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Concurrences
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Economic Continuity of Liability in Antitrust Damages CJEU Preliminary Ruling in C-724/17 *Skanska et al.*

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Abstract

In its judgment in 2019 – marking the first 25 years of the ongoing Finnish asphalt cartel saga – the Court of Justice of the European Union (CJEU) confirmed for the first time that the economic continuity test applies to the determination of persons liable to provide compensation for the damage caused by an infringement of EU competition rules. Before the judgment, the CJEU had only applied the economic continuity test to the determination of persons liable for fines imposed for an infringement of EU competition rules. The CJEU relied on the concept of an 'undertaking', which, within the meaning given to it in EU competition law, covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed. That concept designates an economic unit even if in law that economic unit consists of several persons, natural or legal. Corporate restructurings or acquisitions of an infringer, leading to the infringer ceasing to exist, do not necessarily create a new undertaking free of liability for the conduct of its predecessor that infringed the competition rules, when, from an economic

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point of view, the two are identical. Consequently, under certain circumstances, a company may be liable for damages for the anti-competitive conduct of another company, even when the former did not participate in the infringement itself. The judgment was given due to the request for a preliminary ruling by the Supreme Court of Finland in the context of the Finnish Asphalt *cartel case.*

I. Introduction

By a final court judgment imposing a record total fine of €82.55 million in 2009, a cartel was found to have existed in the asphalt paving market in Finland in 1994–2002.[1] In 2016, the defendants in the follow-on antitrust damages cases were ordered to pay over €30 million in damages and costs.[2] The *Asphalt* case is the most important competition infringement case and antitrust damages case bundle so far in Finland. It is the first case where antitrust damages have been awarded by a court in Finland. Europe-wide, so far, there have been relatively few cartel cases where damages have been awarded by a court, making this a pilot case not only in a Finnish but also in a European context.

The claimants in the damages cases include the State of Finland and approximately 50 cities and municipalities, e.g. Helsinki, Espoo and Vantaa (the first, second and fourth largest cities in Finland, respectively).[3] The defendants include a number of companies (members of the cartel) and/or their alleged successors and, now, one bankruptcy estate.

Many of the damages cases are still pending. With regard to some of them, there arose a question concerning the attribution of liability for antitrust damages after certain corporate restructurings and acquisitions. Subsequently, the Supreme Court of Finland asked the Court of Justice of the European Union (CJEU) for a preliminary ruling on economic continuity of liability in antitrust damages.[4] The CJEU handed down the Preliminary Ruling in 2019 – 25 years since the beginning of the competition infringement in question.[5]

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1 Judgment of the Supreme Administrative Court of 29 September 2009 (KHO:2009:83, Case No. 188/3/08, 189/3/08, 190/3/08, 191/3/08, 196/3/08, 197/3/08 and 199/3/08, No. 2389). The period of participation in the cartel varied between the cartel members.

2 Judgments of the Helsinki Court of Appeal of 20 October 2016 (Case No. S 14/1366, No. 1451, in the case of the City of Vantaa). Some of the judgments are not final.

3 Including the second wave of cases pending in the district court and not taking into account the many cases that have already ended.

4 See the decision of the Supreme Court of 19 December 2017 (Case No. S2016/953, No. 2527).

5 Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions Oy, NCC Industry Oy and Asfaltmix Oy* EU:C:2019:204 (Preliminary Ruling). Language of the case is Finnish but the judgment is available e.g. in English. Guilherme Oliveira e Costa, *The EU Court of Justice confirms the application of the principle of economic continuity in private enforcement of a cartel case (Vantaan kaupunki / Skanska Industrial Solutions)*, 14 March 2019, *e-Competitions Bulletin* March 2019, Art. N° 90362; Etienne Thomas, *Economic continuity: The Court of Justice of the European Union extends to actions for damages the application of the principle of economic continuity and, in that way, its practical interpretation of the notion of undertaking (Vantaan kaupunki)*,

In its ruling, the CJEU held that liability for antitrust damages can follow corporate acquisitions. The ruling will have to be taken into account in all current and future antitrust damages cases in the EU. This paper deals with the ruling and the subsequent judgment of the Finnish Supreme Court.[6]

II. Background

1. Procedural Background

As will be seen, the *Asphalt* case has been dealt with by several authorities and courts, some of them more than once.

In Finland, competition infringement proceedings are administrative in nature. The Finnish Competition and Consumer Authority (FCCA) investigates competition infringements but it is not itself empowered to impose (administrative) fines for the infringements. Instead, it has to make a proposal, a kind of Statement of Objections, to the Market Court for the imposition of fines. Judgments of the Market Court can be appealed to the Supreme Administrative Court, the highest court in administrative proceedings.

The administrative side of the *Asphalt* case went from the FCCA[7] to the Market Court and up to the Supreme Administrative Court. The Supreme Administrative Court held its first ever oral hearing in a competition case in *Asphalt*.

Infringement proceedings may also have side paths to administrative courts. Judgments of administrative courts can be appealed to the Supreme Administrative Court if the Supreme Administrative Court grants leave to appeal. For example, in the early days of *Asphalt* the companies in question appealed to the Helsinki Administrative Court the decisions of the FCCA in which access to certain parts of the case file of the FCCA was refused; and the dispute proceeded to the Supreme Administrative Court.[8]

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14 March 2019, *Concurrences Review N° 2-2019*, Art. N° 90129, 68–69; Chantal Lavoie, *The EU Court of Justice clarifies, in a preliminary ruling concerning an asphalt cartel, who is liable to pay compensation in a damages action arising from article 101 TFEU (Skanska Industrial Solutions)*, 14 March 2019, *e-Competitions Bulletin* March 2019, Art. N° 90219; Carolin Marx, Judith Solzbach, *The EU Court of Justice rules that the concept of undertaking and the principle of economic continuity apply in private enforcements cases as in public enforcement proceedings (Vantaan kaupunki / Skanska Industrial Solutions)*, 14 March 2019, *e-Competitions Bulletin* March 2019, Art. N° 90399.

6 Judgment of the Supreme Court of 22 October 2019 (KKO:2019:90, Case No. S2016/953, No. 1810, FI:KKO:2019:90).

7 At the time, the Finnish Competition Authority (FCA).

8 Judgments of the Supreme Administrative Court of 12 April 2006 (Case No. 2298/2/05, No. 891, Case No. 2299/2/05, No. 895, Case No. 2300/2/05, No. 892, Case No. 2301/2/05, No. 893 and Case No. 2321/2/05, No. 984). Mikko Eerola, Kirsi Kannaste, *The Finnish Supreme Administrative Court rules on right of access to documents related to cartel investigations on the basis of the Finnish Act on Openness of Government Activities (Skanska Asfaltti Oy / Metsäliitto Osuuskunta)*, 12 April 2006, *e-Competitions Bulletin* April 2006, Art. N° 12127.

The Supreme Administrative Court had the case before it again due to so-called extra-ordinary appeals.[9] In one of the appeals, five years after the final cartel judgment by the Supreme Administrative Court, the Court was asked to reconsider its cartel judgment due to alleged errors with regard to the economic continuity test (in connection to fines) but the Supreme Administrative Court did not see a reason to alter its judgment.[10]

Antitrust damages cases, on the other hand, are civil proceedings and are initiated in a district court. The judgments of district courts can be appealed to a court of appeal. The judgments of courts of appeal can be appealed to the Supreme Court, the highest court in civil (and criminal) cases, if the Supreme Court grants leave to appeal.

The damages cases related to the *Asphalt* cartel were dealt with in the Helsinki District Court, although originally some of the cases were initiated in other district courts.[11] The judgments of the Helsinki District Court were appealed to the Helsinki Court of Appeal with many appeals to the Supreme Court. The Supreme Court has already dealt with a number of aspects raised in the *Asphalt* appeals in its recent judgments.

