Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 6 February 2019 [1]

Case C-724/17

Vantaan kaupunki
v
Skanska Industrial Solutions Oy
NCC Industry Oy
Asfaltmix Oy

(Request for a preliminary ruling from the korkein oikeus (Supreme Court, Finland))

(Request for a preliminary ruling — Article 101 TFEU — Private enforcement of competition law — Private liability — Action for damages — Compensation for harm caused by conduct contrary to EU competition law — Prerequisites for compensation — Persons liable to pay compensation — Concept of undertaking — Principle of economic continuity)

1. This case concerns the conditions governing private liability for a breach of EU competition law, liability that was forcefully argued for by the late Advocate General Van Gerven in his seminal Opinion delivered some 25 years ago in *Banks*.[2] That Opinion resonated with me then and still provides inspiration today. It is therefore a pleasure to be able to finish my own mandate as an Advocate General by delivering an Opinion in that very field and to build on the legacy of the Opinion in *Banks*.

2. Important jurisprudential[3] and legislative[4] developments in the field of private liability have taken place since that Opinion. Nevertheless, many issues of fundamental importance remain unresolved. One of those issues concerns the persons that may be held liable for antitrust damages.

1 Original language: English.

2 Opinion of Advocate General Van Gerven in *Banks*, C-128/92, EU:C:1993:860.

3 Most importantly, judgments of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, and of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461.

4 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 (OJ 2014 L 349, p. 1).

3. In public enforcement of EU competition law by competition authorities, the principle of economic continuity is applied in order to help determine the persons liable for a breach of those rules. Based on a broad construction of the concept of 'undertaking' referred to in the Treaty provisions on competition, that principle dictates that liability is not limited to the legal entity that has participated in anticompetitive conduct. In the event of restructuring or other changes in the corporate structure, a penalty payment may be imposed on any entity that is identical, in economic terms, to the entity that infringed EU competition law. [5]

4. In the present case, the question arises whether that fundamental principle of EU competition law must also be applied within the context of private enforcement of EU competition law. More specifically, the question put to the Court is whether in a private law action for damages a company which has continued the economic activity of a cartel participant may be held liable to pay compensation for harm caused by a breach of Article 101 TFEU.

I. Legal framework

5. Under Finnish law, only the subject of law who has caused the damage is, in principle, liable to pay compensation.

6. According to Finnish company legislation, every limited company is a distinct legal person with its own property and its own liability.

7. Moreover, as far as the prerequisites for compensation in the context of extra-contractual liability are concerned, a person who deliberately or negligently causes damage to another is, as a matter of Finnish law, liable to pay compensation.

II. Facts, procedure and the questions referred

8. Between 1994 and 2002, a cartel operated in Finland in the asphalt market. By decision of 29 September 2009, the korkein hallinto-oikeus (Supreme Administrative Court, Finland) imposed penalty payments on seven companies for anticompetitive conduct which was deemed contrary to the national law on restrictions of competition and what is now Article 101 TFEU (given the effect of that cartel on trade between Member States).

9. One of the companies ordered to make a penalty payment was Lemminkäinen Oyj, a company with which Vantaan kaupunki (the municipality of Vantaa) had concluded several contracts for asphalt works between 1998 and 2001.

10. Unlike Lemminkäinen Oyj, some other companies involved in the cartel, namely Sata-Asfaltti Oy, Interasfaltti Oy and Asfalttineliö Oy, have since been dissolved in voluntary liquidation procedures and their respective sole shareholders, now known as Skanska Industrial Solutions Oy, NCC Industry Oy and Asfaltmix Oy, have acquired their subsidiaries' assets and continued their economic activity.

5 For an early expression of that principle, see judgment of 28 March 1984, *Compagnie Royale Asturienne des Mines and Rheinzink* v *Commission*, 29/83 and 30/83, EU:C:1984:130, paragraph 9. See, for more recent examples, judgments of 8 July 1999, *Commission* v *Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 145; of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 59; of 11 December 2007, *ETI and Others*, C-280/06, EU:C:2007:775, paragraphs 45 and 46; and of 18 December 2014, *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraphs 39 and 40.

11. On the basis of the principle of economic continuity, a penalty payment was imposed by the korkein hallinto-oikeus (Supreme Administrative Court) on Skanska Industrial Solutions Oy for its own conduct and that of Sata-Asfaltti Oy, on NCC Industry Oy for the conduct of Interasfaltti Oy, and on Asfaltmix Oy for the conduct of Asfalttineliö Oy.

