

Case C-450/19

Request for a preliminary ruling

Date lodged:

13 June 2019

Referring court:

Korkein hallinto-oikeus (Finland)

Date of the decision to refer:

10 June 2019

Appellant:

Kilpailu- ja kuluttajavirasto

INTERLOCUTORY ORDER OF THE KORKEIN HALLINTO-OIKEUS

Date of the order

10 June 2019

... [not translated]

Subject matter Reference to the Court of Justice for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (TFEU)

Appellant Kilpailu- ja kuluttajavirasto

Contested decision

Markkinaoikeus (Market Court, Finland), 30 March 2016 ... [not translated]

Issue

1. The issue to be resolved in the competition case pending before the Korkein hallinto-oikeus (Supreme Administrative Court) is whether the Kilpailu- ja

kuluttajavirasto (competition and consumer protection authority) submitted an application for an administrative penalty with the Markkinaoikeus (Market Court) within the time limit. The decisive question for the assessment in this case is up until what point in time the continuance of a single infringement of the competition rules by the competitors can be assumed.

2. Several circumstances have a bearing on the assessment of the duration of the competition infringement in the case pending before the Supreme Administrative Court. When it was handling the case, the competition and consumer protection authority presented four different points in time up until which the continuation of a competition infringement could be assumed at the least. This request for a preliminary ruling concerns the question of up until what point in time the economic effects and the continuance of a competition infringement can be assumed in a situation in which one of two participants in a cartel entered into a construction contract as agreed in the cartel with a player outside the cartel if the works are completed for instance two and a half years after the construction contract is entered into and payments arising from that contract are still being made even after the works have been completed. The works in question relate to a 400 kV high-voltage power line constructed between Keminmaa and Petäjäskoski in Northern Finland, in the call for competition for which the contract was awarded to one of the participants in the cartel, Eltel Networks Oy. The question referred in the case, which is set out below, relates to the system of competition established by Article 101 of the Treaty on the Functioning of the European Union (TFEU). The request for a preliminary ruling does not [Or. 2] deal with questions of evidence that are otherwise related to the assessment of the contract under competition law.

Subject matter of the proceedings and relevant facts

3. In an application to impose a fine submitted to the Market Court on 31 October 2014, the competition and consumer protection authority (hereinafter also referred to as: authority) requested that the court jointly and severally impose a fine of EUR 35 000 000 on Eltel Networks Oy and Eltel Group Oy (hereinafter referred to jointly as: Eltel).
4. According to the authority's application to impose a fine, Eltel Networks Oy and Eltel Group Oy infringed Paragraph 4 of the Laki kilpailunrajoituksista (480/1992¹, Law prohibiting restraints of competition No 480/1992) and Article 101 TFEU by entering into agreements regarding prices, profit margins and the allocation of design or construction works relating to high-voltage power lines for power transmission in Finland. According to the application to impose a fine, the competitors' single infringement of the competition rules materialised in several meetings of representatives of the competing companies, in which estimates for future contracts for high-voltage power lines drawn up in tabular

¹ <https://www.finlex.fi/fi/laki/alkup/1992/19920480>

form, prices for those lines, profits to be achieved from them, and — with regard to some of the works — the question of which of the two competitors would execute the high-voltage power line project were discussed and, at times, further developed together. According to the application to impose a fine, this prohibited form of cooperation between the competitors started in October 2004 at the latest and continued uninterrupted until at least March 2011. According to the application to impose a fine, the cartel encompassed the whole of Finland and was capable of affecting trade between Member States of the European Union in the manner referred to in Article 101(1) TFEU.