In addition, the *Asphalt* case has visited the National Bureau of Investigation (NBI). The NBI is one of the national units of the Finnish Police operating throughout Finland. In the beginning of the infringement case, the FCCA asked the NBI to investigate whether a crime had been committed in the context of the cartel, but the NBI found none. Cartel infringements are not criminalised in Finland.

Furthermore, some of the damages cases went to the Southern Finland Regional State Administrative Agency, one of the six Regional State Administrative Agencies (*Aluehallintovirasto*) in Finland, then on appeal to the Hämeenlinna Administrative Court and from there on appeal again to the Supreme Administrative Court. This was because – interestingly – the claimants refused to accept payments for damages ordered by the Helsinki District Court from the defendants.[12]

The *Asphalt* cartel case has also been in the European Court of Human Rights (ECtHR) in Strasbourg, France, as one of the defendants took the case there

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9 Judgment of the Supreme Administrative Court of 29 May 2019 (Case No. 3085/3/14, FI:KHO:2019:T2571) and judgment of the Supreme Administrative Court of 21 May 2018 (Case No. 3116/3/14, FI:KHO:2018:78).

10 *NCC Roads Oy* FI:KHO:2018:78.

11 There is also a second wave of damages cases pending in the Helsinki District Court.

12 See e.g. the decision of the Supreme Administrative Court of 24 February 2017 (Case No. 1145/3/14, No. 790, FI:KHO:2017:T790, in the case of the City of Espoo). This particularity was connected to the fact that the claimants knew or could have assumed that the judgments of the Helsinki District Court were under appeal/were to be appealed and that, therefore, first, the claimants would not receive interest during the appeal phase as they already would have the money, and, second, that they may have had to pay certain interest to the defendants if they lost the case in the Helsinki Court of Appeal (as they would have been in possession of their money). In the end, the Supreme Administrative Court ruled that the payments the defendants had made (to the relevant authority, as the claimants had refused to receive them) were valid. The City of Vantaa was one of the claimants refusing to accept payments but it did not appeal the decision of the Southern Finland Regional State Administrative Agency.

for alleged infringement of Article 6 of the European Convention of Human Rights (right to a fair trial). The ECtHR found no infringement.[13]

In chronological order, the main steps of *Asphalt* were as follows: dawn raids in 2002; the Statement of Objections of the FCCA to the Market Court in 2004; first contacts by the claimants with regard to the damages actions in 2004; the cartel judgment of the Market Court in 2007;[14] first damages cases initiated in a district court in 2008; the cartel judgment of the Supreme Administrative Court in 2009; judgments of the Helsinki District Court in the damages cases in 2013;[15] judgments of the Helsinki Court of Appeal in the damages cases in 2016; the request for a preliminary ruling by the Supreme Court to the CJEU in 2017; the hearing, the Opinion by the Advocate General (AG) and the Preliminary Ruling by the CJEU in 2019; the judgment of the Supreme Court in 2019, following the Preliminary Ruling.

As can be seen in more detail below, the Supreme Court – in its 2019 judgment following the Preliminary Ruling – remanded the damages case in question to the Helsinki Court of Appeal.

As can be understood to some extent already from the above, *Asphalt* has been remarkably controversial, with basically everything presented disputed by the other side. In Finland, the case is unique not only in its size but also in its legal complexity and procedural dimensions. The case has also involved dozens of witnesses, including numerous economists. The hearing of the damages cases at the Helsinki District Court took seven months, three times a week; and a similar hearing was then repeated at the Helsinki Court of Appeal.[16] Because there is basically no case-law on antitrust damages, the case is literally setting the precedent for this particular area of the law on fundamental questions such as available remedies, burden of proof, causal connection, time-barring, joint and several liability, treatment of the VAT, calculation of interest, and now economic continuity.

It is now almost 26 years since the beginning of the cartel in 1994, approximately 18 years since the dawn raids and the end of the cartel in 2002, and more than 10 years since the final cartel judgment in 2009. But the saga still goes on.

2. Background of the Underlying Damages Case in *Skanska*

All in all, there have been approximately 40 damages cases in the first wave of *Asphalt* cartel litigation. The courts have kept each case separate, although

13 *SA-Capital Oy v Finland*, Appl No. 5556/10, CE:ECHR:2019:0214JUD000555610.

14 Judgment of the Market Court of 19 December 2007 (Case No. 94/04/KR, No. 441/2007).

15 Judgments of the Helsinki District Court of 28 November 2013 (Case No. L09/47990, in the case of the City of Vantaa). Katri Havu, "*The Helsinki District Court awards significant damages against asphalt cartel ('Asphalt cartel damages claims')*" (28 November 2013) *e-Competitions Bulletin* November 2013, Art. N° 62284.

16 The case has taken so long that some of the witnesses have already passed away.

they were joined for the duration of the hearings. Not all cases concern the same defendants.

The Supreme Court made the request for a preliminary ruling in a damages case between the City of Vantaa (*Vantaan kaupunki*), the claimant and appellant in the Supreme Court, and Skanska Industrial Solutions Oy (Skanska), NCC Industry Oy (NCC) and Asfaltmix Oy (Asfaltmix), the defendants. Originally, there were four other defendants in the damages case initiated by the City of Vantaa, but the questions on economic continuity do not involve them directly. None of the economic continuity defendants is a party to any of the asphalt paving contracts with the City of Vantaa on which the City of Vantaa bases its damages claims. The annual contracts concern the asphalt paving works in 1998–2001.[17]

In its judgment in 2013, the Helsinki District Court awarded damages to the City of Vantaa on the basis of, inter alia, economic continuity. The Helsinki District Court considered that the principle of economic continuity should be applied in the same way both with regard to fines and with regard to damages. On appeal, however, the Helsinki Court of Appeal, in its judgment in 2016, considered that there was no basis for such an interpretation. The City of Vantaa appealed to the Supreme Court, which granted it leave to appeal limited to the economic continuity of liability for antitrust damages. It may be interesting to note that the City of Vantaa has already been paid the damages ordered by the Court of Appeal, by one of the other four defendants (with whom it had made the asphalt paving contracts).

The three corporate restructuring and acquisition scenarios that took place in the beginning of this millennium and subsequently triggered the question on the applicability of the economic continuity test were as follows:

- In March 2000, Asfaltti-Tekra Oy, a cartel member,[18] which changed its name to Skanska Asfaltti Oy from 1 November 2000, acquired all the shares in Sata-Asfaltti Oy, another cartel member. In 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 in December 2000, i.e. during the cartel period. In August 2017, Skanska Asfaltti changed its name to Skanska Industrial Solutions Oy (Skanska).
- Interasfaltti Oy (prior name Interbetoni Oy), a cartel member, was a 100% owned subsidiary of Oy Läntinen Teollisuuskatu 15 (LT). For

17 There are two other Asphalt cases pending in the Supreme Court in relation to economic continuity, initiated by the City of Espoo and the municipality of Nurmijärvi. The Supreme Court has not yet decided whether a leave to appeal will be granted in these two cases.

