Reshaping Liability – The Concept of Undertaking Applied to Private Enforcement of EU Competition Law

It is undeniable that a ‘follow-on damages claim culture’ is on the rise in Europe. The case-law of the Court of Justice of the European Union has been acting as a catalyst to ensure that victims of cartel infringements are in a position to effectively enforce their right to damages. Although the path followed by the Court removed many obstacles for cartel victims it has also departed from traditional concepts of tort law, including liability for civil damages. By extending concepts which were traditionally confined to public enforcement to private enforcement – such as the notion of undertaking – national courts will be faced with new challenges. It is inevitable that questions which were previously of minor importance in public proceedings will carry a different weight in civil litigation. This article focuses on recent developments and explores possible consequences on the imputation of liability in private enforcement of EU competition law.

I. Introduction

Almost 20 years after its seminal judgment in the case of Courage/Crehan, the Court of Justice of the European Union (CJEU) has continuously and decisively shaped the private enforcement practice of European Competition Law. Recently, there have been a number of judgments corroborating the Court’s role as the white knight of private enforcement. Even though it is beyond any doubt that the damages directive has improved the position of victims of competition law infringements, it has left some questions untouched, such as liability in private enforcement. This question has been dealt with by the Court in its judgment of 14 March 2019 in the case of Vantaan kaupunki v Skanska Industrial Solutions Oy and others Oberösterreich (Skanska), which marks a – certainly provisional – climax in the evolution of private enforcement of EU competition Law. In its judgment, the CJEU ruled that the circle of persons liable for the harm resulting from anticompetitive behaviour is to be determined in accordance to article 101 of the Treaty on the Functioning of the European Union (TFEU). Thus, the notion of undertaking is to be applied to public as well as to private enforcement of competition law. This article aims to explore possible consequences for the imputation of liability in private enforcement. In order to do so it will first shed light on the question whether Skanska is also relevant outside cases of economic succession or limited to the facts of this case. Second, three constellations shall be explored which stand in contrast to the traditional understanding of liability and provide claimants with additional fora of litigation. These are, in order:

- the imputation of liability to the parent company,
- the imputation of liability to the ‘innocent’ subsidiary, and
- the imputation of liability to the economic successor.

II. The CJEU’s ruling in Skanska

The preliminary judgment by the CJEU dealt with an action for damages brought by the Finnish city of Vantaag against Skanska Industrial Solutions Oy, NCC Industry Oy and Asfaltmix Oy as successors of several companies participating in the Finnish asphalt cartel. In 2004, the Finnish Competition Authority imposed fines on the colluding companies, which were subsequently confirmed by the Finnish Supreme Administrative Court in 2009. Each of the companies in question had acquired shares in one of seven undertakings originally involved in the cartel through various acquisition procedures such as restructurings in the years 2000 to 2002. As a result, the economic activities of the infringers were continued by the acquiring companies, although the acquired companies ceased to exist in law either through voluntary liquidation or through merger. According to Finnish civil law, under such circumstances the acquiring companies were not to be held liable for compensation for the harm resulting from anticompetitive conduct even though compensation could not be obtained from the dissolved companies. On the basis of these facts the CJEU had to decide whether the circle of persons liable to compensate the harm resulting from anticompetitive behaviour was to be determined according to the concept of undertaking entailed in Art. 101 TFEU and thus in contrast to Finnish law.

In order to address the aforementioned situation, the Court reiterated its case-law on antitrust damages with reference to the judgment in the case of Kone, which explicitly recognises the direct effect of Art. 101 TFEU among individuals and that these provisions confer directly applicable rights such as the right to damages. The full effectivity of Art. 101 TFEU would be impeded if it were not open to any person to claim compensation for harm resulting from anticompetitive conduct where there is a causal relationship between that harm and the infringement. Consequently, the circle of persons entitled to claim compensation for harm resulting from an infringement of Art. 101 TFEU is to be directly determined by EU competition Law. In other words that circle is not to be determined by the

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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 [2014] OJ L349/1 ff.

2 Case C-882/19 Sumal v Mercedes Benz; Trucks España.
3 As to the facts see Case C-724/17 Vantaan kaupunki v Skanska Industrial Solutions EU:2019:204, para 6 ff; see also Case C-724/17 Vantaan kaupunki v Skanska Industrial Solutions EU:2019:100, Opinion of AG Wahl, paras 8 ff.
4 The fact that reference is made to the judgment in the case of Kone and not the judgments in the Cases C-453/99 Courage v Crehan EU:C:2001:465 and C-295/04 Manfredi v Lloyd Adriatico Assicurazioni EU:C:2006:461 comes as a little surprise, as the latter two have, at least until Skanska, been the ‘judicial loadstars’ for the CJEU when deciding upon matters related to damages for harm caused by anticompetitive behaviour.
5 Case C-724/17 Vantaan kaupunki v Skanska Industrial Solutions EU:2019:204, para 24; Case C- 557/12 Kone v ÖBB-Infrastruktur EU:C:2014:1317, para 20; Case C- 453/09 Courage v Crehan EU:C:2001:465, para 23; Case C- 295/04 Manfredi v Lloyd Adriatico Assicurazioni EU:C:2006:461, para 39.
6 Case C-724/17 Vantaan kaupunki v Skanska Industrial Solutions, EU:2019:204, para 24 ff; Case C- 295/04 Manfredi v Lloyd Adriatico Assicurazioni EU:C:2006:461, para 39; Case C- 199/11 Europese Gemeenschap v Otis EU:C:2012:684, para 43.
7 The same reasoning applies to the determination of the circle of persons entitled to claim compensation for infringements of art 102 TFEU, see Case C-637/17 Cogeco v Sport TV Portugal

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In the same vein, the CJEU held that liability for damages caused by anticompetitive behaviour follows directly from the wording of Art. 101 TFEU. This provision holds that the addressees of the cartel prohibition are ‘undertakings’. In consequence, the concept of undertaking defines the perpetrator responsible for an infringement of Art. 101 TFEU. One of the main intricacies in Skanska was that the infringing companies had ceased to exist. Yet, the Court found that the acquiring companies had taken over the ‘assets and liabilities, including its liability for breaches of EU law’ of the acquired companies. In conclusion, the CJEU qualified the acquiring companies as successor undertakings in accordance to Art. 101 TFEU and held them liable for the harm resulting from anticompetitive conduct.

III. Relevance of Skanska outside cases of economic continuity

Even though no doubts exist that in ‘Skanska-like’ constellations the concept of undertaking is valid in the context of private enforcement, it is presently discussed whether this concept can also be applied beyond this case. Put differently, it remains unclear whether the concept of undertaking determines liability in the whole realm of private enforcement or whether it shall only be applied in cases of economic continuity. The case-law handed down by national courts in the aftermath of Skanska shows a disparate picture.

For example: The Gerichtshof Arnhem-Leeuwarden (NL) held that Skanska is also relevant outside cases of economic continuity and imposes liability on all entities which are part of the same undertaking. In the same vein, the Court of Appeal (UK) made reference to Skanska stating that ‘[…] it would make no sense to give the concept of an “undertaking” a different meaning, depending on whether the remedies in question were fines imposed by the Commission or private actions for damages.’ In contrast, the High Court (UK) held that Skanska concerns economic continuity and not subsidiary liability: ‘It is common ground that Skanska does not address […] the question of subsidiary liability (i.e. the basis upon which two or more subsidiaries or associated companies are to be treated as a single “undertaking” along with their parent company, and as liable in law for the infringement of Art. 101 for which the “undertaking” bears responsibility) […]’ The majority of the German Courts seem to have sided with the latter opinion, inasmuch as Skanska does not give ground for the liability of a subsidiary of an infringing parent company as long as they were not involved in the infringement. However, the Landgericht Dortmund (GE) has held that a competition law infringement of one component of a group of companies creates liability for all other parts of the economic unit. Just as in Germany, the Spanish civil courts do not seem to follow a

EU:C:2019:263, paras 38 ff; Wurmnest Wolfgang, ‘Liability of “undertakings” in damages actions for breach of Articles 101, 102 TFEU: Skanska’ (2020) 57(3) Common Market Law Review 915 ff, 924.

8 In this sense the arguments of the Commission as referred to in Case C-724/17 Vantaankuuppi v Skanska Industrial Solutions EU:C:2019:204, para 33.