12. Following the decision of the korkein hallinto-oikeus (Supreme Administrative Court), Vantaan kaupunki brought a private action for damages before the competent district court (Helsingin käräjäoikeus) against the companies that had been ordered to pay penalty payments, including Skanska Industrial Solutions Oy, NCC Industry Oy and Asfaltmix Oy.

13. In those proceedings, Vantaan kaupunki sought compensation from those companies jointly and severally for the harm caused by the excessive prices paid for asphalt works because of the cartel. Skanska Industrial Solutions Oy, NCC Industry Oy and Asfaltmix Oy contested the action inter alia on the ground that they could not be held liable for harm allegedly caused by legally independent companies. Accordingly, they argued that the claims for compensation should have been directed against the companies dissolved in the liquidation procedures. In their view, since the claims were not put forward in the voluntary liquidation procedures in which the companies that had participated in the cartel were dissolved, the obligations had ceased to exist.

14. The question that thus lies at the heart of the national proceedings is whether Skanska Industrial Solutions Oy, NCC Industry Oy and Asfaltmix Oy may be held liable to pay compensation for harm caused by the anticompetitive conduct of Sata-Asfaltti Oy, Interasfaltti Oy and Asfalttineliö Oy. The district court and the court of appeal have taken divergent views in that regard.

15. The district court found that if the principle of economic continuity is not applied in such a situation, it may be impossible or unreasonably difficult in practice for an individual to obtain compensation for harm caused by an infringement of the relevant competition rules. That is so in particular where the company that committed the infringement has ceased to operate and has been dissolved. Bearing that in mind, the district court considered that, in order to ensure the effectiveness of Article 101 TFEU, the attribution of liability for a penalty payment, on the one hand, and the attribution of liability for damages, on the other, should obey the same principles. On that basis the district court concluded that Skanska Industrial Solutions Oy, NCC Industry Oy and Asfaltmix Oy were liable to pay compensation resulting from the anticompetitive conduct of Sata-Asfaltti Oy, Interasfaltti Oy and Asfalttineliö Oy.

16. That decision was appealed to the competent court of appeal (Helsingin hovioikeus). The court of appeal found that there were no grounds for applying the principle of economic continuity to private law actions for antitrust damages. In that court's view, the need to ensure the effectiveness of EU competition law cannot be argued in order to justify interference with the fundamental principles of extra-contractual liability stemming from the domestic legal system. The principles governing the imposition of penalty payments should not be applied within the context of a private law action for damages, in the absence of any more detailed provisions to that effect. The court of appeal thus dismissed the claims of Vantaan kaupunki in so far as they were directed against Skanska Industrial Solutions Oy, NCC Industry Oy and Asfaltmix Oy for the conduct of Sata-Asfaltti Oy, Interasfaltti Oy and Asfalttineliö Oy.

17. In the same proceedings, the court of appeal ordered Lemminkäinen Oyj to pay Vantaan kaupunki compensation for the harm caused by the cartel. Lemminkäinen Oyj has since paid the municipality the compensation ordered.

18. However, like Vantaan kaupunki, Lemminkäinen Oyj has requested leave to appeal before the korkein oikeus (Supreme Court, Finland) and has been granted leave to appeal. Lemminkäinen Oyj argues inter alia that the compensation it has been ordered to pay should be reduced because Vantaan kaupunki has not sought compensation from the (now dissolved) companies which

participated in the cartel. Vantaan kaupunki was granted leave to appeal before the korkein oikeus (Supreme Court) regarding the question of whether private liability may be attributed to Skanska Industrial Solutions Oy, NCC Industry Oy and Asfaltmix Oy on the basis of the principle of economic continuity.

19. In the light of those arguments presented before it, the korkein oikeus (Supreme Court) must now decide whether liability for compensation may be attributed to a company that has taken over the economic activity of a cartel participant which was dissolved in a voluntary liquidation procedure. In that regard, the korkein oikeus (Supreme Court) explains that the starting-point of extra-contractual liability, as a matter of Finnish law, is that only the (legal) person which caused the harm may be held liable to pay compensation. That is the case except in certain circumstances where 'lifting the corporate veil' has been considered necessary in order to ensure that liability is not unduly circumvented.