18 For the sake of clarity, it should be noted that when e.g. the existence of the cartel, a cartel period, joining the cartel, being a cartel member or participation in the cartel is mentioned in this paper, it is done purely on the basis of the final cartel judgment of the Supreme Administrative Court without including any admission or allegation or similar in such expressions.

most of the Interasfaltti Oy infringement period, LT was 100% owned by a Norwegian company, Rieber & Søn ASA. On 31 October 2000, NCC Finland Oy acquired the shares in LT from Rieber & Søn ASA.[19] On 30 September 2002, Interasfaltti Oy (the so-called "old" Interasfaltti) was merged into its parent LT which, on that occasion, changed its name to Interasfaltti Oy (the so-called "new" Interasfaltti). On 1 January 2003, NCC Finland Oy was split into three new companies. One of them, NCC Roads Oy, received ownership of all the shares in the new Interasfaltti. On 31 December 2003, the new Interasfaltti was wound up following a voluntary liquidation procedure, started on 31 January 2003, pursuant to which its commercial activities were transferred to NCC Roads Oy with effect from 1 February 2003. On 1 May 2016, NCC Roads Oy changed its name to NCC Industry Oy (NCC).[20]

– In June 2000, Siilin Sora Oy, which changed its name to Rudus Asfaltti Oy with effect from 17 October 2000, acquired all the shares in Asfalttineliö Oy, a cartel member. In January 2002, Asfalttineliö Oy was wound up following a voluntary insolvency procedure, pursuant to which its commercial activities were transferred to Rudus Asfaltti Oy from 16 February 2001. In January 2014, Rudus Asfaltti Oy changed its name to Asfaltmix Oy.

It should be noted that there are differences in the above facts between the three scenarios. For example, Skanska itself, unlike NCC and Asfaltmix, took part in the cartel in question.

In the cartel judgment, following the economic continuity test recognised in relation to the imposition of fines by the case-law of the CJEU, the Supreme Administrative Court imposed fines, inter alia, on Skanska for its own conduct and that of Sata-Asfaltti Oy, on NCC for the conduct of the old Interasfaltti, and on Asfaltmix for the conduct of Asfalttineliö Oy.

In this paper, the main focus will be on the scenario involving NCC, and not Skanska or Asfaltmix.[21][22]

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19 The concentration was notified to the FCCA for a merger control clearance (Case No. 901/81/2000, clearance on 12 October 2000).

20 See the Annex (a timeline) for the illustration of the structural links (or the lack thereof) between various companies and the corporate restructurings and acquisitions etc. with regard to NCC.

21 The author was the lead counsel to NCC and Interasfaltti for almost 12 years in 2004–2015, in both cartel and damages (and related) proceedings. At the end of 2015, after the hearing in the damages cases in the Helsinki Court of Appeal, he decided to accept the invitation to join Dittmar & Indrenius in the beginning of 2016, knowing that by moving there he would have to give up his role in the Asphalt cases due to the fact that Dittmar & Indrenius represents claimants in the Asphalt damages actions. In its judgments, the Helsinki Court of Appeal dismissed all of the claims against both NCC and Interasfaltti.

22 In the author's view, the NCC scenario is the most debatable one in the context of the economic continuity test.

3. Legal Framework

Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) prohibits as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. There is basically the same prohibition in national competition law in Finland, naturally without the criterion of effect on trade between EU Member States and the mentioning of the internal market.[23]

It is settled case-law of the CJEU that a fine for a competition infringement can under certain circumstances be imposed on a successor of an infringer.[24] The same approach was followed in *Asphalt* by the Supreme Administrative Court.

However, before the Preliminary Ruling it was not established explicitly anywhere in EU law that the same applies to antitrust damages actions. The principle of economic continuity is not explicitly included in Finnish law either.

For example, the notion was deliberately not included in the EU Private Damages Directive (PDD).[25] In this regard, it can be pointed out that there was a closed workshop in Brussels, Belgium, in May 2015 on the PDD. It was attended by a group of competition law specialists covering the majority of EU Member States.[26] A senior European Commission competition official also attended the workshop as the keynote speaker.[27] Minutes of the workshop are published.[28] It was asked in the workshop whether the theory of successor liability is also relevant for civil liability under the PDD. According to the minutes, the answer was as follows:[29]

> The text of the PDD clearly makes a link between an undertaking being held liable for an infringement of competition law and having to bear civil liability for such infringement. The PDD does not provide to what extent this link can be stretched, for instance on the basis of the theory of economic succession. It will be for the EU Courts to determine the exact implications of Article 1(1) PDD. The text of the PDD therefore

23 See Section 5 of the Finnish Competition Act (948/2011, as amended).

24 See e.g. paras 36–40 of the Preliminary Ruling and the case-law cited.

25 Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.

26 The author had the privilege of being one of the attendees.

27 Eddy De Smijter, European Commission, DG Competition, Head of Unit, ECN and Private Enforcement (currently Head of Unit, International Relations).

28 Frank Wijckmans, Maaike Visser, Sarah Jaques & Evi Noël, *The EU Private Damages Directive – Practical Insights, Minutes of the Closed Workshop 2015* (Intersentia 2016).

29 ibid, 10, paras 31–32.

> does not exclude the possibility that the EU Courts may want to distinguish between liability for fines and civil liability and to avoid completely identical treatment of the personal scope in the two areas. It could also be that it wishes to bridge the concepts.
>
> Currently, the PDD does not necessarily encompass the notion of economic succession. This point was left open. In order to have this interpretation issue resolved, a preliminary ruling of the Court of Justice will most likely be needed.

Similarly in Finland, when the national competition law was amended and the inclusion of the notion of economic continuity in relation to antitrust damages was discussed, it was deliberately decided to not include it in the law.

The applicability of the economic continuity to civil liability was, therefore, the main dispute between the parties in the damages case at hand, and the reason that the Supreme Court asked for a preliminary ruling.

III. Preliminary Ruling of the CJEU

1. Questions Referred for a Preliminary Ruling

By its decision in December 2017, the Supreme Court set out its questions to the CJEU. The document is 21 pages long. It is in Finnish, and it is somewhat unfortunate that it is not available on the CJEU website at all, neither in Finnish nor any other language. In the decision, the Supreme Court explained the object of the dispute, the relevant facts, background of the relevant damages action, outcomes of the lower courts, applicable law (national and EU), the need for a preliminary ruling with information behind each question (consisting of almost half of the document), and finally the questions themselves.

The Supreme Court stayed the proceedings before it and referred the following questions to the CJEU for a preliminary ruling:[30]

(1) Is the determination of which parties are liable for the compensation of harm caused by conduct contrary to Article 101 TFEU to be done by applying that provision directly or on the basis of national provisions?

(2) If the entities liable are to be determined directly on the basis of Article 101 TFEU, are the entities which fall within the concept of "undertaking" mentioned in that article those liable for compensation? When determining the entities liable for compensation, are the same principles to be applied as the Court of Justice has applied to determining the entities liable in cases concerning fines, in accordance with

30 Preliminary Ruling, para 22.

which liability may be founded, in particular, on belonging to the same economic unit or on economic continuity?

(3) If the entities liable are to be determined on the basis of national provisions of a Member State, are national rules under which a company which, after acquiring the entire share capital of a company which took part in a cartel contrary to Article 101 TFEU, dissolved the company in question and continued its activity is not liable for compensation for the damage caused by the anticompetitive conduct of the company in question, even though obtaining compensation from the dissolved company is impossible in practice or unreasonably difficult, contrary to the EU law requirement of effectiveness? Does the requirement of effectiveness preclude an interpretation of a Member State's domestic law making it a condition of compensation for damage that a transformation of the kind described has been implemented unlawfully or artificially in order to avoid liability for compensation for damage under competition law or otherwise fraudulently, or at least that the company knew or ought to have known of the competition infringement when implementing the transformation?

However, due to the answer by the CJEU to the first and second questions (see below), it was unnecessary for the CJEU to reply to the third one.

2. Outcome of the Preliminary Ruling and its Reasoning

The outcome of the Preliminary Ruling is as follows:[31]

> … the answer to the first and second questions is that Article 101 TFEU must be interpreted as meaning that, in a case such as that in the main proceedings, in which all the shares in the companies which participated in a cartel prohibited by that article were acquired by other companies which have dissolved the former companies and continued their commercial activities, the acquiring companies may be held liable for the damage caused by the cartel in question.
>
> In view of the answer to the first and second questions, it is unnecessary to reply to the third question.

