Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

14 January 2021 *

(Reference for a preliminary ruling – Competition – Article 101 TFEU – Agreements, decisions and concerted practices – Manipulation of the bidding procedure – Determination of the duration of the infringement period – Inclusion of the period during which the cartel members implemented the anticompetitive agreement – Economic effects of anticompetitive behaviour – Cessation of the infringement on the definitive award of the contract)

In Case C-450/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Korkein hallinto-oikeus (Supreme Administrative Court, Finland), made by decision of 10 June 2019, received at the Court on 13 June 2019, in the proceedings

Kilpailu- ja kuluttajavirasto

intervening parties:

Eltel Group Oy,

Eltel Networks Oy,

THE COURT (Second Chamber),

composed of A. Arabadjiev (Rapporteur), President of the Chamber, R. Silva de Lapuerta, Vice-President of the Court, acting as Judge of the Second Chamber, A. Kumin, T. von Danwitz and P.G. Xuereb, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Kilpailu- ja kuluttajavirasto, by J. Nyländen, J. Broms, K. Leivo and T. Mattila, acting as Agents,

* Language of the case: Finnish.

– Eltel Group Oy and Eltel Networks Oy, by T. Saraste, M. Joutsimo, C. Wik and A. Paanajärvi, asianajajat,

– the Finnish Government, by J. Heliskoski and A. Laine, acting as Agents,

– the German Government, by R. Kanitz and J. Möller, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by S. Fiorentino, avvocato dello Stato,

– the Latvian Government, by V. Soņeca, L. Juškeviča and K. Pommere, acting as Agents,

– the European Commission, by E. Paasivirta and G. Meessen and by L. Wildpanner, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 September 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 101 TFEU.

2 The request has been made in proceedings brought by the Kilpailu- ja kuluttajavirasto (Competition and Consumer Authority, Finland) concerning the lawfulness of the decision of the Markkinaoikeus (Market Court, Finland) to refuse its application to impose a fine on Eltel Group Oy and Eltel Networks Oy (together 'Eltel'), jointly and severally, for an infringement of Finnish and EU competition law.

Finnish law

3 Pursuant to Paragraph 22 of the kilpailunrajoituksista annettu laki 480/1992 (Law 480/1992 on restriction of competition), as amended by Law 318/2004 ('the Law on restriction of competition') a fine cannot be imposed, inter alia, for an infringement of Paragraph 4 thereof or Article 101 TFEU if the application to that effect is not submitted to the markkinaoikeus (Market Court) within five years from the point at which the restraint of competition ended or the Competition and Consumer Authority became aware of the restriction of competition.

The dispute in the main proceedings and the question referred for a preliminary ruling

4 On 16 April 2007, Fingrid Oyj, the company which owns and is responsible for the development of the high-voltage electricity transmission network, and the main customer for transmission facilities for this type of energy in Finland, published, for the attention of the operators in the sector, a call for tenders drafted in English, for the construction of a high-voltage (400 kV) transmission line between Keminmaa and Petäjäskoski ('the high-voltage line in question'). That call for tenders stated that the fixed-price tenders was to be submitted by 5 June 2007 at the latest. The deadline for the completion of the works was fixed in the invitation to tender as 12 November 2009.

5 On 4 June 2007, Eltel submitted its bid and subsequently won the contract.

6 On 19 June 2007, Eltel and Fingrid signed the contract for the construction work on the high-voltage line in question. The works were completed on 12 November 2009. Fingrid paid Eltel the last instalment of the price for those works on 7 January 2010.

7 On 31 January 2013, Empower Oy submitted a leniency application to the Competition and Consumer Authority, which led that authority to launch an investigation into the existence of an agreement between Empower Oy and Eltel.

8 On 31 October 2014, the Competition and Consumer Authority granted Empower leniency and the latter was exempted from all sanctions.