20. Since it had doubts regarding the correct interpretation of EU law, the korkein oikeus (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(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 parties liable are determined directly on the basis of Article 101 TFEU, are those parties liable for compensation which fall within the concept of undertaking mentioned in that provision? When determining the parties liable for compensation, are the same principles to be applied as the [Court] has applied in determining the parties liable in cases concerning penalty payments, in accordance with which liability may be founded in particular on belonging to the same economic unit or on economic continuity?

(3) If the parties liable are determined on the basis of the 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, has dissolved the company in question and continued its activity is not liable for compensation for harm 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 requirement of effectiveness stemming from EU law? Does the requirement of effectiveness preclude an interpretation of a Member State's domestic law that makes liability subject to the requirement that a transformation of the kind described has been implemented unlawfully or artificially in order to avoid liability for antitrust damages or otherwise fraudulently, or at least that the company knew or ought to have known of the competition infringement when implementing the transformation?'

21. Written observations were submitted by Vantaan kaupunki, Skanska Industrial Solutions Oy ('Skanska'), NCC Industry Oy ('NCC Industry') and Asfaltmix Oy ('Asfaltmix'), the Finnish, Italian and Polish Governments, and the European Commission. Apart from Asfaltmix and the Italian and Polish Governments, those parties also presented oral argument at the hearing held on 16 January 2019.

III. Analysis

22. This case touches upon a fundamental aspect of private enforcement of EU competition law: the interplay between EU law and the domestic laws of the Member States in regulating claims for antitrust damages based on an infringement of EU competition law. Indeed, the principles governing private liability for a breach of EU competition law are to a large extent based on the case-law of this

Court. However, while the Court has inferred the right to claim compensation for an infringement of EU competition law from the Treaties [6] and given guidance on some more specific aspects of the right to claim compensation, [7] private enforcement of EU competition law nevertheless also relies on domestic private law and procedural rules.

23. The EU legislature has sought to shed light on the interplay between EU law and the domestic laws of the Member States in Directive 2014/104, an instrument which is not applicable *ratione temporis* to the present case. That directive has now harmonised certain aspects of actions for antitrust damages brought before national courts. However, like the case-law, that directive leaves several questions of principle unanswered.

24. One of those questions is how (and, in particular, on what legal basis) the persons to be held liable for harm caused by an infringement of EU competition law are to be determined. In the present case, the Court has the opportunity to address that question: the Court is called upon to decide to what extent EU law dictates how liability ought to be attributed in private law actions for antitrust damages instigated before national courts.

25. Before turning to that issue, some preliminary remarks on the system of private enforcement of EU competition law are in order.

A. Introduction: the system of private enforcement of EU competition law

26. Generally speaking, as far as extra-contractual liability in European legal systems is concerned, a party may, through a private law action for damages, seek compensation for harm caused by a particular conduct or action. However, depending on the legal system, the precise contours of such claims brought before courts of law are governed by strikingly different rules and principles. The different legal traditions among the EU Member States explain why divergences exists, inter alia, as regards the type of conduct that may give rise to liability (based for example on tort, delict, quasi-delict or strict liability); the scope of persons regarded as injured parties; causation; the persons that may be held liable for the alleged harm; and the categories of harm that may be compensated.

27. Despite those differences, however, claims for compensation tend to have a primarily reparatory-cum-compensatory (*restitutio ad integrum*) function in Europe. Although having to pay compensation may also have a deterrent function in certain contexts, liability for damages as a self-standing deterrent to (or punishment for) unwanted behaviour is arguably a less widespread phenomenon on the European legal landscape.

28. In the context of EU competition law, however, actions for damages are intended to fulfil both functions. On the one hand, a claim for damages caused by an infringement of EU competition law has a compensatory function. Such claims allow individuals to seek *full* compensation for any harm allegedly suffered on account of an infringement of EU competition law. [8] On the other hand, a private law claim for compensation for harm caused by a breach of competition law may also function as a deterrent, thereby complementing public enforcement.

6 Judgments of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465 paragraph 26 and of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraph 60.

7 See, for example, judgments of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraphs 95 to 97; of 14 June 2011, *Pfleiderer*, C-360/09, EU:C:2011:389, paragraph 32; and of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 37.

8 See, in particular, judgment of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraphs 95 and 96 and the case-law cited.

1. The emphasis placed in the case-law on the full effectiveness of EU competition law and deterrence

29. By employing the forceful language of rights and the effectiveness of EU competition law, the Court has put particular emphasis on the deterrent function of actions for damages for breaches of EU competition law.

