Developments in Finnish Private Antitrust Litigation: Finland Fast-Forwards into the Future?

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1. Introduction

Antitrust damages litigation is increasing, and the European Commission's efforts to foster private enforcement culminated in a proposed Damages Directive and a recommendation for collective redress in June 2013.[1]

This trend is reflected in Finland with a considerable increase in antitrust damages litigation during the past six years. Much of this increase is the result of the infringement decisions concerning four cartels. In 2013, Finland's antitrust damages case law took its first significant steps after the District Court of Helsinki (the District Court) gave judgments in the *Asphalt Cartel* and the *Hydrogen Peroxide Cartel* antitrust damages cases. Both judgments concern points of law that are being litigated around Europe, e.g. the assignability of cartel damages claims, the interpretation of limitation rules and the applicability of the doctrine of economic succession to damages claims. In early 2014, the District Court gave judgments in the *Timber Cartel* and *Car Spare Parts Cartel* cases.

In this article, these damages judgments are reviewed and compared to the Damages Directive. The judgments are not final but provide the best picture so far concerning the state of antitrust damages in Finland. They contain a number of rulings that may be of interest in other jurisdictions too, especially since the judgments seem close to what the Damages Directive will produce.

2. Background of the cases

The *Asphalt Cartel* damages litigation follows the infringement decision concerning a nationwide asphalt cartel by the Supreme Administrative Court in 2009, resulting in record fines of over €80 million. Numerous damages claims followed. The State of Finland and 40 municipalities claimed a total of €122 million from the defendants, who included both cartel members and economic successors of cartel members.[2] On November 28, 2013, the District Court gave 41 judgments awarding the municipalities over €60 million in compensation, including interest and costs. The State of Finland had its claim dismissed since certain employees of the state were found to have been aware of the cartel and to have even participated in it.

The *Hydrogen Peroxide Cartel* damages case is based on a cartel decision adopted by the European Commission in 2006 for a bleaching chemicals cartel. One of the fined undertakings was a Finnish company, Kemira. Two Finnish pulp and paper companies sold their cartel-related damages claims to CDC HP.[3] In 2011 CDC HP filed an action against Kemira in the District Court claiming €21 million in damages. CDC HP has similar claims against Kemira and other companies fined by the Commission pending in Germany. In an interim judgment in July 2013, the District Court ruled, e.g. on the limitation period and assignability of claims, and allowed the case to proceed.[4] However, just before the main hearing was to begin in June 2014, Kemira and CDC HP settled the case for €18.5 million and legal costs.

The *Timber Cartel* was composed of three Finnish pulp and paper companies that operated a timber buyers' cartel. They were fined by the Market Court[5] in 2009 following a leniency application by one of the cartel members. The infringement decision was followed by total damages claims exceeding €200 million from the

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[1] Proposal for a Directive 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, COM(2013) 404 final, 11.6.2013, and Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L201/60. On April 17, 2014, the European Parliament adopted a text of the Directive on antitrust damages actions which was agreed between the European Parliament and the Council during the ordinary legislative procedure. EU Council's formal approval on the Directive is expected in late 2014. The text adopted in April 2014 has been used as a reference in this article (the Damages Directive). No significant changes are expected at this stage.

[2] Interestingly, many of the largest private enforcement claimants so far are government agencies and municipalities. Thus Finnish private enforcement seems spearheaded by public entities. The reason is probably that many public entities are large economic actors, resulting in considerable damages claims. They also have significant economic resources available, enabling them to litigate pilot cases.

[3] CDC Cartel Damages Claims is a company that purchases damages claims and prosecutes the cases in its own name and on its own account typically through special purpose vehicles.

[4] Interim judgments cannot usually be separately appealed. This prevents various satellite questions from putting on hold the proceedings on the main issues, like the quantification of harm.

[5] The court of first instance in public enforcement proceedings.

State of Finland, dozens of municipalities and hundreds of private forest owners. In March 2014, the District Court found the claims of the private forest owners time-barred.