9 By decision of 31 October 2014, that authority submitted an application to the markkinaoikeus (Market Court) for the imposition of a fine of EUR 35 000 000 jointly and severally on Eltel Group and Eltel Networks, for infringement of Paragraph 4 of the Law on restriction of competition and Article 101 TFEU, for having reached an agreement with Empower on prices, margins and market sharing for the design and construction of electricity transmission lines in Finland.

10 According to that decision, the Competition and Consumer Authority also took the view that the infringement was a single and continuous infringement which was implemented in the course of several meetings of the representatives of Empower and Eltel, during which they discussed and sometimes developed, together, estimates presented in the form of tables on future public works contracts for electricity transmission lines, their prices, achievable margins and the allocation of certain contracts. That cartel came into being in October 2004 at the latest and continued uninterruptedly at least until March 2011. The infringement covered 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.

11 By decision of 30 March 2016, the markkinaoikeus (Market Court), dismissed the application for the fine, pursuant to Paragraph 22 of the Law on restriction of competition, taking the view that Eltel had ceased to participate in the restriction of competition before 31 October 2009 and, therefore, that the relevant infringement was time-barred when the application was submitted to it by the Competition and Consumer Authority on 31 October 2014. According to the markkinaoikeus, while the cartel had covered the design work preceding the construction works on the high-voltage line in question, which had been planned separately and was completed in January 2007, it had not covered the construction works on that high-voltage line.

12 The Competition and Consumer Authority brought an appeal against the decision of the markkinaoikeus (Market Court) before the Korkein hallinto-oikeus (Supreme Administrative Court, Finland) seeking to have that decision set aside and the imposition of the proposed fine on Eltel. That authority argues that its application for a fine was received by the markkinaoikeus (Market Court) within the five-year period provided for in Paragraph 22 of the Law on restriction of competition. Until 7 January 2010, the date on which Fingrid paid Eltel the final instalment of the price for the construction works on the high-voltage line in question, the contract binding those companies was still in force and the illegal pricing resulting from the cartel was applied. Alternatively, that authority submits that the restriction on competition had ended at the earliest on 12 November 2009, when the construction works were completed. According to the Competition and Consumer Authority, a works contract awarded to an undertaking participating in a cartel has very tangible and long-term effects for the co-contractor, which is

obliged pay a higher price than that which would have been paid in the absence of an agreement, since payment of that price is spread over several years as the project progresses. Therefore, each time an annual instalment is due for a portion of the work covered by the agreement, such a co-contractor suffers the harmful effects of the contract which directly impact its operating costs for the year in question and, consequently, its economic results and also, beyond that, its competitiveness on the relevant market. In the present case, as Fingrid paid a higher price for the construction of the high-voltage line in question than would have been the case in the absence of the cartel, that additional cost was also reflected in the electricity transmission price paid by the end users.

13 For reasons connected with the assessment of the evidence, Eltel denies the existence of any agreement between it and Empower relating to the high-voltage line in question. Furthermore, it argues that the duration of the infringement of the EU competition rules should be assessed by reference to the period in which the undertakings that committed the infringement engaged in the prohibited conduct. For works put out to tender, the limitation period begins to run from the date on which the tender is submitted, that is, in the present case, on 4 June 2007. In the alternative, Eltel submits that in cases in which the price can still be negotiated after the tender has been submitted, the limitation period begins to run when the definitive contract for the project concerned is signed, in the present case on 19 June 2007. After the submission of the tender or, at the latest, after the contract has been signed, the price proposed or agreed upon has no effect on the market, even if the execution of the project in question or the settlement of the related payment instalments is spread over several more years. Neither the rate of completion of the work nor the related payment schedule would have an impact on competition in the market concerned, as these factors would no longer affect the agreed price.

14 The national court considers that the Court has not yet given a ruling on the question of the determination of the economic effects of an infringement of Article 101 TFEU and the duration of that infringement in circumstances in which (i) a cartel participant has entered into a works contract with a third party at the price agreed upon in the cartel, (ii) the works are completed several years after the conclusion of that contract and, (iii) payment of the price is made in instalments, some of which are still being made after completion of the works.

