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Competition Infringement Damages Actions: Ruling in *Skanska* Provides Clarifications on Who is Liable

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Abstract

Damages disputes related to breaches of EU competition law are heard by Member State courts that apply a combination of EU and national law to these cases. Recently, the European Court of Justice handed down a preliminary ruling concerning who is liable to compensate harm caused by competition infringements (*Skanska* (C-724/17)). Importantly, the ruling confirms that EU competition law, and not national legislation, dictates which legal entities are responsible for damages. Moreover, the ruling indicates that the broadly interpreted concept of "undertaking" and the principle of economic continuity—traditionally discussed in the sphere of public enforcement of EU competition provisions—are also relevant in the context of private law claims. These clarifications are invaluable, because the issue of those liable for damages has not previously been addressed in a detailed manner, and the extent to which EU law, as opposed to national rules, governs this area has not been clear. This contribution explores the *Skanska* ruling and its theoretical and practical implications.

Introduction

While twenty years of EU level case law[1] and one Directive[2] have addressed damages actions for infringements of EU competition law, many issues pertaining to the compensation of harm remain unresolved. Damages disputes are heard by national courts, and, in the absence of EU law norms, Member State laws "fill in the gaps" in accordance with the principle of national procedural autonomy.[3] However, with respect to questions that have not been expressly discussed as matters of EU law, it is sometimes ambiguous as to whether one is dealing with an issue where procedural autonomy, and therefore complementing national law, applies. In this way, a specific element of damages liability may in fact be

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[1] Starting, in terms of preliminary rulings, from *Courage Ltd v Crehan* (C-453/99) EU:C:2001:465. See also Opinion of Advocate General Van Gerven in *Banks v British Coal* (C-128/92) EU:C:1993:860.

[2] Directive 2014/104 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.

[3] See, e.g. *Courage* (C-453/99) EU:C:2001:465 at [29]; *Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04 to C-298/04) EU:C:2006:461 at [56]–[64].

governed by EU law—although EU law would remain vague and require further clarification—so that no room for national manoeuvre exists. Even within public enforcement of competition law, it has not always been clear which matters are governed by EU law and which should be resolved in accordance with national rules.[4]

With these points in mind, *Skanska*[5] dealt with highly relevant yet previously unanswered questions regarding problems such as what is the primary source of law determining who is liable for damages related to competition law infringements. In particular, the referring court raised the issue of whether the question of who is actually liable is a matter of interpreting art.101 of the Treaty on the Functioning of the EU (TFEU).[6] The answer by the European Court of Justice (ECJ) was affirmative. Additionally, the Court confirmed that doctrines developed in the context of the public enforcement of competition law with respect to attribution of liability apply even with respect to private law claims.[7]

The *Skanska* ruling can be characterised as a milestone. First, clarifying that art.101 TFEU is the relevant source of law in terms of the determination of the persons liable is of significant practical relevance. EU law must be applied uniformly across the Union. When applying art.101 TFEU, Member State courts must observe any relevant guidance by the ECJ and note the possibility, and the last instance courts' obligation, to request preliminary rulings on issues where the interpretation of EU law remains unclear. In other words, open-ended EU law does not justify using national rules to "fill the gaps".[8] Secondly, the fact that *Skanska* affirms the applicability of "public enforcement liability doctrines" to damages cases reveals that the doctrines that concern responsibility for breaches of EU competition law are very general in nature.

Rules implementing Directive 2014/104[9] were too recent to be applied to the facts of *Skanska*. In any event, it should be noted that even the Directive—originally intended to significantly harmonise the legal landscape of damages actions[10]—can be considered vague when it comes to dealing with the potential defendants of damages cases. The legislation utilises the notion of "infringer" and defines this as "an undertaking or

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[4] See also "Discussion" below.

[5] *Skanska Industrial Solutions and Others* (C-724/17) EU:C:2019:204.

[6] Request for a preliminary ruling, *Skanska Industrial Solutions and Others* (C-724/17) [2018] OJ C83/14.

[7] *Skanska* (C-724/17) EU:C:2019:204 at [46]–[51], [60].

[8] See art.267 TFEU. In contrast, with respect to details of liability covered by national procedural autonomy, national laws remain highly relevant and divergences between Member States possible. See, e.g. *Manfredi* (C-295/04 to C-298/04) EU:C:2006:461 at [58]–[64], [71]–[72], [81]–[82], [92]–[100]. Directive 2014/104 on actions for damages [2014] OJ L349/1 only harmonized certain selected aspects of damages cases.

[9] Directive 2014/104 on actions for damages [2014] OJ L349/1.

[10] See in particular European Commission, "Green Paper—Damages Actions for Breach of the EC Antitrust Rules" COM(2005) 672 final.

association of undertakings which has committed an infringement of competition law".[11] Although using language that is familiar from arts 101–102 TFEU has been understood as signifying the extension of the principles concerning responsibility to the area of private enforcement,[12] it has not been self-evident which "public enforcement responsibility doctrines" apply to private disputes and, therefore, who exactly are the legal persons liable for damages.[13] The vagueness of the Directive accentuates the importance of the *Skanska* ruling, with clarifications provided in the case dealing with the interpretation of EU primary law and therefore complementing its provisions. Further, the ECJ also makes passing remarks regarding the interpretation of the Directive.

This article analyses the ECJ's reasoning in *Skanska* against the backdrop of public and private enforcement of EU competition law, and assesses the theoretical and practical significance of the ruling.

Factual and legal background to *Skanska*

The main proceedings of the *Skanska* case relate to an asphalt cartel, which, according to the final public enforcement decision of the Finnish Supreme Administrative Court (2009), had been nationwide and in action 1994–2002.[14] The city of Vantaa, along with many other municipalities, claimed damages for the harm caused by the cartelised road construction prices. However, a significant technical problem faced the damages claim: some of the cartel participants had been dissolved in voluntary liquidation proceedings and therefore did not exist anymore. The sole shareholders of those cartel participants had acquired their respective subsidiaries' assets and continued their economic activity.[15]

The national lower instance courts hearing the case—a district court and an appellate court—adopted different solutions regarding the issue of whether the principle of economic continuity, or economic succession, and the requirements concerning effective enforcement of EU competition law would mean that the three companies that had acquired the assets of three cartel members were liable for the harm caused by the dissolved companies. Under national law, such liability would not arise.[16] The dispute ultimately reached

[11] Directive 2014/104 on actions for damages [2014] OJ L349/1, art.2. See also art.1.