30. The Court laid the groundwork for a system of private enforcement in the European Union in its judgments in *Courage*[9] and *Manfredi*.[10] In those cases, the Court set out the right — of any individual — to claim damages for harm caused by anticompetitive conduct.[11]

(a) The twofold function of private actions for antitrust damages

31. It can be seen from the case-law that a right to claim compensation was not, however, established simply to ensure that harm caused by anticompetitive conduct is repaired. Rather, such a right was tied to the need to ensure the full effectiveness of EU competition law.[12] In that regard, the Court has specifically recognised that a right to claim damages strengthens the effectiveness of EU competition law by discouraging undertakings from entering into anticompetitive agreements or participating in other anticompetitive practices and arrangements that are frequently covert. Private actions for damages before national courts are thus also a tool for maintaining effective competition in the European Union.[13] In other words, those actions have the effect of deterring undertakings from engaging in behaviour harmful to competition.

32. It is important to note, however, that while the Court has set out a right to claim damages on the basis of Article 101 TFEU, it has thus far refrained from clearly defining the essential conditions of private liability. Moreover, it is clear that the procedural and substantive framework necessary to obtain damages before a court of law lies, as a matter of principle, within the realm of domestic law.[14] As the Court has held in judgments delivered since *Courage* and *Manfredi*, in the absence of EU rules on the matter, Member States are to lay down the detailed rules governing the exercise of the right to claim compensation for harm resulting from a breach of Article 101 TFEU (or Article 102 TFEU), including rules on the application of the concept of a causal relationship. Member States are however to ensure that those domestic rules comply with the principles of equivalence and effectiveness.[15]

33. Yet which issues regarding actions for damages are governed by EU law and which are, instead, governed by the domestic laws of the Member States? An answer to that question can, in my view, be inferred from the more recent case-law.

9 Judgment of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465.

10 Judgment of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461.

11 Even before the judgment of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, the Court had recognised the direct effect of what are now Articles 101 and 102 TFEU. See judgments of 30 January 1974, BRT and Société belge des auteurs, compositeurs et éditeurs, 127/73, EU:C:1974:6, paragraph 16, and of 18 March 1997, *Guérin automobiles* v *Commission*, C-282/95 P, EU:C:1997:159, paragraph 39.

12 Judgments of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraphs 24 to 26, and of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraph 59.

13 Judgments of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraph 27, and of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraph 91. See moreover judgments of 14 June 2011, *Pfleiderer*, C-360/09, EU:C:2011:389, paragraph 29; of 6 November 2012, *Otis and Others*, C-199/11, EU:C:2012:684, paragraph 42; of 6 June 2013, *Donau Chemie and Others*, C-536/11, EU:C:2013:366, paragraph 23; and of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 23.

14 Judgment of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraph 62.

15 Judgments of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraph 29, and of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:46164, paragraph 62.

(b) The interplay between EU law and domestic law, and the consolidation of deterrence as an objective of private actions for antitrust damages

34. The Court's judgment in *Kone*[16] sheds light on that question. In that case, the Court held that victims of 'umbrella-pricing' — individuals who indirectly suffered harm because of increased prices resulting from a breach of Article 101 TFEU — may claim compensation for such harm by way of a private law action for damages. It was thus considered that a domestic rule on causation that excludes from the outset the possibility of claiming damages for umbrella-pricing is precluded by Article 101 TFEU.[17]

35. Two interrelated issues stand out.

36. First, the Court reiterated in *Kone* that Member States are to devise 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, including those on the application of the concept of a causal relationship. Member States are nevertheless to ensure that those domestic rules comply with the principles of equivalence and effectiveness. That is to say, that the rules in question are no less favourable than those governing actions for breaches of similar rights conferred by domestic law and that those rules do not render the exercise of rights conferred by EU law excessively difficult or practically impossible.[18]

37. Keeping that statement in mind, it could therefore seem that the compatibility with EU law of any domestic rule governing actions for antitrust damages is to be assessed on the basis of the classic test of equivalence and effectiveness. However, it should not be overlooked that after making that general statement, the Court held that, in the particular context of competition law, application of the relevant domestic rules may not jeopardise the effective application of Article 101 TFEU.[19] Indeed, as a closer look reveals, the ensuing assessment is done by reference to the full effectiveness of Article 101 TFEU.[20]

38. The reasoning employed by the Court strikes me as clearly requiring something more than an assessment based on the principles of equivalence and effectiveness. In my view, it calls for an assessment of the compatibility of the contentious domestic rule in the light of the full effectiveness of a Treaty provision, namely Article 101 TFEU.