5. Empower Oy, one of the two cartel participants, submitted a leniency application to the authority on 31 January 2013, on the basis of which the authority launched an investigation into the cooperation described in the application to impose a fine. Based on the leniency application, the authority granted the aforementioned company lenient treatment on 31 October 2014, by way of which the company was exempted from all sanctions.
6. The customers in the case of works on high-voltage power lines are the main grid operator and the regional grid operators. According to the application to impose a fine, electricity grid activity in Finland is a monopoly, as the construction of overlapping electricity grids is not economically viable. The largest contracting entity for works on high-voltage power lines is Fingrid Oyj, which owns the main network which is used in main energy transmission in Finland, and for the development of which it is responsible and the customers of which include electricity utility companies, electricity producers, electricity consumers and electricity market players. Works relating to high-voltage power lines include design and construction. The term of contracts for the construction of high-voltage power lines is often long; this is also the case in the present dispute. **[Or. 3]**
7. By the contested decision of 30 March 2016, the Market Court rejected the application to impose a fine because the matter had become time-barred.
8. According to the decision of the Market Court, based on Paragraph 22 of the Law prohibiting restraints of competition (as amended by Amending Law No 318/2004),² a fine cannot be imposed for, inter alia, an infringement of Paragraph 4 of that law or Article 101 TFEU if the application is not submitted to the Market Court within five years from the point at which the restraint of competition ended or the authority became aware of the restraint of competition. The Market Court took the view that, based on the aforementioned provisions, a fine cannot be imposed on Eltel on the basis of the application to impose a fine of 31 October 2014 if it is assumed that the company had ceased the restraint of competition by 31 October 2009.
9. In its decision, the Market Court also took the view that it was not possible to conclude from the documents submitted by the authority that the alleged

² <https://www.finlex.fi/fi/laki/alkup/2004/20040318>

infringement continued in whatever form until 31 October 2009 or an even later point in time. The court rejected the application to impose a fine on the grounds that the application had been submitted after the expiry of the time limit governed in Paragraph 22 of the Law prohibiting restraints of competition.

10. The competition and consumer protection authority brought an appeal against the decision of the Market Court before the Supreme Administrative Court and requested that the decision of the court be annulled and a fine of EUR 35 000 000 be imposed on Eltel. The authority takes the view that it had provided sufficient evidence of a continuance of the restraint of competition and the application to impose a fine had therefore been submitted within the time limit.
11. With regard to the request for a preliminary ruling, in its appeal the authority argued, as evidence of the continuance of the restraint of competition, that Eltel entered into agreements with its competitor Empower regarding the pricing in the companies' tenders in the tendering procedure for the construction contract for the 400 kV Keminmaa-Petäjaskoski high-voltage power line and that the prohibited cooperation regarding the aforementioned contract continued until 12 November 2009 at the earliest. Together with the other articles of evidence submitted by it, this meant that the decision of the Market Court to reject the application to impose a fine was erroneous.
12. In its contested decision, the Market Court assessed the facts of the case to the effect that, even if the separate design work that preceded the Keminmaa-Petäjaskoski construction contract had fallen within the sphere of the cartel, the latter did not nevertheless extend to the subsequent construction contract relating to the same high-voltage power line project. The design work ended in January 2007. [Or. 4]
13. Fingrid Oyj called on the players in the sector to submit tenders for the Keminmaa-Petäjaskoski construction work by way of its English-language invitation to tender of 16 April 2007. According to the invitation, the fixed-price tenders had to be submitted by 5 June 2007. 12 November 2009 was specified as the deadline for the completion of the works in the invitation to tender.
14. Eltel submitted a tender for the construction project on 4 June 2007. It was stated in that tender that the project would be completed in full and handed over to the customer by 12 November 2009 at the latest.
15. For its tender, Eltel was awarded the contract in the aforementioned tendering procedure. According to the documents submitted in the case, the construction contract entered into between Eltel and Fingrid Oyj in relation to the construction project in question was signed on 19 June 2007, the works were completed on 12 November 2009 and the last instalment for the works was paid on 7 January 2010.
16. In relation to the present request for a preliminary ruling, the decisive question for assessing the duration of the restraint of competition is up until what point in time

a continuance of the economic effects of the alleged cartel and of the unlawful price fixing can be assumed for a construction project of a longer duration than that described above.