[12] See, e.g. C. Koenig, "An Economic Analysis of the Single Economic Entity Doctrine in EU Competition Law" (2017) 13 *Journal of Competition Law & Economics* 281.

[13] For discussion see, e.g. C. Cauffman, "Civil Law Liability of Parent Companies for Infringements of EU Competition Law by Their Subsidiaries" (February 8, 2019) SSRN, *https://ssrn.com/abstract=3331083* [Accessed 6 November 2019].

[14] The Finnish Supreme Administrative Court, KHO 2009:83 (29 September 2009).

[15] For details, see Opinion of AG Wahl in *Skanska* (C-724/17) EU:C:2019:100 at [9]–[19]; *Skanska* (C-724/17) EU:C:2019:204 at [7]–[9]; Decision on requesting a preliminary ruling, the Finnish Supreme Court, 2527, *Vantaan kaupunki v Skanska Industrial Solutions, NCC Industry, and Asfaltmix* (19 December 2017).

[16] See Opinion of AG Wahl in *Skanska* (C-724/17) EU:C:2019:100 at [12]–[19]; Decision on requesting a preliminary ruling, the Finnish Supreme Court, 2527 (19 December 2017). The fact that no preliminary ruling requests were made about the entities liable

the Finnish Supreme Court, which stayed the proceedings and referred three questions for preliminary ruling.[17]

In addition to asking whether art.101 TFEU directly governs the issue of the legal entities liable for damages (the first question), the referring court further asked, in case the answer to the first question was affirmative, whether the companies that fall within the EU law concept of "undertaking" are those who are liable for harm caused, and whether the principles the ECJ has applied with respect to attributing liability within the sphere of public enforcement are applicable, so that liability could be based on belonging to the same economic entity or on economic continuity (the second question). Moreover, in case the persons liable for damages should be determined according to national law, the referring court requested guidance concerning the EU law compatibility of domestic rules under which a company that, after acquiring the entire share capital of another company which took part in an art.101 TFEU infringing cartel, would not be liable for the harm caused (the third question).[18]

Opinion of the Advocate General

Advocate General (AG) Wahl submitted in his Opinion—which was essentially followed by the ECJ—that art.101 TFEU and the notion of "undertaking" dictate those liable for damages, and that the principle of economic continuity should be applied in circumstances such as those of the *Skanska* case. Therefore, compensation could be sought from companies that had acquired the assets of dissolved cartel members.[19] Wahl particularly emphasised that while details of damages claims can be governed by national procedural autonomy, the core elements or "cornerstones" of liability, such as the issue of who is liable, are matters of EU law.[20] Further, the AG underlined the importance of guaranteeing the full effect of EU competition provisions, the deterrent effect of damages liability, and that public and private enforcement constitute complementary mechanisms for ensuring that EU competition law achieves its intended effects.[21]

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during the lower instance court proceedings of the "asphalt cartel saga" was criticised by, e.g. K. Havu, "Private Enforcement of EU (Competition) Law—Remarks and Outlooks Regarding the Intertwinement of EU and National Law" (2014) 150 *Tidskrift Utgiven av Juridiska Föreningen i Finland* 55, 67–68, 71–72.

[17] *Skanska* (C-724/17) EU:C:2019:204, the ECJ's summary of the main proceedings is found at [3]–[22].

[18] Request for a preliminary ruling, *Skanska* (C-724/17) [2018] OJ C83/14.

[19] Opinion of AG Wahl in *Skanska* (C-724/17) EU:C:2019:100.

[20] Opinion of AG Wahl in *Skanska* (C-724/17) EU:C:2019:100 at [40]–[44], [56]–[67].

[21] Opinion of AG Wahl in *Skanska* (C-724/17) EU:C:2019:100 at, e.g. [29]–[50], [67].

Ruling of the Court

The ECJ examined the first and the second preliminary ruling question together, noting that they essentially asked whether art.101 TFEU must be interpreted as meaning that, in a case in which all the shares of companies which have participated in a cartel prohibited by that article were acquired by other companies, which dissolved the former companies and then carried on their commercial activities, the acquiring companies may be held liable for harm caused by the cartel in question.[22] The Court referred to private enforcement case law, remarking that arts 101(1) and 102 TFEU produce direct effects in relations between individuals, and that the full and practical effect of art.101 TFEU would be put at risk if it were not open to any individual to claim damages on the basis of a competition infringement.[23] The ECJ continued that while it is, in the absence of EU rules, for the domestic system of each Member State to lay down the detailed rules governing actions for damages, the determination of the legal entities liable for damages in relation to an infringement of art.101 TFEU is governed by EU law.[24]

The Court explained that the guidance given in public enforcement case law concerning the concept of an "undertaking" and the doctrine of economic continuity apply even to damages claims.[25] Therefore, those required to compensate for the damage caused by an infringement of art.101 TFEU are the undertakings, within the meaning of that provision, which have participated in the anticompetitive practice.[26] The ECJ remarked that this interpretation could not be called into question even pursuant to the provisions of Directive 2014/104 (*ratione temporis* not applicable to *Skanska*). On the contrary, the Directive must be read as confirming that those responsible for harm caused by an infringement of EU competition law are specifically the "undertakings" that committed the infringement.[27]

The ECJ reiterated that the notion of "undertaking" under EU competition law must be understood as designating an economic unit even if in law that economic unit consists of several natural or legal persons.[28] Further, it would undermine the effective application of the EU competition provisions if the actors who infringed competition law could escape the consequences of such infringement by changing their identity. Legal or organisational change does not necessarily create a new undertaking free of liability. Importantly,

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[22] *Skanska* (C-724/17) EU:C:2019:204 at [23].

[23] *Skanska* (C-724/17) EU:C:2019:204 at [24]–[26]. See also *Courage* (C-453/99) EU:C:2001:465.

[24] *Skanska* (C-724/17) EU:C:2019:204 at [27]–[28].

[25] See *Skanska* (C-724/17) EU:C:2019:204 at [29]–[32], [36]–[51].

[26] *Skanska* (C-724/17) EU:C:2019:204 at [29]–[32], [47].

[27] See *Skanska* (C-724/17) EU:C:2019:204 at [33]–[35]; Directive 2014/104 on actions for damages [2014] OJ L349/1.