The CJEU considered it appropriate to examine the first and second questions together, and reasoned the outcome of the Preliminary Ruling as follows.

First, according to the CJEU, the determination of the entity that is required to provide compensation for damage caused by an infringement of Article 101 TFEU is *directly governed by EU law*.[32] Here the CJEU referred to the Opinion

31 Preliminary Ruling, paras 51–52.

32 ibid, para 28.

of AG Nils Wahl[33] without explaining its view itself.[34] In this respect, the AG considered, on the one hand, that because Article 101 TFEU has direct effect it produces legal consequences in relations between individuals and thus creates rights for the benefit of individuals which national courts must safeguard. He reminded readers that the CJEU has inferred from the direct effect of Article 101 TFEU the right for any individual to seek compensation for harm caused by a breach of that provision. On the other hand, the AG pointed out, the CJEU has repeatedly held in this context that detailed rules governing the exercise of that right are to be laid down by EU Member States, subject to the observance of the minimum requirements of equivalence and effectiveness.[35]

The AG was of the view that the determination of the persons liable to pay compensation for harm caused by an infringement of EU competition law is not such a detailed rule governing the exercise of the right to claim compensation but a constitutive condition of liability governed by EU law.[36] This is so because, in his view, the determination of the persons that may be held liable to pay compensation is not a question of details of the concrete application of a claim for compensation or a rule governing the actual enforcement of the right to claim compensation. Instead, he continued, the determination of the persons liable to pay compensation is the other side of the coin of the right to claim compensation for harm caused by a breach of EU competition law. In his view, the existence of a right to claim compensation based on Article 101 TFEU presupposes that there is a legal obligation that has been infringed and that there is a person liable for that infringement.[37]

It must be pointed out, however, that AG Wahl (and the CJEU[38]) referred to the fact that the direct effect of Article 101 TFEU produces legal consequences in relations *between individuals* and that it thus creates rights for the *benefit of individuals* which the national courts must safeguard; and that the CJEU has inferred from the direct effect the right for any *individual* to seek compensation. It is unfortunate that the CJEU (or AG Wahl) did not explain how all this supports their findings in the context of the case at hand where each and every claimant is either an EU Member State or its city or municipality, i.e. not an

33 EU:C:2019:100. The Opinion was delivered on 6 February 2019. The original language of the Opinion is English. AG Wahl delivered his Opinion on his last day in office before moving to the position of a judge in the CJEU on 7 October 2019. It took him only three weeks after the CJEU oral hearing (16 January 2019) to do that. Given the time needed to translate the Opinion into all EU languages, it was remarkably quickly delivered. This and the fact that the Preliminary Ruling was handed down only approximately five weeks after the Opinion (on 14 March 2019) raised doubts as to the relevance of the hearing among many of the parties.

34 The CJEU refers to paras 60–62 of the Opinion.

35 Opinion, para 58.

36 It is interesting to note that the following is said in para 56 of the Opinion: "Most of the parties which submitted observations in the present case have argued that the determination of the persons liable for damages is a question governed by domestic law. In their submission, the leeway enjoyed by Member States in that regard is circumscribed by the principles of equivalence and effectiveness."

37 Opinion, paras 59–61.

38 Preliminary Ruling, para 24.

individual, who, furthermore, have initiated court proceedings *against* private companies (individuals) by claiming damages from them.

Second, the CJEU reasoned the outcome of the Preliminary Ruling by referring to *the concept of an 'undertaking'*. The CJEU states that it is clear from the wording of Article 101(1) 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 that provision.[39] The CJEU continues that it is settled case-law that EU competition law refers to the activities of undertakings,[40] and, due to personal liability for damage caused by infringements of EU competition rules, the undertaking infringing those rules must answer for the damage caused by the infringement.[41] Therefore, according to the CJEU, the entities which are required to compensate for the damage caused by a cartel or practice prohibited by Article 101 TFEU are the undertakings, within the meaning of that provision, which have participated in that cartel or that practice.[42]

The CJEU recalls that the concept of an 'undertaking' within the meaning of Article 101 TFEU covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed.[43] The concept in that context designates *an economic unit even if in law that economic unit consists of several persons*, natural or legal.[44]

With regard to restructurings in which the entity that committed the infringement of EU competition law has ceased to exist, the CJEU recalls that a legal or organisational 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*.[45] Therefore, according to the CJEU, it is not contrary to the principle of individual liability to impute liability for an infringement to a company that has taken over the company which committed the infringement, where the latter has ceased to exist.[46]

The CJEU also refers to its past judgment in which it has stated that for the effective implementation of EU competition rules, it may be necessary to consider

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39 Preliminary Ruling, para 29. The CJEU referred to the judgment of 27 April 2017, Case C-516/15 P *Akzo Nobel and Others v Commission* EU:C:2017:314, para 46.

40 The CJEU referred to judgments in Case C-280/06 *Autorità Garante della Concorrenza e del Mercato v ETI and Others* EU:C:2007:775, para 38 and the case-law cited, and Case C-434/13 P *Commission v Parker Hannifin Manufacturing and Parker-Hannifin* EU:C:2014:2456, para 39 and the case-law cited.

41 Preliminary Ruling, paras 30–31.

42 Preliminary Ruling, para 32.

43 Preliminary Ruling, para 36. The CJEU referred to *ETI* (n 40), para 38 and the case-law cited.

44 Preliminary Ruling, para 37. The CJEU referred to *Akzo Nobel* (n 39), para 48 and the case-law cited.

45 Preliminary Ruling, para 38. The CJEU referred to *ETI* (n 40), para 42; Case C-448/11 P *SNIA v Commission* (not published) EU:C:2013:801, para 22; and *Parker Hannifin* (n 40), para 40.

46 Preliminary Ruling, para 39. The CJEU referred to *SNIA v Commission* (n 45), para 23 and the case-law cited.

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.[47]

At the hearing,[48] the European Commission argued that it is clear from Article 11(1) of the PDD – according to which EU Member States shall ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law[49] – that it is for the legal system of each EU Member State to determine, in accordance with the principles of equivalence and effectiveness, the entity which is to compensate for that damage.[50]

The CJEU did not let that argument affect its considerations on the concept of an undertaking. The CJEU said that Article 11(1) of the PDD does not apply to *the definition of entities* which are required to compensate for such damage, but to *the attribution of liability between those entities* and, thus, does not confer on EU Member States the power to carry out that determination.[51] To the contrary, according to the CJEU, that provision confirms that those responsible for damage caused by an infringement of EU competition law are specifically the 'undertakings' which committed that infringement.[52]

According to the Preliminary Ruling, Asfaltmix had argued that the case-law on the concept of 'undertaking' has been developed in a context in which the European Commission imposes fines for competition infringements, and that that case-law is not applicable to an action for damages such as that at issue in the main proceedings.[53]

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47 Preliminary Ruling, para 40. The CJEU referred to *SNIA v Commission* (n 45), para 25.

48 The author was present at the hearing of the CJEU as a member of the audience. The hearing was held on 16 January 2019.

49 Article 11(1) of the PDD: "Member States shall ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law; with the effect that each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated."

50 Preliminary Ruling, para 33.

51 Preliminary Ruling, para 34. The CJEU also noted that Article 11(1) of the PDD does not apply *ratione temporis* to the facts of the case in the main proceedings.

52 Preliminary Ruling, para 35. According to the CJEU, Article 1(1) of the PDD, first sentence thereof, confirms this. Article 1(1) of the PDD, first sentence: "This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association." As a side remark, it is noted here that contrary to what the CJEU writes in the Preliminary Ruling (para 35), Article 1 is not entitled "Subject matter, scope and definitions" but only "Subject matter and scope". Definitions are in Article 2. *Chapter* 1, on the other hand, is entitled "Subject matter, scope and definitions".