9 Case C-724/17 Vantaankuuppi v Skanska Industrial Solutions EU:C:2019:100, Opinion of AG Wahl, para 61.

10 Case C-724/17 Vantaankuuppi v Skanska Industrial Solutions EU:C:2019:204, para 28.

11 Case C-724/17 Vantaankuuppi v Skanska Industrial Solutions EU:C:2019:100, Opinion of AG Wahl, para 61.

12 This is also reflected in art 23 ff of Regulation 1/2003 as these provisions are directed at undertakings on which the Commission may impose fines, Chris Kerse and Nicholas Khan, EU Antitrust Procedure (6th edn, Sweet & Maxwell 2012) para 7.003.

13 Case C-724/17 Vantaankuuppi v Skanska Industrial Solutions EU:C:2019:204, para 29.

14 ibid para 40; put in the words of AG Wahl liability is to be seen as ‘attached to assets, rather than to a particular legal personality’, Case C-724/17 Vantaankuuppi v Skanska Industrial Solutions EU:C:2019:100, Opinion of AG Wahl, para 80.

15 For eg as put forward by Andreas Fuchs, § 1 in Andreas Fuchs and Andreas Weltebrecht (eds), Handbuch Private Kartellrechtsdurchsetzung (GH Beck 2019) 60 ff; in a similar vein Rüdiger Harms and Philipp Kirst, ‘Anmerkung, Anmerkung zu einer Entscheidung des EuGH, Urteil vom 14.03.2019 (C-724/17) – Zur Frage des kartellrechtlichen Unternehmensbegriffs’ [2019] EUZW 377 ff, 378; contra Wurmnest (n 7) 925 ff, 933; Miguel Sousa Ferro, ‘Antitrust private enforcement and the binding effect of public enforcement decisions’ note 58 <https://law.haifa.ac.il/images/ASCOLA/Miguel%20Sousa%20Ferro.pdf> accessed 6 November 2020; Araujo Boyd Marcos, ‘Should Children Pay for Their Parent’s Sins? The Sumal Preliminary Reference’ [2020] Journal of European Competition Law & Practice 1 ff; Catrina Viera Peres, ‘Not far from the Tree, The problem of inverted liability: imputability of unlawful conduct to the subsidiary for the parent company’s wrongdoing’ 1 <https://law.haifa.ac.il/images/ASCOLA/Catrina%20Viera%20Farpoint.pdf> accessed 6 November 2020; Lena Hornkohl, ‘The economic continuity test in private enforcement of competition law – The ECJ’s judgment in Skanska Industrial Solutions (C-724/17)’ [2020] European Competition Law Review 339 ff; Rogier Mejer and Erik-Jan Zipper, ‘Private enforcement in the Netherlands’ in Ferdinand Wollenschläger, Wolfgang Wurmnest and Thomas M J Möllers (eds), Private Enforcement of European Competition and State Aid Law, Current Challenges and the Way Forward (Kluwer Law International 2020) 143 ff, 152.

16 Gerichtshof Arnhem-Leeuwarden, 26 November 2019, Tennet v Altstom NL:GHARL:2019:10165, consid. 2.5; the Austrian Supreme Court already applied the concept of undertaking of private enforcement before the implementation of the damages directive, see Oberster Gerichtshof (AUT), 2 August 2012, 4 Ob 46/12m consid. 7.4.

17 Court of Appeal (UK), 31 October 2019, BritNed Development Limited v ABB AB and ABB Limited EWCA Civ 1480 [48].

18 High Court (UK), 2 May 2019, Media-Saturn Holding GmbH and others v Toshiba Information Systems (U.K.) Limited UKSC 1095 (Ch) [305]; yet English courts already held – before Skanska – that it is at least arguable that a parent company can be held liable for the infringement of one of its subsidiaries, see eg High Court (UK), Provimi Ltd v Aventis (2003) EWHC 961 (Comm).

19 Landgericht Mannheim (GE), 24 May 2019, 14 O 117/18, at [22]; Landgericht München I (GE), 7 June 2019, 37 O 603/19, at [26]; Landgericht Stuttgart (GE), 12 December 2019, 30 O 271/17, at [38]; see also Wurmnest (n 7) 930 f.

20 Landgericht Dortmund (GE), 8 July 2020, 8 O 75/19, at [47].
stringent line. Some courts seem to have readily accepted the liability of subsidiaries on the sole ground that they were subsidiaries of a parent company that infringed EU competition law. In contrast, other courts have decided that a subsidiary could not be held liable because of the mere fact its parent company engaged in anticompetitive behaviour.

One of the main points for restricting Skanska to cases of economic continuity seems to be that the operative part of the judgment is limited to the case of successor liability. It states that:

‘Article 101 TFEU must be interpreted as meaning that, in a case such as that in the main proceedings, in which 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.

Yet, restricting Skanska only to constellations as mentioned in the operative part seems short-sighted as it does not take into account how the CJEU actually reached its conclusion. According to the Court, liability for damages is not only to be imputed to the actual infringing legal entity, but to the infringing undertaking in the meaning of Art. 101 TFEU.

Therefore the concept of undertaking covers any entity engaged in economic activity, irrespective of its legal status and the way in which it is financed and this also applies in private enforcement.

In civil litigation for competition damages, too, the concept of undertaking designates an economic unit even if in law said economic unit consists of several persons, natural or legal. This argumentative path taken by the CJEU demonstrates that it reached its final conclusion only because the person liable for damages caused by an antitrust infringement is the undertaking. Consequently, the concept of undertaking is uniformly applied in both enforcement fields.

It is also worth noting that if the Court only wanted to secure compensation in circumstances such as in Skanska, it could have chosen to qualify the Finnish rules in place as not being in line with the principle of effectiveness, as the rules in place clearly rendered the right to compensation excessively difficult if not impossible. Yet the Court took another route and thereby struck a balance between the circle of persons entitled to damages and the circle of persons liable for damages, as both are now to be determined according to Art. 101 TFEU. There are several reasons backing the Court’s conclusion. From now on the circle of persons liable (which is one of the main constitutive conditions of the right to damages) has to be applied uniformly throughout the Union. Had the Court decided to leave the question of liability up to the Member State’s domestic legal system the uniformity of the enforcement could have been at stake, given that they observed the principles of equivalence and effectiveness. As all civil courts of the Member States will have to apply the concept of undertaking in private enforcement, legal certainty for cartel victims will increase in the long run.

In the short term, however — and even though the Court has levelled the playing field in regard to liability — this judicial harmonisation will trigger new types of questions, many of which would not surface as such in public enforcement. But there is also an important dogmatic justification for applying the concept of undertaking to private enforcement of competition law. Since its seminal judgment in the case of Courage/Crehan the CJEU has consistently shown a strong tendency to consolidate the role of antitrust damages as an integral instrument of the bifurcated enforcement system. Its main goal is to deter undertakings from engaging in anticompetitive conduct. The right to claim damages is an integral part of the enforcement system and, thus, cannot be seen as isolated and as solely ‘established simply to ensure that harm caused by anticompetitive conduct is repaired.’ Rather to the contrary the right to damages is ‘tied to the need to ensure the full effectiveness of EU competition law’ and hence, also pursues deterrence. The same reasoning applies to private enforcement in general. Both public and private enforcement aim to deter undertakings from entering into anticompetitive

21 For an in-depth discussion of the Spanish case-law see Francisco Marcos, ‘Primeros pronunciamientos de las Audiencias Provinciales sobre reclamaciones de daños causados por el cartel de camiones (I)’ https://almacenderedero.org/primeros-pronunciamientos-de-las-audiencias-provinciales-sobre-reclamaciones-de-danos-causados-por-el-cartel-de-camiones-i/ accessed 6 November 2020.

22 For eg., although before Skanska was handed down, Juzgado Mercantil de Murcia nº1, 27 September 18, No 144/18; Juzgado Mercantil de Valencia nº3, 20 February 19, No 287/18.

23 Juzgado Mercantil de Madrid nº12, 17 July 2019, No 543/18; Juzgado Mercantil de Coruña nº1, 31 July 2019, No 166/18; Juzgado 1ª Instancia Jaén nº4, 10 September 2019, No 569/1; see also Juzgado Mercantil de Valencia nº3, 13 January 2020, No 388/19 denying liability of an independent dealer of the cartelized product, as he could not be qualified of forming part of the infringing undertaking.