[28] *Skanska* (C-724/17) EU:C:2019:204 at [36]–[37]. See also *Akzo Nobel NV and Others* (C-516/15 P) EU:C:2017:314 at [47]–[48]; *ETI and Others* (C-280/06) EU:C:2007:775 at [38].

liability can be attributed to a legal entity which has taken over the economic activities of a company that infringed competition law where the latter has ceased to exist (the doctrine of economic continuity).[29]

In *Skanska*, the relevant defendants in the main proceedings had each acquired a company that had participated in the asphalt cartel. These defendants subsequently wound up and took over the commercial activities of the infringer companies.[30] The ECJ considered that the defendant companies had assumed liability for the damage caused by the cartel as they had ensured the continuation of the economic activities of the infringers. The Court concluded that art.101 TFEU must be interpreted as meaning that companies which have continued the economic activities of former cartel members may be held liable for the harm caused by the cartel.[31]

An additional matter addressed by the ECJ was the possibility of limiting the temporal effects of the judgment, as this had been requested by a party.[32] The Court underlined that limiting the effects of interpretive guidance provided in a preliminary ruling is an exceptional measure and subject to stringent criteria.[33] Since the party requesting the limitation of the temporal effects had in no way substantiated its arguments, the claim was denied.[34] It is settled case law that when explaining the correct interpretation of a rule of EU law, the ECJ clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force.[35]

Discussion

Legal persons liable for damages—an issue of interpreting EU competition law

The ECJ has previously clarified, for example, that any individual should be able to claim damages for harm caused by breaches of EU competition law,[36] and that the harm incurred should be compensated in full, taking into account both actual loss and lost profits.[37] By making these statements, the ECJ has indicated that

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[29] *Skanska* (C-724/17) EU:C:2019:204 at [38]–[40], [46]. Of the previous case law, see in particular *SNIA v Commission* (C-448/11 P) EU:C:2013:801 at [23]–[29].

[30] *Skanska* (C-724/17) EU:C:2019:204 at [48]–[49].

[31] This answer made it unnecessary to reply to the third question. *Skanska* (C-724/17) EU:C:2019:204 at [50]–[52].

[32] *Skanska* (C-724/17) EU:C:2019:204 at [53]–[54].

[33] Namely, the potential effect of the ruling on a large number of legal relationships, entered into in good faith, in a situation where there has been objective uncertainty regarding the implications of EU law. *Skanska* (C-724/17) EU:C:2019:204 at [55]–[57]. See also *Microsoft Mobile Sales International and Others* (C-110/15) EU:C:2016:717 at [59]–[61].

[34] *Skanska* (C-724/17) EU:C:2019:204 at [58]–[59].

[35] E.g. *Microsoft Mobile* (C-110/15) EU:C:2016:717 at [59].

[36] *Courage* (C-453/99) EU:C:2001:465 at [24]–[26]; *Manfredi* (C-295/04 to C-298/04) EU:C:2006:461 at [58]–[61], [89]–[91].

[37] *Manfredi* (C-295/04 to C-298/04) EU:C:2006:461 at [95]–[100]; *Bundeswettbewerbsbehörde v Donau Chemie* (C-536/11) EU:C:2013:366 at [22]–[24].

these issues are questions of EU law. Against this background, it was certainly conceivable that the question of the legal persons liable, as well as more specific questions related to the attribution of liability, could also be matters of the interpretation of EU competition provisions, rather than being covered by national procedural autonomy. However, the matters governed by EU law have not always been clear within competition law enforcement. Additional remarks on this issue and regarding certain details of public enforcement case law will be made in Section "EU competition enforcement: uniformity and divergence".

The transferability of the principles governing responsibility for competition infringements to private litigation has not been previously addressed by the ECJ. The *Skanska* ruling indicates that the same doctrines apply to the attribution of liability in both public and private enforcement cases.[38] This signifies that EU law doctrines concerning responsibility for competition infringements are general in nature and, moreover, can be further developed in different types of cases: ECJ decisions on appeals related to public enforcement by the European Commission (Commission), preliminary rulings on public enforcement by national competition authorities, and preliminary rulings on private enforcement before national courts.

In *Skanska,* the ECJ expresses the core of its guidance—those liable being a matter of interpreting art.101 TFEU— in general terms and in a broadly applicable manner instead of only providing a context-specific, "narrow" answer.[39] Although the *Skanska* ruling focuses specifically on art.101 TFEU, it is evident that similar reasoning applies to art.102 TFEU.[40]

In terms of the "logic" and clarity of EU law, the ECJ's approach visible in *Skanska* is less complex than other alternatives would have been. It means that those responsible for competition infringements are, at least as a starting point, the same legal entities with respect to both liability for fines and for damages. Public and private enforcement proceedings should produce relatively uniform outcomes in terms of attribution of liability, and the solutions regarding those liable for damages should not significantly vary from one Member State to another.[41] As the third question presented by the national court in *Skanska* illustrates, dealing with the practical implications of the alternative solution—leaving the determination of the persons liable to be governed by national rules guided by the "outer limits" set by EU law principles—would have been

[38] *Skanska* (C-724/17) EU:C:2019:204 at [29]–[32], [41]–[42], [47].

[39] See *Skanska* (C-724/17) EU:C:2019:204 at [28].

[40] See also *Skanska* (C-724/17) EU:C:2019:204 at [24]; Opinion of AG Wahl in *Skanska* (C-724/17) EU:C:2019:100 at [69], and, e.g. *Cogeco Communications* (C-637/17) EU:C:2019:263 at [38]–[47] (where art.101 TFEU case law is cited as relevant for art.102 TFEU private enforcement case).

[41] Having said that, the possibility that there are differences in the interpretation of EU law by national courts, that national courts err in their interpretation, do not observe EU law as they should, or do not request a preliminary ruling where this would be necessary, of course remains.

challenging.[42] For example, national courts would have struggled with deciphering what ensuring the full effect of EU law and the principle of effectiveness require in particular private litigation cases, as well as the circumstances according to which national rules should be set aside as incompatible with EU law. Additional preliminary ruling questions on these themes would have been likely.