53 Preliminary Ruling, para 41. As this was one of the main arguments all along in the national proceedings, naturally each defendant, and not just Asfaltmix, had argued it in their submissions to the CJEU. Asfaltmix was not represented at the CJEU hearing.

The CJEU did not accept this argument. The CJEU stated that the right to claim compensation for damage caused by an agreement or conduct prohibited by Article 101 TFEU *ensures the full effectiveness* of that Article and, in particular, the effectiveness of the prohibition in Article 101(1).[54]

According to the CJEU, that right to claim compensation strengthens the working of the EU competition rules, since it discourages anti-competitive agreements or practices thereby making a significant contribution to the maintenance of effective competition in the EU.[55]

The CJEU also referred to the Opinion[56] when stating that actions for damages for infringement of EU competition rules are *an integral part of the system for enforcement of those rules*, which are intended to *punish* anti-competitive behaviour on the part of undertakings and to *deter* them from engaging in such conduct.[57]

Therefore, according to the CJEU, if the undertakings responsible for damage caused by an infringement of EU competition rules could escape penalties by simply changing their identity through restructurings, sales or other legal or organisational changes, the objective of suppressing conduct that infringes the competition rules and preventing its reoccurrence by means of deterrent penalties would be jeopardised.[58]

The CJEU concluded in this respect that it follows that *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 European Commission for competition infringements[59] *as compared with actions for damages* for infringement of EU competition rules.[60]

In the case at hand, according to the CJEU, it is apparent from the information provided by the referring court that Skanska, NCC and Asfaltmix acquired all the shares in Sata-Asfaltti, Interasfaltti and Asfalttineliö respectively, which participated in the cartel in question and, subsequently, when those companies

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54 Preliminary Ruling, para 43.

55 Preliminary Ruling, para 44. The CJEU referred to Case C-557/12 *Kone and Others* EU:C:2014:1317, para 23 and the case-law cited.

56 The CJEU refers to para 80 of the Opinion.

57 Preliminary Ruling, para 45. Para 80 of the Opinion: "… As I have explained above, actions for antitrust damages form an integral part of the enforcement of EU competition law, a system that (taken as a whole) aims primarily at deterring undertakings from engaging in anticompetitive behaviour. In that system, liability is attached to assets, rather than to a particular legal personality. From an economic perspective therefore, the same undertaking that committed the infringement is held liable for both public sanctions and private law damages. Considering that public and private enforcement are complementary and constitute composite parts of a whole, a solution whereby the interpretation of 'undertaking' would be different depending on the mechanism employed to enforce EU competition law would simply be untenable."

58 Preliminary Ruling, para 46. The CJEU referred, by analogy, to *ETI* (n 40), para 41 and the case-law cited.

59 Under Article 23(2) of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] [2003] OJ L1/1).

60 Preliminary Ruling, para 47.

went into voluntary liquidation in 2000, 2001 and 2003, took over all the commercial activities of those companies and wound them up.[61]

The CJEU stated that therefore, it appears, *subject to the definitive assessment by the referring court having regard to all the relevant evidence*[62] that, from an economic perspective, Skanska, NCC and Asfaltmix, on one hand, and Sata-Asfaltti, Interasfaltti and Asfalttineliö respectively, on the other, are the same, and that the three latter companies have ceased to exist as legal persons.[63]

Consequently, the CJEU held that Skanska, NCC and Asfaltmix, successors to Sata-Asfaltti, Interasfaltti, and Asfalttineliö respectively, assumed liability for the damage caused by the cartel, as they have, as legal persons, ensured that those companies were able to continue their economic activities.[64]

In light of the considerations set out above, the CJEU came to the outcome stated in the beginning of this chapter.

3. Request for Limiting the Temporal Effects of the Preliminary Ruling

At the hearing, NCC requested that the CJEU limit the temporal effects of the Preliminary Ruling in the event that it considers that the economic continuity test applies to the determination of persons required to provide compensation for damage caused by an infringement of EU competition rules. In support of its request, NCC argued that that interpretation could not have been foreseen, that it therefore had retroactive effect on those rules, and that it had unforeseen consequences for the conduct of undertakings.[65]

However, the CJEU held that it is not appropriate to limit the temporal effects.[66] The reasoning of the CJEU in this respect was as follows.

First, the CJEU recalled that according to settled case-law of the CJEU, the interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU,[67] the CJEU gives to a rule of EU law *clarifies and defines the*

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61 Preliminary Ruling, para 48.

62 Note also in this respect para 51 and the operative part of the Preliminary Ruling (emphasis added): "… the acquiring companies *may be* held liable for the damage…". Similarly the judgment of the Supreme Court, para 24.

63 Preliminary Ruling, para 49.

64 Preliminary Ruling, para 50.

65 Preliminary Ruling, paras 53–54.

66 Preliminary Ruling, para 59.

67 Article 267 TFEU provides:

"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. The CJEU stated that it follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships that arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that rule before the courts are satisfied.[68]

Second, the CJEU stated that it is only quite exceptionally that it may, in application of the general principle of legal certainty inherent in the EU legal order, for any person concerned, be moved to restrict the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. According to the CJEU, two essential criteria must be fulfilled before such a limitation can be imposed: (i) that those concerned should have acted in good faith and (ii) that there should be a risk of serious difficulties.[69]

More specifically, the CJEU stated that it has taken that step "only in quite specific circumstances, notably where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with EU law by reason of objective, significant uncertainty regarding the implications of European Union provisions, to which the conduct of other Member States or the Commission may even have contributed".[70]

Third, the CJEU pointed out that in the present case, since NCC has "in no way" substantiated its arguments, it has failed to establish that the two essential criteria referred to above have been satisfied in the present case.[71]

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

68 Preliminary Ruling, para 55. The CJEU referred to Case C-110/15 *Microsoft Mobile Sales International and Others v MiBAC* EU:C:2016:717, para 59 and the case-law cited.

69 Preliminary Ruling, para 56. The CJEU referred to *Microsoft Mobile Sales International* (n 68), para 60 and the case-law cited.

70 Preliminary Ruling, para 57. The CJEU referred to *Microsoft Mobile Sales International* (n 68), para 61 and the case-law cited.

71 Preliminary Ruling, para 58.

4. Implications of the Preliminary Ruling

The CJEU has now confirmed for the first time that, in addition to fines, the economic continuity test also applies to antitrust damages. The Preliminary Ruling raises a number of implications.[72]

First, following a corporate acquisition, the acquirer may unknowingly acquire the antitrust damages liabilities of the target company, even if the acquirer itself never participated in the infringement. In particular, this means that an acquirer may not be able to shield itself from the target's antitrust liabilities by only purchasing the assets of the target. The Preliminary Ruling applies to past, present and future acquisitions, making the potential scope for new damages liabilities wide indeed.

Second, attributing liability for antitrust damages to an undertaking instead of a legal entity and applying the CJEU's existing case-law on undertakings can expand the legal exposure of companies in unexpected ways. The economic continuity may not necessarily be a common scenario in damages claims, especially if claimants can use joint and several liability to target other cartel companies.[73] Probably of more importance is that, based on the CJEU's established case-law, an undertaking can cover a number of legal entities in a company group. The most common application of this aspect of the concept of undertaking is parental liability, where a parent company is held jointly and severally liable for fines imposed on a subsidiary, even if the parent did not participate in the subsidiary's anti-competitive conduct. Based on the CJEU's reasoning, some may see that this now applies to antitrust damages as well as fines. Furthermore, because an 'undertaking' can cover different legal persons in different EU Member States, the Preliminary Ruling may make it easier for claimants to establish anchor defendants in jurisdictions that claimants consider favourable, thus increasing possibilities for forum shopping by claimants. Over the coming years, innovative claimants and law firms are sure to test the boundaries of the Preliminary Ruling to its limits as they seek new applications for it.