24 Fuchs in Fuchs and Weitbrecht (n 15) 60 ff; see also LG Stuttgart (GE), 12 December 2019, 30 O 27/17, (38), according to which the CJEU in Skanska had only dealt with the liability for cartel damages of a successor to an undertaking that itself had infringed competition law. In that context, it also considered the scope of the concept of undertaking in art 101(1) TFEU. However, it is not at all obvious that this also implies that the liability for damages caused by a cartel should be extended from cartel members identified in a Commission decision to all their affiliated companies.

25 Case C-724/17 Vantaan kaupunki v Skanska Industrial Solutions EU:C:2019:204.

26 ibid para 32.

27 ibid para 36.

28 ibid para 37.
behaviour. Having set deterrence as a goal of private enforcement it seems straightforward to apply the concept of undertaking to civil proceedings, as the concept itself is the result of a deterrence-oriented public enforcement practice. As a first interim conclusion, it can be stated that the Court’s verdict in Skanska implies that the Member States’ courts will have to employ the concept of undertaking in stand-alone as well as in follow-on proceedings of private competition law, as Skanska cannot be limited to the facts of the case.

IV. Imputation of liability

The concept of undertaking, traditionally employed in public enforcement of EU competition Law, has been shaped over decades through an (albeit somewhat divergent) enforcement practice of the Commission and case-law of the European courts.37 Yet, a legal definition of the concept of undertaking is lacking.38 The following deliberations limit themselves to describing three types of scenarios which are likely to stand in contrast to the traditional rules of civil liability, as they describe circumstances where it is not (only) the person who infringed and caused harm that is held liable for the anticompetitive conduct, but the undertaking as an economic unit which may in law consist of several distinct legal entities.39 Particular attention will be paid to the case where a parent company may be held liable for infringements of its subsidiaries even though it did not actually commit the anticompetitive conduct, or was even aware of it. Whether a subsidiary, which itself did not engage in anticompetitive behaviour, might be held liable for an infringement committed by its parent or another subsidiary will also be analysed. Finally, liability in cases of legal and economic succession, as it was the case in Skanska, will also be described. In addition to standing in stark contrast to civil liability as traditionally perceived, it has to be stressed that an extended liability leads to alternative venues of litigation. If, for instance, it is to be affirmed that the parent company of the infringer or the sister company are to be held liable, the claimant will have additional fora of litigation, of which they will choose the most favourable. Therefore, when addressing the subsequent three scenarios, it has to be borne in mind that Skanska increases the plaintiff’s options in regard to forum shopping within the EU.40

37 To this end see Christian Heinichen, Unternehmensbegriff und Haftungsnachfolge im Europäischen Kartellrecht (Nomos 2011) 36 ff, 122 ff.
38 Louis Vogel, European Competition Law (2nd edn, Bruylant 2018) 55; yet, it is not uncommon to find similar definitions in national law, eg art 2(1)(a) Swiss Cartel Art provides for a legal definition, see Reto Heizmann and Michael Mayer, ‘art 2’ in Roger Zäch and others (eds), KG Kommentar (Dike 2016) 8 ff.
39 It has to be pointed out that a given categorisation for this type of liability does not exist. Yet, most categorisations to be found in the literature more or less reflect the same constellations, see Antoine Colombani, Jindrich Kloub and Sakkers Ewoud ‘Cartel: paras 8 515 ff’ in Jonathan Faull and Ali Nikpay (eds), The EU Law of Competition (3rd edn, OUP 2014); Kerse and Khan (n 12) paras 6.020 ff, 7.003 ff; Alison Jones, Brenda Sifrin and Niamh Dunne, Jones & Sifrin’s EU Competition Law: Text, Cases, and Materials (7th edn, OUP 2019) 141 ff; Luis Ortiz Blanco, EU Competition Procedure (3rd edn, OUP 2013) paras 11.14 ff; Ivo Van Bael and Jean-François Bellis, Competition law of the European Community (5th edn, Wolters Kluwer 2009) 17 ff.
40 Forum shopping in this context is understood as held by AG Megozzi, Case C-98/06 Freedport v Olle Arnoldsson EU:C:2007:302, para 52 note 27: ‘Within certain limits, “forum shopping”, interpreted according to the definition provided by Advocate General Colomer, as “choosing a forum according to the advantages which may arise from the substantive (and even procedural) law applied there” (see the Opinion of 16 March 1999 in Case T-44/97 GIE Group Concord and Others (1999) ECR I-6307, in particular p 6309, footnote 10) is undoubtedly permitted.’

41 Case C-352/13 CDC Hydrogen Peroxide v Akzo Nobel EU:C:2015:335, paras 26 ff; see also Wurmnest (n 7) p. 932 ff.
42 ibid para 33; Till Schreiber, Carsten Krüger and Pádraic Burke, ‘Practical challenges for cross-border follow-on actions’ in Pier Luigi Parcu, Giorgio Monti and Marco Botta (eds), Private Enforcement of EU Competition Law, The Impact of the Damages Directive (Edward Elgar 2018) 15 ff, 37; see also Ulrich Classen and Martin Seegers, ‘The State of Private Enforcement of Competition Law: A Practitioner’s Perspective’ in Magnus Strand, Vladimir Bastidas Venegas and Maros Iacovides (eds), EU Competition Litigation, Transposition and First Experiences of the New Regime (Hart Publishing 2019) 19 ff, 31 ff.
43 See René T Wieser, Wirtschaftliche Einheiten im europäischen Kartellrecht, Wirtschaftliche Einheiten im europäischen Kartellrecht, Eine rechtsvergleichende Studie zu Haftung von wirtschaftlichen Einheiten im deutschen und englischen Schadensersatzrecht für Verstöße gegen europäisches Kartellrecht (Societas Verlagsgesellschaft 2017) 187 ff, especially 187 (note 625), with references to the US American and Swiss liability regime; for further references to similar European liability regimes see Melanie Moser, Konzernhaftung bei Kartellrechtsverstößen: Haftet eine Muttergesellschaft auch zivilrechtlich für ihre Töchter? (Nomos 2017) 108 (note 294).

The reasons for forum shopping are manifold. One reason might be that courts in some Member States have specific experience in competition law matters or might follow an interpretation of the law which is preferable for victims of competition law infringements. The applicable law, the lex fori, however, might be advantageous for a claimant, as it might be in particular favourable in terms of disclosure, length, or costs of proceedings. In addition, the possibility to settle already initiated proceedings ‘out of court’ and the methodologies applied to calculate the interest payable on damages for competition law infringements may be decisive. But there is another factor highlighting the importance of this matter. The CJEU has clarified that all cartel members can be sued together at the court where one of them is domiciled, the so-called ‘anchor defendant’. This option arises when the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments as stipulated by Art. 8(1) of Regulation (EU) 1215/2012. If, for example, the liability of a subsidiary that took part in the infringement in a minor, accessory, or passive manner were to be admitted, the other co-cartelists could be sued at the domicile of the subsidiary. According to the CJEU, a claim can be ‘anchored’ and thus concentrated with one court where actions for damages are brought against several undertakings domiciled in different Member States participating in a single and continuous cartel.41 If that were not possible this could lead to irreconcilable judgments within the meaning of Art. 8(1) of Regulation (EU) 1215/2012.42

The foregoing only stresses that the analysis of which components of a group of companies may be held liable for competition law infringements – and thus qualify as ‘anchor defendants’ in private enforcement – deserves attention.

1. The traditional approach to liability

It has to be highlighted that the concept of undertaking is not commonplace to the Member States’ domestic legal systems, especially in regard to civil proceedings and civil liability. Before further exploring the concept, liability as traditionally understood has to be looked at. In most Member States, legal entities generally only incur liability for their own behaviour with their own funds.43 This reflects the fundamental principle of limited liability in corporate law and is based on the simple rule that stakeholders are not liable for more than the amount
they invest in a company. Generally speaking, one’s risk is limited to one’s stake. In Germany, for example, this principle is referred to as the ‘gesellschaftsrechtliches Trennungsprinzip’. It entails the consequence that others, in addition to the legal entity (such as shareholders), generally do not bear the risk of being civilly liable for harm resulting from infringements committed by the respective entity. In short, a legal entity’s liability within a group of companies has traditionally been characterised by the said principle. In the context of a group of companies, this implies that one company is not liable for the debts of another company even though they belong to the same corporate group. In particular, the parent company is usually not liable for the debts of one of its subsidiaries. Nor is one subsidiary liable for the debts of another component of the group. Yet, in some situations, which are usually of great exception, debtors of a subsidiary may directly claim the assets of another entity of the group and thus ‘pierce the corporate veil’.

