# Economic unity, identity and continuity of the undertaking as a means for liability imputation

Juan Ignacio Ruiz Peris

October 2019

# Economic unity, identity and continuity of the undertaking as a means for liability imputation

Training of National Judges in EU Competition Law

DEFCOMCOURT 4

Session 1

Valencia 24 and 25 October 2019

Juan Ignacio Ruiz Peris
Catedrático de Derecho mercantil

# Undertaking and Legal entity

- National construction of undertaking as legal concept (Italy and Germany)
- Undertaking as a EU legal concept 101 and 102 TFEU.
  - It is clear from the wording of Article 101and 102 TFEU that the authors of the Treaties chose to use the concept of an 'undertaking' to designate the perpetrator of an infringement of the prohibition laid down in those provisions (judgment of 27 April 2017, Akzo Nobel and Others v Commission, C 516/15 P, EU:C:2017:314, paragraph 46 and judgement of 14 March 2019, Vantaan kaupunki vs. Skanska Industrial Solutions Oy, and Others, C 724/17, paragraph 29 ).
  - Furthermore, it is settled case-law that EU competition law refers to the activities of undertakings ( judgments of 11 December 2007, ETI and Others, C 280/06, EU:C:2007:775, paragraph 38 and the case-law cited, and of 18 December 2014, Commission v Parker Hannifin Manufacturing and Parker-Hannifin, C 434/13 P, EU:C:2014:2456, paragraph 39 and the case-law cited and 14 March 2019, Vantaan kaupunki vs. Skanska Industrial Solutions Oy, and Others, C 724/17, paragraph 30)
- EU Competition Law notion of Undertaking*
- Dialectical relationship betwen undertaking and legal entity



Juan Ignacio Ruiz Peris
Catedrático de Derecho mercantil

# *Undertaking in competition law

- Articles 101 and 102 TFEU addresses to undertakings.
- The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.
  - (judgment of 11 December 2007, ETI and Others, C 280/06, EU:C:2007:775, paragraph 38 and the case-law cited and judgement of 14 March 2019, Vantaan kaupunki vs. Skanska Industrial Solutions Oy, and Others, C 724/17, paragraph 36)
- In that regard, the Court of Justice has stated that, in the same context, the term 'undertaking' must be understood as designating an economic unit even if in law that economic unit consists of several natural or legal persons
  - (see judgment of 20 January 2011, General Química and Others v Commission, C-90/09 P, EU:C:2011:21, paragraphs 34 to 36 and the case-law cited, judgment of 27 April 2017, Akzo Nobel and Others v Commission, C 516/15 P, EU:C:2017:314, paragraph 48 and the case-law cited and judgement of 14 March 2019, Vantaan kaupunki vs. Skanska Industrial Solutions Oy, and Others, C 724/17, paragraph 37).



Juan Ignacio Ruiz Peris
Catedrático de Derecho mercantil

# Basic Glosary

- Control exercise
- Group of companies
- Undertaking
  - Economic unit
  - Single economic entity
  - Economic identity
  - Continuity of the undertaking



Juan Ignacio Ruiz Peris
Catedrático de Derecho mercantil

# Functions of the Economic unity in EU Competition Law

- Exoneration of the 101 (1) TFEU prohibition (group privilege)
- Aggregation of magnitudes with respect to determination of business volume in market or of the dominant position –
  - 101 TFEU - articles 1.2 and 3.1 Regulation 330/2010 –
  - 102 TFUE share of the market (dominance)
  - Regulation 139/2004 share of the market (mergers)
- Common liability of the members of the group conforming a sole undertaking.



Juan Ignacio Ruiz Peris
Catedrático de Derecho mercantil

# Liability imputation

- The Court of Justice has stated, when an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement
  - (judgment of 20 January 2011, General Química and Others v Commission, C-90/09 P, EU:C:2011:21, paragraphs 34 to 36 and the case-law cited).
- This economic entity seems to be equivalent to an economic unit that consists of several natural or legal persons and so equivalent to the notion of undertaking.



Juan Ignacio Ruiz Peris
Catedrático de Derecho mercantil

# Absence of paralellism between European and National Law

- Article 61.2 LDC (Spain) fines
  - A los efectos de la aplicación de esta Ley, la actuación de una empresa es también imputable a las empresas o personas que la controlan, excepto cuando su comportamiento económico no venga determinado por alguna de ellas.
- Article 71. 2 b) LDC (Spain) damage compensation.
  - La actuación de una empresa es también imputable a las empresas o personas que la controlan, excepto cuando su comportamiento económico no venga determinado por alguna de ellas.