National legislation and relevant national case-law

17. Pursuant to Paragraph 1a of the Law prohibiting restraints of competition, as amended by Amending Law No 318/2004,³ which is applicable in the present case, the provisions of Articles 81 and 82 of the Treaty establishing the European Community (TEC), now Articles 101 and 102 TFEU, are to be applied if the restraint of competition is capable of affecting trade between Member States of the European Community.
18. Pursuant to Paragraph 4(1) of the Law prohibiting restraints of competition, as amended by Amending Law No 318/2004, agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the appreciable prevention, restriction or distortion of competition are prohibited. Pursuant to point 1 of Paragraph 4(2), agreements, decisions or practices which directly or indirectly fix purchase or selling prices or any other trading conditions or share markets or sources of supply pursuant to point 3 of the same subparagraph are prohibited in particular.
19. In the *travaux préparatoires* for the Law prohibiting restraints of competition ... [not translated], in relation to Paragraph 4 of the law it is stated, inter alia, that the paragraph also covers the prohibition of bid-rigging cartels. [Or. 5]
20. Pursuant to Paragraph 22 of the Law prohibiting restraints of competition, as amended by Amending Law No 318/2004, a fine cannot be imposed for, inter alia, an infringement of Paragraph 4 of the law or Article 101 TFEU if the application is not submitted to the Market Court within five years from the point at which the restraint of competition ended or the authority became aware of the restraint of competition. It is clear from the specific justifications relating to Paragraph 22 in the Government bill for the Law prohibiting restraints of competition ... [not translated] that the five-year limitation period should be the same as the one applicable in EU law.
21. In its decisions recorded in the official collection (KHO 2009:83 and KHO 2013:8), the Supreme Administrative Court stated that it is to be assumed that, in the case of a single infringement of the competition rules, the five-year limitation period provided for in Paragraph 22 of the Law prohibiting restraints of competition begins, at the earliest, when the most recent action connected with that single process has ended.

³ <https://www.finlex.fi/fi/laki/alkup/2004/20040318>

22. However, the Supreme Administrative Court was not obliged to decide how the duration and cessation of a restraint of competition is to be assessed in a situation in which a cartel participant has entered into a construction contract as agreed in the cartel with a player outside the cartel if the works are not completed until years after the construction contract is entered into and payments arising from that contract are still being made even after the works have been completed.

Relevant provisions of EU law

23. Pursuant to Article 101(1) TFEU, the following are prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices of under which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. These are, in particular, agreements, decisions and practices which, pursuant to point (a) of the aforementioned provision, directly or indirectly fix purchase or selling prices or any other trading conditions or which, pursuant to point (c), share markets or sources of supply.
24. It is clear from Article 25(1)(b) of Council Regulation (EC) No 1/2003 (OJ 2003 L 1, p. 1) of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty that the limitation period for the imposition of penalties in the case of competition infringements of the type alleged here is five years. Paragraph 2 of the aforementioned article provides that the time begins to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time begins to run on the day on which the infringement ceases. **[Or. 6]**
25. In the case-law of the Court of Justice, it has already been regarded as sufficient, in Case C-51/75, *EMI Records*, ECLI:EU:C:1976:85, that, in a case in which agreements are no longer in force, such agreements continue to produce their effects after they have formally ceased to be in force. According to the judgment, it is assumed that an agreement between undertakings is only regarded as continuing to produce its effects if from the behaviour of the persons concerned there may be inferred the existence of elements of concerted practice and of coordination peculiar to the agreement and producing the same result as that envisaged by the agreement (paragraphs 30 and 31 of the judgment).
26. In its judgment in Case C-70/12 P, *Quinn Barlo and Others v Commission*, ECLI:EU:C:2013:351, the Court of Justice stated that, in relation to the duration of an infringement, it is settled case-law that the system of competition established by Articles 101 and 102 TFEU is concerned with the economic effects of agreements, or of any comparable form of concertation or coordination, rather than with their legal form. With regard to agreements between undertakings which are no longer in force, it is sufficient, for Article 101 TFEU to be applicable, that they continue to produce their effects after they have formally ceased to be in

force. It follows that the duration of an infringement may be assessed by reference to the period during which the undertakings that committed the infringement engaged in conduct prohibited by that article. It can therefore be found that there was an infringement, for example, throughout the whole period in which the unlawful prices were applied (paragraph 40 of the judgment, in which reference is also made to the aforementioned judgement in the *EMI Records* case and the judgment in Case C-243/83, *Binon* ECLI:EU:C:1985:284).