2. Imputation of liability to the parent company

The aforementioned traditional approach to liability seems to be at odds with the concept of undertaking. The latter transcends national corporate structures and is to be regarded as alien to the traditional perception of tort liability. A scenario which is very likely to stand in contrast to the general understanding of civil liability in most Member States is the liability of a parent company for the anticompetitive behaviour of one of its subsidiaries. Two questions have to be raised in this section. First, when does a parent company in addition to its infringing subsidiary qualify as one single undertaking? Second, who bears the onus of proof of the existence of a single undertaking in private enforcement proceedings?

a) ‘Parental responsibility’

According to the CJEU’s case-law, the parent company can be held liable for an infringement committed by one of its subsidiaries under the condition that both are part of one economic unit and thus form a single undertaking for the purpose of competition law. For the application of competition rules the formal separation between two parties resulting from their separate legal personality is not conclusive – the decisive test is the unity of their conduct on the market. This is the case if the subsidiary does not enjoy sufficient autonomy to determine its market appearance independently. In essence, the concept of undertaking determines the economic unit that commits an infringement of the competition rules and covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed. It is also immaterial whether in law that economic unit consists of several persons, natural or legal. As liability for harm caused by anticompetitive behaviour is personal in nature, it follows that the infringing undertaking, which is not necessarily the same as the infringing entity, has to answer for its behaviour. Put differently, it is the undertaking that determines the circle of persons liable for an anticompetitive conduct. Therefore, the Commission has been in a position to impose fines on the parent company even though it did not itself commit the infringement.

As a consequence of the Skanska not only the Commission but also a civil court might hold a parent company liable for the infringement of one of its subsidiaries, under the condition that both form part of the same undertaking. In order to do so, two criteria must be demonstrated:

- The parent company must be in a position to exercise decisive influence over the commercial behaviour of its subsidiary.
- It has to be established that the influence was actually exercised on the basis of factual evidence, including, in particular, any management power of the parent company over its subsidiary.

It is worth noting that the control exercised by the parent company over the infringing subsidiary does not necessarily have to be in connection to the unlawful conduct. Therefore, it is unnecessary to prove that the controlling company de facto exercised a direct or indirect influence over the unlawful conduct of its infringing subsidiary or that it was even aware of that unlawful conduct. The underlying idea of the abovementioned can be exemplified by so-called ‘group privilege’. As two companies form one single undertaking the prohibition of cartels does not apply to agreements between them, i.e. internally. Also, internal restructurings are usually not caught by merger control and thus do not have to be notified. Yet, outwardly, they form one economic unit and hence to be held jointly responsible for

51 Case C-155/14 P Evonik Degussa v Commission EU:C:2016:446, para 27; Case C-97/08 P Akzo Nobel EU:C:2009:536, para 44.
52 Case C-724/17 Vantaan kaupunki v Skanska Industrial Solutions, EU:C:2019:204, para 36.
53 ibid para 3; the General Court refers to undertakings as ‘economic units which consist of a unitary organisation of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis and can contribute to the commitment of an infringement of the kind referred to in that provision’, Case T-9/09 HFB Holding v Commission EU:T:2002:70, para 54; Case T-352/94 Mo Och Domsjö v Commission EU:T:1998:103, para 87.
54 Case C-724/17 Vantaan kaupunki v Skanska Industrial Solutions EU:C:2019:204, para 31; see also Case C-97/08 P Akzo Nobel v Commission EU:C:2009:536, para 56.
55 Case C-185/14 P Evonik Degussa v Commission EU:C:2016:446, para 27.
56 Case C-623/15 P Toshiba v Commission EU:C:2017:21, para 45.
57 Case T-701/14 Niche Generics v Commission EU:T:2018:921, para 503.
58 Case C-155/14 P Evonik Degussa v Commission EU:C:2016:446, para 27; Case C-97/08 P Akzo Nobel v Commission EU:C:2009:536, para 59.
59 Case T-343/07 Shell Petroleum EU:T:2012:478, para 61. It becomes evident that the concept of undertaking is distinct from the liability of a parent company for direct involvement in the infringement of its subsidiary, e.g. when its personnel were directly involved in the decision making of a subsidiary, to this end see Case T-234/07 Koninklijke Groeloch v Commission EU:T:2011:476, para 47 ff.
60 Case C-440/11 P Commission v Stichting Administratiekantoor Portielje EU:C:2012:763, Opinion of AG Kokott, para 31.
any infringement of the undertaking which they ultimately form.60 In this respect, liability of the undertaking, encompassing the parent company and its subsidiary, can be seen as the other side of the coin of this privilege. Despite the aforementioned and convincing justification of the concept of undertaking, the concept itself is far from being clear cut. For example, it is not necessary for the parent company to hold 100% of its subsidiaries shares in order to qualify as forming part of the same undertaking. In general, majority shareholders can also qualify as exercising decisive influence over their subsidiaries. This was the case in Bananas, where an 80% limited partnership interest in addition to the rights associated with the said interest created the ability to exercise decisive influence.61 A further example of the broad concept of undertaking is the judgment of the GC in the case of Fuji Electric. The GC qualified a minority shareholder as parent company and consequently held it liable, as it was in a position to exercise decisive influence on its subsidiary. This was especially so because the minority interest was allied to rights greater than those normally granted to minority shareholders in order to protect their financial interests. In these constellations, a parent company is enabled to actually exercise a decisive influence on its subsidiary’s market conduct.62 In Toshiba, the CJEU held that the mere existence of a veto right of one company in another made it possible to conclude that decisive influence had actually been exercised by the parent company.63 It reached its conclusion on the ground that the holder of a right of veto over certain decisions in an undertaking must necessarily be consulted before the adoption of any decisions capable of being vetoed and, necessarily, has to consent to those decisions.64 The mere fact that the veto right has never been exercised does not allow us to draw the conclusion that it did not exercise decisive influence over the conduct of the undertaking.65 The same logic applies not only in the case of a direct relationship between the parent company and its subsidiary, but also where that relationship is indirect through the interposition of another company. In this case the existence of a single economic unit is not excluded.66 The same holds true where two parent companies jointly own their subsidiary.67

Even though the reasoning in each of the mentioned cases is sound, it only highlights the far-reaching consequences which, prior to Skanska, were generally exclusively confined to public enforcement. This has now changed, as the concept of undertaking is to be applied in stand-alone and follow-on damages proceedings. Therefore, in the event that the abovementioned criteria are demonstrated by the claimant, a parent company might be liable for conduct in which it did not actively partake or was even aware of.68 In addition, it might be sued – along with the other cartel members – at its domicile in accordance to Art. 8(1) of Regulation (EU) 1215/2012.

b) Probatio diabolica

Interrelated with the foregoing is the burden of proof. Generally speaking, the Commission has to establish that two or more companies form one single undertaking, i.e. demonstrate that the parent company actually exercised decisive influence over the subsidiary when the infringement occurred. However, where a parent company holds 100% of the shares of the subsidiary, the Commission may rely on a rebuttable presumption that both of the criteria discussed above are deemed to be fulfilled. Hence, there is a rebuttable presumption that the parent company had decisive influence over the conduct of its subsidiary and also that the parent company de facto exercised decisive influence over the conduct.69 It is then established by way of presumption that two separate legal entities form one single undertaking.70 The onus of proof is then shifted on to the parent company. It is then up to the latter to demonstrate that it did not exert decisive influence over the subsidiary,71 the so called ‘Akzo presumption’. Unless the parent company amasses sufficient evidence to show that its subsidiary acts independently on the market and thereby rebuts the presumption, it will be held jointly and severally liable for its subsidiary’s conduct.72 As a consequence it is the parent company which has the burden of proof to show that two separate legal entities are not jointly and severally liable for conduct, i.e. of Skanska, it is here submitted that claimants seeking compensation for harm caused by infringements of Art. 101 TFEU also benefit from said presumption in civil proceedings. If Skanska were to be limited to the facts of the case, one could argue that applying the presumption to private enforcement is not compatible with most of the Member States’ liability regime and that the judgment does not give any ground for such far-reaching consequences. Yet, by stressing that damages claims are an essential part of the enforcement system, which itself mainly aims at deterrence, it seems correct to apply the said presumption to private enforcement. This concept enables both the Commission and the victims to ensure that the objectives of deterrence and effective enforcement of competition law are met. However, this conclusion has also to be regarded as problematic, as the extensive and meandering case-law does not give enough clear guidance when the rebuttable presumption actually applies. It can be difficult to assess whether a corporate structure is to be regarded as one economic unit and thus a single, liable undertaking, as several factors must be taken into consideration.