15 It follows from the judgments of 15 June 1976, *EMI Records* (51/75, EU:C:1976:85), of 3 July 1985, *Binon* (243/83, EU:C:1985:284), and of 30 May 2013, *Quinn Barlo and Others* v. *Commission* (C-70/12 P, not published, EU:C:2013:351), that it is the economic effects of the anticompetitive conduct, and not its legal form, that are relevant for the assessment of its duration. The economic effects of a restriction of competition may continue even after the formal termination of a single and continuous infringement, for example, until the end of the period during which the collusive prices were in force.

16 According to the national court, that case-law supports the view that an infringement of Article 101 TFEU, such as that identified by the Competition and Consumer Authority in the main proceedings, continues until the contracting party adversely affected by the cartel has paid the full collusive price, as that price produces economic effects on its activity throughout the period of performance of the contract. However, the same case-law could also indirectly support the argument that the effects of the collusive price on competition continue until the date of submission of the tender or conclusion of the final contract, since the price no longer has any effect on the market after that date.

17 In those circumstances, the Korkein hallinto-oikeus (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Can the system of competition established by Article 101 [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?'

Consideration of the question referred

18 By its question, the national court seeks to ascertain, in substance, at what point in time the alleged participation of an undertaking in an infringement of Article 101(1) TFEU is regarded as having ended, which consists in the concerted submission, with its competitors, of a tender, when that undertaking has won the tender and has concluded a works contract with the contracting authority, the performance and payment of the price of which being staggered over time.

19 In that regard, according to the national court, in order to determine when the alleged participation of an undertaking in an infringement of Article 101(1) TFEU comes to an end, four points in time are possible: when that undertaking has submitted its tender, when the contract has been concluded, when payment of the last instalment of the agreed price has been made and when the work which is the subject matter of the contract has been completed.

20 Pursuant to Article 101(1) TFEU, the following are prohibited on the ground that they are incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices 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.

21 According to settled case-law of the Court, in order for there to be an 'agreement' within the meaning of Article 101(1) TFEU undertakings should have expressed their joint intention to conduct themselves on the market in a specific way. (see, to that effect, judgments of 15 July 1970, *ACF Chemiefarma* v *Commission*, 41/69, EU:C:1970:71, paragraph 112, and of 29 October 1980, *van Landewyck and Others* v *Commission*, 209/78 to 215/78 and 218/78, not published, EU:C:1980:248, paragraph 86).

22 The concept of a concerted practice within the meaning of Article 101(1) TFEU refers to a form of coordination between undertakings which, without being taken to the stage where an agreement properly so called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them (judgment of 26 January 2017, *Duravit and Others* v *Commission*, C-609/13 P, EU:C:2017:46, paragraph 70 and the case-law cited).

23 The criteria of coordination and cooperation which are constituent elements of a 'concerted practice' within the meaning of that provision must be understood in the light of the concept inherent in the provisions of the FEU Treaty relating to competition, to the effect that each economic operator must determine independently the policy which it intends to adopt on the internal market (judgment of 26 January 2017, *Duravit and Others* v *Commission*, C-609/13 P, EU:C:2017:46, paragraph 71).

24 In that regard, Article 101(1) TFEU precludes any direct or indirect contact between economic operators of such a kind as either to influence the conduct on the market of an actual or potential competitor or to reveal to such a competitor the conduct which the operator concerned has decided to follow itself or contemplates adopting on the market, where the object or effect of those contacts is to restrict competition (see, to that effect, judgment of 26 January 2017, *Duravit and Others* v *Commission*, C-609/13 P, EU:C:2017:46, paragraph 72).

25 Furthermore, according to settled case-law, agreements to share customers, like agreements on prices, clearly form part of the category of the most serious restrictions of competition (see, to that effect, judgment of 16 July 2015, *ING Pensii*, C-172/14, EU:C:2015:484, paragraph 32 and the case-law cited).