In the *Car Spare Parts Cartel* case, a car spare parts wholesaler claimed damages from five competitors. The claimant demanded €57 million for market foreclosure that caused the claimant's new retail chain concept to fail commercially. In the infringement proceedings, one of the defendants received leniency. The others were fined a total of €1 million by the Supreme Administrative Court in 2012 for exchanging information on future pricing behavior regarding the claimant's retail chain. In March 2014, the District Court dismissed the claim because it found no causal connection between the infringement and the alleged harm.

3. Prior infringement decision had binding effect

It is clear that national authorities and courts cannot take decisions that run counter to the infringement decisions of the Commission or the Court of Justice of the European Union (CJEU).[6] In most Member States, the situation is uncertain concerning national infringement decisions. Without clear rules or precedents, the damages claimant must prepare to prove the infringement despite a previous national infringement decision. The Damages Directive aims to avoid this need to repeat the infringement proceedings. It requires that final infringement decisions by national authorities and courts shall be binding in subsequent damages proceedings in the same member state.[7]

In the *Asphalt Cartel* the District Court held that the Supreme Administrative Court's infringement decision was binding in the damages proceedings.[8] The exact scope of the binding effect is not clear but seems to cover the existence of the infringement, the parties responsible and the infringement period. However, it remained possible to show that the infringement lasted longer than established in the infringement decision and that there were additional infringers. The national infringement decision provided the infringement's minimum scope which could not be disputed and did not need to be proven in the damages proceedings.[9] In the *Car Spare Parts Cartel* the District Court made a similar ruling.

The binding nature of the infringement decision should ease the evidentiary burden in the damages proceedings. However, it also makes the public enforcement proceedings even more crucial. For example, small changes to the duration or geographic scope of the infringement may not have a major impact on fines, but they could have a major impact on the amount of damages. Infringement proceedings could become, if possible, even more contested because the stakes will be that much higher.

4. Liability was joint and several

Certain competition infringements, most notably cartels, involve more than one infringer. It is important for both claimants and defendants to be able to assess which parties are liable and for which parts of the infringement. It is particularly important if some of the infringers no longer exist or are no longer able to pay.[10]

The Damages Directive sets joint and several liability as the main rule.[11] In the *Asphalt Cartel* case, some of the defendants argued that their participation was not causally connected to all the harm caused by the infringement. Their claims were based on, e.g. minuscule market share, geographic distance from a particular claimant and non-participation in a claimant's tendering process. The question was whether, from the point of view of damages, the infringement should be considered one incident of damage or as consisting of separate incidents (i.e. each asphalting contract). In effect, these defendants argued that they were not liable for those incidents of damage where they did not actively participate.

These arguments were not accepted by the District Court. In line with the main principle of the Damages Directive, all the infringers were held jointly and severally liable for all the damage suffered by a claimant during their participation in the cartel. A claimant could claim its entire damages from any defendant. Even those cartel members who had a minor role were liable for all the harm their co-infringers had inflicted.[12]

The District Court reasoned that the cartel's effectiveness was dependent on the cartel members following the cartel agreement. Market sharing and bid-rigging were possible only through the infringers' joint efforts. Every cartel member made it possible for the other members to overcharge their customers, so all the members caused the overcharge together. Therefore, a causal connection existed between all the infringers and each instance of overcharging.

5. Contract partner was ultimately liable for contribution

The apportioning of liability between multiple infringers can be even more important to an infringer than the total amount of damages. This is because, presumably, each infringer will compare its own benefits to its own costs,

[6] See art.16(1) of Council Regulation 1/2003 of 16 December 2002 and para.13 of the Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles [101 and 102 TFEU]. The abbreviation CJEU is used throughout this article to refer to the Court of Justice of the European Union (previously the European Court of Justice) including the General Court.

[7] Article 9(1). Final infringement decisions in other Member States may be presented at least as prima facie evidence of an infringement along with other material.