60 ibid. 61 Case C-293/13 P re h Del Monte Produce v Commission EU:C:2015:416, paras 12, 29.
62 Case T- 132/07 Fuji Electric v Commission EU:T:2011:344, para 183; see also Case T-395/09 Gigaset v Commission EU:T:2014:23; Case T-399/09 HSE v Commission EU:T:2013:647, para 54.
63 CJEU, C- 623/15 P Toshiba v Commission EU:T:2017:21, paras 60 ff, 73.
64 ibid para 73. 65 ibid para 73.
66 ibid para 435.
67 Case T-470/13 Merck Generics v Commission EU:T:2016:452, para 435.
68 Case T-343/06 Shell Petroleum v Commission EU:T:2012:478, para 44 ff; Case C-172/12 P EI du Pont de Nemours v Commission EU:C:2013:601, paras 46 ff; Case C- 179/12 P The Dow Chemical Company v Commission EU:C:2013:605, paras 57 ff; although not concerning ‘parental responsibility’, it has to be pointed out that even consultancy firms, which are not active on the relevant market, are active for an infringement of art 101 TFEU where it contributes actively and intentionally to a cartel between producers which are active on a market other than that on which the consultancy firm itself operates, Case T- 27/10 AC-Trechand v Commission EU:T:2014:59, para 43 ff; similar to AC-Trechand Case T- 180/15 Icap and others v Commission EU:T:2017:795, para 104.
69 For an example of liability of a parent company that did not engage itself in an infringement but was attributed liability as it had decisive influence over one of its infringing subsidiaries see Rechtbank Amsterdam (NL), 4 June 2014, CDC v Kemira NL:RBAMS:2014:3190; discussion of the latter judgment Schreiber, Krüger and Burke (n 42) 15 ff, 37; another example of liability of a parent company is Court of Appeal (UK), 13 September 2012, Toshiba Carrier UK Ltd and others v KME Yorkshire Ltd and others [2012] EWA Civ 1190, [38].
70 Case C-155/14 P Evonik Degussa v Commission EU:C:2016:446, para 28.
71 Case C-286/08 Stora Kopparbergs Bergslags v Commission EU:C:2009:630, paras 26 ff; Case C-97/08 P Akzo Nobel v Commission EU:C:2009:536, paras 60 ff; Case C-155/14 P Evonik Degussa v Commission EU:C:2016:446, para 28.
72 Case C-97/08 P Akzo Nobel v Commission EU:C:2009:536, paras 54, 61.
73 Case C-155/14 P Evonik Degussa v Commission EU:C:2016:446, para 29; see for the strict requirements for rebuttal of the presumption Case C- 440/11 P Commission v Stichting Administratieskaart Portielje EU:C:2013:514, paras 80 ff.
It is quite telling that the presumption has been referred to as the \textit{probatio diabolica}.

For instance, in the judgment in the case of \textit{Power Cables}, a financial sponsor, the parent company held 100\% of the shares in a subsidiary for a limited period of 41 days over the relevant cartel period. It then reduced its share first to 92\%, then to 84\%. Yet, the parent company retained control of the entire voting rights at all relevant times. The GC confirmed that the Commission was right to rely on the rebuttable presumption. The rationale for this is where a parent company is able to exercise all the voting rights associated with its subsidiary’s shares it is in a similar situation to that of the sole owner of that subsidiary. This is particular so, when it has a very high majority stake in the share capital of that subsidiary.

As the parent company is able to determine the economic and commercial strategy of the subsidiary concerned the burden of proof shifts, even though it does not hold all or virtually all the share capital of that subsidiary. According to the case-law, the presumption also applies where a parent company, even indirectly, holds a shareholding close to 100\%.

The above demonstrates that the rule underlying the rebuttable presumption is far from being clear-cut and leaves a considerable degree of latitude. The consequences of this shortcoming have been legal uncertainty and a lack of predictability in the determination of the undertaking in administrative proceedings conducted by the Commission or national competition authorities.

The CJEU’s judgment in \textit{Skanska} now extrapolates these uncertainties to private enforcement. As a critical observation, it also has to be added that it remains doubtful in stand-alone proceedings whether a defendant will be in a position to amass sufficient lucid evidence to demonstrate the corporate structures of a group of undertakings and the specific roles of the companies assumed therein, let alone any infringement. Yet, in follow-on proceedings the potentially damaged person will clearly benefit from the \textit{Skanska} ruling, as the “extended” liability is transposed to civil proceedings.

3. Imputation of liability to ‘innocent’ subsidiaries

In order to address the imputation of liability to a subsidiary two different constellations that might surface in civil proceedings have to be examined. One case is the ‘missing head’-scenario; the other is where liability is imputed to other components of a group of companies, regardless of their involvement in the actual infringement.

\begin{itemize}
\item[a)] ‘Missing head’
\end{itemize}

The ‘missing head’-scenario refers to situations where there is no legal person at the head of a group of companies, yet they are owned by one person or family. In regard to this situation, the CJEU quashed the GC’s\textsuperscript{73} judgment in the case of \textit{Siderúrgica Aristrain Madrid}, finding the simple fact that the share capital of two separate commercial companies is held by the same person or the same family is insufficient, in itself, to establish that those two companies are an economic unit. Therefore, the actions of one company cannot be attributed to the other one.\textsuperscript{81} Under these circumstances, two separate entities cannot be seen as forming part of a single undertaking – the actions of one cannot be attributed to the other. Accordingly, even after \textit{Skanska}, harm resulting from anticompetitive conduct committed by a separate undertaking will not cause civil liability for other companies that are not part of that undertaking, even though their share capital is held by the same person or family.

Irrespective of this, it is not excluded that other facts might establish that these companies form one economic unit and thereby one single undertaking.\textsuperscript{82} This was the case in \textit{HFB}. The GC upheld the finding that two separate corporate structures formed one economic unit – and thus one single undertaking – as they were controlled by a single individual. In that case, two sister companies and their respective subsidiaries were qualified as one undertaking as the companies were in some form or another controlled by the said individual via a majority shareholding and/or sole directorship. Given that the individual represented the interests of those companies in the relevant meetings, the Commission was entitled to qualify all these companies as pursuing a common long-term economic aim and thus forming one undertaking.

\begin{itemize}
\item[b)] Liability within a group of companies = liability simply by reason of membership?
\end{itemize}

It has been shown that a parent company can be held liable for the infringement of a subsidiary under the condition that they form one undertaking. Yet, in a group of companies the ultimate parent company usually controls several other subsidiaries in addition to the infringing subsidiary. It is debated whether each and every constituent of the group can be seen as a part of the group.

\textsuperscript{73} See the arguments of the parties in Case C- 520/09 \textit{Arkena v Commission} EU:C:2011:619, para 25; Andreas Scordamaglia, ‘Cartel Proof, Imputation and Sanctioning in European Law: Reconciling Effective Enforcement and Adequate Protection of Procedural Guarantees’ (2010) 7 Competition Law Review 279 (hereafter ‘Guarantees’).

\textsuperscript{74} Case C- 508/11 P \textit{Eni v Commission}, EU:C:2013:289 para 48 referring to a constellation where ‘elle détenait la quasi-totalité, à savoir 99.99 \% du capital’; see also Case C-508/11 P \textit{Eni v Commission} EU:C:2013:289, para 46, where 99.97\% of the capital in the subsidiary was held by the parent company; see also Case C-408/12 P FPK v Commission EU:C:2014:2153; if the share capital of a company is owned by a natural person or if one person is part of the company’s administration, the person is not per se, in its sole capacity as a shareholder or member, to be classified as an undertaking within the meaning of art 101(1) TFEU, Case C-189/02 P \textit{Danske Rørindustri v Commission} EU:C:2005:280, para 11.

