

# Will the ECJ Put an End to Cartelists Restructuring Their Way out of Liability for Damages?

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On 6 February 2019, Advocate General Wahl handed down an opinion on a request for a preliminary ruling from a Finnish court as to successor companies' liability for damages stemming from their predecessors' involvement in a cartel. Were the ECJ to follow AG Wahl's opinion, this would represent a helpful and significant judgment for claimants because companies would no longer be able to restructure their way out of liability for damages arising from anti-competitive conduct.

## Background

In 2009, the Supreme Administrative Court of Finland found against seven companies for their participation in a cartel operating in the Finnish asphalt market from 1994 to 2002. Whilst some companies involved in the cartel were voluntarily dissolved before the fines could be imposed, the sole shareholders of those companies acquired the dissolved companies' assets and continued their economic activity. The Supreme Administrative Court therefore imposed fines upon the successor entities.

In subsequent private actions for damages resulting from the cartel, compensation was sought on the basis of joint and several liability from the successor entities. Those successor entities argued that they ought not to be liable because they were legally independent, separate companies from those involved in the cartel. Whilst the Finnish district court sided with those claiming damages, the appeal court found to the contrary, ruling that there was no reason why the principle of economic continuity (i.e. that the successor companies were continuing the economic activity of their predecessors) should apply to private damages actions, nor why the domestic legal principles relating to liability ought to be secondary to the need to ensure consistency in the application of EU competition law.

The matter was referred to the Supreme Administrative Court of Finland, which decided to make a reference to the ECJ to determine the matters at hand – the key element of which being whether the principle of economic continuity ought to extend to antitrust damages. If so, the successor companies that continued the economic activity of the cartel participants ought to be liable in private actions for the damages caused by their (dissolved) infringing predecessors.

## AG's opinion

In his opinion, AG Wahl considered that the ECJ should find successor companies liable for the damages caused by the anti-competitive behaviour of their predecessors.

AG Wahl acknowledged that this case touches upon a fundamental aspect of EU competition rules: that of the interaction of EU competition law and the domestic laws of the Member States in private damages actions, which are based upon EU law but which are brought via national courts (and therefore governed by the Member States' procedural and substantive legal frameworks). However, AG Wahl found that the question as to the persons liable to pay compensation for breaches of EU competition law is to be determined on the basis of EU law, not the laws of the Member States. He stated that as Article 101 has a direct effect, it creates legal rights for individuals which the Member States must safeguard. Indeed, the question as to who is liable to pay compensation is the corollary of the right to claim compensation for breach of EU competition law at all. Should the Member States be allowed to determine this question, the consistent application - and therefore effectiveness - of EU law would be threatened.

As to the principle of economic continuity, the AG said that corporate restructuring does not necessarily create a new undertaking free of liability for an infringement if, from an economic point of view, the two entities are the same. The principles which are applied to the public enforcement of competition law ought also to apply when it comes to private enforcement. This is the case even though according to private law, the infringing entity would not be the same as the entity liable to pay compensation.

## **Conclusion**

If the ECJ follows AG Wahl's opinion, this will represent a significant development in the private enforcement landscape and a helpful one for claimants who might otherwise have had their claims for redress thwarted by cartellists' corporate restructuring.

With thanks to co-authors HuChing Mao and Edouard Bruc.