For a recent example, a court of appeal in the Netherlands applied the Preliminary Ruling very broadly and ruled in an antitrust damage case that a company, Cogelex – although it was *not* fined or even included in the European Commission cartel investigation in question[74] and although it had *not* continued the business

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72 Some of the implications discussed here were also presented in an alert from the author's law firm, the next day following the Preliminary Ruling. The author is grateful to the authors of the alert, Toni Kalliokoski and Karla Halonen.

73 Although in theory economic continuity applies (within the temporal limits of relevant limitation periods) to all M&A transactions (where there is no *legal* succession) and to all competition infringements. This is because in any M&A transaction, although naturally not at all in each of them, there may be a relevant connection to a competition infringement, and because any competition infringement, now or in the near future, may have a relevant connection to a transaction/restructuring.

74 *Gas Insulated Switchgear* (Case COMP/F/38.899). María Luisa Tierno Centella, Maurits Pino, Jindrich Kloub, "*The EU Commission fines a cartel in the gas insulated switchgear sector*" (24 January 2007) *e-Competitions Bulletin* January 2007, Art. N° 36175.

of any of the infringers – could be held liable for damages caused by the competition law infringement of its 48% shareholder Alstom as it was held to be part of the same 'undertaking' with that parent company.[75] Apparently, the court dismissed the argument of Alstom that the reasoning of the Preliminary Ruling should be limited to cases of economic continuity. Without knowing the details of the Dutch case, the court's application/interpretation of the Preliminary Ruling seems incorrect. The claimants should not be free to choose a defendant between the legal entities within an undertaking.[76] It remains to be seen whether the Dutch Supreme Court will have the opportunity to consider the issue.

Third, the CJEU has now essentially copied into private enforcement a concept that was developed in and traditionally thought to apply only to public enforcement. This raises the obvious question of whether there are other EU law concepts and principles that have been developed and so far been used only in public enforcement that could be applied also to private enforcement. One example is the concept of a single and continuous infringement.[77] Should the causality between a cartel and the alleged damage be assessed through the infringement as a whole or contract by contract?

Fourth, the Preliminary Ruling underlines that antitrust damages are clearly a new type of damages action where even well-established national law concepts may be called into question as this new field slowly takes form.

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75 Judgment of the Court of Appeal of Arnhem – Leeuwarden of 26 November 2019 (Case No. 200.177.480, NL:GHARL:2019:10165). Caroline Cauffman, "*The Court of Appeal of Netherlands finds a subsidiary liable for cartel damage caused by its minority shareholder that had or could have a decisive influence over it (GIS Cartel)*" (26 November 2019) *e-Competitions Bulletin* January 2020, Art. N° 92742.

76 Naturally, this is all the more so in the context of private equity 'undertakings' where the portfolio companies (and their businesses) under control of the private equity fund are generally much more remote from each other (and from the parent) than in a more traditional group of companies.

77 A better expression is a 'single overall agreement' (see Richard Whish & David Bailey, *Competition Law* (9th edn, OUP 2018) 106). According to the concept, undertakings bear responsibility for the single overall agreement even though they may not be involved in every aspect of its operation on a day-to-day basis (see ibid). Regarding the concept, see also e.g. the judgment of the General Court of the EU of 12 July 2019 in Case T-8/16 *Toshiba v Commission* EU:T:2019:522, paras 56, 123 and 248 (appeal pending in the CJEU, Case C-700/19 P): 56 "The concept of a single and continuous infringement presupposes a complex of practices adopted by various parties in pursuit of a single anticompetitive economic aim (judgments of 24 October 1991, *Rhône-Poulenc v Commission*, T-1/89, EU:T:1991:56, paragraphs 125 and 126)." 123 "It is not necessary to establish whether those instances of conduct present a link of complementarity in order to characterise them as a single and continuous infringement. On the other hand, it is necessary to establish, in order to show that there has been a single and continuous infringement, whether the condition relating to a single objective has been respected, that is to say whether there are any elements characterising the various instances of conduct forming part of the infringement which are capable of indicating that the conduct in fact implemented by other participating undertakings does not have an identical object or identical anticompetitive effect and, consequently, does not form part of an 'overall plan' as a result of an identical object distorting the normal pattern of competition within the internal market (see, to that effect, judgment of 19 December 2013, *Siemens and Others v Commission*, C-239/11 P, C-489/11 P and C-498/11 P, not published, EU:C:2013:866, paragraphs 247 and 248)." 248 "According to settled case-law, the fact that there is a single and continuous infringement does not necessarily mean that an undertaking participating in one or more aspects can be held liable for the infringement as a whole. The Commission still has to establish that that undertaking was aware of the other undertakings' anticompetitive activities at European level or that it could reasonably have foreseen them. The mere fact that there is identity of object between an agreement in which an undertaking participated and an overall cartel does not suffice for a finding that the undertaking participated in the overall cartel. It should be recalled that Article 101(1) TFEU does not apply unless there exists a concurrence of wills between the parties concerned (judgment of 10 October 2014, *Soliver v Commission*, T-68/09, EU:T:2014:867, paragraph 62 and the case-law cited)."

Fifth, now that it is confirmed that the concept applies also to antitrust damages, its existence must be taken even better into account in M&A agreements.

Finally, the Preliminary Ruling is based on Article 101(1) TFEU. As described above, Article 101(1) requires that the competition infringement in question may affect trade between EU Member States.[78] According to the final cartel judgment of the Supreme Administrative Court, this criterion was fulfilled with regard to the *Asphalt* cartel. However, in a case where the criterion of effect on trade is *not* fulfilled, the Preliminary Ruling is not applicable as Article 101 is not applied in such a case. This means (in the absence of national rules/rulings to the contrary) that the economic continuity test is *not* applied in antitrust damages in such a context. This is turn means that there are two categories of antitrust damages cases in this sense and in only one of them can the claimants benefit from the economic continuity of liability. This is not an ideal situation, and national law must be amended if one wishes to attribute liability for antitrust damages to such successors as in the case at hand in scenarios where purely national law is applied.

5. Fairness of the Outcome of the Preliminary Ruling

The question arises as to how fair the outcome of the Preliminary Ruling is.[79] Unlike with fines, where one can find EU case-law on economic continuity over a long period of time, there has been basically nothing anywhere before the Preliminary Ruling – in other words, since the introduction several decades ago of the prohibition in question (now in Article 101(1) TFEU) – that indicated that it existed for antitrust damages. Quite the contrary.

For example, first (in no particular order), as said, there was no EU case-law on it.

Second, over the years the approximately 40 claimants and their lawyers have not found proof (e.g. case-law, decisions, legislation etc.) that it existed.

Third, over the years the courts dealing with the issue have not found proof (e.g. case-law, decisions, legislation etc.) that it existed.[80]

Fourth, it was discussed but deliberately not included in the relatively new PDD. In other words, even after 20 years since the beginning of the infringement the

78 Article 101(1) TFEU (emphasis added): "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices *which may affect trade between Member States* and which have as their object or effect the prevention, restriction or distortion of competition within the internal market…"

79 From the Nordic perspective, fairness in law has always been important. "What is neither just not equitable, cannot be the law; it is for the equity in the law that it is accepted." This legal principle is part of a collection of legal principles, "Instructions for a Judge", drafted by Olaus Petri, reformer, minister and legal scholar, in the 1530s. "Some general rules which the judge shall comply with" were first printed in 1616. Since 1635 they have formed and still form the introduction of the collections of laws published annually both in Sweden and in Finland. See <https://oikeus.fi/en/index/esitteet/olauspetrintuomarinohjeet.html> (accessed 31 December 2019).