Juan Ignacio Ruiz Peris
Catedrático de Derecho mercantil

## Fines
## JUDGMENT OF THE GENERAL COURT (Ninth Chamber)
## 12 December 2018, Case T-677/14, Biogaran vs. Commission
## Facts. Appeal brought on 28 February 2019. Case C-207/19 P. (not relevant for economic unit doctrine purposes)

- On 9 July 2014, the Commission adopted Decision C(2014) 4955 final relating to a proceeding under Article 101 and Article 102 TFEU (Case AT.39612 — Perindopril (Servier)) ('the contested decision'). (39) Article 1 of the contested decision finds that Unichem, including its subsidiary Niche, and Servier, including its subsidiary Biogaran, infringed Article 101 TFEU by participating in a reverse payment patent dispute settlement agreement covering all Member States, except Croatia and Italy.
- This Decision was appealed by Biogaran on 19 September 2014.
- Biogaran (the applicant) is a generic company whose distribution activity is almost exclusively limited to France, wholly owned subsidiary of Laboratoires Servier SAS, itself a subsidiary of Servier SAS. (8) distributes perindopril compound produced by other members of the Servier group under a patent owned by its holding Servier SAS.
- Servier obtain various supplementary protection certificates for medicinal products in some Member States with different dates of expiration.
- National litigation between Servier and seven generic companies – including Niche –claiming the absence of novelty of the patent.
- Settlement agreement between Servier and Niche Generics Ltd ('Niche') Niche was to refrain from making, having made, keeping, importing, supplying, offering to supply or disposing of generic perindopril made using the process developed by Niche, which Servier regarded as infringing the 339, 340 and 341 patents, as validated in the United Kingdom, using a substantially similar process or using any other process that would infringe the 339, 340 and 341 patents ('the process at issue') until the local expiry date of those patents (Clause 3 of the agreement) ('the non-marketing clause'). (22). This settlement could be classified as a restriction of competition by object (recitals 1369 and 3011 of the contested decision).
- Licensing agreement of the same date between Biogaran agreement and Niche concerning the transfer from Niche to Biogaran of three product dossiers (that is to say 'any and all information and/or data in possession of Niche related to the products and necessary for the obtention of marketing authorisations') and of an existing marketing authorisation in return for a payment by Biogaran to Niche of GBP 2.5 million

Juan Ignacio Ruiz Peris
Catedrático de Derecho mercantil

# Court of Justice doctrine

- Presumption: In the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed competition law, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary
  - (judgment of 10 September 2009, Akzo Nobel and Others v Commission, C-97/08 P, EU:C:2009:536, paragraph 60). Thus, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent company exercises decisive influence over the subsidiary's commercial policy (judgment of 29 March 2011, ArcelorMittal Luxembourg v Commission and Commission v ArcelorMittal Luxembourg and Others, C-201/09 P and C-216/09 P, EU:C:2011:190, paragraph 98).
- Imputation: The decisive influence which a parent company exercises over its wholly owned subsidiary supports the presumption that the acts of the subsidiary are carried out in the name and on behalf of the parent company and, consequently, of the undertaking which they comprise. (223)
- Absence of an autonomous interest: Biogaran had not pursued a genuine commercial interest in concluding the Biogaran agreement and had not implemented an autonomous strategy, outside the control of its parent company. (223)
- Application in case of combined conduct: If it is possible to impute to a parent company liability for an infringement committed by its subsidiary and, consequently, to make both companies jointly and severally liable for the infringement committed by the undertaking which they comprise, without infringing the principle of personal responsibility, the same applies a fortiori where the infringement committed by the economic entity comprising a parent company and its subsidiary results from the combined conduct of both those companies (General Court judgement (Ninth Chamber) of 12 December 2018, Case T-677/14, Biogaran vs. Commission). (Biogaran 218).
- Relevance of the contribution to the implementation: The condition for the attribution of various anticompetitive acts constituting the cartel as a whole to all the 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
  - (see, to that effect, judgments of 26 January 2017, Duravit and Others v Commission, C-609/13 P, EU:C:2017:46, paragraphs 117 to 126, and of 8 July 2008, AC-Treuhand v Commission, T-99/04, EU:T:2008:256, paragraph 133). (Biogaran 225).



