

## Piercing the Corporate Veil

### *The German Sausage Saga*

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#### 5.1 INTRODUCTION: CORPORATE RESPONSIBILITY AND COMPETITION LAW

The question under which circumstances an undertaking is liable for its own competition law infringement – not to mention the liability for infringements committed by an affiliated undertaking – is of invaluable practical importance. From the early days of European competition law, there has been an interesting legal relationship between the ‘single economic entity’ as the addressee of EU competition law and the respective entities under national corporate laws. Legend has it, businesses in some European jurisdictions can avoid fines by way of corporate restructuring, while in other jurisdictions, this is not an option.<sup>1</sup> The present contribution traces the developments in the EU and in Germany during recent years with special regard to the so-called German ‘sausage gap’ – a once well-known and much-exploited lacuna that helped shelter companies from liability through specific corporate restructuring.

Section 5.2 of this chapter discusses underlying principles of corporate and competition law, providing the relevant context for an in-depth analysis of the German ‘sausage gap’. Section 5.3 addresses the evolution of German law and jurisdiction with regard to restructuring efforts aimed at avoiding cartel fines. Section 5.4 then focuses on the European competition law developments with regard to liability for cartel damages claims and, in particular, assesses the interplay of the European concept of the ‘single economic entity’ with underlying principles of law. Finally, Section 5.5 offers some concluding remarks and an anticipated outlook on these issues moving forward.

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<sup>1</sup> R Klotz, ‘ECN+ Ante Portas Editorial’ (2018) 2 CoRe 71, 72.

## 5.2 ENTITY PRINCIPLE AND ENTERPRISE PRINCIPLE – A COMPARATIVE PERSPECTIVE

Corporate law, both nationally and internationally, is based on the premise of the individual corporation – the legal entity. This stems from the fundamental defining characteristic of the corporation constituting a separate legal person with rights and obligations distinct from those of its owners.<sup>2</sup> The logical consequence of this perception is the ‘corporate veil’, the concept of limited corporate liability under which the shareholders of a corporate entity are not (personally) liable for the entity’s debts. This understanding is largely determined by the traditional concept of a single corporate entity. The emergence of corporate groups in modern economies, where shareholders or creditors often are corporations themselves, has not fundamentally changed this standard conception of the corporation in case law or relevant literature.

However, the nature of a corporate group will not be fully appreciated where too much emphasis is placed to the separate legal entity within a group, the ‘entity view’ only. So on the other hand, the enterprise view would focus on all of the legal entities that form the corporate group as part of a single economic operation.<sup>3</sup> Historically, ‘enterprise view’ and ‘entity views’ have therefore provided for competing theories of liability within tort law and various statutory regimes. Tension between the enterprise and the entity approach, as well as the courts’ general hesitation to impose enterprise liability, can be explained in part by the factually complex nature of the corporate group itself as well as by the complicated exercise for uniformly defining the ‘corporate group’.<sup>4</sup>

So whereas the principle of limited liability is provided for in many company law systems, the exception of abolishing the rules of limited liability to the benefits of creditors of the corporation is often referred to as ‘veil-piercing’ and is mostly shaped by courts.<sup>5</sup> However, situations that call for a piercing of the corporate veil are recognised in virtually all jurisdictions.<sup>6</sup> There are rather different situations in which corporations of a group are held liable, but most of which do not presuppose the existence of a group. Such are internal liability of the shareholders towards the

<sup>2</sup> Generally, a company consists of five basic elements: legal person, limitation of liability, transferable shares, delegated management in a board structure and investor ownership, R Kraakman and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, OUP 2017) 5ff; C Windbichler, ‘Konzernrecht: Gibt es das?’ (2018) NZG 1241, 1244; for a comprehensive overview with further references from a US American perspective see for example V Harper Ho, ‘Theories of Corporate Groups: Corporate Identity Reconciled’ (2012) 42 Seton Hall L Rev 879, 884ff.

<sup>3</sup> Harper Ho (n 2) 898.

<sup>4</sup> Harper Ho (n 2) 898ff.

<sup>5</sup> For a US-focused analysis of veil-piercing jurisprudence see Harper Ho (n 2) 898.

<sup>6</sup> M Venturuzzo and others, *Comparative Corporate Law* (1st edn, West Academic Press 2015) 151ff.

company, external liability towards third parties, fiduciary duties, contract and tort, attribution of risk, knowledge and fault as well as contractual responsibility, etc.<sup>7</sup>

In contrast, abstracting to the level of the corporate group, a real enterprise perspective implies that the group as a whole bears rights and obligations that either derive from those of one or more members of the group or may also be independent. For the sake of preserving the limited liability within the group, derivative liability of the group (or one entity within the group) based on wrongful conduct by another affiliate has generally been rejected within veil-piercing doctrine.<sup>8</sup> From a comparative perspective, US courts have determined that ‘piercing the corporate veil’ vertically or extending enterprise-wide liability horizontally (when the separation between the corporation and its shareholders produces anomalous or inequitable results) might occur only in exceptional circumstances.<sup>9</sup>

Interestingly, from an empirical perspective, veil-piercing is common with regard to statutory provisions such as environmental and antitrust law. However, it does not arise as often as one would expect, even less with regard to tort law cases, and it is more likely to occur when the shareholder behind the veil is an individual rather than another corporation.<sup>10</sup> Imposing obligations and potential for liability on the corporate group – or on a parent corporation as a proxy for the group as a whole – is always problematic because it compels the courts to disregard the formal legal identity of the individual companies comprising the group. If applied broadly or unpredictably, this approach could threaten the very existence of corporate groups as it threatens the risk assessment of shareholders as investors.

### 5.3 THE GERMAN SAUSAGE SAGA: HIDING BEHIND THE CORPORATE VEIL

#### 5.3.1 *The ‘Sausage Gap’ – Background*

In 2014, the German Federal Cartel Office (‘FCO’) imposed fines totalling €338 million on 21 sausage manufacturers for illegal price-fixing agreements between 1997 and 2009, which sought to implement industry-wide price increases for the

<sup>7</sup> Harper Ho (n 2) 946. In German law, for example, liability for a withdrawal destroying the economic basis (*existenzvernichtender Eingriff*) and the immoral damage to the company (*sittenwidrige Schädigung*).

<sup>8</sup> Harper Ho (n 2) 918.

<sup>9</sup> Harper Ho (n 2) 900.

<sup>10</sup> T Cheng, ‘The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines’ (2011) University of Hong Kong Faculty of Law Research Paper <https://ssrn.com/abstract=1790610> or <http://dx.doi.org/10.2139/ssrn.1790610> accessed 17 August 2017; J Matheson, ‘The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context’ (2009) 87 NCL Rev 1091; for a survey of veil-piercing doctrine and practice, see K Strasser, ‘Piercing the Veil in Corporate Groups’ (2005) 37 Conn L Rev 637, 637 n 1; R Thompson, ‘Piercing the Corporate Veil: An Empirical Study’ (1991) 76 Cornell L Rev 1036, 1038; R Thompson, ‘Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors’ (1999) 13 Conn J Int’l L 379.

sale of sausage products to the retail trade. Two of the alleged conspirators, partnerships with limited liability (*GmbH & Co. KG*) that were initially fined €128 million, belonged to the largest German sausage manufacturer – a holding company ultimately held by an entrepreneurial family.<sup>11</sup>

After lodging appeals against the fines, the two partnerships' major assets were transferred for the benefit of other entities within the group. The partnerships were subsequently subject to formal liquidation proceedings and ultimately dissolved. As a consequence of internal restructuring measures of this sort, the addressees of the fines had literally ceased to exist. According to the FCO, the proceedings therefore had to be closed.<sup>12</sup>

Whenever talking about the 'sausage gap' (*Wurstlücke*), it must be kept in mind that this was no isolated incident – it was merely the most noteworthy due to the level of fines imposed. In the course of these proceedings, the FCO's president publicly expressed his dismay as the FCO grudgingly had to drop fines imposed on three other accused companies on account of similar internal restructuring measures. This led to a failure to collect a significant portion of imposed fines (i.e. €238 million).<sup>13</sup>

But why was the chain of liability cut in these – and previous – cases without legislative interference? Context can be provided when looking at the principles that follow and the provisions under German law.