80 *Iura novit curia* is recalled.

test was not included in *the* legislative piece that would have been perfect for its codification had there been an agreement that it existed (or that it is wanted in the first place).

Fifth, it was discussed but deliberately not included in the relatively recent amendments to Finnish competition law.

Sixth, even the European Commission, at the hearing of this particular case, stated that it is "clear" that it is for the legal system of each EU Member State to determine, in accordance with the principles of equivalence and effectiveness, the entity which is to compensate for the damage.[81]

Seventh, as said above, according to the Opinion: "[m]ost of the parties which submitted observations in the present case have argued that the determination of the persons liable for damages is a question governed by domestic law."[82]

In effect, no one knew that the test also existed in antitrust damages. The principles of legality and legitimate expectations should have been given more weight in the assessment.

There are further reasons to question the fairness of the outcome of the Preliminary Ruling.

For example, first (in no particular order), the infringement in question took place back in 1994–2002, in other words some 17–25 years prior to the Preliminary Ruling.

Second, the case at hand, like each *Asphalt* damages case, is against private companies by public entities (EU Member State, city/-ies and/or municipality/-ies), not the other way around, and not even between private companies.[83]

Third, there was no mala fide, at least with regard to NCC.[84] No claimant has argued there was. The restructurings etc. were legitimate and logical, as explained, for example, by the relevant auditors as witnesses in the damages proceedings.

Fourth, the economic continuity test applies potentially to all past infringements, however long ago they took place.

Fifth, the relevant Finnish legislation and case-law were sufficient to protect prudent creditors/claimants.

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81 See Preliminary Ruling, para 33.

82 Opinion, para 56.

83 Para 58 of the Opinion is recalled (similarly para 25 of the Preliminary Ruling): "…because Article 101 TFEU has direct effect it produces legal consequences in relations between individuals and thus creates rights for the benefit of individuals which the national courts must safeguard."

84 Skanska participated in the cartel itself but the author does not have detailed enough knowledge of Asfaltmix to assess the bona fide/mala fide.

Sixth, the test does not apply to cases to which Article 101 TFEU does not apply (i.e. when the criterion on effect on trade is not met), leaving the two categories of cases in an unequal position.

A limitation to the temporal effect of the Preliminary Ruling, i.e. removing its retroactive effects, would have been a fairer outcome and removed many of these and similar concerns.[85]

One additional aspect, in particular, in the attribution of liability to NCC for both fines and damages has been disturbing: why did the company who owned the infringer for the majority of the infringement period[86] escape all liability? As can be remembered (and as illustrated in the Annex), no part of the NCC group had a structural link to the infringer, the old Interasfaltti, before 31 October 2000, just a little more than a year before the infringement ended, when NCC Finland Oy bought LT (the parent company of the old Interasfaltti) from Rieber & Søn ASA. Rieber & Søn ASA had owned the old Interasfaltti, through LT, since 1 April 1997[87] until that sale.[88] This has not been properly assessed by any of the authorities or courts. Naturally, the main criticism in this regard is directed towards the FCCA who, in the beginning of the administrative case, in the early years of this millennium, for some reason did not go after Rieber & Søn ASA at all (not even for the joint and several liability). Given the concepts of 'undertaking', parental liability and joint and several liability, it is unfair that only NCC has to carry all the burden of the infringement of the old Interasfaltti.

Similarly, it must be noted that for years there was quite a confusion by the FCCA and some of the claimants with regard to whether they were after NCC or Interasfaltti or both. As the three defendants in question have argued all along, the claimants could also have (and should have) sought compensation from the now dissolved companies, the infringers. Although AG Wahl stated in the Opinion that "it is well-known that one cannot pick the pockets of a naked man"[89], it is at least as well known in Finland that under certain circumstances the ones who have received assets of a liquidated company may well have to

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85 It is unclear to the author whether and, if so, to what extent a limitation to the temporal effect was argued by the defendants in the written procedure. Paragraphs 53–54 and 58 of the Preliminary Ruling seem to give an impression that it was raised only at the hearing, only by NCC, and without substantiating its arguments. This would be unfortunate.

86 According to the cartel judgment (final) of the Supreme Administrative Court, the infringement period of the old Interasfaltti was from 7 July 1997 to winter 2002. The FCCA was more specific in its Statement of Objections with regard to the end of the period: 11 February 2002.

87 i.e. it acquired it a few months before the old Interasfaltti joined the cartel.

88 Later, Rieber & Søn ASA was acquired by Orkla: in August 2012, Orkla announced that it had signed an agreement with the Rieber family for the purchase of their shares in Rieber & Søn ASA (see Press Release (20 August 2012) <https://www.orkla.com/news/orkla-buys-rieber-son/>) and in April 2013 it announced that the acquisition was now complete (see Press Release (26 April 2013) <https://www.orkla.com/downloads/orkla-asa-acquisition-of-rieber-son-now-completed/>).

89 Opinion, para 78: "While Finnish company legislation indeed appears to allow an injured party to take such action, it is difficult to envisage how such a course of action could ensure an individual any effective right to compensation: it is well-known that one cannot pick the pockets of a naked man." He also said this at the hearing.

return them if a claim is subsequently made against the liquidated company; the referred Finnish legislation is there for a reason. In addition, on the basis of national law the creditors/claimants had every opportunity to prevent the clothes being taken off in the first place.

IV. Judgment of the Supreme Court

On 22 October 2019, the Supreme Court handed down its judgment. In the judgment the Supreme Court summarised some of the arguments of the defendants; for example, that they are not liable for damage caused by legally independent (other) companies, that the damage claims should have been addressed to such wound-up companies, and that as the claims were not presented in the liquidation procedures of these companies, the claims are also precluded.[90]

The Supreme Court also summarised the judgments of the Helsinki District Court and the Helsinki Court of Appeal in the case of the City of Vantaa, albeit very briefly. The Supreme Court basically stated that the Helsinki District Court found that, in the context of liquidated companies, due to national damages and company legislation, it is impossible or unreasonably difficult in practice for a claimant to use its right, included in EU competition law, for compensation for harm caused by an infringement of competition rules. Consequently, applying only national law would risk the effectiveness of Article 101 TFEU. According to the Helsinki District Court, the principle of economic succession[91] should be applied in the same way with regard to the attribution of liability for fines and for damages. As a consequence, the Helsinki District Court held that Skanska (for its own conduct and that of Sata-Asfaltti), NCC (for the conduct of Interasfaltti) and Asfaltmix (for the conduct of Asfalttineliö) are jointly and severally liable for the damage with the other defendants.[92]

With regard to the judgment of the Helsinki Court of Appeal, the Supreme Court stated that the Court of Appeal found that on the basis of EU law there are no grounds for applying the principle of economic succession in antitrust damages. According to the Helsinki Court of Appeal, one cannot interfere with the fundamental conditions of the national damages institution by using the principle of effectiveness. Making it easier for claimants to bring antitrust damages cases cannot be what a court dealing with a damages claim wishes to achieve with its judgment and one should refrain from clearly extended interpretations of the rights conferred by EU law. The Court added that, without more specific rules, one cannot apply the principles applied to the liability for

90 Judgment of the Supreme Court, para 9.

91 In the national proceedings, the term 'principle of economic succession' was used. The CJEU uses the term 'economic continuity test' in the Preliminary Ruling. They mean the same.