Legal persons liable: substantive context

Attribution of liability: public enforcement background and *Skanska*

The affirmation that the notion of "undertaking" is decisive for identifying the actors liable for damages signifies that the doctrines that have been expressed in ECJ case law as a part of the interpretation of that notion under arts 101–102 TFEU are also relevant in private enforcement cases.[43] Therefore, not only must the guidance concerning economic succession be observed when adjudicating private law claims, but ECJ case law on, for instance, parent company liability may also be relevant. "Undertaking" designates an economic unit, even if that unit consists of several legal persons (the single economic entity doctrine).[44] For example, a parent company and its subsidiary form a single undertaking in the case where the subsidiary does not make independent decisions regarding its conduct in the market, a situation that is presumed when the parent has a 100% shareholding in the subsidiary.[45] When EU competition law is infringed, the entire undertaking bears responsibility.[46]

Regulation 1/2003, art.23(2) simply states that the Commission "may by decision impose fines on undertakings and associations of undertakings".[47] Nevertheless, fines are in practice imposed on legal persons. The company liable for paying fines can be, for example, a parent company of the entity that infringed competition law, or indeed several legal persons that belong to the same undertaking can be jointly and severally liable for the fines. The EU Courts have repeatedly referred to the broad understanding of "undertaking" as justifying fining legal entities other than those who actually, by their own active behaviour,

[42] See *Skanska* (C-724/17) EU:C:2019:204 at [22].

[43] See *Skanska* (C-724/17) EU:C:2019:204 at [28]–[32], [39]–[40], [45]–[46], [48]–[51]; Opinion of AG Wahl in *Skanska* (C-724/17) EU:C:2019:100 at [71]–[81].

[44] E.g. *Akzo Nobel NV* (C-516/15 P) EU:C:2017:314 at [48]; *Commission v Parker Hannifin Manufacturing* (C-434/13 P) EU:C:2014:2456 at [39]; *General Química* (C-90/09 P) EU:C:2011:21 at [35]; *ETI* (C-280/06) EU:C:2007:775 at [38]–[39]. For discussion see, e.g. O. Odudu and D. Bailey, "The Single Economic Entity Doctrine in EU Competition Law" (2014) 51 C.M.L. Rev. 1721.

[45] *Akzo Nobel and Others v Commission* (C-97/08 P) EU:C:2009:536 at [60]–[62].

[46] E.g. *Akzo Nobel NV* (C-516/15 P) EU:C:2017:314 at [46]–[49]; *Schindler Holding and Others* (C-501/11 P) EU:C:2013:522 at [103]–[111]; *ArcelorMittal Luxembourg v Commission* (C-201/09 P and C-216/09 P) EU:C:2011:190 at [95].

[47] Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

took part in anticompetitive practices.[48] The relationship between the single economic entity doctrine and parental liability as well as the partially ambiguous justifications for determining which legal persons will be fined have been perceived as problematic.[49]

Now, on the basis of *Skanska*, it appears that parent companies may also be held liable for damages.[50] Additionally, certain parallel developments in public enforcement case law accentuate the significance of this implication. Notably, in July 2018, the General Court (GC) upheld a Commission decision which found an investment firm jointly and severally liable with its indirect subsidiary for an infringement of art.101 TFEU.[51]

The principle of economic continuity can be characterised as an expression of the broad definition of "undertaking".[52] Case law illustrates that it is applied, in particular, where the company that committed a competition infringement has ceased to exist, either in law or economically. An important justification is that undertakings could escape penalties altogether if all it took to free themselves from liability was to change their identity through legal or organisational changes.[53] Moreover, if a penalty were imposed on an undertaking that continues to exist in law, but has ceased its economic activity, such a penalty would not achieve its deterrent effect.[54] Therefore, when the economic activities in the context of which competition provisions were infringed continue, liability for anticompetitive behaviour can be attributed to a legal person that has taken over and continued those economic activities.[55] That new legal person has, as further clarified in *Skanska,* "assumed liability" with respect to obligations connected to those activities.[56]

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[48] See, e.g. *Dow Chemical and Others v Commission* (C-499/11 P) EU:C:2013:482 at [47]–[49]; *Akzo Nobel NV* (C-516/15 P) EU:C:2017:314 at [50]–[54]; *Schindler* (C-501/11 P) EU:C:2013:522; *Akzo Nobel and Others* (C-97/08 P) EU:C:2009:536; *Evonik Degussa GmbH v Commission* (C-155/14 P) EU:C:2016:446 at [27]. See also Odudu and Bailey, "Single Economic Entity" (2014) 51 C.M.L. Rev. 1738, 1742–1757; A. Kalintiri, "Revisiting Parental Liability in EU Competition Law" (2018) 43 E.L. Rev. 145.

[49] See Odudu and Bailey, "Single Economic Entity" (2014) 51 C.M.L. Rev. 1745–1757; Kalintiri, "Parental Liability" (2018) 43 E.L. Rev. 145; S. Thomas, "Guilty of a Fault that one has not Committed. The Limits of the Group-Based Sanction Policy Carried out by the Commission and the European Courts in EU-Antitrust Law" (2012) 3 *Journal of European Competition Law & Practice* (*JECLaP*) 11. These authors note, i.a. that the single economic entity doctrine alone is incapable of fully explaining which legal persons are fined. Within undertakings, fines are often imposed on parent companies (and not on any persons belonging to the same economic entity). See also further Section "Personal Liability?" below.

[50] See *Skanska* (C-724/17) EU:C:2019:204 at, e.g. [31]–[32].

[51] *The Goldman Sachs Group v Commission* (T-419/14) EU:T:2018:445 (an appeal is pending before the ECJ).

[52] See also Opinion of AG Wahl in *Skanska* (C-724/17) EU:C:2019:100 at [73].

[53] See *Parker Hannifin* (C-434/13 P) EU:C:2014:2456 at [40]; *SNIA* (C-448/11 P) EU:C:2013:801 at [22]–[24]; *ETI* (C-280/06) EU:C:2007:775 at [40]–[43].

[54] See *ETI* (C-280/06) EU:C:2007:775 at [40].

[55] See *ETI* (C-280/06) EU:C:2007:775 at [43].

[56] *Skanska* (C-724/17) EU:C:2019:204 at [50]. See also *SNIA* (C-448/11 P) EU:C:2013:801 at [25]–[29]; *Erste Group Bank and Others* (C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P) EU:C:2009:576 at [83].

Personal liability?