### 5.3.1.1 Competition Law Infringements as Administrative Offences

German competition law is based on the tenet that competition law violations are administrative offences (*Ordnungswidrigkeiten*) which are considered sub-level of crime punished by fines under Sec. 81 (1)–(3) German Act on Regulatory Offences ('ARO'). The ARO is historically conceived in the way that fines require subjective accountability of the distinct addressee on whom they are imposed. Although fines can also be imposed on a legal entity (Sec. 30 ARO), German competition law like the ARO would in principle require a specific legal person to be such an addressee. This idea is based on the ARO's principle of liability which is – disregarding terminological subtleties for this purpose – nothing more than the principle of fault (Sec. 12 ARO).<sup>14</sup> In short, since responsibility stems from the (legal)

<sup>11</sup> FCO Case Report [2017] B12-13/09; FCO, 'Bundeskartellamt imposes fines on sausage manufacturers' (Press release 15 July 2014) [www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/15\\_07\\_2014\\_Wurst.html;jsessionid=nn=3591568](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/15_07_2014_Wurst.html;jsessionid=nn=3591568), accessed 6 June 2020.

<sup>12</sup> FCO, 'Proceedings against companies of ClemensTönnies group concluded – fines of 128 million euros cancelled due to restructuring measures' (Press release 19 October 2016) [www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/19\\_10\\_2016\\_Wurst.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/19_10_2016_Wurst.html) accessed 6 June 2020.

<sup>13</sup> FCO, "Wurstlücke" – Weitere Bußgelder in Höhe von rund 110 Mio. Euro entfallen in Folge von unternehmensinternen Umstrukturierungen' (Press release 26 June 2017) [www.bundeskartellamt.de/SharedDocs/Publikation/DE/Pressemitteilungen/2017/26\\_06\\_2017\\_Bell\\_Wurstl%C3%BCcke.pdf?\\_\\_blob=publicationFile&v=3](http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Pressemitteilungen/2017/26_06_2017_Bell_Wurstl%C3%BCcke.pdf?__blob=publicationFile&v=3) accessed 6 June 2020.

<sup>14</sup> M Löbbe, 'Konzernverantwortung und Umwandlungsrecht' (2013) 177 ZHR 518, 524.

person's behaviour, it cannot be attached to an entity's assets and, as such, cannot be transferred nor subject to legal succession.

### 5.3.1.2 Legal Entity Principle and Principle of Separation

In order to hold a legal entity accountable under German law, it is required that a specific natural person or corporate body has acted on behalf of the legal entity – the legal entity principle (*Rechtsträgerprinzip*).<sup>15</sup> According to the Act against Restraints of Competition ('ARC') applicable at the time of activities of the 'sausage cartel', a fine could only therefore be imposed on a legal person if the administrative offence had been committed by a corporate body or an employee working for the company in a managerial capacity. The imposition of a fine required (and still requires) a direct relationship between the acting perpetrator and the legal entity on whose behalf it has acted.<sup>16</sup> This relationship ceases to exist in the case of universal succession due to a merger or as a result of a company's de-registration after liquidation proceedings. Since the perpetrator did not act on behalf of the absorbing legal entity but, rather, on behalf of the merged entity, the chain of liability is cut where assets are transferred to such a succeeding legal entity. Even if the natural person involved in a cartel continues to conduct business within the succeeding company, there would be no subrogated liability for the newly founded (or respectively surviving) company.

German corporate law is further based on the premise of legal independence of the individual group companies. Although these companies are economically and legally linked within the group in a variety of ways, corporate law does not create a collective legal entity. According to this principle of separation (*Trennungsprinzip*),<sup>17</sup> a legal entity is only liable for its own activities, even within a group of companies. In general, there is no accessory liability to the detriment of the parent company for the liabilities of a subsidiary. This is a fundamental principle also under tort law. Of course, the parent company may be liable for any of its own infringements of management obligations (Sec. 31 German Civil Code) but only where the parent company was directly involved by action or omission – a condition not often met.

### 5.3.1.3 Application of These Principles in German Case Law and Legislative Attempts to Establish Liability in Cases of Succession

Long before the renowned 'sausage gap', companies had taken advantage of the provisions on legal succession in order to avoid fines. The German Federal Court

<sup>15</sup> BGH, KRB 55/10 *Versicherungsfusion* [2011]; BGH, KRB 47/13 *Silostellgebühren III* [2014]; BGH, KRB 2/10 *Transportbeton*; MLöbbe (n 14) 520ff, 541.

<sup>16</sup> BGH, KRB 8/85 *Bußgeldhaftung* [1986] para 11; *Silostellgebühren III* (n 15); T Mäger and F von Schreitter, 'Die kartellrechtliche Bußgeldhaftung nach der 9. GWB Novelle – Überblick und Kritik' (2017) NZKart 264, 265.

<sup>17</sup> Windbichler (n 2) 1244ff; Löbbe (n 14) 539ff.

(‘Federal Court’) had already addressed the problem of corporate legal succession in 1986. Bound by the concepts of the legal entity and the separation principle, the Federal Court developed the so-called concept of ‘near-identity’.<sup>18</sup> According to this concept, the successor is only liable for fines in cases of legal succession where the succeeding company is, from an economic perspective, still the same. This concept required that (i) the assumed (acquired) assets continued to be separated from the assets of the actual person or entity responsible for the infringement; (ii) such assets were used in the same or similar manner as before; and (iii) constitute a significant part of the successor’s assets. In other words, they have retained an economically independent position, characterising the succeeding legal entity (the new legal entity merely forming a new legal and economic shell).

These conditions derived from the specific circumstances of the case such that subsequent case law was dealt with on a case-by-case basis. As such, a comprehensive framework to address legal succession with regard to liability for antitrust fines could not be established. For instance, sticking to the criteria that the assets of the responsible company remain essentially undiminished within the assets of the succeeding company, the Federal Court denied any legal succession in a case of a ‘merger between equals’ in which both the assets of the succeeding company and assets of the merged company had been operationally unified.<sup>19</sup>

However, the Federal Court was not oblivious to the opportunities for circumventing an imminent fine by companies employing targeted arrangements under company law.<sup>20</sup> Specifically, the Federal Court pointed out that an extension of the legal succession in liability for fines in cases of this kind would lead to ‘group liability’. But in light of the principle of separation, the adoption of such group liability was reserved for the legislator which is obliged to determine its nature and limits.<sup>21</sup>

This reasoning is further underpinned by another essential aspect of administrative offences: the law of administrative offences is traditionally seen as the ‘little brother’ of criminal law. With regard to the criminal law character, the constitutional prohibition of analogy in criminal cases forbids any application beyond the limits of literal interpretation.<sup>22</sup> Thus, as long as it is not provided for *de lege lata*, responsibility for fines cannot be transferred on the basis of universal succession.

In 2014, the Federal Court in *Silostellgebühren III* considered the implications of EU law, namely of the *effet utile*.<sup>23</sup> In this case, the FCO claimed that liability for fines of the legal successor could be justified on the basis of the direct application

<sup>18</sup> *Bußgeldhaftung* (n 16) para 13; later affirmed and refined in BGH, KRB 55/10 *Versicherungsfusion* [2011]; BGH, KRB 2/10 *Höhe der Verbandsgeldbuße* [2011]; *Silostellgebühren III* (n 16) para 12; BGH, KRB 39/14 *Melitta* [2015] para 3.

<sup>19</sup> BGH, KRB 55/10 *Versicherungsfusion* [2011] para 19.

<sup>20</sup> Speaking of ‘unfortunate consequences’: *ibid.* at para 25.

<sup>21</sup> *Ibid.* at para 25.

<sup>22</sup> *Ibid.* at para 12; derived from art 103 para 2, Basic Law for the Federal Republic of Germany.

<sup>23</sup> *Silostellgebühren III* (n 16) paras 18, 33.

of Article 5 (1) Regulation (EC) No 1/2003 – in other words, confirming the EU concept of the ‘single economic entity’.

