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Court of Justice ruling in Skanska: EU competition law concept of 'undertakings' and principle of economic continuity to the rescue in civil damages claims

Chantal Lavoie (Lavoielegal) · Friday, March 22nd, 2019

In its preliminary ruling in Skanska Industrial Solutions and Others[1], the Court of Justice has ruled on the fundamental question of who is liable to pay compensation in an action for damages for breach of Article 101 TFEU. Is the answer to be found in EU law or national law? Can the person liable to pay compensation in civil national proceedings be different from the person fined in public enforcement proceedings under EU competition law. What if the national law where the civil proceedings are taking place does not recognise the right to claim damages against entities other than the legal person having caused the harm? The ruling is an essential contribution to guaranteeing the rights of persons to claim damages against the same economic entities having infringed EU competition law rules and to preserving the full effectiveness of the private and public enforcement mechanism of EU competition law.

Facts

The case concerns a cartel put in place in Finland from 1994 to 2002 in the asphalt market. Amongst others, Asfaltti-Tekra, Sata-Asfaltti, Lemminkäinen, Interasfaltti and Asfalttineliö were found to have participated in the cartel.

The parties

Asfaltti-Tekra acquired the shares in Sata-Asfaltti in March 2000 and later changed its names to Skanska Asfaltti. During a liquidation procedure, the business of Sata-Asfaltti was transferred to Skanska-Asfaltti in December 2000. Finally, Sata-Asfaltti was wound up in January 2002. Sanska Asfaltti changed its name to Skanska Industrial Solutions (SIS) in August 2017.

In October 2000, NCC Finland acquired the shares in Läntinen, the parent of Interasfaltti. In September 2002, Interasfaltti and Läntinen merged and the latter changed its name to Interasfaltti. Then in January 2003 NCC Finland was split in three with NCC Roads acquiring all the shares in Interasfaltti. Finally in December 2003, Interasfaltti was wound up with the business of Interasfaltti transferred to NCC

Roads as of February 2003. NCC Roads changed its name to NCC Industry (NCC) in May 2016.

Asfalttineliö was acquired in June 2000 by Siilin Sora which later changed its name to Rudus Asfaltti. Asfalttineliö was wound up in January 2002 with its business transferred to Rudus Asfaltti in February 2001. Rudus Asfaltti changed its name to Asfaltmix in January 2014.

The infringement and follow-on action for damages

The Finnish Supreme Administrative Court imposed fines in 2009 on seven companies for breach of Article 101 TFEU and equivalent national provisions. In particular, fines were imposed on:

1. SIS for its own conduct and that of Sata-Asfaltti;
2. NCC for the conduct of Interasfaltti; and
3. Asfaltmix for the conduct of Asfalttineliö.

As a result of the Court's infringement finding, the City of Vantaa initiated an action for damages against, amongst others, SIS, NCC and Asfaltmix as Lemminkälinen had carried out asphalt works during the cartel period. The District Court found the successor companies to be liable for the conduct of their predecessor companies and therefore jointly and severally liable for the conduction of the cartel members. However the Court of Appeal of Finland refused to apply the economic continuity principle to an action for damages and upheld the claim only against SIS with respect to its own conduct. On appeal, the Supreme Court stayed the proceedings pending this reference to the Court of Justice for a preliminary ruling.

The key issue before the Court

The reference to the Court of Justice raises a fundamental question regarding the applicability of EU competition law concepts and principles in the area of public enforcement to private enforcement. Of particular relevance in this case is the apparent conflict with EU competition law principles which arises from Finnish rules on civil liability pursuant to which only the legal entity that caused a damage is liable; the corporate veil can only be lifted if the resulting group structure was set up to avoid legal liability.

The key issue is therefore which legal persons are liable in an action for damages and whether this determination should be made on the basis national law or EU law.

The findings of the Court

In a very succinct ruling, the Court of Justice confirmed existing caselaw to the effect that any person can initiate an action for damages before national courts for harm caused as a result of an agreement or practice in breach of article 101 TFEU provided causation between the breach and the damage can be shown. It reaffirmed the principle of direct legal effect of Article 101 TFEU in relations between individuals and that such a right to claim for compensation is essential to ensure the full effectiveness of EU competition law rules.

The issue at stake in this case was whether the entities liable for compensation should be determined on the basis of national rules or on the basis of Article 101 TFEU. The Court ruled that:

1. The entities liable for compensation in an action for damages resulting from a breach of Article 101 TFEU are to be determined in accordance with EU law.
2. EU law uses the concept of 'undertaking' under Article 101 TFEU to "designate the perpetrator of an infringement" of this provision. It is these 'undertakings' which have infringed Article 101 TFEU which "must answer for the damage caused by the infringement".
3. Relying on the Court's judgment in *Akzo Nobel*[2], the Court reaffirmed that an 'undertaking' under Article 101 TFEU refers to an economic unit, regardless whether such an economic unit comprises one or more natural or legal persons. Furthermore, in the context of a restructuring, the same principles applied in the context of public enforcement of Article 101 TFEU should also apply to actions for damages, namely that an undertaking should not be allowed to escape liability by changing its identify following a restructuring or an organisational change. This is because actions for damages form an "integral part of the system for enforcement of those rules" and pursue the same objective of punishing Article 101 breaches and of deterrence.
4. By acquiring, dissolving and assuming the commercial activities of the entities found liable for the asphalt market cartel breach, SIS, NCC and Asfaltmix have therefore also assumed their liability for damages.
5. The effect of the judgment cannot be limited in time since the applicant did not provide sufficient evidence that the entities concerned acted in good faith and that there would be a risk of serious difficulties if the judgment were not limited in time.