39. The difference between an assessment based on the principles of equivalence and effectiveness, on the one hand, and an assessment based on the full effectiveness of Article 101 TFEU, on the other, is an important one. It aids in determining the demarcation line between questions governed by, respectively, EU law and the domestic legal systems of the Member States.

16 Judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317.

17 Judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 37.

18 Judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraphs 24 and 25 and the case-law cited.

19 Judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 26 and the case-law cited.

20 Judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 27 et seq., and in particular paragraph 34. By way of comparison, see regarding the application of the principles of equivalence and effectiveness, judgments of 14 June 2011, *Pfleiderer*, C-360/09, EU:C:2011:389, paragraphs 30 to 32, and of 6 June 2013, *Donau Chemie and Others*, C-536/11, EU:C:2013:366, paragraphs 32 to 34.

40. On my reading of the case-law, the classic test of equivalence and effectiveness is applied only in relation to 'detailed rules governing the exercise of the right to claim compensation' before national courts. In other words, that test is applied with regard to rules that (in one way or another) relate to the *application* of the right to claim compensation before a court of law.[21] Such rules are to be laid down by the Member States.

41. By contrast, where the constitutive conditions of the right to claim compensation are at stake (such as causation), such conditions are examined by reference to Article 101 TFEU.

42. It is of course true that, in *Kone*, the Court refrained from giving a positive definition, as a matter of EU law, of the concept of a 'causal link'. It did so contrary to the proposal of Advocate General Kokott.[22] Instead, the Court trod carefully (as it so often does) and limited its answer to what was strictly necessary in the case then under consideration.[23] Thus, referring to the full effectiveness of Article 101 TFEU, the Court held that that Treaty provision precludes a domestic rule on causation which excludes from the outset the possibility of claiming damages based on the existence of umbrella pricing.

43. In other words, although the Court left the development of the meaning of the concept of a causal link up to future case-law, that should not in my view be understood as meaning that the conditions that constitute the very cornerstone of a claim for damages are governed by domestic law.

44. Second, as a close corollary to the emphasis put on the full effectiveness of Article 101 TFEU, the rationale of a right to claim compensation for harm caused by an infringement of EU competition law was in *Kone* firmly tied to deterrence. Indeed, by discarding the applicability of a rule requiring a direct causal link in order to establish private liability, the Court held that Article 101 TFEU precludes a domestic rule which excludes the private liability of undertakings belonging to a cartel for harm caused by an increase in prices on the market as a result of the anticompetitive conduct.[24]

45. The 'harm' caused by umbrella pricing is a consequence of an independent pricing decision taken by a person not involved in the impugned anticompetitive conduct. Such a decision may affect a vast number of individuals. As a result, the number of individuals enjoying a right to claim damages on the basis of a breach of EU competition law directly on the basis of Article 101 (or Article 102 TFEU), considerably increases. Bearing that in mind, the ruling in *Kone* constitutes a decisive step in consolidating the role of actions for antitrust damages as an instrument designed to deter undertakings from engaging in anticompetitive behaviour.

2. Whether the emphasis placed on deterrence is warranted

46. Although a great deal could be said about the added practical value of the solution reached in *Kone* for the effectiveness of the system of private enforcement overall, the emphasis the Court placed on deterrence *in general* is in my view justified for several reasons. I will highlight two of them briefly.

21 This is what Advocate General Kokott has described as the *how* of the right to claim compensation. See Opinion of Advocate General Kokott in *Kone and Others*, C-557/12, EU:C:2014:45, point 23. It might moreover be possible to distinguish further between remedial rules and purely procedural rules, as well as between the requirements stemming from EU law that such rules must meet. See in that regard W. Van Gerven, 'Of rights, remedies and procedures', *Common Market Law Review*, Vol. 37, 2000, 501–536, at 503 and 504.

22 Opinion of Advocate General Kokott in *Kone and Others*, C-557/12, EU:C:2014:45, point 31 et seq.

23 C. Sunstein, *One case at a time: judicial minimalism on the Supreme Court*, Harvard, Harvard University Press, 1999. In the EU context on judicial minimalism, D. Sarmiento, 'Half a case at a time: dealing with judicial minimalism at the European Court of Justice', in M. Claes et al., *Constitutional conversations*, Cambridge, Intersentia, 2012, 11–40.