The Federal Court confirmed its concept of so-called ‘near identity’ and explicitly rejected the claim that EU standards could be directly applied to determine the undertaking as the economic unit under German law. The Federal Court recognised that the Member States’ courts had to make full use of the interpretative range of German legal provisions with regard to the *effet utile*. However, EU legislation would empower only the European Commission to take decisions against a single economic entity, not the national competition authorities and courts.<sup>24</sup>

The Federal Court drew a clear line between the obligation to interpret national law in conformity with EU law and the obligation to obey general principles of national law in such an interpretation. The Federal Court emphasised the limits of literal interpretation as well as the principle of legal certainty, which prohibited interpretation *contra legem* in this case.<sup>25</sup> According to constitutional principles also found in EU primary law (e.g. Article 49 (1) Charter of Fundamental Rights; Article 7 Human Rights Convention), criminal liability could not simply be inferred by interpreting national law which does not provide for such liability. Such an interpretation would not be compatible with EU law.<sup>26</sup> Interestingly, the Federal Court saw no need to refer the matter to the Court of Justice of the European Union (‘CJEU’) since ‘the correct application of Union law was so obvious as to leave no room for reasonable doubt’.<sup>27</sup>

Meanwhile, the legislator attempted to bridge some of the ‘gaps’ that had become obvious in the practice of the Federal Court. In 2013, statutory liability was introduced in constellations of universal succession and partial universal succession by split-up, where the fine could accordingly be imposed on the legal successor.<sup>28</sup> However, the legislator did not include all cases of legal succession – not covered were certain cases of partial legal succession such as spin-off (*Abspaltung*) and carve-out and cases of singular succession (*Einzelrechtsnachfolge*, e.g. asset deals).<sup>29</sup> Hence, legal succession with regard to liability for fines still required that the perpetrator company ceased to exist. Therefore, ‘co-liability’ – for example of the parent company following the model of EU law – was still not provided for under German law.<sup>30</sup>

As it happens, and despite sausages being a German speciality, the sausage ‘gap’ was not peculiar to Germany. In 2017, for example, the Lisbon Appeal Court found that a parent company could not be held liable for an antitrust infringement by omission under general Portuguese rules, leading to a reduction of the total fines

<sup>24</sup> *Ibid* at para 24.

<sup>25</sup> *Ibid* at para 19.

<sup>26</sup> *Ibid* at para 20.

<sup>27</sup> *Ibid* at para 32.

<sup>28</sup> s 30 (2a) ARO, implemented in 2013 in the course of the 8<sup>th</sup> amendment of the ARC.

<sup>29</sup> Other restructuring measures such as transformation of form were also not included.

<sup>30</sup> Mäger and von Schreitter (n 16) 265.

that were imposed on the group by the Portuguese Competition Court.<sup>31</sup> The Competition Authority did not test this ruling subsequently – leading to speculation that this might also result in a Portuguese ‘sausage gap’.<sup>32</sup>

### 5.3.2 *The End of the Sausage: German Reform of the ARC*

Ultimately, it was not until 2017 that the legislator closed the infamous ‘sausage gap’ in the course of the 9<sup>th</sup> amendment of the ARC<sup>33</sup>. On the occasion of the implementation of the EU Damages Directive<sup>34</sup>, the 9<sup>th</sup> amendment significantly extended the liability for fines imposed in cartel fine proceedings in three regards.

Firstly, it introduced the liability of the economic unit (former § 81 (3a) ARC, now § 81a (1) ARC)<sup>35</sup>. If a ‘person in a leading position’ commits an administrative offence by which the competition law duties of the ‘undertaking’ have been infringed, fines can also be imposed on other legal persons that ‘made up’ (formed) the undertaking at the time of the infringement and that exercised direct or indirect decisive influence over the management of the entity which infringed competition law.

Secondly, the liability of the legal successor was tightened by introducing unlimited<sup>36</sup> liability for the legal successor (former § 81 (3b) ARC, now § 81a (2) ARC) and stipulating the liability of the economic successor (former § 81 (3c) ARC, now § 81a (3) ARC). This means that the universal legal successor is liable in cases where the legal entity responsible under competition law no longer exists. In addition, a singular legal successor (e.g. acquirer of assets) can be liable, even where the legal entity continues to exist but has become economically irrelevant. Thus, every transfer of a business unit that was involved in a competition law infringement can cause liability for fines in respect of the successor.

Finally, these changes were accompanied by the introduction of a contingent liability during the transition period to also cover restructuring measures until the new regulations became fully effective.<sup>37</sup>

<sup>31</sup> Michael Sousa Ferro, ‘The Portuguese “Sausage Gap”: Parent Company Liability for Antitrust Infringements Not Yet Assured in Portugal’ (2017) 1 CoRe 266.

<sup>32</sup> *Ibid.*

<sup>33</sup> Federal Law Gazette I 1416 ‘Neuntes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen’ (2017).

<sup>34</sup> 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 L349/2 (EU Damages Directive).

<sup>35</sup> § 81 (3a) to (3c) ARC have been transferred identical in wording into § 81a ARC (1) through (5) by Federal Law Gazette I 2 ‘Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer Bestimmungen’ (2021).

<sup>36</sup> Contrasting the usual regime of s 30 (2a) ARO, § 81a (2) ARC does not limit the liability to the value of the acquired assets if a competition infringement under European or German law is concerned.

<sup>37</sup> Separate contingent liability section (which now is obsolete due of lapse of time frame) in former § 81a ARC Federal Law Gazette I 1416 ‘Neuntes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen’ (2017).



These above-described measures went beyond simply closing the so-called ‘sausage gap’. The intent was to fully harmonise German law with EU practice concerning liability for cartel fines. Introducing liability of the economic unit provoked significant criticism insofar as it violated the principle of legal certainty, the principle of fault, and the principle of *in dubio pro reo*.<sup>38</sup> Putting aside constitutional concerns for a moment, from an enforcer’s perspective, the provisions extended liability to the successors of restructured companies and their parent companies with the aim of preventing cartel members from escaping fines by means of internal restructuring. In other words: one would expect German law should have been prepared for the ‘wurst’ case, right? However, the tension between entity liability versus enterprise responsibility in relation to antitrust infringements committed by other legal entities (under justifying circumstances) was thereby only solved with regard to fines.

### 5.3.3 *Developments with Regard to Cartel Damages Claims*

The persisting divergence in the treatment of the single economic entity versus the legal entity becomes more obvious when looking at the flip side of the coin: the capacity to be sued. The Member States’ courts have been reluctant to employ the single economic entity principle also in civil damages situations. For example, in 2018, the French Supreme Court ruled that the notion of an economic entity is not applicable to damages claims deriving from anti-competitive conduct. According to the court, competition law should not interfere with the principle of personal liability under French civil law.<sup>39</sup>

In Germany, in the course of implementing the EU Damages Directive, the 9<sup>th</sup> ARC amendment also adapted the rules on ‘Damages and Disgorgement of Benefits’ – establishing the framework for compensation for harm caused by a competition law infringement.<sup>40</sup> While the rules on fines have drawn a verbal connection to the concept of the single economic entity (§ 81 ARC, cf o), the rules on damages (§§ 33a (1)ff ARC) still revert to the ‘infringer’ as the addressee of claims without further description of the specific legal entity. This prompted a vibrant discussion among scholars as to whether the closing of the ‘sausage gap’ with regard to the collection of fines would also have an impact on civil law liability in cartel damages claims.<sup>41</sup>

<sup>38</sup> O Mörsdorf, ‘Nachfolger- und Konzernhaftung wegen Verstößen gegen das Unionskartellrecht’ (2020) ZIP 489, 490; T Ackermann, ‘Unternehmenssteuerung durch finanzielle Sanktionen’ (2015) ZHR 179 538, 550, 551; M Habersack, ‘Aktienkonzernrecht – Bestandsaufnahme und Perspektiven’ (2016) AG 2016, 691, 696, 697; S Thomas, ‘Die sogenannte wirtschaftliche Einheit: Auslegungsfragen zur neu eingeführten akzessorischen Konzernhaftung im deutschen Kartellbußgeldrecht’ (2017) AG 637, 644ff.

<sup>39</sup> Cour de cassation, Chambre commerciale, *Optical Center c/ Frères Lissac, Lissac enseignne, Gadol et Audioptric Trade Services* [2018] n° 16-24.619 17-11.909 ECLI:FR:CCASS:2018:CO00123.

<sup>40</sup> Determined in s 2 Damages and Disgorgement of Benefits (§§ 33ff ARC).

