LEGAL UPDATE

AG Wahl advises the CJEU following preliminary questions in a Finnish cartel damage case on the relationship between European law and domestic law in the private enforcement of competition law

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In a recently published opinion in a Finnish cartel damage case, Advocate General (AG) Wahl discussed the important issue of the relationship between European competition law and private liability law (opinion delivered on 6 February 2019 in the case C-724/17). According to AG Wahl, liability for a breach of European competition law follows directly from European competition law (Articles 101 and 102 TFEU) for both public and private enforcement. The function of both types of enforcement is to secure the full effectiveness of European competition law, albeit through different mechanisms. According to AG Wahl, the concept of 'undertaking' in Article 101 TFEU and the related principle of economic continuity must therefore also be consistently applied in private cartel damage proceedings (i.e. the same as in public enforcement). This means that if a party is ordered to pay a penalty payment by the Commission, its private liability is a given. Following the AG in this reasoning has significant implications for private enforcement of European law, including for follow-on cartel damage claims. It means that private law liability for an infringement of competition law can (*ipso facto*) be attributed to all those ordered to pay a penalty payment and/or all persons (or legal persons) that constitute the economic unit (the undertaking) that has committed the infringement.

The competition law concept of 'undertaking' and the principle of economic continuity

For a proper understanding of the discussion, it is important to note that European competition law focuses on undertakings. The concept of 'undertaking' in Article 101 TFEU is broader than the person (or legal person) that directly performs the activity itself. The concept does not (necessarily) coincide with a particular person (or legal person), but can encompass different persons and entities that form a unit in economic terms in the performance of economic activity, e.g. in the case of a parent company that exercises control over a subsidiary that actually performs the activity. The principle of economic continuity is an expression of this broader concept of 'undertaking'. It determines that in certain circumstances a party that acquires the assets and continues the activities of a party that has infringed competition rules can be held liable for that infringement. That is possible if the continuing party is identical in economic terms. The ratio of this principle is that undertakings should not be able to escape penalties simply through restructurings, sales or other legal or organisational changes (CJEU 18 December 2014, C-434/13).

Facts in the Finnish case

The Finnish cartel damages case related to the following. Between 1994 and 2002, a cartel operated in Finland in the asphalt market. By decision of 29 September 2009, the highest administrative court of Finland imposed penalty payments on the cartel members for a breach of the (European) cartel prohibition. Several entities that were involved in the breach at the time had by then been dissolved or liquidated, while other entities had continued their activities. The Finnish administrative court held those succeeding entities liable for the conduct of the dissolved entities on the principle of economic continuity. Further to the ruling of the Finnish administrative court, the municipality of Vantaa brought a private follow-on action seeking compensation from the cartel members addressed in the decision (i.e. including the succeeding entities) jointly and severally for the harm caused by the cartel. In the private proceedings, the succeeding entities contended, put briefly, that they could not be held liable under private law for the conduct of the (dissolved and liquidated) entities whose activities they had continued. In the first and second instance, the courts reached different findings. The Finnish Supreme Court found

that this question of liability formed reason to refer questions to the CJEU for a preliminary ruling on the relationship between Article 101 TFEU and domestic law.

AG Wahl's analysis

AG Wahl finds first and foremost that the questions referred for a preliminary ruling relate to the interplay between European and domestic law, and raise the question to what extent European law dictates how liability ought to be attributed in private law actions for antitrust damages. According to settled case law of the CJEU, anyone may claim damages for harm caused by anticompetitive conduct. AG Wahl stresses that from this case law it follows that private enforcement of competition law not only has a compensatory function, but also has an important function as a deterrent. However, in the absence of European private rules, the rules on *exercising* this right to claim compensation are laid down by domestic laws, whereby the domestic rules must comply with the principles of equivalence and effectiveness.

AG Wahl finds that the answer to the question of which issues in cartel damage cases are governed by European law and which ones by domestic law can be found in more recent CJEU case law. He cites the *Kone* judgment, in which the CJEU held that Article 101 TFEU precludes any domestic rule that excludes from the outset the possibility of claiming damages for umbrella damages (a form of harm indirectly caused by a cartel) (CJEU 5 June 2014, C-557/12). According to AG Wahl, the CJEU's finding in *Kone* is not based so much on applying a test of the principles of equivalence and effectiveness to the litigious national rule, but rather arrives at this finding by reference to the *full effectiveness* of Article 101 TFEU. AG Wahl views this as an important distinction: it aids in determining the demarcation line between questions governed by EU law and domestic laws respectively. AG Wahl's analysis is that the test of the principles of equivalence and effectiveness is only applied with regard to domestic rules that relate to the *application* of the right to claim compensation. By contrast, where the *constitutive* conditions of the right to compensation are at stake, such as causation in *Kone*, the situation is examined by reference to the full effectiveness of Article 101 TFEU.

AG Wahl then concludes that the determination of the person liable to pay compensation for anticompetitive conduct is a constitutive condition for the right to compensation that must be determined on the basis of EU law, including in private actions for damages: "*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.*"

AG Wahl notes that the constitutive conditions of liability must be uniform throughout the EU, or there would be a risk of economic operators being treated differently and a risk that the right to claim compensation could be considerably restricted. AG Wahl furthermore notes that the application of different rules in different member states on such a fundamental issue would not only thwart the fundamental objective of EU law to create a level playing field on the internal market for all undertakings, but would also be an invitation to forum shopping. All this would in the end adversely affect the deterrent function of actions for damages and thus the effectiveness of the enforcement of EU competition law. According to AG Wahl, the arguments put forward in the context of public enforcement 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. The fact is that public and private enforcement of European competition rules have the same deterrent function and should in that respect be regarded as a whole. Not applying the principle of economic continuity would considerably weaken the deterrent effect of the right to claim compensation. AG Wahl considers that this proposed solution, whereby a company may indeed be held liable for anticompetitive behaviour of another (dissolved) company, is neither extraordinary nor surprising. He points out that EU competition law (taken as a

whole) *primarily* aims at deterring undertakings from engaging in anticompetitive behaviour, and "*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.*"

AG Wahl concludes that the principle of economic continuity is to be applied in private law actions for damages before a national court, thereby allowing individuals to seek compensation from a company that continued the economic activity of a cartel participant.

Comments
AG Wahl's conclusion is consistent with the CJEU's ruling in the *CDC Hydrogen Peroxide* judgment (CJEU 21 May 2015, C-352/13). In that judgment, albeit in the context of international jurisdiction, in the case of a binding decision by the Commission containing the finding that there had been an infringement of the cartel prohibition, the ECJ held the following: "*on the basis of that finding, holding each participant liable for the loss resulting from the tortious actions of those participating in the infringement.*" (para. 24). Should the CJEU (once more) follow the line that AG Wahl proposes, those ordered in a Commission decision to pay a fine can no longer raise the defence that they are not liable under private law because they themselves did not breach the competition rules, e.g. on the basis of the argument that they have been fined solely due to their decisive influence in their capacity as parent company.

The findings of AG Wahl could have an impact on the M&A and insolvency (e.g. pre-pack) practices as well. Potential purchasers may need to take a careful look at potential competition law infringements of the target, even where the intended transaction (merely) concerns a transfer of assets (by which the economic activity of the target is continued). After all, under the principle of economic continuity, they risk being held liable for any anticompetitive behaviour of the target.

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