\textsuperscript{75} Colombian, Klobouk and Ewoud in Faull and Nipkay (n 39) para 8 520, hold that it ‘has become the firm policy of the Commission to hold the ultimate parent entity liable when the requisite conditions are met’. This indicates that the liability of a “innocent” sister company is of lesser importance in public enforcement as the difficulties in recovering a fine are usually mitigated by addressing the parent company.

\textsuperscript{76} Note also that the national competition authorities are required to apply the concept of undertaking in the context of public enforcement as stipulated by the ECN+ Directive, Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L113/3 ff; in a general context see also Heinichen and Schmidt (n 73) text at note 32.

\textsuperscript{77} See the arguments of the parties in Case C- 520/09 \textit{Arkena v Commission} EU:C:2011:619, para 25; Andreas Scordamaglia, ‘Cartel Proof, Imputation and Sanctioning in European Law: Reconciling Effective Enforcement and Adequate Protection of Procedural Guarantees’ (2010) 7 Competition Law Review 279 (hereafter ‘Guarantees’).

\textsuperscript{78} Case C- 508/11 P \textit{Eni v Commission}, EU:C:2013:289 para 48; Case C-909/09 P \textit{General Quinica v Commission}, EU:C:2011:21 para 88; in both judgments, reference is made to a “[...] interposed company [...]”.

\textsuperscript{79} Case C-289/11 P \textit{Legris Industrie} EU:C:2012:270, para 48 referring to a constellation where ‘elle détenait la quasi-totalité, à savoir 99.99 \% du capital’; see also Case C-508/11 P \textit{Eni v Commission} EU:C:2013:289, para 46, where 99.97\% of the capital in the subsidiary was held by the parent company; see also Case C-408/12 P FPK v Commission EU:C:2014:2153; if the share capital of a company is owned by a natural person or if one person is part of the company’s administration, the person is not per se, in its sole capacity as a shareholder or member, to be classified as an undertaking within the meaning of art 101(1) TFEU, Case C-189/02 P \textit{Danske Rørindustri v Commission} EU:C:2005:280, para 11.

\textsuperscript{80} Colombian, Klobouk and Ewoud in Faull and Nipkay (n 39) para 8 520, hold that it ‘has become the firm policy of the Commission to hold the ultimate parent entity liable when the requisite conditions are met’. This indicates that the liability of a “innocent” sister company is of lesser importance in public enforcement as the difficulties in recovering a fine are usually mitigated by addressing the parent company.

\textsuperscript{81} Case C-196/99 \textit{P Siderúrgica Aristrain Madrid v Commission} EU:C:2003:529, para 99.

\textsuperscript{82} Ortiz Blanco (n 39) paras 11.17 ff; Colombian, Klobouk and Ewoud in Faull and Nipkay (n 39) para 8 538.

\textsuperscript{83} Case T-99/04 \textit{HFB v Commission} EU:T:2002:70, paras 55, 61 ff.
economic unit and thus a member of the undertaking simply by reason of membership to a group of companies or other corporate structures. If that were the case, liability would also be imputed to the subsidiaries. This would lead to the result that it would have to shoulder the consequences of the infringement as it forms part of the same corporate group, regardless of the fact that a subsidiary did not engage in any form of anticompetitive behaviour. The subsidiary would then be faced with an inverse liability, even though it had neither any decisive influence over the infringers’ conduct, nor participated in the infringement. If that were the case, the notion of undertaking would lose its contours as all entities pertaining to one corporate group would qualify as belonging to the same undertaking. In this regard, there would not be much sense in distinguishing between the liability of a group of companies and the liability of the entities forming the undertaking, as both were the same. This is not convincing. Therefore, the following deliberations demonstrate that liability cannot automatically be attributed to a subsidiary simply by reasoning that its parent company itself infringed or had decisive influence over another subsidiary engaging in anticompetitive behaviour.  

(1) EU-practice

It is telling that the Commission has already found in Copper Plumbing Tubes that several legal entities within one corporate group formed separate undertakings. For the purposes of imputation of a fine, companies within the same group were treated differently as they formed separate undertakings. The reason for this was that the companies had separate management boards, operational management, and reporting structures for a certain period of time. The companies acted independently by competing against one another on the same market. This case illustrates that it is not possible for all components of a corporate group to automatically form part of one undertaking as they can, possibly, belong to separate undertakings. It is concluded that liability for anticompetitive behaviour can be attributed to different components in a group of companies, under the condition that all of them also form part of the same single economic unit and thus undertaking. The CJEU seems to have shared a similar understanding in a somewhat different constellation. In Jungbunzlauer, liability for an infringement committed by a subsidiary (1) of a holding company was attributed to another subsidiary (2) within the same holding. In this case the aforementioned rebuttable presumption of decisive influence could not be inferred, as the subsidiary obviously did not financially control its sister. Yet, the fact that all group management activities had been delegated from the holding company to (2), was proof that (1) carried out the instructions given by (2) and therefore did not decide independently upon its own market appearance. This shows that liability for an infringement of one subsidiary within one group of companies can be imputed to another subsidiary, given that one subsidiary had decisive influence over the other, and thus both formed part of one undertaking. But again, liability in this case seems to be in line with the aforementioned ‘parental responsibility’, as one company has a decisive influence over another.

However, liability of a subsidiary should not be limited to these particular circumstances. A nuanced approach seems to have been taken by AG Menagofzi in Siemens. He held that in the case of an undertaking which is made up of various legal persons, the persons who have participated in the cartel, as well as the ultimate parent company which exercises a decisive influence over them, may be regarded as legal entities collectively constituting a single undertaking. These entities may then be held responsible for the acts of that undertaking for the purposes of competition law. This means that the actual undertaking is composed of each subsidiary within a group of companies that in some way participated in an infringement and all other companies of that group that exercised a decisive influence over one or several of the infringing group companies. Therefore, a subsidiary cannot be held liable by the simple fact that it belongs to a group of companies of which some components also constitute an undertaking in the meaning of Art. 101 TFEU. In other words, where a subsidiary did not participate or have a decisive influence over the infringing companies, liability may not be attributed to it. In conclusion, a subsidiary that did not partake in an infringement, nor had a decisive influence over one of the infringing persons, is not to be regarded as part of the single undertaking. Thus, and in light of the principle of personal responsibility, it may not be held liable either in public or in private enforcement as it does not form part of the undertaking. A further indication that the concept of undertaking cannot be overstretched in practice is to be found in the context of Art. 23(2) of Regulation No. 1/2003. This provision stipulates that the Commission can hold a number of legal persons forming part of one and the same undertaking jointly and severally liable for payment of a fine. In this context, the Court has repeatedly stressed that the Commission is obliged to respect certain limitations of the concept of undertaking, which requires that due account is to be taken of the characteristics of the undertaking concerned.

An additional limitation seems to have been set by the GC in Biogaran. The GC held that the very concept of undertaking within the meaning of EU competition law presupposes –

85 This debate is by no means new; for a wider construed form of liability see eg Kersten Kersting, ‘Haftung von Schwester- und Tochtergesellschaften im europäischen Kartellrecht’ [2018] ZHR 8 ff, translated version to be found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3355816&download=yes accessed 6 November 2020; Hans-Markus Wagener, ‘Follow-up zu Skanska – Bisherige „Umsetzung“ durch nationale Zivilgerichte’ [2019] NZKart 535 ff, translated version to be found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455993 accessed 6 November 2020; contra Heinichen and Schmidt (n 73) 2337 ff; Dominik Braun and Manuel Kellerbauer, ‘Das Konzept der gesamtschuldnerischen Verantwortlichkeit der Konzerngesellschaften bei Zuwendungen gegen das EU-Wettbewerbsrecht – Teil 1’ [2015] NZKart 175 ff, 179 ff; see also Paul in Fuchs and Weitbrecht (n 45) 170; according to Vieira Peres (n 15), liability can only be attributed to one legal entity for the conduct of another if the former effectively controlled the latter during the infringement period. The fact that entities belong to the same undertaking cannot suffice to attribute liability.

86 Copper Plumbing Tubes (Case COMP/E-138.069) Commission Decision C(2004) 2826.

87 ibid para 564 ff.