<sup>41</sup> S Wachs, ‘Faktische Übernahme des wirtschaftlichen Unternehmensbegriffs für die Passivlegitimation bei Follow-on-Klagen?’ (2017) WuW 2; H Schaper and P Stauber, ‘Ausgewählte Themen des neuen Kartellschadensersatzrechts – Schadensersatz, Abwälzung, Gesamtschuld und Innenausgleich’

The EU concept of the single economic entity would not apply in this way – at least not until the German legislator introduced liability of the group or liability of the parent company for civil damages. The basic principles of German tort law, in particular, the legal entity principle, would continue to apply.<sup>42</sup> Since the EU Damages Directive<sup>43</sup> did not explicitly regulate the question of responsibility and the *acquis communautaire* had not yet specified the civil liability of group companies for cartel damages, the question of attribution was to be solved by national law.<sup>44</sup>

Yet, the opposite opinion emphasises that a provision in a Member State's civil law does not meet the requirements under the principle of effectiveness if it declares only part of the company liable for damages. This would be in contrast with the EU perspective where the whole company commits the underlying infringement.<sup>45</sup> The EU legislator only would have clarified such a point in the EU Damages Directive if it had wanted to deviate from the EU concept of the undertaking addressed in Article 1 (1) EU Damages Directive. The CJEU in *Kone* had already developed requirements for national tort law based on the principle of effectiveness and, at the same time, explicitly referred to the undertaking.<sup>46</sup> Thus, the undertaking could be sued under EU law.<sup>47</sup> Injured parties would bear far more than the normal risk of insolvency if only a small sub-unit of the group could

(2017) *NZKart* 279; R Bechtold and W Bosch, in R Bechtold and W Bosch (eds), *Gesetz gegen Wettbewerbsbeschränkungen: GWB* (9th edn, CH Beck 2018) § 33 para 7.

- <sup>42</sup> Bechtold and Bosch (n 41) § 33 para 7; J Bornkamm and J Tolkmitt in: Langen and Bunte (eds) *Kartellrecht* (13th edn, Luchterhand 2018) § 33a para 15; V Emmerich in: T Körber, H Schweitzer, D Zimmer (eds), *Immenga/Mestmäcker, Wettbewerbsrecht* (6th edn, CH Beck 2020) § 33 GWB para 22ff; Wachs (n 41) 2.
- <sup>43</sup> See EU Damages Directive (n 34) art 1 (1) and recitals 11ff.
- <sup>44</sup> Bechtold and Bosch (n 41) para 7; W Wurmnest in: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann (eds), *Kartellrecht* (4th edn, CH Beck 2020) § 33a GWB para 30 (LMRKM); V Emmerich in *Immenga/Mestmäcker: Wettbewerbsrecht* (n 42) § 33a para 30ff; denying a corresponding derivation based on the principle of effectiveness: LG Berlin, 16 O 193/11 Kart, *Fahrtreppen* [2013]; LG Düsseldorf, 37 O 27/11 Kart – *Aufzugskartell* [2016] ECLI:DE:LG.D:2016:0908.37O27.11 KART.00 NZKart 490, 492; S Mäger and von Schreitter (n 16) 270ff; P von Hülsen and B Kasten, 'Passivlegitimation von Konzernen im Kartell-Schadensersatzprozess? – Gedanken zur Umsetzung der Richtlinie 2014/104/EU' (2015) *NZKart* 296, 299; R Harnos, 'Harmonisierung des Kartellbußgeldrechts qua *effet utile*?' (2016) *ZWeR* 284, 299ff; S Thomas and S Legner, 'Die wirtschaftliche Einheit im Kartellzivilrecht' (2016) *NZKart* 155, 157.
- <sup>45</sup> C Kersting in: Kersting/Podszun, Die 9. GWB-Novelle (1<sup>st</sup> edn, 2017) c 7 para 25ff with further references in connection with the European concept of undertaking, EU Damages Directive (n 34) art 1 (1) and an external civil-law partnership of the group (para 34ff); W Jaeger in: LMRKM (n 44) art 101 (2) AEUV, para 55ff, 59.
- <sup>46</sup> Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG* [2014] ECLI:EU:C:2014:1317, para 37.
- <sup>47</sup> C Kersting, 'Die neue Richtlinie zur privaten Rechtsdurchsetzung im Kartellrecht' (2014) *WuW* 564, 565; C Kersting, 'Kartellschadensersatzrecht nach der 9. GWB-Novelle' (2017) *VersR* 581, 584ff; W Jaeger in: LMRKM (n 44) art 101 (2) AEUV para 55; V Emmerich in *Immenga/Mestmäcker: Wettbewerbsrecht* (n 42) § 33 para 32; T Lettl, 'Kartellschadensersatz nach der Richtlinie 2014/104/EU und deutsches Kartellrecht' (2015) *WRP* 537, 538; T Makatsch and A Mir, 'Die neue EU-Richtlinie zu Kartellschadensersatzklagen – Angst vor der eigenen "Courage"?' (2015) *EuZW* 7, 8; A Petrasincu, 'Kartellschadensersatz nach dem Referentenentwurf der 9. GWB-Novelle' (2016) *WuW* 330;

be held liable. Assets could easily be reduced to the detriment of the injured party. Groups could transfer assets of subsidiaries which committed competition infringements to other group entities or even pool such competition risks in subsidiaries with low capitalisation.

However, even supporters of that view doubt that the far-reaching EU concept of liability as such takes sufficient account of the fundamental principles of legality, legal clarity, and fault. For example, it is often stated that the principle of personal responsibility on the EU level has become purely abstract and is overshadowed by practically irrebuttable presumptions.<sup>48</sup>

So how do the discussed concepts of the legal entity principle and the separation principle in the Member States' civil law systems relate to the EU concept of the single economic entity? Before addressing by reference to the CJEU's ruling in *Skanska* (Section 5.4), we will briefly recall the cornerstones of the concept of the single economic entity in EU competition law.

### 5.3.4 *The Concept of the Single Economic Entity in Contrast to Legal Entity Principle and Principle of Separation*

In EU competition law, an independent concept of enterprise prevails, namely the single economic entity. The addressee of competition law is the undertaking, which is to be understood as any entity or body engaged in economic activity, regardless of its legal status and the way in which it is financed.<sup>49</sup> This often involves a (whole?) group of companies.<sup>50</sup> Thus, the CJEU affirms both the possibility of imposing a fine on the legal or economic successor of the company committing the competition law violation in the event that this company ceases to exist<sup>51</sup> and the possibility

H Schweitzer, 'Die neue Richtlinie für wettbewerbsrechtliche Schadensersatzklagen' (2014) *NZKart* 335, 343 [on art 11 (1) of the EU Damages Directive]; A Weitbrecht, 'Die Umsetzung der EU-Schadensersatzrichtlinie' (2015) *WuW* 959, 964; Ministerial Counsellor A Jungbluth, as cited in K Pipoh, 'Umsetzung der Kartellschadensersatzrichtlinie (2014/104/EU) in das deutsche Recht' (2016) *NZKart* 226. Left open by H Stauber and P Schaper, 'Die Kartellschadensersatzrichtlinie – Handlungsbedarf für den deutschen Gesetzgeber?' (2014) *NZKart* 346, 347.

<sup>48</sup> Meyer-Lindemann, in: Kersting/Podszun (n 45) c 17 para 42; M Kling, 'Die Haftung der Konzernmutter für Kartellverstöße ihrer Tochterunternehmen' (2010) *WRP* 506, 510ff; P Voet van Vormizeele, 'Die EG-kartellrechtliche Haftungszurechnung im Konzern im Widerstreit zu den nationalen Gesellschaftsrechtsordnungen' (2010) *WuW* 1008, 1018ff.

<sup>49</sup> Settled case-law since Case C-41/90 *Höfner und Elser* [1991] ECLI:EU:C:1991:161, para 21; Case C-189/02 P *Dansk Rørindustri and Others* [2005] ECLI:EU:C:2005:408, para 112.

<sup>50</sup> Case C-97/08 P *Akzo Nobel* [2009] ECLI:EU:C:2009:536, para 54ff; Case C-521/09 P *Elf Aquitaine* [2011] ECLI:EU:C:2011:620; Case C-516/15 P *Akzo Nobel and Others v Commission* [2017] ECLI:EU:C:2017:314, para 43ff; Case T-144/07 *ThyssenKrupp Liften Ascenseurs and Others* [2011] ECLI:EU:T:2011:364, para 92ff; Case C-170/83 *Hydrotherm* [1984] ECLI:EU:C:1984:271, para 11; see also § 81a 1) ARC.

