where the infringing company has been dissolved.

The Court of Appeal decided otherwise. It found that the need to ensure the effectiveness of EU competition law could not justify interference with the fundamental principles of extra-contractual liability stemming from the domestic legal system.

The original claimant was granted leave to appeal before the Supreme Court. This Court decided to make a preliminary referral to the Court of Justice.[2]

In essence, the Supreme court wanted to find out "whether Article 101 TFEU must be interpreted as meaning that, (…) (where) all the shares of the companies which have participated in a cartel prohibited by that article were acquired by other companies, which dissolved the former companies and carried on their commercial activities, the acquiring companies may be held liable for the damage caused by that cartel."[3]

Court of Justice: the EU competition law concept "undertaking" also applied to determine liability for damages

The Court of Justice referred to its settled case-law , saying that "the full effectiveness of Article 101 TFEU and, in particular, the practical effect of the prohibition laid down in paragraph 1 of that provision would be put at risk if it were not open to any individual to

claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition."[4]

It also reiterated its previous statement "that 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 for the harm resulting from an agreement or practice prohibited under Article 101 TFEU, provided that the principles of equivalence and effectiveness are observed."[5]

However, following the opinion of the Advocate General,[6] the Court held 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."[7]

Furthermore, since it is undertakings which infringe EU competition rules and the liability for such infringements is personal in nature, it is the infringing undertakings which are liable for the damage caused by the infringement.[8]

According to the Court, this is not contrary to the provisions of Directive 2014/104/EU[9] which states in its Article 1 "that those responsible for damage caused by an infringement of EU competition law are specifically the "undertakings" which committed that infringement."[10] Moreover, that Directive does not apply *ratione temporis* to the facts of the case.

The Court furthermore recalls the well-known definition of the concept "undertaking," within the meaning of Article 101 TFEU: "any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed."[11]

It follows that the concept undertaking refers to an economic unit.[12] Referring to earlier case law with regard to public enforcement of EU competition law,[13] the Court specifies that "when an entity that has committed an infringement of the competition rules is subject to a legal or organizational change, this change does not necessarily create a new undertaking free of liability for the conduct of its predecessor that infringed the competition rules, when, from an economic point of view, the two are identical."[14]

Furthermore, the effective implementation of EU competition law may require holding the purchaser of the infringing undertaking liable for that infringement if that undertaking ceased to exist because it has been taken over by the purchaser, which takes over its assets and liabilities, including its liability for breaches of EU law.[15]

Reiterating its statement that the right to claim compensation for damage caused by an infringement of Article 101 TFEU ensures the full effectiveness of that article and, in particular, the effectiveness of the prohibition laid down in paragraph 1 thereof, the Court stresses that "right strengthens the working of the EU competition rules, since it discourages agreements or practices, frequently covert, which are liable to restrict or distort competition, thereby making a significant contribution to the maintenance of effective competition in the European Union."[16]

The Court therefore follows the Advocate General[17] in his opinion that "actions for damages over infringement of EU competition rules are an integral part of the system for enforcing those rules, which are intended to punish anticompetitive behavior on the part of undertakings and to deter them from engaging in such conduct."[18]

The Court adds that "if the undertakings responsible for damage caused by an infringement of the EU competition rules could escape penalties by simply changing their identity through restructurings, sales or other legal or organizational changes, the objective of suppressing

conduct that infringes competition rules and preventing its reoccurrence by means of deterrent penalties would be jeopardized."[19]

Therefore, "the concept of 'undertaking', (…) cannot have a different scope with regard to the imposition of fines by the Commission under Article 23(2) of Regulation No 1/2003 as compared with actions for damages for infringement of EU competition rules."[20]

Consequently, the answer to the Finnish Supreme Court's question is that "Article 101 TFEU must be interpreted as meaning that (…) (where) all the shares in the companies which participated in a cartel prohibited by that article were acquired by other companies which have dissolved the former companies and continued their commercial activities, the acquiring companies may be held liable for the damage caused by the cartel in question."[21]

The Court also refused to limit the effects of its judgment over time, stating that the interpretation given of EU law in preliminary reference decisions only clarifies and defines the meaning and scope of those rules as they must be or ought to have been understood and applied from the time of their entry into force. Only in exceptional circumstances may the Court, in application of the general principle of legal certainty, restrict the opportunity of relying on an interpretation with a view to calling into question legal relationships established in good faith. Moreover, in order to justify such an exception, in addition to the requirement of good faith, there should be a risk of serious difficulties.[22] In *Skanda*, the party invoking the time limitation failed to establish that those criteria were fulfilled.[23]

Comments

The Court of Justice's decision in *Skanska* is a landmark case in the field of private enforcement of competition law. While it was clear since Courage that any individual who suffered damage as a result of an infringement of competition rules could claim damages, the Court had not yet clearly indicated which entity was obliged to pay them.

