

Supreme Court

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KKO:2019:90

Damages in a competition law matter

Diary number: S2016/953

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Facts and issue

A nationwide cartel in the asphalt market had been set up in Finland, with the participating companies agreeing on dividing up contracts, prices and tendering for contracts in asphalt works. The plaintiff city had entered into asphalt works contracts with a company participating in the cartel and incurred additional costs due to overpricing resulting from the cartel.

A Ltd, B Ltd and C Ltd had participated in the cartel. The companies had later been dissolved and their sole shareholders, V Ltd, X Ltd and Y Ltd, respectively, had acquired the subsidiaries' assets and continued their commercial activities.

The Finnish Competition Authority had proposed that fines be imposed on the asphalt companies for infringements of the domestic competition legislation and Article 81 EC (now Article 101 TFEU). The issue of fines was fully resolved by the Supreme Administrative Court of Finland, which imposed fines on V Ltd for its own conduct and that of A Ltd, on X Ltd for the conduct of B Ltd and on Y Ltd for the conduct of C Ltd. The Supreme Administrative Court noted in its ruling that the economic continuity test, for imposing a sanction for anticompetitive behaviour also on others than those directly engaged in prohibited conduct, had been established in the case-law of the European Court of Justice (ECJ) at least since 1975. Hence, this test was an essential and generally recognised element of EU competition law.

The plaintiff city brought an action before the District Court against V Ltd, X Ltd and Y Ltd, as well as against other cartel companies that had been fined, claiming that the companies be held jointly and severally liable for the additional cost which the city had to pay due to overpricing resulting from the cartel.

The District Court held that the principle of effectiveness of EU law required the application of the economic continuity test and ruled that V Ltd, X Ltd and Y Ltd were liable for the damage. The companies appealed to the Court of Appeal, which held that the principle of effectiveness cannot call into question the fundamental characteristics of the Finnish rules on civil liability. The economic continuity test applied in relation to the imposition of fines cannot be applied to actions for damages in the absence of more specific provisions. The Court of Appeal dismissed the plaintiff city's claims against the companies in question.

The issue before the Supreme Court was whether V Ltd was liable for the conduct of A Ltd, X Ltd liable for the conduct of B Ltd, and Y Ltd liable for the conduct of C Ltd, regarding the harm caused to the plaintiff city as a result of the cartel, when V Ltd, X Ltd and Y Ltd had acquired the shares of the companies participating in the cartel, dissolved the said companies and continued their commercial activities.

Applicable law

Domestic legislation did not contain provisions regarding the attribution of liability in cases where a company participating in a cartel and causing harm has later been dissolved and its commercial activities continued by another company.

The cartel in question had been liable to affect trade between Member States. Accordingly, the requirements of EU law were to be taken into account in the case. EU law did not contain specific provisions regarding the parties against whom a claim for damages can be filed for harm arising from an infringement of Article 101 TFEU.

The Supreme Court held that the earlier case-law of the ECJ did not make it clear how to determine the parties that are liable for the damage caused by an infringement of Article 101 TFEU. Accordingly, the Supreme Court made the following reference for a preliminary ruling to the ECJ:

"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 entities liable are to be determined directly on the basis of Article 101 TFEU, are the entities which fall within the concept of "undertaking" mentioned in that article those liable for compensation? When determining the entities liable for compensation, are the same principles to be applied as the Court of Justice has applied to determining the entities liable in cases concerning fines, in accordance with which liability may be founded, in particular, on belonging to the same economic unit or on economic continuity?"

The ECJ issued its preliminary ruling by judgment of 14 March 2019 in the case *Skanska Industrial Solutions et al.*, C-724/17, EU:C:2019:204, as follows:

"Article 101 TFEU must be interpreted as meaning that, in a case such as that in the main proceedings, in which all the shares in the companies which participated in a cartel prohibited by that article were acquired by other companies which have dissolved the former companies and continued their commercial activities, the acquiring companies may be held liable for the damage caused by the cartel in question."

Assessment by the Supreme Court

The Supreme Court held, on the basis of the preliminary ruling issued by the ECJ, that the party liable for compensation for the damage under EU competition law must be determined by reference to Article 101 TFEU and the concept of undertaking mentioned in that article. An undertaking, in turn, must be understood as designating an economic entity. Accordingly, in a restructuring situation where the infringing economic unit had been dissolved, a company acquiring the commercial activities of the dissolved company and continuing those activities may be held liable, under the economic continuity test, for the harm caused by anticompetitive behaviour.

As noted by the ECJ, the concept of undertaking in Article 101 TFEU cannot have a different scope with regard to the imposition of fines for anticompetitive behaviour, on one hand, as compared with actions for damages for an infringement of competition rules, on the other hand. The Supreme Court held that each parent company and its respective subsidiary were parts of the same economic entity where the commercial activities of the subsidiary participating in the cartel had been transferred to the parent company in a voluntary liquidation procedure. Later, the subsidiaries had been formally dissolved by their parent companies. The Supreme Court concluded that V Ltd was liable for the conduct of A Ltd, X Ltd liable for the conduct of B Ltd, and Y Ltd liable for the conduct of C Ltd, for the damage caused to the plaintiff city.

As the Court of Appeal had dismissed the plaintiff city's claim against V Ltd, X Ltd and Y Ltd based on economic continuity, the Court of Appeal had not ruled on the other conditions of liability nor on the amount of damages. The case was referred back to the Court of Appeal.

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