26 It should also be borne in mind that the concept of a 'single and continuous infringement', as recognised in the case-law of the Court of Justice, presupposes the existence of an 'overall plan' which consists of various acts, each of which has the identical object of distorting competition in the internal market, irrespective of the fact that one or more of those acts could also, in themselves and taken in isolation, constitute an infringement of Article 101 TFEU (judgment of 22 October 2020, *Silver Plastics and Johannes Reifenhäuser* v *Commission*, C-702/19 P, EU:C:2020:857, paragraph 81 and the case-law cited).

27 It is clear from the order for reference that the conduct of the undertakings concerned by the investigation of the Competition and Consumer Authority, as identified by the latter, consisted in the holding of meetings between representatives of those undertakings, at which they discussed and sometimes finalised, together, estimates presented in the form of tables on future public calls for tenders for the construction of electricity transmission lines, on their prices, on the margins achievable and on the distribution of those calls for tenders, as well as in the concerted submission of bids to those calls for tenders. That authority classified that conduct as a single and continuous infringement under Article 101(1) TFEU.

28 As regards Eltel's most recent conduct, which the Competition and Consumer Authority regards as falling within the scope of that infringement, it is apparent from the documents submitted to the Court that that authority took the view that, prior to the submission of bids in the call for tenders for the construction of the high-voltage line in question, which required each bidder to submit a fixed-price bid, Eltel had agreed with its competitor Empower on the amount of their respective tenders. Subsequently, those companies submitted their tenders and Eltel won the contract based on its bid. That bid remained in force until 19 June 2007, when a contract was concluded between Eltel and Fingrid at the price stated in the tender.

29 It follows from the considerations set out in paragraphs 20 to 26 of the present judgment that such conduct, if its existence is established, is, in principle, capable of constituting an infringement of Article 101(1) TFEU.

30 As regards the cessation of an undertaking's participation in such an infringement, according to settled case-law, the system of competition established by Articles 101 and 102 TFEU is concerned with the economic consequences of agreements, or of any comparable form of concertation or coordination, rather than with their legal form. Consequently, in the case of agreements which have ceased to be in force, it is sufficient, in order for Article 101 TFEU to apply, that they produce their effects beyond the date on which the unlawful contacts formally come to an end. It follows that the duration of an infringement may be assessed by reference to the period during which the undertakings concerned engaged in conduct prohibited by that article. For example, an infringement may last throughout the whole period in which the unlawful prices were applied, even though the agreement has already formally ceased to be in force. (see, to that effect, judgment of 30 May 2013, *Quinn Barlo and Others* v *Commission*, C-70/12 P, not published, EU:C:2013:351, paragraph 40 and the case-law cited).

31 In the present case, it is apparent from the order for reference, as set out in paragraph 28 of the present judgment, that the concerted bidding for the contract for the construction of the high-voltage line in question is Eltel's most recent conduct, which the Competition and Consumer Authority considers to be part of the single and continuous infringement of Article 101(1) TFEU. In addition, the national court states that, according to that authority, Eltel and Empower agreed on the prices of their respective bids and put that agreement into effect by submitting bids which were thus coordinated.

32 In those circumstances, subject to a final assessment by the referring court, in the light of all the relevant elements submitted to it, it must be held that the duration of Eltel's participation in the alleged infringement of Article 101(1) TFEU covers the entire period during which that undertaking implemented the anticompetitive agreement which it concluded with its competitors, including the period during which the fixed-price offer which that undertaking submitted was in force or could have been converted into a definitive contract between Eltel and Fingrid.

33 Contrary to the arguments of the Competition and Consumer Authority and the Governments of Finland, Germany and Latvia in their respective written observations, it cannot be held that Eltel's participation in the alleged infringement of Article 101(1) TFEU covers a period extending beyond the date on which the essential characteristics of the contract for the construction of the high-voltage line in question were finally determined and, in particular, the total amount to be paid for those works.

34 As the Advocate General observed, in substance, in points 33 to 35 of his Opinion, the objective pursued by the Union's competition rules, which are designed to protect not only the direct interests of competitors or consumers, but the structure of the relevant market and thus competition as such, set out in paragraph 38 of the judgment of 4 June 2009, *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343), requires that an infringement of Article 101(1) TFEU must be held to last as long as the restriction of competition resulting from the conduct concerned persists.