88 Yet, after an internal restructuring, which created a parent-subsidiary relationship, significant overlaps between management boards and coordinated operational management existed, which is why they were then qualified as forming a single undertaking.
through the presumption of the parent company exercising a decisive influence over the wholly owned subsidiary – that the subsidiary acts within the framework of the objectives pursued by the parent company under the parent company’s direction and control. The condition for the imputation of liability to all parts of the undertaking is satisfied where each part of that undertaking has contributed to its implementation, even in a subsidiary, accessory, or passive role. It is worth mentioning that the Court did not require that the subsidiary must implement the infringement knowingly as a criterion for the imputation of liability. Biogaran leaves room for two conclusions. One is that the subsidiary does not necessarily have to be aware of the fact that it is actually engaged in anticompetitive behaviour. The other conclusion is that a subsidiary must have formed part of the infringement, even though its role assumed therein can be of minor importance, even in a manner of subordinate, accessory, or passive nature. These findings also demonstrate that each constituent of a group of companies is not deemed to be liable for an infringement committed by another constituent i.e. the parent company or even another subsidiary of the same group. In a broad summary, and given that the notion of undertaking should have the same meaning in private as public enforcement, a damages claim can be brought against a component of an undertaking which implemented the infringement, albeit without knowledge of the actual infringement. Further it has to be demonstrated that it was under decisive influence of another component of the undertaking, which had knowledge of the infringement or had decisive influence over the infringing subsidiary.

(2) UK-practice

With this in mind, it is important to stress that the UK Courts have already adopted a similar understanding. Yet, the relevant cases were primarily jurisdictional and concerned ‘anchoring’ litigation with English courts dealing with liability on a summary basis. The most relevant of these cases seems to be Provimi, decided upon in 2003, in which Mr Justice Aikens held:

‘Therefore, the point comes down to this: what knowledge of the infringing agreement by the legal entity being sued, if any, does a claimant have to plead and prove in order to succeed in a claim for damages for infringement of Art. 101(1) TFEU? There are no cases or even textbook opinions to provide me with a ready answer. Moreover, there is a tension between

English law and EU competition law concepts. In English law the separate entity of corporations is respected and knowledge of one corporation will not readily be imputed to another. But EU competition law maintains the concept of an Undertaking, which is more flexible than a legal entity. It can embrace a number of legal entities, so long as they act as a single economic unit and no legal entity acts independently for any relevant purpose.

It seems to me to be arguable that where two corporate entities are part of an “undertaking” (call it “Undertaking A”) and one of those entities has entered into an infringing agreement with other, independent, “undertakings”, then if another corporate entity which is part of Undertaking A then implements that infringing agreement, it is also infringing [Art. 101(1) TFEU].

In my view, it is arguable that it is not necessary to plead or prove any particular “concurrence of wills” between the two legal entities within Undertaking A. The EU competition law concept of an “undertaking” is that it is one economic unit. The legal entities that are part of the one undertaking, by definition of the concept, have no independence of mind or action or will. They are to be regarded as all one. Therefore, so it seems to me, the mind and will of one legal entity is, for the purposes of [Art. 101(1) TFEU], to be treated as the mind and will of the other entity. There is no question of having to “impute” the knowledge of one entity to another, because they are one and the same.

This is to be understood to mean that if a subsidiary is part of the same group of companies as the infringer, and if the subsidiary implements the infringement in some way, liability for the infringement might also be attributed to it – the so-called Provimi point. Nevertheless, it cannot be overlooked that it is disputed whether the requirement for a claim to be brought on the basis that the subsidiary (i.e. the English defendant) had knowingly implemented the cartel, or whether mere knowledge suffices. In the latter cases, it seems that knowledge of the parent company, exercising decisive influence over its subsidiary, is imputed to the defendant. In Media

98 Case C-724/17 Viantaun kaupunkt vs Skanska Industrial Solutions EU:C:2019:204, para 45.
99 For a similar approach see High Court (UK), Nokia Corporation vs AU Optronics Ltd & Mastercard Inc [2012] EWHC 731 (Ch) [82].
100 See for an in-depth discussion of the English case-law before Skanska, Aidan Robertson, ‘Skanska, Industrial Solutions: what does the Court of Justice’s landmark judgment mean for cartel damages litigation?’ [2019] European Competition Law Review 347 ff, 349 ff.; see also Florian Wagner-von Papp, ‘Private Enforcement in the United Kingdom’ in Ferdinand Wollensscherl, Wolfgang Wurmnest and Thomas M J Möllers (eds), Private Enforcement of European Competition and State Aid Law, Current Challenges and the Way Forward (Kluwer Law International 2020).
101 High Court (UK), Provimi Ltd v Aventis [2003] EWHC 961 (Comm.).
Saturn Holding the abovementioned Biogaran was also discussed, but in the end whether knowledge of implementing the infringement is necessary and if such a criterion is in line with the concept of undertaking was left open.115 Irrespective of this uncertainty, implementation is to be understood in a broad manner. It is not only selling the cartelised product that shall qualify as implementing an infringement, but also when a subsidiary directly deals with the damaged persons (i.e. the purchasers of the cartelised goods and services on behalf of other members of its corporate group in way of customer services or information role).109 Offering transformed products and thereby furthering the objectives of the cartel may also be seen as implementing an infringement and thus creating liability of a subsidiary. In essence, a subsidiary is to be seen as part of the undertaking only if it, to some extent, furthers the objective of the anticompetitive behaviour.116 If, however, a subsidiary is not at all active in the affected market, it does not form part of the same economic unit and therefore is not part of the same undertaking as the parent.108 The foregoing also seems to be in line with Sainsbury’s Supermarkets:

‘[In our view a person is not ipso facto liable for an infringement of [Art.] 101 by reason only of the fact that he, she, or it is a member of an undertaking responsible as a matter of EU law for the infringement, in circumstances where the person in question neither participated in the infringement nor had decisive influence over the conduct in the relevant market of other member(s) of the undertaking who did participate. We appreciate that in such circumstances it may well be unlikely that the person in question would in fact be held to be part of that “undertaking”.’109

Yet, it is impossible to draw general guidelines in order to determine when and under which conditions a subsidiary implements an infringement. Therefore, it has to be decided in each individual case whether a subsidiary implements the infringement.110

(3) Clarifying the concept of undertaking

There seems to be a convincing way to implement the aforementioned conclusion in the current definition of undertaking. As already pointed out, the decisive test in order to establish whether separate legal entities form one single economic unit and therefore one undertaking is to demonstrate the unity of their conduct in the market.111 This definition is too vague and can be narrowed down in the following way. In order to qualify as one single undertaking the unity of the conduct of several separate entities in the affected market has to be shown. It then becomes of essence to ascertain which companies of the corporate structure acted jointly as a single economic unit in the affected market and thus formed the undertaking. It is argued that this approach provides the necessary clarity, that not all of a group’s constituents automatically belong to the undertaking by the mere fact of being part of the group of companies. In other words, the mere fact that the parent company exerts decisive influence on other subsidiaries that themselves did not participate in the infringement in any way does not result in liability for all of the constituents of the corporate group.

Attention has to be drawn to the following fact. The decisions of the Commission are binding for national courts in subsequent litigation, i.e. follow-on proceedings. The binding effect not only applies to the operative part but to the decision in its entirety.112 It is maintained that all companies figuring in the operative part and having necessarily been heard, and defended themselves, as a separate entity in the public enforcement procedure can serve as defendants in a follow-on proceeding. However, it is often the case that other entities of a group of companies also form part of the undertaking, as they also implemented the infringement. Yet, they usually do not figure in the operative part, let alone mentioned in the decision. This, however, should not exclude the possibility that these legal entities may also be defendants in civil litigation and can be therefore sued for damages.113 However, in these cases the claimant must amass sufficient evidence, demonstrating that the defendant actually implemented the infringement and can thus be held liable for the infringement.114 It is only a matter of time until the CJEU will answer the question whether the concept of undertaking is to be understood in a way as to encompass an ‘innocent’ subsidiary. The Court has been requested for a preliminary ruling by the Audiencia Provincial de Barcelona in regard to questions concerning civil liability of a subsidiary for its infringing parent and/or sister company.14 In this referral case Sumal, the CJEU has inter alia to answer:

(A) Does the doctrine of the single economic unit developed by the Court of Justice provide grounds for extending liability from the parent company to the subsidiary, or does the doctrine apply solely in order to extend liability from subsidiaries to the parent company?