[8] The Finnish Competition and Consumer Authority (FCCA) cannot impose fines. It makes a fining proposal to the Market Court which organizes a trial. The Market Court's decision can be appealed to the Supreme Administrative Court.

[9] Due to uncertainty, the claimants in the *Asphalt Cartel* and *Car Spare Parts Cartel* damages cases re-litigated the existence of the infringement. They submitted much the same evidence as the FCCA had used in the infringement proceedings and named many of the same witnesses.

[10] Claimants will be unable to recover compensation from such an infringer, and the other infringers will be unable to obtain contribution.

[11] Article 11(1).

[12] Article 11(2) of the Damages Directive seeks to protect small businesses from such situations.

disregarding the position of the other infringers. The Damages Directive requires that infringers can obtain contribution from their co-infringers if one has to pay more than its own share through joint and several liability. Each infringer's share of the total liability would be apportioned in accordance to its relative responsibility for the harm caused by the infringement of competition law.

The defendants in the *Asphalt Cartel* case were jointly and severally liable. However, they had the right to claim contribution from their co-infringers. The District Court's approach to contribution was different from the Damages Directive. Based on national case law, it considered the monetary benefit obtained via the rigged supply contracts so important that it held the contract party responsible for the total overcharge in a contract. If an infringer other than the contract party had to pay the damages to a claimant through joint and several liability, that infringer could recover the full amount from the infringer that was the contract party. Conversely, it could obtain nothing from anyone else. This way, each infringer was ultimately liable for the harm it had caused to its own customers.

If the contract party is unable to pay, there is an element of all-or-nothing to the District Court's approach. Either the claimant will be able to recover damages from some other infringer, who will then be unable to obtain contribution, or, if joint and several liability has ceased for some reason, the claimant will be unable to recover in the first place.

6. Economic succession was applied to antitrust damages

In EU competition law, it is well established that a company which did not commit an infringement may under certain circumstances become liable for an infringement committed by another company. This doctrine of economic succession has been developed by the CJEU since the *Suiker Unie*[13] decision in the 1970s. To the best of our knowledge, this doctrine has only been applied to fines imposed under public enforcement of the competition law, not to damages under private enforcement. Unsurprisingly, the District Court's decision to apply economic succession to damages in the *Asphalt Cartel* case has created controversy. The judgment is a significant new interpretation regarding the application of economic succession.

Certain non-infringing asphalt companies had purchased the shares of infringing asphalt companies. The non-infringing companies subsequently transferred to themselves the assets of the acquired companies and continued the same business. The now empty acquired companies were put into voluntary liquidation and wound up, seemingly leaving no suitable defendant.[14]

In the public enforcement proceedings, the Supreme Administrative Court imposed fines on the acquiring companies on the basis of economic succession. At the time, the doctrine was not codified into the Finnish Competition Act. The Supreme Administrative Court therefore applied EU law directly, finding that the doctrine was well-established in the CJEU's case law.

In the private enforcement proceedings, the defendants argued that economic succession did not apply to damages and was not a doctrine of private law. The District Court first analysed whether the claimants' right to damages had ceased when the infringing companies were wound up. The District Court held that it had not. Typically, the companies had been wound up already before the legal basis for the damages existed.[15] When the legal basis did exist before the companies were wound up, the District Court held that the infringing companies had nonetheless acted improperly by failing to declare the existence of such liabilities before they were wound up.[16]

Then the District Court considered whether the doctrine of economic succession was part of Finnish national law in antitrust damages, and held that it was not. Under national law, the claimants could only bring their claims against the wound-up infringing companies. Since those companies had ceased to exist and had no assets, recovery of compensation seemed improbable. The District Court found such relief insufficient because the national remedies available endangered the effectiveness of EU competition law.[17]

The District Court considered itself compelled by EU law to ensure the availability of effective antitrust damages remedies for infringements of EU competition law yet no effective national remedies were available. The Court's solution was to apply the EU competition law doctrine of economic succession to antitrust damages. The non-infringing companies were held liable for the damage caused by the infringing companies whose assets they had acquired, just as they had in the public enforcement proceedings.