<sup>51</sup> Case C-49/92 *Anic* [1999] ECLI:EU:C:1999:356, para 145; Case C-125/07 P *Erste Bank Group and Others* [2009] ECLI:EU:C:2009:576, para 76; on the conditions for imposing a fine on the successor in the event of the survival of the old company: Case C-280/06 *ETI SpA and Others* [2007] ECLI:EU:C:2007:775, para 49ff.

of imposing a fine on the parent company for competition infringements committed by its subsidiary.<sup>52</sup> Inasmuch as an undertaking may consist of several legal entities,<sup>53</sup> the European Commission may also sanction other legal units for this infringement instead of or in addition to the legal entity responsible for the competition infringement. In the former case of sanctioning the successor instead of the responsible corporate entity that ceased to exist, the company continues to exist within the successor (economic continuity); in the latter case of sanctioning the parent company for competition infringements of its subsidiary, both legal entities are considered part of a single economic entity.<sup>54</sup>

The liability of a company's successor under EU law obviously intends to ensure the effectiveness of competition law by making it impossible to escape liability through restructuring, sale or liquidation of the legal entity responsible.<sup>55</sup> With regard to the attribution of liability within a corporate group, this objection is less convincing. The case law tends to indicate an efficiency-driven structural liability of the parent company so that a parent company is held liable as a guarantor for the compliant conduct of the group subsidiary on account of its factual possibilities to influence the subsidiary.<sup>56</sup> The prerequisite for the joint responsibility of legally independent companies, therefore, is that the parent company exercises (can exercise?) decisive influence on the subsidiary so that the subsidiary essentially follows instructions from the parent company.<sup>57</sup> In turn, this is presumed where the shareholding is almost complete (close to 100%).<sup>58</sup>

## 5.4 THE OTHER END OF A SAUSAGE – IS THERE A CORPORATE VEIL AFTER SKANSKA?

### 5.4.1 *The Setting and the CJEU's Decision in Skanska*

Against the backdrop of the tension between the EU concept of the single economic entity and the legal entity principle governing national civil laws and laws of civil procedure, the CJEU's 2019 ruling on national reference in *Skanska* was highly anticipated. In a nutshell, the CJEU was required to clarify whether determining who is liable for compensating victims of a cartel in breach of Article 101 TFEU is a

<sup>52</sup> *Akzo Nobel* [2009] (n 50) para 58.

<sup>53</sup> *Hydrotherm* (n 50) para 11; more recently: *Akzo Nobel* [2009] (n 50) para 55; *Akzo Nobel and Others v Commission* [2017] n 50) para 48.

<sup>54</sup> N Pauer, 'The Single Economic Entity Doctrine and Corporate Group Responsibility in European Antitrust Law' (1st edn, Wolters Kluwer 2017) 199, 201; J Biermann in *Immenga/Mestmäcker: Wettbewerbsrecht* (n 42) preface to art 23 of Regulation (EC) No 1/2003, para. 112.

<sup>55</sup> *ETI SpA and Others* (n 51) para 41.

<sup>56</sup> Reading the case-law in this way: Mörsdorf (n 38) 490 with further references.

<sup>57</sup> Settled case-law since Case 48-69 *Imperial Chemical Industries Ltd* [1972] ECLI:EU:C:1972:70, paras 132, 135; *Akzo Nobel* [2009] (n 50) para 58.

<sup>58</sup> *Akzo Nobel* [2009] (n 50) para 60.

matter of EU or national law.<sup>59</sup> In doing so, the CJEU shifted the rules for attribution of liability for cartel fines within the group (the single economic entity) to questions of civil liability for damages (i.e. who can be sued in damages cases).

The main proceedings concerned a follow-on damages claim brought by the City of Vantaa against a nationwide cartel in the asphalt market implemented in Finland between 1994 and 2002. The City of Vantaa brought a damages action against the defendants (jointly and severally), who had acquired 100% of the shares in each of the supposed cartel companies (or their then parent companies) in the year 2000 and, later, dissolved and liquidated these companies. The defendants had taken over their respective assets and continued their respective operations. The Finnish Competition Authority had uncovered the asphalt cartel in March 2002 and proposed fines in 2004, whereupon the Finnish Supreme Administrative Court (on the basis of Article 81 EC old version) imposed these fines on the defendants in September 2009 using the economic continuity test.

The defendants argued, *inter alia*, that they were not liable for claims against independent legal entities (their former subsidiaries). Furthermore, the claims were said to no longer exist as they had not been included in the respective liquidation procedures. These arguments led to contradictory decisions from the district and appeal courts in Finland. Whereas the District Court held that the principle of economic continuity must be applied in the same way as in administrative fine proceedings (on account of the principle of effectiveness), the Helsinki Court of Appeal denied civil liability for lack of a legal basis in Finnish law. It was the Finnish Supreme Court that referred the case to the CJEU as it had to decide between, on the one hand, the assumption that only the legal entity that caused the damage is liable for this, and, on the other hand, EU case law permitting any person to claim compensation for damages resulting from an infringement of Article 101 TFEU. The Court asked whether the determination of the liable party with regard to damages caused by an infringement is a matter of EU or national law and, if a matter of EU law, whether the principle of economic continuity should be applicable like in cases concerning fines.

The CJEU held that it was a matter of EU law to determine the entity required to provide compensation for damages caused by an infringement of Article 101 TFEU. It confirmed that the effectiveness of Article 101 TFEU would be jeopardised if undertakings responsible for damages caused by an infringement of EU competition rules were able to escape liability simply by changing their identity.<sup>60</sup> The CJEU also vaguely addressed the methodological approach for determining the entity under EU law, suggesting that it should be the same as with regard to the imposition of fines under Article 23 (2) of Regulation No 1/2003.<sup>61</sup>

<sup>59</sup> Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions and Others (Skanska)* [2019] ECLI:EU:C:2019:204.

<sup>60</sup> *Skanska* (n 59) para 28, 46.

<sup>61</sup> *Ibid.* at para 47.

#### 5.4.2 *Ratio of Skanska and Open Questions*

If not read as a mere individual ruling, the notion of the court was indeed groundbreaking and not compulsory as Article 101 TFEU does not determine particularities of civil liability. Nor did the EU Damages Directive clarify these topics in 2014. The Commission itself, referring to joint and several liability under the EU Damages Directive, had argued that the person liable to pay damages should be determined under national law.<sup>62</sup>

A variety of questions remains, deriving from the two pillars of the case. On the one hand, there is the CJEU's case law regarding fundamental principles of the private enforcement system developed since *Courage/Crehan*<sup>63</sup> and on the other, there is the very specific notion of undertaking in EU competition law.

##### 5.4.2.1 Is There a European Claim for Damages?

Based on the panacea that is the principle of effectiveness, the CJEU elevates the private damages claim together with the determination of the opponent to the level of EU primary legislation. The Advocate General (in *Skanska*) claimed that this idea was not entirely new as Article 101 TFEU already has a direct effect and produces legal consequences in relations between individuals. It thus creates rights for the benefit of individuals which the national courts must safeguard.<sup>64</sup> However, recognising the principles of equivalence and effectiveness means acknowledging that

in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an agreement or practice prohibited under Article 101 TFEU.<sup>65</sup>

There are probably more open questions after *Skanska* than before. From a doctrinal point of view, for example, how does a claim for damages under EU law fit into the legal framework of the Member States when EU law demands the claim's existence and determines the liable persons while the other conditions are (probably) governed by national law? Will there be further prerequisites for damages claims to be derived directly from EU law in the future? Advocate General Wahl's opinion<sup>66</sup> could indicate that the substantive criteria of the right to damages, such as a causal link, were also governed by Article 101 TFEU and not by domestic law, which (only)

<sup>62</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council (2013), COM:2013:0404:FIN; EU Damages Directive (n 34), recitals 11, 37.

<sup>63</sup> Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECLI:EU:C:2001:465. For a list of the leading cases see *Kone* (n 46) paras 20–25.

<sup>64</sup> Opinion of AG Wahl in *Skanska* (n 59) paras 80, 81.

<sup>65</sup> *Skanska* (n 59) para 27, citing *Kone* (n 46) para 24 and the case-law cited therein.

<sup>66</sup> Opinion of AG Wahl *Skanska* (n 59) para 38ff.

had to be assessed by reference to the principle of effectiveness. This seems at least questionable in light of the *Kone* decision;<sup>67</sup> however, the CJEU did not address this issue in *Skanska*. In general, to define requirements of a national civil law claim under the influence of EU law leads to muddy waters. From a dogmatic perspective, it creates a strange impact on the unity of the legal system, both at the EU and the Member States' level. It should therefore be noted that competition law damages claims remain claims under the respective applicable national law and that only the existence of a claim for damages, the person of the obligated party (undertaking), and the person of the entitled party (everyone) are defined by EU primary law.<sup>68</sup> The same outcome could have been achieved without the ratio of *Skanska* by employing the principle of effectiveness when applying national law.