24 Judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 37.

47. First, as the Court has observed, private enforcement through actions for damages provides a complementary deterrent for anticompetitive behaviour, which public enforcement alone is unable to achieve. Like public enforcement, private enforcement aims to influence the behaviour of undertakings on the market, in order to deter those undertakings from engaging in anticompetitive behaviour.

48. On the one hand, if individuals (often with first-hand knowledge of cartels or other anticompetitive conduct) have effective private law remedies at their disposal, the likelihood increases that a greater number of illegal restrictions will be detected and that the infringers will be held liable.[25] In other words, the risk of detection increases considerably. On the other hand, while the deterrent effect of a single claim for compensation is arguably negligible, it is the number of *potential* claimants that, together with the increased risk of detection, help explain why private enforcement mechanisms (such as actions for damages) constitute an effective means of ensuring that competition rules are observed.[26]

49. Second, it should be called to mind that harm caused by anticompetitive conduct is usually purely economic harm. Although it may be relatively straight-forward to identify and prove direct harm to certain persons' economic interests, it is worth emphasising that infringements of competition law also involve indirect harm and, more generally, negative consequences on the structure and functioning of the market. Needless to say, quantifying or proving harm, let alone causation, on the basis of a counterfactual chain of events, raises a plethora of problems.

50. Fundamentally, however, the real harm caused by illegal restrictions of competition is the dead weight loss resulting from such restrictions, that is to say a loss of economic efficiency caused by the anticompetitive conduct in question. This means that the harm identified in actions for damages based on an infringement of competition law is in reality a proxy for the economic inefficiencies resulting from the infringement and the corollary loss to society as a whole in terms of reduced consumer welfare. In the final analysis, therefore, the compensatory function of an action for damages for an infringement of competition law remains in my view subordinate to that of its deterrent function.

51. Bearing those considerations in mind, I shall now move on to specifically address the questions referred by the korkein oikeus (Supreme Court).

B. Consideration of the questions referred

52. The referring court has put three questions to the Court, two of which have been presented in the alternative (depending on the answer given to the first question referred). All three questions are intrinsically linked and seek clarification on one issue: does EU law require that, in a private law action for damages before a national court, an individual must be allowed to seek compensation for harm caused by a breach of EU competition law from a company that has continued the economic activity of a cartel participant? In other words, must the principle of economic continuity be applied in this context?

53. In my opinion, that question calls for an affirmative answer.

54. To explain why that is so, I shall address the first and second questions referred in turn.

25 Although the Commission emphasises the compensatory function of actions for damages, it nevertheless recognises their usefulness in deterring undertakings from anticompetitive behaviour. See, to that effect, Commission White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, p. 3 with references. Available at: http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf (accessed on 22 January 2019).

26 See also Opinion of Advocate General Van Gerven in *Banks*, C-128/92, EU:C:1993:860, point 44.

1. The determination of the persons liable to pay compensation is a matter of EU law

55. By its first question, the referring court wishes to know whether the persons liable to pay compensation for harm caused by conduct contrary to Article 101 TFEU are to be determined on the basis of EU law, or whether that question remains a matter of domestic law.

56. 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.

57. I do not subscribe to that viewpoint.

58. On the one hand, 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. As indicated above, the Court 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 Court has repeatedly held in this context that detailed rules governing the exercise of that right are to be laid down by the Member States, subject to the observance of the (minimum) requirements of equivalence and effectiveness.[27]

59. Is the determination of the persons liable to pay compensation for harm caused by an infringement of EU competition law such a detailed rule governing the exercise of the right to claim compensation? Or is it a constitutive condition of liability governed by EU law?

60. In my view, it is a constitutive condition of liability governed by EU law.

61. The determination of the persons that may be held liable to pay compensation is not a question regarding any details of the concrete application of a claim for compensation or a rule governing the actual enforcement of the right to claim compensation. 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. Indeed, the existence of a right to claim compensation based on Article 101 TFEU presupposes that there is a legal obligation that has been infringed.[28] It also presupposes that there is a person liable for that infringement.

62. That person may be inferred from Article 101 TFEU, a provision which applies to undertakings. Indeed, the addressees of the prohibition laid down in Article 101 TFEU are undertakings, a concept that the Court has applied flexibly in the context of public enforcement and the imposition of penalty payments.