The District Court reasoned that the right to antitrust damages is a special type of damages remedy where priority must be given to the objectives and principles of competition law. The Court argued that the public and private enforcement of EU competition law form one enforcement system with shared objectives. This enforcement system should therefore be seen as a whole. The principle of effectiveness can under certain circumstances necessitate economic succession in public enforcement. The same must therefore apply to private

[13] *Cooperatieve Vereniging Suiker Unie UA v Commission of the European Communities* [1975] E.C.R. 1663.
[14] One acquiring company continued the infringement committed by a company it acquired. Two acquiring companies did not continue the infringement committed by the companies they acquired.
[15] The legal basis was the final infringement decision for tort damages or the end of participation in the cartel for contractual damages.
[16] The process of winding up a company in Finland includes a procedure to establish the assets and known liabilities of the company. The cartel damage caused by the infringing companies was considered a known liability to those companies and therefore should have been declared. The District Court ruled that a company could not benefit by intentionally failing to declare its liabilities.
[17] The District Court noted that, for example, if all infringing companies were wound up, claimants would have no suitable defendant at all, defeating the purpose of the damages remedy.

enforcement if the right to antitrust damages based on EU law were otherwise endangered. In sum, the District Court held the doctrine of economic succession to be a *general* principle of EU competition law, and applicable to both public and private enforcement.

The District Court stated that if economic succession were applied differently in public and private enforcement, an infringer would have to pay fines to the state but not damages to injured parties. The Court considered such an outcome illogical and unacceptable. It held that the CJEU's judgments did not prevent the application of economic succession to antitrust damages. In addition to a "penalty" or "fines", the decisions also mention liability for another company's infringements in general.[18]

The EU law principle of effectiveness seems to be the main reason the District Court applied economic succession to antitrust damages. Since the required level of effectiveness is somewhat open to interpretation, and other principles could also affect the outcome, the exact circumstances to apply economic succession to antitrust damages remain undetermined. The Court made reference to the CJEU's case law and the Supreme Administrative Court's infringement decision. Thus, it seems that the public enforcement case law on economic succession should apply to private enforcement.

The District Court confirmed that economic succession on antitrust damages is possible when the infringer still exists in law but not economically.[19] Also, no illegitimate motives for the asset transfer were required for economic succession to apply. Finally, economic succession only concerned identifying the liable party. The nature of the liability did not change. For example, when the infringing party was contractually liable, the economic successor was also contractually liable though it was not party to those contracts. The Court did not rule on a situation where the infringer had not been wound up but was simply unable to pay.

7. Knowledge of an infringement prevented recovery of damages

Sometimes in antitrust damages proceedings the defendant may argue that the claimant was aware of the infringement or even participated in it.[20] The defendant may argue that by allowing the infringement to happen, the claimant has accepted the infringement and forfeited the right to damages.

An unusual feature in the *Asphalt Cartel* was that the State of Finland was found to have known about and participated in the cartel.[21] During the damages proceedings, certain former employees of the state's own asphalt paving unit admitted for the first time to have known about the cartel and to have later participated in it. The District Court held that knowledge of the existence of the cartel prevented the state from obtaining damages.[22] The state's claim was dismissed with costs.

At least two important questions arise from the judgment in this regard: the issue of a legal entity's knowledge and the effects of that knowledge.