The terminology used by the EU Courts appears to have contributed to the fact that case law on attribution of liability has been occasionally considered as problematic.[57] The ECJ describes liability under competition law as "personal/individual liability" or "personal/individual responsibility" (*responsabilité personnelle*).[58] This may indeed appear confusing as it is clearly possible that legal persons other than those who by their own actions infringed competition law ultimately bear the responsibility in terms of fines or, as we now know, damages. The ECJ maintains there is no controversy[59]: When discussing personal liability, the ECJ refers to the personal liability of entire undertakings, not just of individual legal or natural persons.[60] Therefore, the notion of personal liability under EU competition law differs from, for instance, Member State company and private laws,[61] which utilise this concept when referring to personal liability of an actual legal person.[62]

Further, the manner in which the EU Courts have inferred, in particular, the liability of parent companies from the notion of the "personal liability of undertakings" has been considered defectively justified.[63] Commentators underline that a solid theory for parental liability appears to be lacking and that, on the basis of case law, the possibilities for parent companies to avoid liability seem virtually nonexistent, even where they show that they had taken steps to avoid competition infringements within their company groups.[64] If practically nothing exonerates these parents from liability, then the issue of what exactly the justification is

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[57] See, e.g. Thomas, "A Fault that one has not Committed" (2012) 3 *JECLaP* 11; Kalintiri, "Parental Liability" (2018) 43 E.L. Rev. 145. See also Odudu and Bailey, "Single Economic Entity" (2014) 51 C.M.L. Rev. 1745–1757.

[58] E.g. *Alliance One International and Others (AOI)* (C-628/10 P and C-14/11 P) EU:C:2012:479 at [42]; *ETI* (C-280/06) EU:C:2007:775 at [39]; *Commission v Anic* (C-49/92 P) EU:C:1999:356 at [78]–[80]; *SNIA* (C-448/11 P) EU:C:2013:801 at [23].

[59] E.g. *SNIA* (C-448/11 P) EU:C:2013:801 at [23]; *AOI* (C-628/10 P and C-14/11 P) EU:C:2012:479 at [42]–[44]. See also *Eni v Commission* (C-508/11 P) EU:C:2013:289 at [47]–[50]; *Metsä-Serla and Others v Commission* (C-294/98 P) EU:C:2000:632 at [34], and the GC in *Bolloré v Commission* (T-372/10) EU:T:2012:325 at [52].

[60] See *Akzo Nobel NV* (C-516/15 P) EU:C:2017:314 at [49]; *Akzo Nobel and Others* (C-97/08 P) EU:C:2009:536 at [56], [77]; *Parker Hannifin* (C-434/13 P) EU:C:2014:2456 at [39], [51]. See also the GC in, e.g. *Prysmian and Prysmian cavi e sistemi v Commission* (T-475/14) EU:T:2018:448 at [119]–[139] (an appeal is pending before the ECJ).

[61] Note also *Schindler* (C-501/11 P) EU:C:2013:522 at [101], where the ECJ mentions personal liability according to the way in which national private laws understand the concept, and states that this principle "cannot be relevant for defining the perpetrator of an infringement of competition law, which is concerned with the actual conduct of undertakings".

[62] For discussion see, e.g. Thomas, "A Fault that one has not Committed" (2012) 3 *JECLaP* 11, 14–16. See also Kalintiri, "Parental Liability" (2018) 43 E.L. Rev. 159.

[63] See, e.g. Kalintiri, "Parental Liability" (2018) 43 E.L. Rev. 145; Thomas, "A Fault that one has not Committed" (2012) 3 *JECLaP* 11; Odudu and Bailey, "Single Economic Entity" (2014) 51 C.M.L. Rev. 1745–1757.

[64] See, e.g. Kalintiri, "Parental Liability" (2018) 43 E.L. Rev. 155–162; *Evonik Degussa* (C-155/14 P) EU:C:2016:446; *Schindler* (C-501/11 P) EU:C:2013:522.

for the liability in the first place is further confounded.[65] Additionally, commentators and parties to cases have noted that arts 48 and 49 of the Charter of Fundamental Rights of the EU (regarding the presumption of innocence and the principle of legality) can be seen as suggesting that the personal responsibility of "an economic entity" is a questionable construction from the standpoint of the rights of the actual legal persons that constitute an economic entity.[66] Arguments along these lines have not, however, been accepted by the EU Courts.[67] From a broader perspective, the way in which parties rely on the notion of personal responsibility in order to avoid parental or succession liability,[68] while the EU Courts refer to the concept as a justification for finding liability,[69] evidences the differing interpretations and ambiguities surrounding the notion.

In *Skanska*, the ECJ states that liability for damage caused by infringements of EU competition rules is personal in nature and therefore an undertaking which infringes those rules must answer for the harm caused.[70] Further, companies who have continued the economic activities of cartel participants—where the actual infringers have ceased to exist—can be held liable for damage caused and that this is not contrary to the principle of individual liability.[71] In all, the utilisation of "individual liability" in *Skanska* aligns with public enforcement case law: the ruling discusses the liability of undertakings and liability related to certain economic activities.[72] *Skanska* does not significantly elaborate upon the notion, but affirms the relevance of "personal liability of undertakings" in terms of private claims—and evidences that the the controversies and arguable legal-technical problems surrounding this autonomous EU competition law concept remain highly topical.

Extending the liability doctrines to private enforcement: arguments for and against

The broad applicability of responsibility doctrines, as observable on the basis of *Skanska*, contributes to the coherence of the enforcement of EU competition law, and decreases divergence in terms of private

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[65] See also Kalintiri, "Parental Liability" (2018) 43 E.L. Rev. 159–162.

[66] See, e.g. Thomas, "A Fault that one has not Committed" (2012) 3 *JECLaP* 14–17; *Villeroy & Boch v Commission* (C-625/13 P) EU:C:2017:52 at [140]–[143]; *Goldman Sachs* (T-419/14) EU:T:2018:445 at [184]–[185].

[67] See, e.g. *Villeroy & Boch* (C-625/13 P) EU:C:2017:52 at [141]–[156]; *Goldman Sachs* (T-419/14) EU:T:2018:445 at [187]–[194].

[68] E.g. *Villeroy & Boch* (C-625/13 P) EU:C:2017:52 at [140]–[143]; *Eni* (C-508/11 P) EU:C:2013:289 at [50]; *Goldman Sachs* (T-419/14) EU:T:2018:445 at [184]–[185]; *Prysmian* (T-475/14) EU:T:2018:448 at [120]–[122].