Juan Ignacio Ruiz Peris
Catedrático de Derecho mercantil

# General Court position in the case (214 – 216)

- Biogaran was a wholly owned subsidiary of Servier at the time of the conclusion of the Biogaran agreement and the presumption arising from that finding has not been rebutted
  - (see, to that effect, judgment of 10 September 2009, Akzo Nobel and Others v Commission, C-97/08 P, EU:C:2009:536, paragraphs 60 to 65). (Biogaran 214)
  - It should be pointed out that Biogaran has not demonstrated that it decided its commercial policy independently of Servier.
  - The evidence discussed above concerning the existence of an inseparable link between the two agreements confirms Servier's decisive influence over Biogaran's conduct and the actual use of that power.
  - In order to illustrate Biogaran's independence of Servier, the applicant argues that
    - Biogaran's directors have never held positions at Servier. However, that evidence cannot rebut the presumption that Servier actually exercises a decisive influence over Biogaran
      - (see, to that effect, judgment of 16 September 2013, Roca v Commission, T-412/10, EU:T:2013:444, paragraph 76).
    - As regards the other circumstances alleged by the applicant, showing that it was operating independently on the market — by means of premises, brands and assets distinct from those of Servier — and also as a generic company, they illustrate only that Biogaran is a legal person separate from Servier but cannot rebut the presumption that Servier exercises a decisive influence over Biogaran.
- Biogaran was therefore, at the time of the conclusion of the Biogaran agreement and of the settlement agreement between Servier and Niche, the subsidiary of Servier and constituted with its parent company one and the same undertaking for the purposes of competition law. (215)
- The Commission was therefore entitled, in application of the concept of 'undertaking', to consider that Servier and Biogaran were jointly and severally liable for the conduct which was alleged against them, since the acts committed by each were accordingly deemed to have been committed by one and the same undertaking
  - (see, to that effect, judgments of 20 March 2002, HFB and Others v Commission, T-9/99, EU:T:2002:70, paragraphs 524 and 525, and of 12 December 2007, Akzo Nobel and Others v Commission, T-112/05, EU:T:2007:381, paragraph 62; see also, to that effect and by analogy, judgments of 6 March 1974, Istituto Chemioterapico Italiano and Commercial Solvents v Commission, 6/73 and 7/73, EU:C:1974:18, paragraph 41, and of 16 November 2000, Metsä-Serla and Others v Commission, C-294/98 P, EU:C:2000:632, paragraphs 26 to 28). (Biogaran 216)



Juan Ignacio Ruiz Peris
Catedrático de Derecho mercantil

# General Court position in the case (220)

- On the view of the Court the Commission therefore correctly considered that the Biogaran agreement and the settlement agreement between Servier and Niche were concluded between the same undertakings, namely the Servier group, on the one hand, and Niche, on the other hand, and
- that the infringement of Article 101 TFEU was to be imputed to the Servier group, thereby justifying the finding that Servier as the parent company and its subsidiary Biogaran were jointly and severally liable, the respective conduct of each having contributed to the infringement.
  - *But Sevier Group or participants ? because the first is composed, of Servier SAS, and several subsidiaries (1) not only Biogaran.*
- That conclusion is all the more necessary since the conduct of the two companies is closely related because of the inseparable links, established by the Commission, between the Biogaran agreement and the settlement agreement between Servier and Niche.



Juan Ignacio Ruiz Peris
Catedrático de Derecho mercantil

# Damage compensation
# JUDGMENT OF THE COURT (Second Chamber) 14 March 2019 Case C 724/17 *Vantaan kaupunki vs. Skanska Industrial Solutions Oy, ed al.* (Skanska)