The state's asphalt paving unit was a separate organizational unit within the state but not a separate legal entity. The District Court held that since sufficiently high-ranking employees of the state knew about the cartel, the state as a legal entity knew about the cartel, regardless of whether the state's other organisational units knew about it.[23] The District Court held the state had not suffered damage since it had accepted the infringement. The judgment was largely based on the fact that the State is a single legal entity. This unitary view will likely prove problematic, especially for multi-faceted entities like states that may, from a competition law perspective, even comprise a number of different undertakings.[24]

Secondly, the effects of a legal entity's knowledge concerning the infringement should be in accordance with EU law. For some reason, the District Court made no reference to *Courage*, though the CJEU outlined in *Courage* when a party to an infringement of EU competition law is unable to rely on its own infringement to obtain damages.[25]

8. Uncertainty continues concerning limitation periods

Time-barring is a common defence against antitrust damages claims, especially in follow-on cases where the time periods involved can be very long. The problems typically relate to uncertainty concerning the beginning of the limitation period.[26]

[18] The court referred to, e.g. *Autorità Garante della Concorrenza e del Mercato v Ente Tabacchi Italiani - ETI SpA* (C-280/06) [2007] E.C.R. I-10893 at [42]–[43] and *NMH Stahlwerke GmbH v Commission of the European Communities* (T-134/94 R) [1999] E.C.R. II-239 at [127] and Commission decision 94/599/EC [1994] OJ L239/14 Case IV/31.865.

[19] One of the wound-up companies had returned into legal existence once it was named as a defendant. It remained economically inactive and had no assets. See *City of Kajaani v Lemminkäinen Oyj* (judgment 13/64943) November 28, 2013 Helsinki District Court 285.

[20] For example, a distribution agreement may contain prohibited restrictions. Both parties are aware of the restrictions when they enter into the agreement.

[21] The state is a major purchaser of asphalt paving because of its duty to maintain public roads. It also operated its own asphalt paving unit which conducted some of that work.

[22] The state received no compensation for the period it was found to have known about the cartel but did not participate in it. Thus, the later participation was actually meaningless for the outcome. The Court found that the state could have prevented the cartel, and thus its own injury, by reporting the cartel.

[23] Cf. *European Commission v Otis NV* (C-199/11) [2013] 4 C.M.L.R. 4 at [69]–[70]. The CJEU accepted a distinction between the knowledge possessed by the different departments of the Commission. The Commission as a competition authority possessed certain confidential information. This was not found to put the Commission into an unfairly advantageous position as a claimant in antitrust damages proceedings when it was not shown that this information was known by the Commission as a damages claimant.

[24] On the one hand, it is problematic if part of a legal entity can first participate in an infringement and then another part can claim damages by pleading ignorance. On the other hand, it is likewise problematic if a few employees can completely forfeit their employer's right to damages by failing to act on information they receive.

[25] *Courage Ltd v Crehan* (C-453/99) [2001] E.C.R. I-6297 at [30]–[33].

[26] Finland's new Competition Act, which was not yet applicable in these cases, is based on objective commencement dates to prevent this uncertainty.

In the *Asphalt Cartel*, different limitation periods were applicable depending on which remedy was applied. The date when the limitation period began to run was when the claimant knew or should have known about the damage and the parties responsible for it. The Court found the limitation period began from the final infringement decision. The Court thus allowed potential claimants to wait for a high degree of certainty concerning the cause of action before requiring them to act.

Another possibility would have been to begin the limitation period from the date of the FCCA's fining proposal. However, the District Court considered, inter alia, that since the FCCA is a party to a dispute in the public enforcement proceedings, its claims concerning the infringement did not constitute sufficient grounds to begin the limitation period.

The District Court adopted a similar interpretation in the *Car Spare Parts Cartel*. The limitation period only began from the Supreme Administrative Court's final infringement decision despite the claimant itself reporting the infringement to the FCCA and one of the defendants having later admitted the infringement when it applied for leniency.

In the *Hydrogen Peroxide Cartel*, the District Court ruled that the limitation period began from the date of the Commission's infringement decision. The infringement decision was not published until later but the Commission published a press release concerning the decision and the fined parties. The District Court's reasoning differs from the two abovementioned cases since the Commission's decision was not final. A differentiating factor may have been that the Commission can both find an infringement and impose a fine while the FCCA cannot.