At first glance, the answer is clear: the infringer. In fact, that is also the answer given by the Court of Justice in *Skanska*. The reason why there was so much doubt about this issue was that EU competition law imposes obligations on undertakings, understood as economic entities, which may comprise one or more physical or legal persons. By contrast, the Member States' rules on civil liability and civil procedure do not use the concept of undertaking. Liability can be incurred by physical or legal persons, and it is physical and legal persons that can be a party in civil proceedings. Moreover, it is a basic principle of the Member States' corporate law that a legal person is only liable for his own funds. Using the concept of undertaking in civil law would imply that a legal person can be liable for infringements of competition law committed by another legal person whose economic activities they have taken over, or that a parent company is liable for infringements of competition law by a subsidiary.

Therefore, the transposition of the concept of undertaking into civil law, as well as the attribution of liability for infringements committed by one legal person to another legal person forming part of the same economic entity, has been strongly opposed by numerous scholars.[24] Equally, national courts have refused to apply the competition law doctrine of parent company liability in damages cases.[25]

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[2] Paras 6-21.

[3] Para 23.

[4] Para 25. The Court refers to CJ June 5, 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, para 21 and the case-law cited.

[5] Para 27 referring to CJ June 5, 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, para 24 and the case-law cited.

[6] Opinion Advocate General Wahl dd. February 6, 2019, *Skanska Industrial Solutions and Others*, Case C-724/17, ECLI:EU:C:2019:100, 60-62.

[7] Para 28.

[8] Paras 30-32.

[9] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 L 5 December 2014, L 349/1.

[10] Para 35.

[11] Para 36 with reference to CJ December 11, 2007, *ETI and Others*, C-280/06, EU:C:2007:775, para 38 and the case-law cited.

[12] Para 37 referring to CJ April 27, 2017, *Akzo Nobel and Others/Commission*, C-516/15 P, EU:C:2017:314, para 48 and the case-law cited.

[13] CJ December 11, 2007, *ETI and Others*, C-280/06, EU:C:2007:775, para 42; CJ December 5, 2013, *SNIA/Commission*, C-448/11 P, EU:C:2013:801, para 22; CJ December 18, 2014, *Commission/Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, para 40.

[14] Para 38.

[15] CJ December 5, 2013, *SNIA v. Commission*, C-448/11 P, EU:C:2013:801, para 25.

[16] CJ June 5, 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, para 23 and the case-law cited.

[17] Opinion, para 80.

[18] Para 45.

[19] See, by analogy, CJ December 11, 2007, *ETI and Others*, EU:C:2007:775, para 41 and the case-law cited.

[20] Para 47.

[21] Para 51.

[22] CJ September 22, 2016, *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, para 60 and the case-law cited.

[23] Para 58.

[24] Bram Braat, "Kartelschade in Nederland; een eerste aanzet," *Nederlands Tijdschrift voor Europees Recht* 2013, 321; Philipp Von Hülsen & Boris Kasten, "Passivlegitimation von Konzernen im Kartell-Schadenersatzprozess? – Gedanken zur Umsetzung der Richtlinie 2014/104/EU," *NZKart* 2015, 300; Jeroen S. Kortmann, "The draft directive on antitrust damages and its likely effects on national law," in Arthur S. Hartkamp (ed.), *The Influence of EU Law on National Private Law - General Part*, Deventer, Wolters Kluwer, 2014, 681-683; Jeroen S. Kortmann, "Toerekening van externe (rechts)handelingen aan de rechtspersoon," in Gerard Van Solinge (ed.), *Relativering van Rechtspersoonlijkheid*, Deventer, Kluwer, 2012, 75; Stefan Thomas & Sarah Legner, "Die wirtschaftliche Einheit im Kartellzivilrecht," *NZKart* 2016, 155 et seq.; Philipp Voet van Vormizeele, "Die EG-kartellrechtliche Haftungszurechnung im Konzern im Widerstreit zu den nationalen Gesellschaftsrechtsordnungen," *WuW* 2010, 1016 et seq.

[25] District Court Midle-Netherlands July 20, 2017, ECLI:NL:RBMNE:2016:4284, Regional Court of Berlin August 6, 2013, ECLI:DE:LGBE:2013:060813U16O193.11, 81–82.