- Preliminary ruling: Request for a preliminary ruling concerning the interpretation of Article 101 TFEU in relation of the application of undertaking notion to a succession of separated legal entities owners of the in a successive way of the same undertaking and the principle of effectiveness of EU law with regard to the rules in Finnish law relative to separate legal personality applicable to actions for damages in respect of infringements of EU competition law, following that in accordance with Finnish Company law, every limited liability company is a separate legal person with its own property and its own liability in connection with a case of undertaking continuity and economic identity.
- Case: Between 1994 and 2002 a cartel in the asphalt market was set up in Finland. The cartel agreed on dividing up contracts, prices and tendering for contracts, covered the whole of that Member State and was also liable to affect trade between Member States.
  - On 22 March 2000, Asfaltti-Tekra, - participant in the cartel - which changed its name to Skanska Asfaltti Oy from 1 November 2000, acquired all the shares in Sata-Asfaltti. On 23 January 2002, the latter was wound up due to a voluntary liquidation procedure in the course of which its business was transferred to Skanska Asfaltti on 13 December 2000. Skanska Asfaltti also took part in the cartel in question. On 9 August 2017, that company changed its name to Skanska Industrial Solutions ('SIS'). The same was done by the other participants in the cartel.
- The City of Vantaa appealed to the Korkein oikeus (Supreme Court, Finland) against the judgment of the Hovioikeus (Court of Appeal).
- The Korkein oikeus (Supreme Court) observes:
  - that Finnish law does not lay down rules on the attribution of liability for damage caused by an infringement of EU competition law in a situation such as that at issue in the main proceedings.
  - The rules on civil liability in Finnish law are based on the principle that only the legal entity that caused the damage is liable.
  - In the case of legal persons, it is possible to derogate from this basic rule by lifting the corporate veil. However, that approach is only possible if the operators concerned used the group structure, the relationship between the companies or the shareholder's control in a reprehensible or artificial manner, resulting in the avoidance of legal liability. (Piercing the veil doctrine).



Juan Ignacio Ruiz Peris
Catedrático de Derecho mercantil

# Undertaking vs. Legal entity (16-19)

- The referring court observes that it is clear from the case-law of the Court that any person may claim compensation for damage resulting from an infringement of Article 101 TFEU if there is a causal link between that damage and the infringement and it is for the domestic legal order of each Member State to lay down the detailed rules for exercising that right. (16)
- However, it is not clear from that case-law whether persons who are required to provide compensation for such damage must be determined by direct application of Article 101 TFEU, or whether the detailed rules laid down by the domestic legal order of each Member State are applicable. (17)
- If the persons liable to provide compensation for damage resulting from an infringement of Article 101 TFEU are to be determined by direct application of that article, it is not clear to the referring court which persons may be held liable for the infringement of that article. (18)
- In that context, it is possible to establish the liability of the person infringing the competition rules or the liability of an 'undertaking', within the meaning of Article 101 TFEU. According to the case-law of the Court, when an undertaking consisting of several legal persons infringes the competition rules, it is for that undertaking to answer for the infringement, in accordance with the principle of personal liability. According to that case-law, liability for an infringement of Article 101 TFEU may be attributed to the entity which has continued the business of the entity responsible for the infringement in question, if the latter has ceased to exist. (19)



Juan Ignacio Ruiz Peris
Catedrático de Derecho mercantil

# Court of Justice doctrine

- Since the liability for damage caused by infringements of EU competition rules is personal in nature, the undertaking which infringes those rules must answer for the damage caused by the infringement. (31)
- When an entity that has committed an infringement of the competition rules is subject to a legal or organizational change, this change does not necessarily create a new undertaking free of liability for the conduct of its predecessor that infringed the competition rules, when, from an economic point of view, the two are identical
  - (see, to that effect, judgments of 11 December 2007, ETI and Others, C 280/06, EU:C:2007:775, paragraph 42; of 5 December 2013, SNIA v Commission, C 448/11 P, not published, EU:C:2013:801, paragraph 22; and of 18 December 2014, Commission v Parker Hannifin Manufacturing and Parker-Hannifin, C 434/13 P, EU:C:2014:2456, paragraph 40 and judgement of 14 March 2019, Vantaan kaupunki vs. Skanska Industrial Solutions Oy, and Others, C 724/17, paragraph 38).
- It is therefore not contrary to the principle of individual liability to impute liability for an infringement to a company which has taken over the company which committed the infringement where the latter has ceased to exist
  - (judgment of 5 December 2013, SNIA v Commission, C 448/11 P, not published, EU:C:2013:801, paragraph 23 and the case-law cited and judgement of 14 March 2019, Vantaan kaupunki vs. Skanska Industrial Solutions Oy, and Others, C 724/17, paragraph 39).
- The Court has stated that, for the effective implementation of the EU competition rules, it may be necessary to consider that the purchaser of the offending undertaking is liable for the infringement of those rules if that offending undertaking ceases to exist by reason of the fact that it has been taken over by the purchaser, which as the acquiring company, takes over its assets and liabilities, including its liability for breaches of EU law
  - (judgment of 5 December 2013, SNIA v Commission, C 448/11 P, not published, EU:C:2013:801, paragraph 25 and judgement of 14 March 2019, Vantaan kaupunki vs. Skanska Industrial Solutions Oy, and Others, C 724/17, paragraph 40)