In the *Timber Cartel*, the District Court found that the limitation period began from the FCCA's first press release where the FCCA stated that a leniency applicant had provided information, and named the suspected infringers. The claims of the hundreds of private forest owners were thus time-barred.

It seems impossible to reconcile all the different interpretations with each other, even taking into account factual differences between the cases. Especially the *Car Spare Parts Cartel* and *Timber Cartel* both included leniency applicants and FCCA press releases. Despite this, the difference in the beginning of the limitation periods could hardly have been greater, ranging from the FCCA's first press release to the Supreme Administrative Court's final infringement decision.

The District Court's decisions in the *Asphalt Cartel* and *Car Spare Parts Cartel* are in line with the Damages Directive in that they give particular significance to the final infringement decision. The Damages Directive requires that the limitation period cannot expire sooner than one year after the final infringement decision.[27]

9. Interest can increase awards significantly

Antitrust damages cases often involve long time periods. The availability of interest from an early point in time can have significant impact on the total amount of a monetary award.

The proposed Damages Directive originally included a provision requiring the payment of interest from the time the harm occurred. The Damages Directive now only refers to payment of interest without further qualifications.[28] However, the recitals stress that interest should be paid from the time the harm occurred.[29] The basis for the Commission's interest interpretation is *Manfredi*[30] referring to *Marshall*.[31, 32] Interestingly, in *Marshall* the CJEU did not actually require payment of interest from the time the harm occurred if the national rules did not allow for it. Against this background, the Commission's interpretation seems perhaps overconfident. Nonetheless, the Commission's position has now been included in the recitals of the Damages Directive.

In the *Asphalt Cartel*, the District Court awarded two types of interest. Compensatory interest accrued from the time the harm occurred until the claims were lodged. The interest rate was the European Central Bank's (ECB) reference rate. Overdue interest accrued from the time the claims were lodged until actual repayment. The interest rate was the ECB's reference rate plus 7 percentage points. On average, interest increased the awarded sums by about 50 per cent.

The *Asphalt Cartel* judgment indicates that Finnish interest rules are compatible with the original form of the proposed Damages Directive and go further than the adopted Damages Directive. The average 50 per cent increase on the awarded amounts seems like significant additional deterrence.[33] However, from the first overcharges in 1994 to the District Court's judgment in 2013, Finland's consumer price index rose by 37 per cent, eroding much of the real value of the increased award.[34]

One of the problems with a late starting point for interest is that it effectively turns the overcharge into an interest-free involuntary loan from the customer to the

[27] Article 10(4).
[28] Article 2(2).
[29] Recital 12. The recital also notes that national rules can be used to determine whether the effluxion of time is taken into account separately as interest or as a constituent part of actual loss or loss of profit.
[30] *Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04) [2006] E.C.R. I-6619 at [97].
[31] *Marshall v Southampton and South West Hampshire AHA* (C-271/91) [1993] E.C.R. I-4367 at [31].
[32] For example, Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, C(2013) 3440, June 11, 2013, para.6.
[33] For its overall effects in the *Asphalt Cartel* case, see John Connor and Toni Kalliokoski, "The Finnish Asphalt Cartel Court Decision On Damages: An Important EU Precedent And Victory For Plaintiffs" CPI Antitrust Chronicle February 26, 2014, pp.6–8.
[34] Pre-judgment interest could provide a "European way" to increase deterrence instead of a damages multiplier as in the US. For an analysis of the effects of different interest options, see Eckart Bueren, Kai Hüschelrath and Tobias Veith, "Time is Money — How Much Money is Time? Interest and Inflation in Competition Law Actions for Damages" ZEW, Centre for European Economic Research Discussion Paper No.14-008.

infringer. Furthermore, this "loan" does not have to be repaid unless the infringement is discovered and the customer successfully sues for repayment. If the infringer can meanwhile put the overcharge into productive use, the proceeds could far surpass the interest rate payable in an eventual payback scenario. From this point of view, an early rather than late accrual date seems preferable.[35]

If Member States adopt very different positions on the accrual date and the interest rate, it will provide powerful incentives for forum shopping.[36]

10. Other interesting developments

Despite the increase in private enforcement, claimants often feel uncertain about the probability of obtaining compensation, and fear legal costs related to long proceedings. One solution to this uncertainty is the business model adopted by CDC[37] which has created controversy in Germany. The main point of contention in Germany is that CDC assigns the damages claims to a minimally-funded special purpose vehicle which enables CDC to avoid paying the other side's costs if CDC were to lose with costs.