#### 5.4.2.2 What Is 'the Undertaking' Anyway?

With the abovementioned, the EU notion of the undertaking is decisive. The CJEU in *Skanska* merely recalls that the undertaking is

any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed [...] even if in law that economic unit consists of several persons, natural or legal.<sup>69</sup>

Transferring the concept of 'undertaking' to damages claims simplifies the matter, yet it misses the point. An analysis of the European Commission and the CJEU practice shows that the concept of a single economic entity that has been used to identify the undertaking is not at all a consistent concept.<sup>70</sup> In particular, the attribution of responsibility within the group derived from the concept of the single economic entity is controversial. While numerous authors try to fit such attribution into a conceptually coherent framework and consider it necessary for the effective enforcement of EU competition law,<sup>71</sup> the (arguably) greater part of the literature criticises sanctions against legal persons not responsible for the competition law infringement.<sup>72</sup>

<sup>67</sup> P Hauser, 'Der Ersatzpflichtige im Kartelldeliktsrecht: Anwendung des Grundsatzes wirtschaftlicher Kontinuität?' (2019) *WuW* 123, 125; A Weitbrecht, 'Kartellschadensersatz 2019' (2020) *NZKart* 106, 106; J Zöttl, notes to 'EuGH: Kartellrecht: Umbrella Pricing – Kone' (2014) *EuZW* 586, 589.

<sup>68</sup> Arguing for a continuum with regard to harmonization: M Hjartström and J Nowag, 'EU Competences and Damages Directive: The Continuum Between Minimum and Full Harmonisation' (2019) Lund University Legal Research Paper Series, LundLawCompWP 2/2019 May 2019 <https://ssrn.com/abstract=3383613> accessed 17 August 2021.

<sup>69</sup> *Skanska* (n 59) para 36ff; citing judgment in *ETI SpA and Others* (n 51) para 38 and the case-law cited therein and citing judgment in Case C-516/15 *P Akzo Nobel and Others v Commission* [2017] EU:C:2017:314, para 48 and the case-law cited therein.

<sup>70</sup> Pauer (n 54) 9, 143ff pinpointing to special ambivalence of case-law with regard to joint ventures.

<sup>71</sup> Predominantly, C Kersting 'Liability of Sister Companies and Subsidiaries in European Competition Law' [2020] 41(3) *ECLR* 125, 130, with further references to earlier publications.

<sup>72</sup> Mörsdorf (n 38); W Bosch, 'Verantwortung der Konzernobergesellschaft im Kartellrecht' (2013) 177 *ZHR* 454, 461ff; R Bechtold and W Bosch, 'Der Zweck heiligt nicht alle Mittel' (2011) *ZWeR* 160, 160ff; M Kling,



5.4.2.2.1 GROUP LIABILITY? There are voices arguing that the CJEU wanted to establish what is discussed with the buzzword ‘group liability’. In accordance with the case law, imputing a subsidiary’s competition law infringement to the parent company would only be a symptom of imputation to the single economic entity. Hence, albeit not visible in case law yet, the economic unit can be held accountable for the infringement that is to say, subsidiaries are liable for parent and sister companies.

With regard to German civil law, the concept of the single economic entity could be mirrored by stipulating a legal capacity of the corporate group forming a civil law partnership (*Gesellschaft bürgerlichen Rechts* or *GbR*, Sections 705ff German Civil Code).<sup>73</sup> The *GbR* is the basic partnership type and most general form of partnership under German company law. Conveniently, a private partnership can be established without formal requirements for any purpose that could (and would typically) be something as small as two people jointly renting an automobile for a weekend trip. Infringements by parts of the economic unit could then be attributed to such partnership leading to a joint and several liabilities of the other constituent parts of the economic unit as a consequence. This opinion pinpoints that the liability of the economic unit must be understood as the liability of all legal entities constituting the economic unit.<sup>74</sup> From a comparative perspective, similar forms of partnerships might provide the same reasoning in other Member States.<sup>75</sup> In fact, the idea was already considered (but discarded) in the UK in the 1950s as a ‘single economic unit theory’.<sup>76</sup>

However, every solution which ascribes the single economic entity to a partnership is contradictory: the single economic entity in EU case law is primarily found in constellations of control (parent/subsidiary). A group that might form a single economic entity can at the same time hardly constitute a partnership under civil law because of the typical relationship of superiority and subordination within the group, which is not consistent with the equal pursuit of objectives that characterises a partnership. Due to the complexity in dealing with corporate groups, a ubiquitous ‘corporate group (liability) law’ does not exist. Internationally, there is a persistent rumour, that some jurisdictions have implemented comprehensive regulations of the corporate group, thereby creating a distinct entity form governed by

‘Wirtschaftliche Einheit und Gemeinschaftsunternehmen – Konzernprivileg und Haftungszurechnung’ (2011) *ZWeR* 169, 177ff; A Riesenkampf and U Krauthausen, ‘Liability of Parent Companies for Antitrust Violations of their Subsidiaries’ (2010) 31 *ECLR* 38, 41; van Vormizeele (n 48) 1013ff.

<sup>73</sup> Kersting (n 71) 128.

<sup>74</sup> Kersting (n 71) 128: ‘joint action on the market triggers joint liability’.

<sup>75</sup> *Gragdansko Druzesstvo* (Bulgaria); *Société civile* (France); *Società semplice* (Italy); *Maatschap* (Netherlands); *Enkelt bolag* (Sweden).

<sup>76</sup> *DHN*, [1976] 1 *WLR* at 850. *DHN* notwithstanding, English judges have asserted that there is no presumption that group companies be treated as a single economic unit or an enterprise under English company law, see only Cheng (n 10) 60ff.



its own body of law.<sup>77</sup> However, despite many jurisdictions enacting rules for corporate groups,<sup>78</sup> it must be stated that there is no such thing as ‘the corporate group law’.<sup>79</sup> Even EU law which contains a large number of laws relevant to groups does not maintain a comprehensive group law system.<sup>80</sup> Thus, to refer to them as cases of a corporate group, liability would be misleading.

Even proponents in favour of a group liability recognise that there might be cases where such a corporate group liability is not justifiable.<sup>81</sup> Neither the method nor the results of full-blown group liability within the single economic entity are therefore convincing.

5.4.2.2.2 THE SINGLE ECONOMIC ENTITY UNRAVELLED There lies a problem of dogmatic derivation at the heart of the single economic entity. Initially, the concept was developed for the application of the so-called ‘group privilege’.<sup>82</sup> The single economic entity doctrine is unchallenged with regard to the origin of competition or the intensity of that competition in a market.<sup>83</sup> In other words, it is clear that in general rights of control define a single economic entity. However, it is unclear why and under which circumstances the existence of such right should be used to attribute liability. As highlighted before, the CJEU shifts the burden of determination to a presumption. Unlike a legal entity, an economic entity is not clearly defined but requires an ad hoc appreciation by a court based on several factual elements, ones which may be subject to changes over time. The use of presumptions here is tempting, but problematic with regard to legal certainty, the principle of culpability, and the presumption of innocence.

For a variety of reasons, scholars therefore argue that there is no unique single economic entity doctrine that can be used for both identifying the single economic entity with regard to a unified competitive force on the market and attributing liability for infringements of competition law.

<sup>77</sup> Harper Ho (n 2) 885 with further references.

<sup>78</sup> In Italy since the reform of the *codice civile* (2004); Turkey 2011; in France exist for example special rules in the law on the corporate duty of vigilance of parent companies and instructing companies in *Code de Commerce* L 225-102-4; text books on the continent also often hold chapters dealing with corporate group constellations; see for example Windbichler (n 2) 1242 with further detailed references.

<sup>79</sup> Windbichler (n 2) 1241. Central legal aspects regulated with regard to corporate groups are eg profit and loss absorption and accounting integration and consolidation.

<sup>80</sup> H Fleischer, ‘Europäisches Konzernrecht: Eine akteurzentrierte Annäherung’ (2017) *ZGR* 1, 8ff, 15.

<sup>81</sup> In case changes in the single economic entity suggest that the new member of the single economic entity did not contribute to the infringement of the past, for example, disposing shares of 50 percent in a subsidiary and forming a joint venture with another company should not imply that the second mother of the joint venture is liable with regard to the subsidiaries’ cartel infringements of the past; see C Kersting, ‘Kartellrechtliche Haftung des Unternehmens nach Art. 101 AEUV’ (2019) *WuW* 290, 297.

<sup>82</sup> For a detailed discussion of the emergence and implications of the single economic entity doctrine in EU competition law, see O Odudu and D Bailey, ‘The Single Economic Entity Doctrine in EU Competition Law’ (2014) 51 *CMLR* 1721.

<sup>83</sup> Odudu and Bailey (n 82) 1738; for Merger Regulation context see para 175 of the Commission’s Jurisdictional Notice [2008] OJ C 95/1 and for the context of vertical agreements see art 1 (2) *VBER* 330/2010 [2010] OJ L 102/1.