Juan Ignacio Ruiz Peris
Catedrático de Derecho mercantil

# Court of Justice doctrine 2

- If the undertakings responsible for damage caused by an infringement of the EU competition rules could escape penalties by simply changing their identity through restructurings, sales or other legal or organizational changes, the objective of suppressing conduct that infringes the competition rules and preventing its reoccurrence by means of deterrent penalties would be jeopardized
  - (see, by analogy, judgment of 11 December 2007, ETI and Others, C 280/06, EU:C:2007:775, paragraph 41 and the case-law cited and judgement of 14 March 2019, Vantaan kaupunki vs. Skanska Industrial Solutions Oy, and Others, C 724/17, paragraph 46).
- The concept of 'undertaking', within the meaning of Article 101 TFEU, which constitutes an autonomous concept of EU law, cannot have a different scope with regard to the imposition of fines by the Commission under Article 23(2) of Regulation No 1/2003 as compared with actions for damages for infringement of EU competition rules. (judgement of 14 March 2019, Vantaan kaupunki vs. Skanska Industrial Solutions Oy, and Others, C 724/17, paragraph 47)



Juan Ignacio Ruiz Peris
Catedrático de Derecho mercantil

# Court of Justice position in the case

- 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 (judgement Vantaan kaupunki vs. Skanska Industrial Solutions Oy, and Others, C 724/17, paragraph 51).



Juan Ignacio Ruiz Peris
Catedrático de Derecho mercantil

## Dialectic undertaking vs. Legal Entity conclusions

- Prevalence of the undertaking in the conflict with legal separation of personalities in application of 101 and 10 TFEU.
- Economic entity vs. Legal entity
- No piercing the veil
  - There is not a excepcional application of piercing the veil doctrine.
  - There is a regular appplication of  more economic analisys typical of Competition Rules interpretation and application.



Juan Ignacio Ruiz Peris
Catedrático de Derecho mercantil

# Latest findings of the Court of Justice doctrine

- Same meaning of undertaking for fines and damages: The concept of 'undertaking', within the meaning of Article 101 TFEU, which constitutes an autonomous concept of EU law, cannot have a different scope with regard to the imposition of fines by the Commission under Article 23(2) of Regulation No 1/2003 as compared with actions for damages for infringement of EU competition rules.
- Presumption: In the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed competition law, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary.
- To rebut this presumption subsidiary shall
  - demonstrated that it decided its commercial policy independently of the parent company.
  - It its no relevant the proof for instance that
    - Subsiriary's directors have never held positions at parent company.
    - The use of brands and assets distinct from those of the parent company.
- Absence of an autonomous interest: Relevance of the fact that subsidiary had not pursued a genuine commercial interest and had not implemented an autonomous strategy, outside the control of its parent company in relation with the prohibited conduct.
- Imputation to the undertaking in case of combined conduct:
  - If it is possible to impute to a parent company liability for an infringement committed by its subsidiary and, consequently, to make both companies jointly and severally liable for the infringement committed by the undertaking which they comprise, without infringing the principle of personal responsibility,
  - the same applies a fortiori where the infringement committed by the economic entity comprising a parent company and its subsidiary results from the combined conduct of both those companies



Juan Ignacio Ruiz Peris
Catedrático de Derecho mercantil

# Latest findings 2

- Concept of undertaking application: The Commission is entitled, in application of the concept of 'undertaking', to consider that subsidiary and parent company were jointly and severally liable for the conduct which was alleged against them, since the acts committed by each were accordingly deemed to have been committed by one and the same undertaking
- Imputation through undertaking succession: It is not contrary to the principle of individual liability to impute liability for an infringement to a company which has taken over the company which committed the infringement where the latter has ceased to exist.
- Relevance of the contribution to the implementation: The condition for the attribution of various anticompetitive acts constituting the cartel as a whole to all the 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.



Juan Ignacio Ruiz Peris
Catedrático de Derecho mercantil