[69] E.g. *Commission v Siemens Österreich and Others* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [44]–[49]; *Akzo Nobel NV* (C-516/15 P) EU:C:2017:314 at [49]; *Prysmian* (T-475/14) EU:T:2018:448 at [124]–[139].

[70] *Skanska* (C-724/17) EU:C:2019:204 at [31]–[32].

[71] *Skanska* (C-724/17) EU:C:2019:204 at [36]–[50].

[72] See *Skanska* (C-724/17) EU:C:2019:204 at [31]–[50], and, e.g. *Akzo Nobel NV* (C-516/15 P) EU:C:2017:314 at [48]–[49]; *SNIA* (C-448/11 P) EU:C:2013:801 at [23]–[25]. As aptly put by AG Wahl, under EU competition law, "liability is attached to assets, rather than to a particular legal personality" (Opinion of AG Wahl in *Skanska* (C-724/17) EU:C:2019:100 at [80]).

enforcement case outcomes. Additionally, the fact that the notion of "undertaking" is used to determine who is responsible for damages increases deterrence and aggregate sanctions for competition infringements, prevents companies from opportunistically exploiting the limited liability of limited liability companies,[73] and facilitates obtaining compensation, thereby advancing corrective justice. One of the practical consequences of the *Skanska* ruling is that companies contemplating acquisitions must take into account not only the risk of liability for fines regarding target companies' previous breaches of EU competition law,[74] but also the risk of damages liability.

Even though the solution of extending the doctrines concerning responsibility for competition infringements to private litigation can be welcomed from the standpoint of the effectiveness and clarity of EU law, arguments against applying "public enforcement responsibility doctrines" to horizontal damages cases can be presented, as well. To start with, a general and universal rationale for tort law is that the person that *causes* harm is the one who is liable for its compensation. Liability of other persons or entities is an exception to this main rule.[75] Additionally, parent companies are not, in general, legally responsible for the acts and debts of their subsidiaries. To the contrary: one of the fundamental features of limited liability companies is that their shareholders do not carry unlimited personal responsibility for the debts of the company, that is, the liabilities of a company are not considered debts held by the shareholders. Usually, exceptions to the fundamental separation of corporate and shareholder assets and obligations are limited and narrow.[76]

The doctrines relating to the attribution of liability have also been questioned in the context of competition infringement fines, with arguments in this context relying on, for example, company law grounds such as those mentioned above.[77] In terms of horizontal, private claims, the criticism based on the traditional

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[73] For discussion see, e.g. Koenig, "Single Economic Entity Doctrine" (2017) 13 *Journal of Competition Law & Economics* 325–327. This author underlines that limited liability is not easily justified in the case of involuntary creditors.

[74] In terms of earlier discussion see A. Brown and M. Schonberg, "Widening the Net: the General Court Extends the Principle of Successor Liability in EU Competition Law" (2013) 34 E.C.L.R. 1; C. Hummer and L. Leitner, "Antitrust Audit in the Context of Transactions: Motives and Key Practical Aspects" (2012) 3 *JECLaP* 226; K. Dyekjaer-Hansen and K. Hoegh, "Succession of Liability for Competition Law Infringements with Special Reference to Due Diligence and Warranty Claims" (2003) 24 E.C.L.R. 203; K. Hoegh, "Succession of Liability for Competition Law Infringements—the Cement Judgment" (2004) 25 E.C.L.R. 534.

[75] See also, e.g. W. Van Gerven, J. Lever and P. Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law* (Oxford: Hart Publishing, 2000), pp.69, 297–300, 522–535.

[76] See regarding European laws, e.g. the Opinion of AG Trstenjak in *Idrima Tipou* (C-81/09) EU:C:2010:304 at [33]–[34] with references; Opinion of AG Kokott in *Schindler* (C-501/11 P) EU:C:2013:248 at [64]–[65]; C. Van Dam, *European Tort Law*, 2nd edn (Oxford: OUP, 2013), pp.516–519.

[77] See, e.g. Kalintiri, "Parental Liability" (2018) 43 E.L. Rev. 146–147; Thomas, "A Fault that one has not Committed" (2012) 3 *JECLaP* 11–15; Brown and Schonberg, "Widening the Net" (2013) 34 E.C.L.R. 1. The commentators cited in this fn. also highlight, e.g. the lack of credibility of the deterrence arguments.

principles of private law could be considered even more justified.[78] The ECJ's clarifications regarding the determination of those liable, and the emphasis placed upon the full effect of EU competition provisions, should be considered a further step in giving primacy to EU competition law goals over other considerations and principles. In *Skanska*, the Court simply rejected the argument that the responsibility doctrines established within public enforcement could not apply to private law claims.[79] AG Wahl did similarly in his Opinion, albeit discussing the tension between the "private law logic" and competition law enforcement expressly.[80]

EU competition enforcement: uniformity and divergence

Questions that have surfaced regarding governing law within public enforcement

Even in the field of public enforcement of competition law, the ECJ has been called upon to clarify which matters are EU law related, and therefore for the Commission and the EU Courts to decide, and which are governed by national law. Notably, the ECJ has explained that even though EU law governs the imposition of fines on undertakings, certain practical details related to joint and several liability, as well as the ultimate proportions of the fine that each company within an undertaking is required to pay, are not matters for the Commission or EU Courts.[81]

The ECJ has stated (somewhat ambiguously) that

> "the EU law concept of joint and several liability for payment of a fine concerns only the undertaking itself and not the companies of which it is made up".[82]

Further, although Art.23(2) of Regulation 1/2003 signifies that the Commission is entitled to hold a number of companies jointly and severally liable for a fine, in so far as they formed part of the same undertaking, it is not possible to conclude on the basis of either the wording of that provision or the objective of the joint and several liability mechanism under EU competition law that that power to impose penalties extends

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[78] For discussion see, e.g. S. Thomas and S. Legner, "Die Wirtschaftlliche Einheit im Kartellzivilrecht" (2016) 4 *Neue Zeitschrift für Kartellrecht* 155; Cauffman, "Liability of Parent Companies" (2019) 5–7; D. Wiegandt, *Bindungswirkung kartellbehördlicher Entscheidungen im Zivilprozess: Zur Verzahnung von Kartellverwaltungs- und Kartellprivatrecht* (Tübingen: Mohr Siebeck, 2018), pp.174–175.

[79] *Skanska* (C-724/17) EU:C:2019:204 at [40]–[50].

[80] Opinion of AG Wahl in *Skanska* (C-724/17) EU:C:2019:100 at [71]–[81].