27. The duration of an infringement has also been dealt with in the case-law of the General Court (c.f., inter alia, judgments in Joined Cases T-147/09 and T-148/09, *Trelleborg Industrie v Commission*, ECLI:EU:T:2013:259, paragraph 68, and in Case T-449/14, *Nexans France and Nexans v Commission*, ECLI:EU:T:2018:456, paragraph 129).

Summary of the essential arguments of the parties

28. The competition and consumer protection authority, which brought an appeal before the Supreme Administrative Court, asserted that its application to impose a fine of 31 October 2014 had been submitted to the Market Court within the prescribed five-year time limit. The authority based its view on the grounds that up until 7 January 2010, [Or. 7] when Fingrid Oyj paid the final instalment for the construction works, the aforementioned construction contract relating to the Keminmaa-Petäjäsoski construction project had been in force and the unlawful pricing had been applied. Alternatively, the restraint of competition had ended even earlier, on 12 November 2009, when the construction works were completed. According to the authority, the cartel had the economic effects on the market referred to in the case-law of the Court of Justice up until the aforementioned points in time, and Fingrid Oyj suffered damage as a customer owing to the cartel price paid by it.
29. The authority also argued that the effects of the contract of a cartel participant that was awarded the contract were very concrete and long-lasting for the party paying the price agreed in the cartel, as the payments would be made over several years, in accordance with the progress of the project. In each year in which the customer paid instalments for the construction project coordinated in the cartel, the harmful effects of the contract for the year in question were directly reflected in the costs of the activity of the customer of the member of the cartel and therefore also in the economic result and, furthermore, in the activity of the customer company on the market. According to the authority, as Fingrid Oyj paid an excessive price for the works, the increased costs would have also impacted on the customer prices of the grid operator, that is to say on the prices paid by the electricity consumers for the transfer of electricity.
30. The view taken by the competition and consumer protection authority would mean that, on those grounds alone, the authority's application to impose a fine had been submitted within the five-year period.

31. Eltel for its part contested, with the grounds submitted by it in connection with the assessment of evidence, that Eltel and Empower entered into agreements regarding the Keminmaa-Petäjäsoski construction works. Eltel also asserted that the duration of the competition infringement was to be assessed by reference to the period during which the undertakings that committed the infringement engaged in the prohibited conduct. It could therefore be assumed that the limitation period for works tendered in competitive bidding procedures began at the point at which the tender was submitted. Eltel submitted its tender for the construction contract in question on 4 June 2007.
32. According to Eltel, in cases where the price can still be negotiated after the tender has been submitted, the limitation period alternatively begins when the final contract for the project concerned was entered into. In the present case, Fingrid Oyj and Eltel entered into a contract relating to the construction works on 19 June 2007. According to Eltel, the price that was tendered or agreed in the contract no longer had any effect on the market after the tender had been submitted or, at the latest, after the contract had been signed, even if the project in question continued or if instalments to be paid for the project were still being paid even after a number of years. According to Eltel, the question [Or. 8] of according to which timetable the works progressed or when payment was made for them did not affect competition on the market, because the agreed price no longer changed during these events. A different interpretation would lead to uncertain and unforeseeable results that were not connected with the restraint to competition, and this infringed the principle of legal certainty.
33. If one were to share the view taken by Eltel, this would mean that the application to impose a fine of the competition and consumer protection authority would not have been submitted until after the expiry of the period prescribed for that purpose, provided that, of the circumstances otherwise presented in the application to impose a fine, none that occurred at a subsequent point in time were of significance with regard to the decision in the case.

The need for the preliminary ruling

34. The Supreme Administrative Court is not aware that, in the case-law of the Court of Justice, a position has been taken on the determination of the economic effects of a competition infringement within the meaning of Article 101 TFEU and therefore also relating to the duration of that infringement in a situation in which a cartel participant entered into a construction contract as agreed in the cartel with a player outside the cartel if the works are completed several years after the contract is entered into and payments arising from that contract are still being made even after the works have been completed. The Supreme Administrative Court considers that a legal interpretation is required as to whether it can be assumed that a competition infringement continues up until the point at which the payment obligations arising from the contract for the works that falls within the sphere of the cartel have been discharged in their entirety or the project has been

completed — as would be in line with the view taken by the competition and consumer protection authority — or whether it has to be assumed that the infringement ceases and the limitation period begins when the tender for the works is submitted or the contract for the works is signed — as would be in line with the view taken by Eltel.