The case law has been extensively analysed and differentiated numerous areas of application of the concept of the single economic entity.<sup>84</sup> In this light, one could even doubt the argumentative intrinsic value of the single economic entity with regard to the attribution of liability.<sup>85</sup>

Against the backdrop of the friction caused by the legal entity principle as a ubiquitous concept in all industrial states and in light of the CJEU's case law, it is argued that the concept of the single economic entity itself is only the consequence of applying the principle of effectiveness but not a condition for the effective enforcement of competition law. Case law concerned with the application of the principle of economic continuity and parental liability would usually employ both lines of argumentation in parallel without a strict dogmatic differentiation.<sup>86</sup>

The principle of effectiveness itself is the standard according to which any assessment of a single economic entity is to be made. That conclusion is supported by the fact that EU institutions can in no way avoid designating a legal entity as an addressee for the statement of objection in a second step. An 'economic entity' without a legal entity is not a suitable addressee for measures of the European Commission. To stay in line with the sausage picture: a kind of black pudding that can hardly be nailed to the wall.<sup>87</sup> EU institutions impose fines on parents and subsidiaries as joint and several debtors in a two-step approach. The European Commission firstly determines the undertaking and secondly identifies a legal person against which a fine is enforced.<sup>88</sup> This approach can be best explained by the principle of effectiveness.

In this respect, the judgment in the *Skanska* case could be seen as a confirmation of this context-dependent understanding of the single economic entity. Strikingly, the CJEU in *Skanska* justified the transfer of principles from the context of fines to the context of private actions for damages solely on the basis of the common root of both sanction regimes in the efficiency objective.<sup>89</sup> Yet, the CJEU does not comment on the prerequisites of the single economic entity which would have been expected in this context. Due to this contextual understanding of the single economic entity, parental liability appears to be appropriate and necessary in the absence of an equally effective means for the effective enforcement of EU law.<sup>90</sup>

<sup>84</sup> For a comprehensive overview Odudu and Bailey (n 82) 1721.

<sup>85</sup> Mörsdorf (n 56) 493.

<sup>86</sup> *Ibid.*, with reference to *ETI SpA and Others* (n 51) paras 41, 42.

<sup>87</sup> Providing the original metaphor: Windbichler (n 2) 1244.

<sup>88</sup> Pauer (n 54) 9; see also art 299 TFEU.

<sup>89</sup> Mörsdorf (n 38) 494; R Harms and P Kirst, 'Der kartellrechtliche Unternehmensbegriff (2019) *EuZW* 374, 378.

<sup>90</sup> Admittedly, the CJEU's case law, according to which the existence of a group-internal compliance system must be regarded as proof of the existence of an economic unit between parent company and subsidiary, seems to provide suboptimal incentives for preventing group-internal competition law infringements, see Mörsdorf (n 38) 495; Case C-501/11 P *Schindler Holding* [2013] ECLI:EU:C:2013:522, para 113ff.

On the other hand, liability of the subsidiary for competition law infringements by the parent or a sister company does not appear to provide incentives for avoiding such infringements. The single economic entity is conceptually characterised in a way that only one part (usually the parent company) exerts a decisive influence on the other parts and thus is in a position to control behaviour to a significant extent. Behavioural incentives, on the other hand, have no effect when there is no possibility for the subsidiary to influence the behaviour of the parent or sister company. Liability of the subsidiary or sister company is not even necessary to prevent the parent company from transferring assets to these companies. Transferred assets are accessible due to the liability of the (economic) successor and the liability of the parent company.<sup>91</sup>

5.4.2.2.3 IMPLICATIONS OF THE CJEU'S RULING IN *SKANSKA* FOR NATIONAL RULES ON FINES? *Skanska* found that acquiring companies may be held liable for the damage caused by the infringement and that in determining the liable entities the same principles (concept of undertaking) are to be applied as in cases concerning fines.<sup>92</sup> With that, one could argue that the ruling's implications are equally relevant to the law on the imposition of fines. It follows from the equal treatment of fines and damages regarding the notion of undertaking that the addressee of a fine is equally directly defined by Article 101 TFEU when national cartel authorities impose fines for an infringement of Article 101 TFEU.

According to this reading, the ECN Plus Directive<sup>93</sup> only has clarifying effect insofar as it requires Member States to ensure that fines can also be imposed on 'undertakings' and that the notion of undertaking applies for the purpose of parent and successor liability (cf Article 13 (1), (5), and recital 46).<sup>94</sup>

The introduced § 81a (1–5) of the German ARC would (probably) no longer be required as far as infringements of EU competition law are concerned and even for pure German cases. The CJEU's ruling in *Skanska* has no direct impact on matters of national competition law, where they do not affect trade between Member States. However, since the German legislator has amended the key provisions of German competition law by implementing the term 'undertaking' explicitly in order to align relevant legal provisions with EU law, the development of EU law is recreated by German law.<sup>95</sup>

<sup>91</sup> Mörsdorf (n 38) 495.

<sup>92</sup> *Skanska* (n 59) para 51.

<sup>93</sup> 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 L11/3 (ECN Plus Directive).

<sup>94</sup> Hauser (n 67).

<sup>95</sup> Explanatory Memorandum to the draft Seventh Act amending the ARC, Bundestag publication of 12 August 2004, 15/3640, 22; J Biermann in: *Immenga/Mestmäcker, Wettbewerbsrecht* (n 42) preface to § 81 GWB, para 37.

More importantly, the CJEU has not limited the temporal effects of its ruling.<sup>96</sup> Since the CJEU in preliminary rulings clarifies only existing EU law, the finding that the determination of the undertaking is a matter of EU law, ironically, already applied in 2017. From this viewpoint, the German ‘sausage gap’ would not even have existed, but would have been a mere error of law. It did not take long after *Skanska* until it was hypothesised it could be possible to reopen and continue fine proceedings that were discontinued due to the lack of (solvent) addressees with the parent company or the economic successor.<sup>97</sup>

For mergers and acquisitions, the outcome of the *Skanska* ruling underscores the importance of due diligence. Broadened liability might trigger a higher demand for buyer-protective representations and warranties regimes in share deals and even asset deals. Particularly, compliance warranties of future transactions might include an explicit commitment by the seller’s business with regard to competition law compliance. Once there are reasonable grounds to suspect that the acquirer will be an addressee of antitrust-related claims originating from the transferred business, a special indemnity might be granted by the seller holding the acquirer harmless from any claims in this regard, ideally backed up by a parent company guarantee in order to mitigate the risk that the selling entity ceases to exist. One crucial point of negotiation will be the corresponding limitation period for claims resulting from a breach of such warranty or indemnity. Since the CJEU in *Skanska* explicitly rejected limiting the temporal effects of the decision and since competition law infringements often remain in the dark for several years, acquirers might consider the usual limitation periods to be insufficient.

#### 5.4.3 *Developments After Skanska*

The Member States’ courts have so far taken different approaches towards questions that have arisen since *Skanska*.

The question of how the principle of economic continuity will be applied will certainly become even more pressing in the future as it impacts not only the ‘given’ group but a multitude of potential third-party purchasers. As regards the purchase of an undertaking, the CJEU does not seem to presuppose any fault on the part of the purchaser. Rather, the purchaser ‘takes over its assets and liabilities, including its liability for breaches of EU law’.<sup>98</sup> By way of example, a German court’s ruling regarding legal succession held that the company taking over a business unit of the alleged cartelist via spin-off was liable for cartel damages on the basis of a corporate law regulation in the Transformation Act (*Umwandlungsgesetz*).<sup>99</sup> The

<sup>96</sup> *Skanska* (n 59) para 55ff.

<sup>97</sup> Hauser (n 67).

<sup>98</sup> *Skanska* (n 59) para 40, citing Case C-448/11 P *SNIA v Commission* [2013] EU:C:2013:801, para 25.

<sup>99</sup> OLG Düsseldorf, U (Kart) 18/17 *Schienerkartell* [2019] ECLI:DE:OLGD:2019:0123, UKART.18.17.oA, para 31ff.

successor did not participate in the alleged infringement. However, the German court applied the existing liability scheme of the Transformation Act and affirmed joint and several liabilities of the cartel and its successor for damages that arose up to the point in time when the spin-off took effect (i.e. by registration in the commercial register). Although the infringement putatively existed even until after this point in time, liability was not extended for the successor in this regard. In short, the court made use of an existing corporate liability regime, which is designed to protect creditors in general, not specifically creditors of cartel damages claims. Unlike in *Skanska*, the successor neither had been involved in the infringements itself nor did other aspects command an extension of the claimants' recoverable assets from a normative point of view.