The Finnish branch of CDC's *Hydrogen Peroxide Cartel* damages litigation also involved issues regarding assignability of claims. In an interim judgment, the District Court did not invalidate the assignments to CDC, and allowed the case to proceed.[38] Should some national courts accept CDC's business model and some reject it, this will raise another forum shopping dilemma not addressed in the Damages Directive.

Another issue encountered in the Finnish branch of CDC's *Hydrogen Peroxide Cartel* damages litigation concerned the effect of arbitration clauses on antitrust damages litigation. Commercial contracts commonly contain arbitration clauses whose wide applicability would seem to direct antitrust damages claims as well as other types of disputes into arbitral proceedings. The hydrogen peroxide supply agreements that were alleged to contain an overcharge also included different sorts of arbitration clauses.

The District Court considered itself competent to hear the case despite the arbitration clauses. It reasoned that when the parties agreed on the arbitration clauses, they did not intend to settle antitrust damages claims in arbitration. Furthermore, the District Court considered that the antitrust damages claims we not based on the terms and conditions agreed in the hydrogen peroxide supply agreements or breaches thereof but on the overcharge caused by the cartel agreement.

This interpretation adds even more uncertainty to antitrust damages proceedings since parties can no longer rely on their arbitration clauses in all circumstances. For CDC's business model, this interpretation is a necessity because it relies on the possibility to bundle claims. This would be seriously compromised if instead of combined proceedings in a civil court it had to initiate numerous arbitral proceedings.

11. Conclusions

The four judgments reviewed in this article, especially the *Asphalt Cartel* judgment, contain important rulings concerning the interpretation of national and EU law in antitrust damages claims. The judgments provide an adequate foundation for antitrust damages in Finland. To obtain compensation, the claimant has to prove the fact of damage and causal connection. After that, it seems difficult for infringers to completely avoid liability. However, the contradictory judgments on time-barring serve to remind why the Damages Directive is necessary.

To a large extent, the judgments already comply with the requirements of the Damages Directive or go even further. From a Finnish perspective, the effects of the Damages Directive do not seem particularly dramatic as far as the points of law contained in these judgments were concerned. Even where the judgments went further, such as awarding interest from the time the harm occurred, there is little sign of the type of overcompensation or overdeterrence that is commonly associated with antitrust damages.

As regards the future, perhaps the most significant part of the judgments was the District Court's statement in the *Asphalt Cartel* that the public and private enforcement of EU competition law form one enforcement system with shared objectives. This stance was to a large extent based on the CJEU's antitrust damages case law. First, this shows that the Court recognised the often complex interaction between EU and national law that forms the basis of antitrust damages for infringements of EU competition law. Secondly, the Court acknowledged the need to create a system of enforcement that balances both public and private enforcement. This outlook found its most significant expression in the Court's new interpretation on economic succession, applying it also to antitrust damages.

Like the Damages Directive, these judgments provide the first glimpses of what is to come, yet the final shape of private enforcement remains open in Finland like in most other Member States.

[35] It could even be argued that since the infringer knew all along that the overcharge was not legally his, he was overdue from the beginning, and liable to pay overdue interest.
[36] See fn.34 above.
[37] See fn.3 above.
[38] *CDC Hydrogen Peroxide Cartel Damage Claims SA v Kemira Oyj* (interim judgment 36492) July 4, 2013 Helsinki District Court 61–65.