(B) If it is possible to extend liability from the parent company to the subsidiary, what would be required in order for it to be possible?

Holding GmbH and others v Toshiba Information Systems (U.K.) Limited [158] ff.
110 High Court (UK), 2 May 2019, Media-Saturn Holding GmbH and others v Toshiba Information Systems (U.K.) Limited [155] ff, discussing the criterion of implement, Wagner-von Papp (n 100) note 96.
109 High Court (UK), Vattenfall AB v Prysmian SpA [(2018) EWCH 1694 (Ch) (72) ff.
108 Note that it is still unsure, whether liability in only imputed to the subsidiary that knowingly implemented the cartel or whether mere implementation is sufficient.
107 The so-called ‘shoe polish example’, Cooper Tire & Rubber Co & Ors v Shell Chemicals UK Ltd & Ors [(2009) EWCH 2609 (Comm) (56), upheld by Court of Appeal (UK), Cooper Tire & Rubber v Dow Deutschland [2010] EWCA Civ 864 [45], these cases are also discussed in Brealey and George (n 103) [5.56]; Wagner-von Papp (n 100).
106 CAT (UK), Sainsbury’s Supermarkets Ltd v Mastcard Inc [2016] CAT 11 [363(23)], [363(18)].
105 High Court (UK), 2 May 2019, Media-Saturn Holding GmbH and others v Toshiba Information Systems (U.K.) Limited [111].
104 Case C-217/05 Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos EU:C:2006:784, para 41.
111 Case C-344/98 Masterfoods v HB Ice Cream EU:C:2000:689, para 50 f.
112 Case C-344/98 Masterfoods v HB Ice Cream EU:C:2000:689, para 50 f.
113 Sousa (n 15) note 60 ff; see also Araujo Boyd (n 15) 8.
114 It has to be pointed out in Case T-67/11 Martinvairn v Commission EU:T:2015:984 para 35 that: ‘In that respect, it must be considered, contrary to the Commission’s assertions at the hearing, that a national court would take a decision contrary to that adopted by the Commission not only if it gave a different legal classification to the anticompetitive conduct examined, but also if its decision differed from that of the Commission as regards the temporal or geographic scope of the conduct examined or as regards the liability or non-liability of persons investigated in relation to the conduct at issue and whose liability was examined in the Commission’s decision.’ Yet, Araujo Boyd (n 15) 8 f rightly points out: ‘That decision was not appealed and is therefore final; however, it might be considered a weak precedent as it was never confirmed by the CJEU.’
115 Case C-882/19 Sumal, so far, little information on this case is available on the CJEU’s website; further information can be found at Heinrich Heine University’s competition and antitrust law blog (D Kart, 15 November 2019) <https://www.d-kart.de/en/blog/2019/11/15/er-neues-haftung-von-konzerngesellschaften> accessed 6 November 2020.
It thus remains to be seen whether national courts in civil proceedings have to regard all subsidiaries of a parent company as liable.\(^{116}\) The deliberations above can give some guidance when addressing this matter.

### 4. Imputation of liability to the successor company

The last scenario to be addressed is liability in cases of legal and economic succession. As an introductory remark to this section, it is necessary to quote the CJEU’s judgment in the case of ENI in which the Court held ‘[…] that if no possibility of imposing a penalty on an entity other than the one which committed the infringement was foreseen […]’ that if no possibility of imposing a penalty on an entity other than the one which committed the infringement was foreseen, undertakings could escape penalties by simply changing their identity through restucturings, sales, or other legal or organisational changes. This would jeopardise the objective of suppressing conduct that infringes the competition rules and preventing its reoccurrence by means of deterrent penalties.”\(^{117}\) Due to the particular lengthiness of cartel investigations, it is not rare for a company which participated in an antitrust violation to be subsequently taken over or become part of another undertaking after or while the infringement was committed,\(^{118}\) as in the case of Skanska.

According to the principle of personal liability, the responsibility of an undertaking for fines resulting from a cartel infringement is not affected by a restructuring or change in legal form. Restructurings and transfers of companies and/or their respective assets within a group are therefore in principle irrelevant if the entities belong to the same economic unit and hence undertaking. In analogy, the CJEU’s case-law holds that “a change in the legal form and name of an undertaking does not necessarily have the effect of creating a new undertaking free of liability for the anti-competitive behaviour of its predecessor when, from an economic point of view, the two are identical”.\(^{119}\) Where the legal entity engaged in anti-competitive behaviour ceases to exist as a result of a takeover, liability may shift to the acquiring undertaking. The rationale behind this is rooted in the principle of economic continuity. Just like in Skanska, taking over assets and liabilities such as liability for breaches of EU law does not mean that an economic entity ceases to exist from an economic viewpoint.\(^{120}\) The economic continuity test determines in which cases liability can be assigned to a legal successor who itself did not infringe the law and thus was not part of the economic unit at the time of the infringement. Yet, the economic continuity test will ‘only be applied where the legal person responsible for running the undertaking [e.g. the parent company] has ceased to exist in law after the infringement has been committed.’\(^{121}\) This eventually changes if the acquiring undertaking continues the infringing behaviour. As an interim conclusion, it can be stated that in addition to the parent company that exerts decisive influence over an infringer, liability can be imputed to other subsidiaries given that they have participated in the infringement, and thus form part of the undertaking. But liability can also be imputed to the economic successor although it might not have had any ties in the infringement. These are new forms of civil liability which, after Skanska, have to be applied in private enforcement of EU competition law.

### V. Conclusion

The CJEU in Skanska addressed a matter which had not been harmonised by the Damages Directive,\(^ {122}\) but in the end is crucial to private enforcement. As Skanska is also of relevance in cases outside economic succession, liability for fines in public enforcement and liability for damages in private enforcement of EU competition Law are to be determined in accordance with the concept of undertaking. It has been shown that the notion of undertaking significantly differs from the traditional perception of civil liability of natural persons and legal entities. Nevertheless, by applying the concept of undertaking to both public and private enforcement, the CJEU assumes that both form part of one enforcement system which ultimately aims at deterrence.\(^ {123}\) Had the Court decided to leave the determination of the circle of persons responsible to compensate the harm resulting from antitrust infringements up to the Member States’ domestic legal systems, given that they observed the principles of equivalence and effectiveness, the uniformity of the enforcement could have been at stake. As all civil courts of the Member States will have to apply the concept of undertaking in private enforcement, it should not be overlooked that this concept is by no means clear cut and often leads to situations where the onus is placed on a parent company without having clear guidance as to how to rebut the presumption of forming part of one single undertaking. In conclusion, even though the Court has created a ‘level playing field’ in regard to the circle of persons liable for anticompetitive behaviour, this judicial harmonisation will trigger new types of questions, which (partly) would not have surfaced as such in public enforcement. For example, is the ‘innocent’ subsidiary also liable for its parents’ or even other subsidiaries’ conduct? Time (and the CJEU) will tell.

\(^{116}\) For an in-depth discussion of the recent German case-law see Wagener (n 85); see also Christian Kersting, ‘Schienenkartell: Internationale Zuständigkeit wegen Haftung der Mutter für die Tochter’ [2019] WuW 603 ff, translated version to be found at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3470670>.

\(^{117}\) Case C- 508/11 P Eni v Commission EU:C:2013:289, para 41.

\(^{118}\) Van Bael and Bellis (n 39) 25.

\(^{119}\) Case C-29/83 CRAM and Rheinzink v Commission EU:C:1984:130, para 9; Case C-204/00 P Aalborg Portland v Commission EU:C:2004:6, para 59; Case C-280/06 Autorità Garante della Concorrenza e del Mercato v ETI EU:C:2007:775, para 42.

\(^{120}\) Case C-724/17 Vantaan kaupunki v Skanska Industrial Solutions EU:C:2019:204, para 40.

\(^{121}\) Case C-49/92 P Commission v Anic EU:C:1999:356, para 145.

\(^{122}\) See Damages Directive (n 1).

\(^{123}\) Case C-724/17 Vantaan kaupunki v Skanska Industrial Solutions EU:C:2019:204, para 47.