92 Judgment of the Supreme Court, paras 10–11.

fines to the liability for damages. For these reasons, the Helsinki Court of Appeal dismissed the claims insofar as they were addressed to Skanska for the conduct of Sata-Asfaltti, to NCC for the conduct of Interasfaltti and to Asfaltmix for the conduct of Asfalttineliö.[93]

With regard to economic continuity, the Supreme Court first stated that there are no general or antitrust-damages-related special rules in national law on the correct addressees of a damages claim when the cartel member that has caused the damage has been wound up and another company has continued its activities.[94] The Court also stated that there are no such rules in the EU law either.[95] The general starting point of the legal rules on damages is that only the legal subject that has caused the damage is responsible for it.[96]

The Supreme Court then explained certain main points of the Preliminary Ruling and dismissed various arguments of the defendants directly on the basis of the Preliminary Ruling. One of the arguments the Court dismissed was NCC's argument to limit the temporal effects of the Preliminary Ruling. Interestingly here, as in the Preliminary Ruling,[97] the argument is only allocated to NCC and not the other defendants. Had it been in the arsenal of each defendant and dealt with in depth by them, one wonders whether it would have been given more weight both in the Preliminary Ruling and possibly, depending on the view of the CJEU, in the subsequent judgment of the Supreme Court.

When dismissing the argument of the defendants that the claims are precluded as they were not presented in the liquidation proceedings of the infringers, the Supreme Court referred to paragraph 28 of the Preliminary Ruling, in which the CJEU said that the determination of which entity is required to provide compensation for damage caused by an infringement of Article 101 TFEU is directly governed by EU law.[98] On this basis, the Supreme Court sets aside the relevant national law and its own precedent, which would have led to the opposite conclusion.[99] It also explicitly mentions in this context the direct effect of (e.g.) Article 101(1) TFEU and the related rights which it as a national court must safeguard.[100]

However, as mentioned above in the context of paragraph 28 of the Preliminary Ruling, the CJEU based its view on the Opinion without further elaboration.

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93 ibid, paras 12–13.

94 ibid, para 16.

95 ibid, para 19.

96 ibid, para 17.

97 See Preliminary Ruling, para 53.

98 Judgment of the Supreme Court, paras 31 and 22.

99 ibid, paras 31–33.

100 ibid, para 31.

As said above, however, AG Wahl derived his conclusion from the fact that the direct effect of Article 101 TFEU produces legal consequences in relations *between individuals* and that it thus creates rights for the *benefit of individuals* which the national courts must safeguard.[101] Likewise, the Supreme Court explicitly mentioned in this context the legal consequences in relations *between individuals* and the rights for the *benefit of individuals*. It thus seems unsatisfactory that in the case at hand (and in related *Asphalt* damages cases) such an effect, consequences and rights are applied *against individuals* (the defendant companies) for the benefit of an EU Member State or its city or municipality (the claimants).[102]

As a conclusion, the Supreme Court held that Skanska, NCC and Asfaltmix were liable for the damage caused to the City of Vantaa by Sata-Asfaltti, Interasfaltti and Asfalttineliö respectively. The Supreme Court continued that the Helsinki Court of Appeal thus should not have dismissed the claims with regard to these defendants for the reasons given by the Helsinki Court of Appeal.[103]

In addition, the Supreme Court stated in its conclusions that as the Helsinki Court of Appeal dismissed the claims of the City of Vantaa against the three defendants in question, it has not *in other respects* (i.e. apart from economic continuity) made a finding on the prerequisites of their liability for the damage or on the amount of the damage.[104] The Supreme Court thus concluded – given the hierarchy of courts – that *to this extent* the case must be remanded to the Helsinki Court of Appeal.[105]

In the operative part of its judgment, the Supreme Court overturned the judgment of the Helsinki Court of Appeal insofar as the claims were dismissed.[106]

The Supreme Court said in its judgment that the Helsinki Court of Appeal must deal with the matter on its own initiative without delay.[107]

It seems that the Supreme Court left the door open for various arguments on the basis of which liability for damages (at least in theory) may not necessarily materialise. It is recalled that the Supreme Court said that the Helsinki Court

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101 See Opinion, para 58 and the case-law cited in endnote 27 of the Opinion.

102 According to a reasoned Legal Opinion by a Professor of Law presented in the national *Asphalt* damages proceedings, such an interpretation of EU law is not possible.

103 Judgment of the Supreme Court, para 34 (in Finnish (emphasis added): "Hovioikeuden ei siten olisi *mainitsemillaan perusteilla* tullut hylätä kannetta näiden yhtiöiden osalta.").

104 Judgment of the Supreme Court, para 35 (in Finnish (emphasis added): "… se ei ole lausunut *muilta osin korvausvastuun edellytyksistä* eikä korvauksen määrästä.").

105 ibid.

106 In the judgment of the Helsinki Court of Appeal, the claims were dismissed vis-à-vis Skanska for the conduct of Sata-Asfaltti with regard to the 1998–2000 asphalt paving contracts, vis-à-vis NCC for the conduct of Interasfaltti with regard to the 1998–2001 asphalt paving contracts and vis-à-vis Asfaltmix for the conduct of Asfalttineliö with regard to the 1998–2000 asphalt paving contracts.

107 Information at the time of writing (31 December 2019) is that the Helsinki Court of Appeal sent a request for statement to the City of Vantaa on 8 November 2019 and that the current (already extended) deadline to respond to the request is 3 January 2020. The case number is S 19/2484.

of Appeal should not have dismissed the claims *for the reasons given by the Helsinki Court of Appeal*, e.g. that economic continuity is not applicable to antitrust damages. It is also recalled that the Supreme Court stated that as the Helsinki Court of Appeal dismissed the claims of the City of Vantaa which were based on economic continuity, it has not *in other respects* made a finding on the prerequisites of liability for the damage or on the amount of the damage and that to this extent the case must be remitted to the Helsinki Court of Appeal.

Therefore, there should not be anything preventing the Helsinki Court of Appeal (or another national court in a similar matter) from dismissing the damages claims due to, for example, time-barring or lack of causality. In other words, if, for example, a claimant has not been prudent and sent the defendants the necessary notices in order to interrupt the running of a limitation period, its claims should be time-barred and there should be no reason why the economic continuity test (or e.g. the principle of effectiveness) should save such claims. As the economic continuity test is the same for both fines and damages, as we have now learned from the CJEU, this is supported by the obvious fact that the test would not save a competition authority either, like the European Commission, from imposing a fine too late (outside the time limits). There is a difference between certain own actions by a defendant undertaking (e.g. transferring the business of an infringer to a new company) and actions (or non-actions) by a claimant (e.g. omitting to interrupt a limitation period). Consequently, it will be interesting to see what arguments, if any, the defendants present in the Helsinki Court of Appeal (or a defendant in a similar case elsewhere).[108]

V. Conclusion

The Preliminary Ruling is ground-breaking as it confirms for the first time that the economic continuity test also applies to the determination of persons liable for damage caused by an infringement of EU competition rules, in addition to applying to the determination of persons liable for fines. It raises important implications and interpretations, not all of which can even be seen in these early days of the EU antitrust damages scene. The Preliminary Ruling is one in a series of several recent preliminary rulings of the CJEU on antitrust damages.[109] There is also room for further clarification with regard to the economic continuity test, and the competition law community is surely keen to see that and other developments regarding antitrust damages in future rulings.

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108 And whether one day the case will be knocking on the Supreme Court's door again.

109 The other rulings in 2019 are Case C-637/17 *Cogeco Communications Inc v Sport TV Portugal SA and Others* EU:C:2019:263; Case C-451/18 *Tibor-Trans Fuvarozó és Kereskedelmi Kft. v DAF TRUCKS NV* EU:C:2019:635; and Case C-435/18 *Otis GmbH and Others v Land Oberösterreich and Others* EU:C:2019:1069.

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