[81] See *Siemens Österreich* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [57]–[61]; *Villeroy & Boch* (C-625/13 P) EU:C:2017:52 at [150]–[153].

[82] *Villeroy & Boch* (C-625/13 P) EU:C:2017:52 at [150]; *Siemens Österreich* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [57].

> "beyond the determination of joint and several liability from an external perspective, to the power to determine the shares to be paid by those held jointly and severally liable from the perspective of their internal relationship".[83]

Additionally, even though the joint and several liability for fines as a mechanism pursues the objective of strengthening the effectiveness of the recovery of fines, the actual shares of the fine each of the companies must cover are not of interest to the Commission, where the fine has been paid in full by one or more of the liable parties.[84] It is for the national courts to determine the shares of fine covered by each of the jointly and severally liable companies, in a manner consistent with EU law, by applying applicable national rules.[85]

These discussions vividly illustrate that envisioning the matters to be governed by EU law and national rules respectively is not always easy and that clarifications by the ECJ are invaluable. The statements reviewed above elucidate that national laws may retain significant relevance in terms of certain details of competition law enforcement. Nevertheless, it should be noted that the issue at stake in *Skanska*—who is liable for an infringement in the first place—is of such a fundamental nature that it cannot be considered extremely surprising to be found to be a matter of EU law. The above-discussed fine case law focuses on the practical sharing of liability within an undertaking after that undertaking has been found responsible for an infringement. The concrete execution of joint and several liability for fines, and for example details of possible recovery payments between the different companies involved, are questions of a different "level" than the issue of which entities can be held responsible in the first place. The way in which the ECJ refers to, first, the primary question—that is, the imposition of fines on the basis of belonging to the same undertaking—as the "external" perspective of liability and, secondly, to how fines are actually shared between jointly and severally liable companies as the "internal" perspective of liability, is an attempt to clarify that these issues are of a clearly separable nature.[86]

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[83] *Villeroy & Boch* (C-625/13 P) EU:C:2017:52 at [151]; *Siemens Österreich* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [58]; art. 23(2) of Regulation 1/2003 on the implementation of the rules on competition [2003] OJ L1/1.

[84] See *Villeroy & Boch* (C-625/13 P) EU:C:2017:52 at [152]–[153]; *Siemens Österreich* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [59]–[64]. Recently, the GC has reasoned similarly in *Goldman Sachs* (T-419/14) EU:T:2018:445 (see at [196]–[204]) and *Prysmian* (T-475/14) EU:T:2018:448 (see at [149]–[159]). In these cases, the GC had to address arguments according to which the fact that the companies fined no longer constituted a single entity at the time of the adoption of the fine decision signified that the Commission should have determined the actual shares of the fine to be covered by each company. The GC noted that the Commission was, in any event, entitled to confine itself to determining the amount of the fine that those companies were jointly and severally liable to pay, i.e., the Commission was not required to determine the portions to be paid by the companies from the perspective of their internal relationship.

[85] See *Siemens Österreich* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [60]–[62], [70]–[71].

[86] See, e.g. *Siemens Österreich* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [58]–[82]; *Villeroy & Boch* (C-625/13 P) EU:C:2017:52 at [151]–[153].

What is clear after *Skanska* is that the application of the EU competition law notion of "undertaking" in terms of the identification of the entities responsible is always a matter of EU law.[87] Both the public and private enforcement strands of case law show that certain questions related to consequences of competition law infringements are still essentially to be resolved on the basis of national law, and that this applies, in particular, to matters that can be described as practical or technical—although the categories of "practical or technical details" and "other questions" are blurry and therefore this kind of categorization is not very helpful.[88] Since *Skanska* addresses a clearly elemental issue of liability, the ECJ's statements made in this ruling can be seen as a natural continuation to the previous competition enforcement case law.

Skanska and Directive 2014/104

Directive 2014/104 was not applicable to *Skanska*[89] but was nonetheless discussed in the case in the spirit of analysing whether the wording of the Directive revealed something about the general EU law approach to the determination of the legal persons that could be liable for harm.[90] The ECJ underlined that for example art.11(1) of Directive 2014/104 (regarding the joint and several liability of undertakings) does not call into question the interpretation that the "undertakings", as defined under arts 101–102 TFEU, are liable for damages, as the Directive specifically indicates that those liable to compensate harms are the undertakings that infringed competition law. The Court emphasised that the Directive cannot be read as leaving the question of who is liable to Member States.[91] It is now evident that any provisions of the Directive that mention entities liable must be read so that their interpretation aligns with these starting points.[92]

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[87] See *Skanska* (C-724/17) EU:C:2019:204 at [29]–[32].

[88] See, e.g. *Siemens Österreich* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [57]–[74]; *Villeroy & Boch* (C-625/13 P) EU:C:2017:52 at [150]–[154]; *Manfredi* (C-295/04 to C-298/04) EU:C:2006:461; *Kone AG v ÖBB-Infrastruktur AG* (C-557/12) EU:C:2014:1317; *Skanska* (C-724/17) EU:C:2019:204 at [27]–[28]. The category of "practical or technical details" must be understood broadly, which makes defining its limits challenging. As illustrated by, e.g. the cases cited in this note, the category even includes central issues related to the evaluation of evidence. See also the seminal work regarding issues of Community law and matters left for national remedial and procedural rules: W. Van Gerven, "Of Rights, Remedies and Procedures" (2000) 37 C.M.L. Rev. 501.

[89] *Skanska* (C-724/17) EU:C:2019:204 at [34]; Directive 2014/104 on actions for damages [2014] OJ L349/1.

[90] See *Skanska* (C-724/17) EU:C:2019:204 at [33]; Opinion of AG Wahl in *Skanska* (C-724/17) EU:C:2019:100 at [65].

[91] *Skanska* (C-724/17) EU:C:2019:204 at [32]–[35]; Directive 2014/104 on actions for damages [2014] OJ L349/1. In addition to the remarks made by the Court, it should be noted that even though recital 11 of the Directive includes the statement "[w]here Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions...", this passage must be understood as merely referring to imputing damages to *undertakings*. Therefore, not even this recital suggests that the principal determination of the sphere of those who can potentially be held liable is left to national laws.

[92] See *Skanska* (C-724/17) EU:C:2019:204 at [31]–[47]; Opinion of AG Wahl in *Skanska* (C-724/17) EU:C:2019:100 at [61]–[69]. See also fn.91 above.