63. According to the principles set out in the case-law, that concept covers any entity engaged in economic activity, irrespective of its legal status and the way in which it is financed. When such an entity infringes EU competition law, it falls, according to the principle of personal responsibility, to that entity to answer for the infringement.[29]

27 In particular, judgments of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraphs 24 and 29, and of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraphs 61 and 62. See moreover judgments of 14 June 2011, *Pfleiderer*, C-360/09, EU:C:2011:389, paragraphs 29 and 30; of 6 June 2013, *Donau Chemie and Others*, C-536/11, EU:C:2013:366, paragraphs 23 and 27; and of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraphs 23 and 24.

28 The idea of correspondence between rights and legal obligations can be traced back to Hohfeld. See W. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', *Yale Law Journal*, Vol. 23, 1913, 16–59, at 30 to 32. See also W. Van Gerven, 'Of rights, remedies and procedures', *Common Market Law Review*, Vol. 37, 2000, 501–536, at 524.

29 See for example judgments of 11 December 2007, *ETI and Others*, C-280/06, EU:C:2007:775, paragraphs 38 and 39 and the case-law cited; of 13 June 2013, *Versalis* v *Commission*, C-511/11 P, EU:C:2013:386, paragraph 51; and of 18 December 2014, *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraph 39.

64. Bearing that in mind, I have difficulty in identifying any good reason why the determination of the persons liable to pay compensation within the context of private liability should be determined on a different basis. Quite the contrary.

65. At the hearing, the Commission suggested that the silence of the Court's case-law on the issue, together with the fact that Directive 2014/104 now makes specific reference to the joint and several liability of undertakings for antitrust damages,[30] indicate that the determination of the persons to be held liable is a matter of domestic law subject to the observance of the principles of equivalence and effectiveness. However, the fact that the Court has not had an opportunity to clarify this issue — or that the EU legislature has included a provision on joint and several liability of undertakings in that directive — says little about the normative basis on which the persons liable for damages ought to be determined, or indeed, the principles that are to be applied in determining those persons.

66. The determination of the persons liable directly affects the very existence of a right to claim compensation. As such, it constitutes a question of fundamental importance, on par with the right to claim damages itself. In other words, as is the case for causation, another constitutive condition of liability, the persons liable are to be determined on the basis of EU law.

67. The constitutive conditions of liability must be uniform.[31] If the persons liable to pay compensation differed from one Member State to another, there would be an obvious risk of economic operators being treated differently, depending on the domestic jurisdiction dealing with the private law claim for compensation. From the perspective of the effective enforcement of EU competition law, leaving the determination of the persons liable for damages to the discretion of the Member States could considerably limit the right to claim compensation. Furthermore, the application of different rules across the Member States on a fundamental issue directly affecting the very existence of a right to claim compensation would not only run counter to one of the fundamental objectives of EU competition law, which is to create a level playing field for all undertakings active on the internal market, but also be an invitation to forum shopping.[32]

68. In the final analysis, such a solution would adversely affect the deterrent function of actions for damages and thus the effectiveness of the enforcement of EU competition law, an objective on which the Court has placed particular emphasis in the case-law.

69. Therefore, in a private law action for damages before a national court, the persons held liable to pay compensation for harm caused by an infringement of EU competition law should be determined on the basis of EU law, with reference to Article 101 TFEU (or, as the case may be, to Article 102 TFEU).

70. Does that mean that the principle of economic continuity should be applied in an action for antitrust damages before a national court to determine the persons liable to pay compensation?

30 Article 11(1) of Directive 2014/104 provides: '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.'

31 Opinion of Advocate General Van Gerven in *Banks*, C-128/92, EU:C:1993:860, points 49 to 54 on such conditions (the existence of damage, a causal link between the damage claimed and the conduct alleged, and the illegality of such conduct). In that analysis, the persons to be held liable seem, implicitly, to be the undertakings having engaged in the illegal conduct.

32 For a similar reasoning in relation to the question of causation, see Opinion of Advocate General Kokott in *Kone and Others*, C-557/12, EU:C:2014:45, point 29.

2. Whether the principle of economic continuity is to be applied in determining the persons liable to pay compensation in the context of a private action for antitrust damages

71. By its second question referred, the referring court asks whether the determination of the persons liable to pay compensation is governed by the same principles as those laid down by the Court in the context of the imposition of penalty payments.

72. It is useful to begin by briefly reiterating the basic tenets of the Court's case-law on the principle of economic continuity, which, it should be recalled, has been developed in the context of public enforcement of EU competition law.