Commentary

The ruling is an important addition to existing rules and case-law in the area of private enforcement of EU competition law and on the intersection between private and public enforcement. In particular, the ruling builds on the *Courage* and *Manfredi* line of cases which recognised the right of individuals to claim for damages arising from harm incurred from a breach of EU competition law rules and on the *Kone**[3]* judgment which recognised that a domestic rule on causation preventing an action for damages for umbrella pricing (indirect claimants) was prohibited under Article 101 TFEU. However the Court of Justice does not consider in its ruling whether Finnish rules regarding the persons liable in a civil damages claim are in line with the principle of effectiveness and equivalence of EU law. This was not necessary because the Court took as a starting point that the attribution of liability is a question of EU law, not of national law.

There are several important findings in the Court's ruling.

1. As regards the relationship between private enforcement and public enforcement

The ruling is an important confirmation that private and public enforcement of

competition law rules go hand-in-hand and that a successful enforcement of competition law rules requires a harmonious and consistent interpretation of competition law concepts in both areas of private and public enforcement.

As explained by Advocate-General Wahl in his Opinion[4], actions for damages in the context of EU competition law play a dual role of compensation and deterrence. This dual role differs from the objective of actions for damages in several Member States in Europe which is to award compensation for harm caused (but not used as a deterrence mechanism). This is an important feature which highlights the interaction, and complementary role of private enforcement, with public enforcement for breaches of EU competition law.

2. As regards the interaction between EU law and national law in the context of actions for damages resulting from a breach of EU competition law rules

Whilst this may appear simple it is not. At a preliminary stage, EU law opens the right for claimants to lodge competition law-related damages claims as a result of the direct effect of EU competition law rules. However, EU law is silent on how actions for damages can be brought by claimants. This is a matter for national law.

That is not to say however that EU law is not relevant in private damages claims. Indeed what the ruling does is to state that certain issues relevant to actions for damages are governed by EU law. This is the case for determining the persons liable to compensate for damages caused by a breach of EU competition law rules as this is one of "the constitutive conditions of the right to claim compensation"[5]. As was the case for causation in *Kone*, the determination of the persons liable in an action for damages must also be assessed under Article 101 TFEU.

The Court's interpretation is consistent, and not in contradiction, with the Directive on actions for damages[6]. Article 11 of the Directive on action for damages sets out that Member States must ensure that undertakings having breached EU competition rules are held jointly and severally liable for the harm caused and required to compensate. The Court points out however that this is not to say that it is for Member States to define who these 'undertakings' are. This is supported by the fact that the Directive on actions for damages refers in its scope to 'undertakings' as an underlying concept from which to build and set out a commonality of rules in the area of private enforcement.

3. As regards the concept of 'undertaking' and principle of economic continuity

The ruling contains a significant statement that an "undertaking" is an "autonomous concept of EU law" and that it must be applied and interpreted in the same way for purposes of public or private enforcement of EU competition law rules.

This also means that the exercise of the right to claim damages – which is to be determined by national laws – is premised on a number of conditions arising, namely that the existence of a breach of EU competition law rules, a person liable for this breach and a causal link between the damage and the infringement. These conditions are to be determined in accordance with EU law, including – as the Court has ruled in this instance – the concept of "undertaking" as used in EU competition law.

The Court also goes further by ruling that not only should the EU concept of "undertaking" be relied upon to determine the persons liable in an action for damages under EU competition law rules but also that the principle of economic continuity applied in the area of public enforcement should also apply in the context of private enforcement. The principle of economic continuity has been developed to ensure that a company which continues its economic activities through a legal or organisational change remains liable for infringing EU competition law rules. This guarantees the deterrent effect of sanctions for breach of competition law rules in order to prevent 'undertakings' – economic entities – having committed a breach from escaping punishment by changing their legal identity. As Advocate-General Wahl put it: under EU competition law, "liability is attached to assets, rather than a particular legal personality"[7].

The ruling is therefore a significant step in guaranteeing (i) a uniform application throughout the European Union of the conditions giving rise to a right to compensation for a breach of EU competition law rules; and (ii) the full effectiveness of EU competition law rules by applying to both the ambit of private and public enforcement the same concept and interpretation as regards the persons liable for an infringement of EU competition law rules.

Conclusion

With this ruling, the Court extends the application of the concept of economic continuity in the context of public enforcement to actions for damages for breach of Article 101 TFEU. It is implicit from the ruling that the same assessment should apply to an action for damages under Article 102 TFEU. This means that the same entities having breached EU competition law rules are liable for sanctions by a competition authority and for compensation in a civil action for damages. For businesses, the case highlights the significant competition law risks involved in mergers and acquisitions and the importance of undertaking a full due diligence exercise prior to completing transactions. The expression 'buyer beware' takes on its full meaning.

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[1] Judgment of 14 March 2019, Skanska Industrial Solutions and Others, C-724/1, EU:C:2019:204.

[2] C-516/15 P, EU:C:2017:314.

[3] C-557/12, EU:C:2014:1317.

[4] Opinion of Advocate General Wahl delivered on 6 February 2019, C-724/17, EU:C:2019:100.

[5] Ibid, paragraph 41.

[6] 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 2014 L 349, p. 1).

[7] Opinion of Advocate General Wahl delivered on 6 February 2019, C-724/17, EU:C:2019:100, paragraph 80.

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