With regard to the more general question of horizontal or vertical liability for competition law infringements of other group companies, a majority of German courts have rejected the possibility of being sued for cartel damages in civil court in relation to a parent's subsidiary or a sister company and thus, in principle, its civil liability for infringements committed by other members of the same economic unit.<sup>100</sup> Even while quoting *Skanska*, courts have referred to the EU principle of personal responsibility.<sup>101</sup> If there is a lack of decisive influence, national courts have not reflexively attributed liability to a subsidiary or sister company. Rather, they have focused on whether the subsidiary had control over the actions of the other group companies.

Against the backdrop of national rules which have incorporated parental liability through the transposition of the EU Damages Directive<sup>102</sup>, commentators eagerly awaited the CJEU's findings in the case of *Sumal*. Divergent decisions<sup>103</sup> in Spain had caused a referral to the CJEU for a preliminary ruling on whether a subsidiary can be liable for its parent company's conduct.<sup>104</sup> The CJEU was asked to elaborate on the context of intra-group relationships and, in particular, whether the concept of the single economic entity is to be understood with regard to control or also with regard to other intra-group aspects (such as being a beneficiary of a parent or sister company). The opinion of the Advocate General, in this case, suggested that control alone is not a suitable criterion for assessing liability since subsidiaries do not

<sup>100</sup> LG Mannheim, 14 O 117/18 Kart LKW-Kartell [2019] ECLI:DE:LG MANNH:2019:0424.14 O 117.18 K ART.0A; LG München I, 37 O 6039/18 Löschfahrzeug-Kartell [2019] ECLI:DE:LG MÜNEN:2019:0607.37 O 6039.18.0A; indicating a dissenting opinion, but without ultimate decision in this case LG Dortmund, 8 O 75/19 Sanitärgrößhändler [2020] ECLI:DE:LG DORTM:2020:0708.8 O 75.19 KART.00 para 46, citing Case C-97/08 P Akzo Nobel [2009] ECLI:EU:C:2009:536, para 54.

<sup>101</sup> Case C-286/13 P Dole Food [2015] ECLI:EU:C:2015:184, para 140; *Skanska* (n 59) para 32, 39.

<sup>102</sup> eg Portugal: art 3 (2) Lei n.º 23/2018; Spain: art 71.2 (b) Ley de Defensa de la Competencia.

<sup>103</sup> Case C-882/19 *Sumal SL* [2021] ECLI:EU:C:2021:800; eg Juzgado de lo Mercantil No 3 de Valencia [2019] ECLI:ES:JM V:2019:34; Audiencia Provincial de Barcelona Sec. 15 [2019] Rollo núm. 775/2019-2ª, ECLI:ES:APB:2019:9370A, para 11.

<sup>104</sup> Request for a preliminary ruling from the Audiencia Provincial de Barcelona of 3 December 2019, Case C-882/19 *Sumal* [2019] OJ C87/7.

exert control over their parents. However, the Advocate General also highlighted the principle of personal liability.<sup>105</sup> A ‘downward’ liability would require that the subsidiary not only was controlled by the parent company but also was objectively necessary for the infringement of the parent company.<sup>106</sup> The market conduct of the subsidiary must have made it possible to concretise the effect of the infringement. Only then, the parent and subsidiary would be jointly and severally liable.<sup>107</sup> A consequent application of that reasoning means that there can be more than one single economic entity within a group of companies depending on the context of the respective case.

Eventually, the CJEU holds the subsidiary liable as part of the economic unit even if it is not the addressee of the imposed fines and thus once more pierces the corporate veil. Remarkably, the CJEU’s ruling only partially adopts the Advocate General’s proposed criteria for this veil-piercing. In *Sumal*, the CJEU first reiterates the established concepts of undertaking and economic unit and the element of control.<sup>108</sup> However, after acknowledging the fact that the same parent company may be part of several economic units depending on the respective activity of a conglomerate, the CJEU adopts broader requirements in order to establish joint and several liability in cartel damages cases. Liability shall not be construed to a subsidiary if the parent’s infringements are committed in the context of economic activities entirely unconnected to the subsidiaries’ own activity in which the subsidiary was in no way involved.<sup>109</sup> However, the damaged party has (only) to show that the subsidiary formed such an economic unit by proving (i) the economic, organisational and legal links between the defendant subsidiary and its parent and (ii) a specific link between the subsidiary’s economic activity and the subject matter of the infringement of the parent (i.e. by proving that both entities distribute identical products).<sup>110</sup> So, the CJEU does not implement an automatism of vertical and horizontal liability. But it is just a matter of time before the CJEU will be asked to specify to what extent a product (range) must be identical.

Referring to the right to an effective remedy and to a fair trial, the CJEU cryptically emphasises that the subsidiary must dispose of all means necessary to defend itself. In particular, it must be able to dispute that it belongs to the same economic unit as its parent but as well defend itself with regard to the decision of the Commission arising from previous public enforcement.<sup>111</sup> Means with regard to the latter are

<sup>105</sup> Case C-882/19 *Sumal SL* [2021] ECLI:EU:C:2021:800, para 42; opinion of the Advocate General Giovanni Pitruzella, C-882/19 *Sumal* [2021] ECLI:EU:C:2021:293, para 39, 64.

<sup>106</sup> Opinion of the Advocate General Giovanni Pitruzella, C-882/19 *Sumal* [2021] ECLI:EU:C:2021:293, para 57.

<sup>107</sup> *Ibid.* at para 57 ff.

<sup>108</sup> Case C-882/19 *Sumal SL* [2021] ECLI:EU:C:2021:800, para 41–44 citing i.a. *Akzo Nobel*.

<sup>109</sup> Case C-882/19 *Sumal SL* [2021] ECLI:EU:C:2021:800, para 47.

<sup>110</sup> *Ibid.* at para 51 f.

<sup>111</sup> *Ibid.* at para 53.

factually limited, however, since national courts cannot rule against the existence of an infringement already found by the European Commission.<sup>112</sup> The contradiction is obvious: the subsidiary is factually not able to exercise such rights, since the European Commission grants such rights of defence only to the entities involved in infringement proceedings, but not to affiliated ‘third-parties’, which according to *Sumal* can later be sued as part of an economic unit. The CJEU here considers it sufficient that during such infringement proceedings the economic unit exerted such rights of defence.

Supposedly, the CJEU’s ruling opens the path to the liability of any of the sister companies, since any legal entity that is part of the economic unit which has committed an infringement can generally be the addressee of damage claims.<sup>113</sup> With that, a new form of forum shopping is possible where damaged parties will consider and weigh favourable conditions in different member states such as presumptions regarding the amount of damages or different statutes of limitation. It will be crucial for subsequent rulings that the CJEU finds suitable criteria that also consider aspects of property and investment protection if the parent company does not hold 100% of the shares.

## 5.5 CONCLUSIONS AND OUTLOOK

This chapter initially outlined the basic premises that corporate law is built on globally: the entity principle and the enterprise principle that, depending on the point of view and field of law, make the unity or multiplicity of the group of companies stand out. In this context, the chapter portrayed how the focus on the single corporation legal entity principle and the principle of separation has been utilised in some instances to avoid liability for cartel fines by restructuring in Germany. This infamous gap was eventually closed by wide-reaching reforms.

Highlighting the persistent tension between the issues of limited liability and responsibility for competition law infringements, the chapter then discussed how basic corporate law principles relate to the EU concept of the single economic entity, with particular regard to private damages claims. This chapter finally argues that the CJEU ruling in *Skanska* reaffirms that liability for fines and damages should follow a cautious assessment in relation to the principle of effectiveness, which is also the starting point for determining the single economic entity. This may lead to a more contextual and nuanced understanding of the single economic entity and, in turn, a more balanced approach with regard to the allocation of liability within corporate groups (i.e. to the extent required by the principle of effectiveness). In any case, the chapter emphasises that an automatic vertical or even horizontal liability within the corporate group disregards fundamental principles

<sup>112</sup> *Ibid.* at para 55.

<sup>113</sup> Compare Case C-882/19 *Sumal SL* [2021] ECLI:EU:C:2021:800, para 50.

of corporate and civil law and would lead to unreasonable results. Against the backdrop in which EU economic law is still a picture puzzle, it is important that EU courts post-*Skanska* and *Sumal* take the opportunity and focus on the general context of matters relating to multi-corporate enterprises. Such focus would avoid that excessive regulatory tendencies regarding group external law undermine general principles of civil law systems in the Member States which could produce equally conclusive results.