73. The principle of economic continuity is an expression of the broad definition of an undertaking in EU competition law. It is applied, in particular, where the entity that committed the infringement has ceased to exist, either in law or economically. As the Court has explained, if a penalty were imposed on an undertaking that continues to exist in law, but has ceased its economic activity, such a penalty would have no deterrent effect. [33]

74. Generally speaking — although personal responsibility remains the main rule — the rationale of extending liability to the entity that has continued the activities of the entity which infringed EU competition law is that undertakings could otherwise escape penalties by changing their identity through restructurings, sales or other legal or organisational changes. This would jeopardise the objective of suppressing conduct that infringes competition law and preventing its reoccurrence by means of deterrent penalties. [34]

75. From the perspective of EU competition law, therefore, a legal or organisational change does not necessarily create a new undertaking free of liability for the conduct of its predecessor that committed the infringement, when, from an economic point of view, the two are identical. In that regard, the legal forms of the entity that committed the infringement and the entity that succeeded it are also, according to the Court, irrelevant. [35] That is because, from an economic perspective, the entity remains the same.

76. In my view, the arguments that have been put forward in the context of public enforcement of competition law to justify recourse to a broad concept of 'undertaking' and, its close corollary, the principle of economic continuity, are also valid in the context of a private law claim for compensation for a breach of EU competition law. That is because a private action for damages, like the public enforcement of competition law by competition authorities, also has the function — though not through the same mechanism — to deter undertakings from engaging in anticompetitive behaviour. Indeed, as Vantaan kaupunki has pointed out, public and private enforcement of EU competition law together form a complete system of enforcement, albeit with two limbs, that should be regarded as a whole.

77. If the principle of economic continuity were not applied in the context of actions for damages, it would considerably weaken the deterrent element involved in allowing *any* individual to claim damages for an infringement of EU competition law.

78. Moreover, as this case aptly illustrates, undertakings could avoid private liability by means of corporate or other arrangements that would render it practically impossible for individuals to exercise their right to compensation based on Article 101 TFEU. In that regard, Skanska, NCC Industry and Asfaltmix have all argued before this Court that Vantaan kaupunki could also have sought

33 Judgment of 11 December 2007, *ETI and Others*, C-280/06, EU:C:2007:775, paragraphs 40 and 42 and the case-law cited.

34 See inter alia judgments of 11 December 2007, *ETI and Others*, C-280/06, EU:C:2007:775, paragraph 41 and the case-law cited, and of 18 December 2014, *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraph 40.

35 Judgment of 11 December 2007, *ETI and Others*, C-280/06, EU:C:2007:775, paragraph 43.

compensation from the now dissolved companies. 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.

79. To be sure, it might appear problematic that a company may be held liable for harm caused by the anticompetitive behaviour of another (dissolved) company, simply because that company has continued the economic activity of the infringer. It could thus be argued that the application of the principle of economic continuity to a claim for damages upends the private law logic of such claims, given in particular that the infringer and the person liable to pay compensation are not (legally) the same.

80. Yet, in my view, there is nothing extraordinary — or for that matter surprising — about that solution. 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.

81. Accordingly, I am of the view that Article 101 TFEU must be interpreted as meaning that, in determining the person liable to pay compensation for harm caused by a breach of that provision, the principle of economic continuity is to be applied so that, in a private law action for damages before a national court, an individual may seek compensation from a company that has continued the economic activity of a cartel participant.

82. Before concluding, however, a final observation is necessary: an observation prompted by the arguments put forward by NCC Industry at the hearing.

83. In its oral pleading, NCC Industry asked the Court to limit the temporal effects of its judgment if the Court were to consider that the principle of economic continuity is to be applied in determining the persons liable to pay compensation in a private law action for antitrust damages. That request was, however, based on a general and insufficiently substantiated claim regarding the financial consequences that such an interpretation would have on economic operators having engaged in company acquisitions. Consequently, that request should be rejected from the outset, without there being any need to examine in detail whether the two cumulative conditions regarding the limitation of the temporal effects of a judgment set out in the case-law have been fulfilled in this case.[36]

IV. Conclusion

84. In the light of all the above considerations, I propose that the Court answer the questions referred for a preliminary ruling by the korkein oikeus (Supreme Court, Finland), as follows:

Article 101 TFEU must be interpreted as meaning that, in determining the person liable to pay compensation for harm caused by a breach of that provision, the principle of economic continuity is to be applied so that, in a private law action for damages before a national court, an individual may seek compensation from a company that has continued the economic activity of a cartel participant.

36 For those conditions, see for example judgment of 22 September 2016, *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, paragraphs 59 to 61 and the case-law cited.