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Entities not fined by Commission can be liable for competition law infringement damages

A Dutch court of appeal in the Netherlands issued an important ruling this week that follows on from the *Skanska* judgment of the European Court of Justice earlier this year. In *Skanska*, the ECJ held that European law determines which entities can be held liable for damages caused by an infringement of competition law. It also ruled that the "undertaking" which has infringed the competition rules is the one to answer for the damages caused by the infringement.

According to the Dutch court – ruling in a dispute between TenneT and Alstom – *Skanska* implies that even entities which are part of the same undertaking and to which the Commission has not attributed the infringement, can be liable for damages. This would be the case if the national court established that those entities are part of the same undertaking as the entity held liable in a Commission decision. This ruling shows once again that important and long-standing civil law principles – such as respect for the corporate identity of legal entities – may be set aside if they stand in the way of effective redress for cartel damages.

In the *Skanska* case, the European Court of Justice ruled on 14 March 2019 that "the determination of the entity which is required to provide compensation for damage caused by an infringement of Article 101 TFEU is directly governed by EU law". The Arnhem/Leeuwarden Court of Appeal applied this ruling in proceedings between TenneT and Alstom. TenneT sued four entities of the Alstom group, seeking compensation for damages caused by the gas insulated switchgear cartel. One of these entities (Cogelex) was part of the Alstom group during the infringement period, but was not fined by the Commission.

In a ground-breaking ruling, the court of appeal held that it follows from Article 16 of Regulation 1/2003 that national courts are bound by the Commission's conclusions regarding legal entities' liability for competition law infringements. This applies even if the Commission decided not to attribute liability to certain entities. National courts can therefore still establish that these entities are in fact liable as they belong to the same undertaking. The fact that these entities were not addressed by the Commission's decision and therefore do not have the right to appeal, is not relevant, because the right of appeal could have been exercised by the "undertaking", according to the court.

So far, the European Commission has only attributed liability to legal entities which

committed infringements or had decisive control over the actual infringer. The court of appeal's judgment suggests that other legal entities within the same corporate group as the infringer can also be held liable, for the sole reason that they belonged to the same undertaking, irrespective of the nature of their activities. It is unclear whether this is what the court of appeal intended, because Cogelex was active on the market of cartelised products. In any event, this judgment again shows that important and long-standing civil law principles – such as respect for the corporate identity of legal entities – may be set aside if they stand in the way of effective redress for cartel damages.