In his Opinion, AG Wahl was even more straightforward in criticising the line of argument according to which the provisions of the Directive could be decisive instead of art.101 TFEU. Quite justifiably, Wahl noted that the persons liable could be inferred from art.101 TFEU and that it is difficult to identify a good reason why the determination of those liable to pay compensation should be determined on a different basis. Further, the fact that the ECJ had not yet clarified the issue or the fact that the EU legislature had included a provision on joint and several liability of undertakings in Directive 2014/104, "says little about the normative basis on which the persons liable for damages ought to be determined".[93] Indeed, both disregarding the Treaty provisions as sources of law and considering that a directive can simply bypass primary law would be theoretically problematic.

Concluding remarks

The question underpinning *Skanska* was a notably fundamental one, distinguishing the case from many other competition enforcement cases. The way in which the ECJ tackled the case is comparable to the approach adopted in the seminal *Courage* ruling, in which the ECJ addressed the very existence of competition infringement damages liability as a matter of EU law.[94] *Courage* and *Skanska* both clarify, on the basis of EU primary law and in a straightforward and general manner essential elements of that liability, namely, who is liable to whom.[95]

In any event, *Skanska* constitutes an example of a justified preliminary ruling request the outcome of which was not easily foreseeable. This is observable even on the basis of the variety of views put forward by the parties and interveners in *Skanska*.[96] The case is also a heads-up for national courts to recognise the possibility that other private enforcement related questions may in fact be matters of "pure EU law".[97] Having said that, it should be remarked that the general approach of the ECJ to competition law enforcement has not been to try and eliminate all divergence related to the application of national rules, or to national

[93] Opinion of AG Wahl in *Skanska* (C-724/17) EU:C:2019:100 at [62]–[66].

[94] *Courage* (C-453/99) EU:C:2001:465 at [19]–[27].

[95] *Courage* (C-453/99) EU:C:2001:465 at [24]–[26]; *Skanska* (C-724/17) EU:C:2019:204 at [28]–[32], [47]–[51].

[96] *Skanska* (C-724/17) EU:C:2019:204. See for details Opinion of AG Wahl in *Skanska* (C-724/17) EU:C:2019:100 at [56]–[57], [65].

[97] The existing preliminary rulings, *Skanska* included, do not set out any full lists of fundamental elements of damages liability that are governed directly by EU law. See, e.g. *Skanska* (C-724/17) EU:C:2019:204 at [28].

courts' room for discretion, a course of action noticeable from, for instance, early rulings on contract term nullity issues,[98] the damages case of *Kone,*[99] and certain cases on fines.[100]

With respect to questions that are governed by national rules, the application of national law within the "outer limits" demarcated by EU law principles, such as that of effectiveness, remains intricate.[101] In the near future, even the interpretation of the somewhat vague Directive 2014/104 is likely to raise new preliminary ruling questions.[102] Overall, in the areas of competition law enforcement and tangential private law matters, combining EU and national law "correctly" remains an issue which is both theoretically interesting and highly relevant in practice. Parallel developments with the *Skanska* case include the pending case of *Otis*, which concerns "remote claimants" and the issue of whether EU law prevents a categorical exclusion of potential claimants who are not active as suppliers or customers in the relevant product and geographic market affected by a cartel.[103] It remains to be seen in how much detail the ECJ will discuss substantial matters of EU law and their interface with national rules in this case.[104]

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[98] E.g. *Societe de Vente de Ciments et Betons de L'Est SA v Kerpen & Kerpen* (319/82) EU:C:1983:374 at [11]–[12].

[99] *Kone* (C-557/12) EU:C:2014:1317, see at [32]–[37]. The ECJ could have made far-reaching and more generally applicable statements on the meaning of EU law and, e.g., defined what constitutes a legally relevant causal relationship in the context of competition infringement damages, but it chose not to do so.

[100] E.g. *Villeroy & Boch* (C-625/13 P) EU:C:2017:52; *Siemens Österreich* (C-231/11 P to C-233/11 P) EU:C:2014:256.

[101] See, e.g. *Manfredi* (C-295/04 to C-298/04) EU:C:2006:461 at [62]–[64], [71]; Directive 2014/104 on actions for damages [2014] OJ L349/1, recital 11 and art.4.

[102] Directive 2014/104 on actions for damages [2014] OJ L349/1. In terms of recent cases, see *Cogeco* (C-637/17) EU:C:2019:263. See also more broadly regarding open questions, e.g. J. Drexl, "Consumer Actions after the Adoption of the EU Directive on Damage Claims for Competition Law Infringements" (12 November 2015) Max Planck Institute for Innovation and Competition Research Paper No 15-10, SSRN *http://ssrn.com/abstract=2689521* [Accessed 6 November 2019]; B. Rodger, M. Sousa Ferro, and F. Marcos, "The Antitrust Damages Directive: Facilitating Private Damages Actions in the EU?" (2019) 10 *JECLaP* 129; P. Van Cleynenbreugel, "The Presumption of Harm and Its Implementation in the Member States' Legal Orders" in M. Strand, V. Bastidas Venegas and M. Iacovides (eds), *EU Competition Litigation, Transposition and First Experiences of the New Regime* (Oxford: Hart Publishing, 2019) p.201.

[103] Request for a preliminary ruling, *Otis Gesellschaft and Others* (C-435/18) [2018] OJ C352/19; Opinion of AG Kokott in *Otis Gesellschaft and Others* (C-435/18) EU:C:2019:651.

[104] As this contribution was approved for publication in December 2019, it should be noted that the ECJ has handed down its ruling in the case of *Otis* (*Otis GmbH* (C-435/18) EU:C:2019:1069). The ruling confirms that, albeit art.101 TFEU must be interpreted as meaning that anyone may claim compensation, the application of the notion of causal link—and deciding whether a causal connection has been established—is a task for the national courts. The *Otis* ruling does not significantly develop EU law beyond providing a "narrow" clarification according to which no requirement of a specific connection to the "objective of protection" pursued by the EU competition provisions exists as an element of causal link. In practice, national judiciaries retain notable room for discretion in terms of causation matters, even though subject to the principle of effectiveness and to the vague requirement that the national rules applied "must not jeopardise the effective application" of arts 101–102 TFEU (see *Otis* (C-435/18) EU:C:2019:1069 at [22]–[25], [30]–[34]).