35. For the purpose of assessing the present case, the case-law of the Court of Justice does not appear to be entirely clear with regard to this central question of interpretation. Based on their wording, the statements of the Court of Justice in the aforementioned paragraph 40 of the *Quinn Barlo* judgment appear in themselves to support the view that the economic effects of a restraint of competition may continue for example throughout the whole period in which the unlawful prices were applied. The restraint of competition in question in the aforementioned judgment differs from the restraint of competition in the present case, however, and the judgment does not make it clear whether, when assessing the duration of the competition infringement and the limitation period of the application to impose a fine, significance can be attached to the completion of the works under the construction contract and the circumstance of how long payments for the works as agreed in the cartel are made to the parties to the construction contract. **[Or. 9]**
36. It can be inferred from the case-law of the Court of Justice that it is the economic effects of the anti-competitive practices rather than their legal form that are of central importance when assessing the duration of a competition infringement. According to the case-law, the economic effects of a restraint of competition that infringes Article 101 TFEU can continue to have an effect even if the complex infringement of competition rules which is to be regarded as a single process in the relationship between the competitors has already formally ended. The Supreme Administrative Court takes the view that it could be argued that this supports the conclusion that a competition infringement in the form of a bid-rigging cartel always continues until the point at which the contracting party harmed by the cartel has paid the unlawful price agreed in the cartel in full, as the construction project coordinated with regard to the price in the cartel has economic effects on the activity of the contracting party of the cartel member for that entire period.
37. On the other hand, it could also be argued that the case-law indirectly supports the view put forward by Eltel that, in the case of works tendered in competitive bidding procedures, the application of the prices or the effects thereof on competition continue until the tender is submitted or the final contract is entered into. After that time, the price in the tender or contract would no longer have any effect on the market, even if the project itself is still under way.
38. The present case concerns the economic effects and the duration of an alleged competition infringement. It is not a case concerning claims for damages, for which, regarding the beginning of the limitation period, the point at which the contract is entered into is regarded as the significant time of causation according

to the national case-law (KKO 2016:11), and not the time of payment of the purchase price under the contract.

39. Since, as far as the Supreme Administrative Court is aware, the case-law of the Court of Justice does not contain any judgments in which a position has been taken on the limitation period for a competition infringement in an alleged cartel case which, as in the present case, is based on prohibited tender collusion, it is necessary to obtain a preliminary ruling from the Court of Justice in this case. Even if circumstances other than those relating to this request for a preliminary ruling are also taken into consideration in a full assessment of the duration of the present restraint of competition, the position adopted by the Court of Justice on the question of interpretation will have a key impact on the legal evaluation of the duration and economic effects of the restraint of competition and therefore also on the decision as to whether the application to impose a fine of the competition and consumer protection authority was submitted within the time limit prescribed for that purpose.

... [not translated] **[Or. 10]**

Question referred

The Supreme Administrative Court has decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling pursuant to Article 267 TFEU:

Can the system of competition established by Article 101 of the Treaty on the Functioning of the European Union (TFEU) be interpreted to mean that, in a situation in which a cartel participant has entered into a construction contract as agreed in the cartel with a player outside the cartel, the competition infringement continues, due to the economic effects caused thereby, throughout the whole period in which contractual obligations arising from the contract are discharged or payments for the works are made to the contracting parties, that is to say up until the point at which the last instalment is paid for the works, or at least up until the point at which the works in question are completed;

or is it to be assumed that the competition infringement continues only until the point at which the company that committed the infringement has submitted a tender for the works concerned or entered into a contract for the execution of the works?

Once it has received a preliminary ruling on the question set out above from the Court of Justice, the Supreme Administrative Court will give a final decision in the case.

... [not translated] **[Or. 11]** ... [not translated]