35 However, in the case of conduct prohibited by Article 101(1) TFEU, which consists in the manipulation of a tender procedure for the award of a public contract by means of the fixing by competitors of the price to be submitted for that tender and/or the award of the contract, the restrictive effects of the cartel on competition disappear, in principle, at the latest at the time when the essential characteristics of the contract, and in particular the overall price to be paid for the goods, works or services which are the subject of the contract, have been definitively

determined, where appropriate, by the conclusion of a contract between the successful tenderer and the contracting authority, as it is at that moment that the latter is definitively deprived of the opportunity to obtain the goods, works or services in question under normal market conditions. It is for the national court to ascertain the date on which the essential characteristics of the contract in question, and in particular the overall price to be paid for the construction work on the high-voltage line in question, were definitively determined.

36 That conclusion is not called into question by the argument put forward by the Competition and Consumer Authority and the Finnish, German and Latvian Governments in their respective written observations, that the harmful economic effects of the cartel on the price agreed in the contract between Eltel and Fingrid lasted until the final instalment of that price was paid, and that the cartel could have had harmful economic repercussions downstream, in particular in the form of higher electricity distribution tariffs to be paid by Fingrid's customers.

37 As the Advocate General observed, in substance, in point 39 of his Opinion, a distinction must be drawn between the restrictive effects of the cartel on competition, which consist in the exclusion of competing tenderers and/or the potential artificial restriction of the customer's choice, which deprives the contracting authority of the opportunity to obtain the agreed goods, works or services under competitive conditions, and the resulting wider adverse economic effects on other market players, on the basis of which such players, as the European Commission pointed out in its written observations, may seek redress before the national courts.

38 Moreover, the questions regarding the limitation period for such an action for damages, as well as of any action by the contracting authority to challenge the legality of the tender or to have the contract terminated, are legal questions distinct from those related to the date on which an infringement of the competition rules ended and the period during which a penalty for that infringement may be imposed before the limitation period expires.

39 The argument put forward by the Competition and Consumer Authority and by the Finnish and German Governments in their respective written observations, to the effect that adopting an infringement period which is too short, in a situation such as that at issue in the main proceedings, would be contrary to the obligation to give full effect to Article 101 TFEU, since a higher number of infringements would go unpunished as a result of the application of the limitation rules, must also be dismissed.

40 As the Advocate General observed, in substance, in points 45 and 46 of his Opinion, since Union law, in application of principles characteristic of a Union governed by the rule of law, recognises the principle that the actions available to the Commission and the national competition authorities, to prosecute and penalise infringements of Article 101 TFEU, are subject to limitation, the effective implementation of that provision cannot justify artificially extending the duration of the infringement period in order to allow its prosecution.

41 It follows from all of the foregoing considerations that the answer to the question referred is that Article 101(1) TFEU must be interpreted as meaning that, where an undertaking which has allegedly participated in a single and continuous infringement of that provision, the most recent constituent element of which consists in the concerted submission with its competitors of a tender for the award of a public works contract, has won the contract and concluded with the contracting authority a works contract determining the essential characteristics of that contract and, in particular, the overall price to be paid for those works, the performance and payment of the price for which are staggered over time, the infringement period corresponds to the period

up to the date of signature of the contract concluded between the undertaking and the contracting authority on the basis of the concerted bid submitted by that undertaking. It is for the national court to ascertain the date on which the essential characteristics of the relevant contract and, in particular, the total price to be paid for the work, have been definitively determined.

Costs

42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 101(1) TFEU must be interpreted as meaning that, where an undertaking which has allegedly participated in a single and continuous infringement of that provision, the most recent constituent element of which consists in the concerted submission with its competitors of a tender for the award of a public works contract, has won the contract and concluded with the contracting authority a works contract determining the essential characteristics of that contract and, in particular, the overall price to be paid for those works, the performance and payment of the price for which are staggered over time, the infringement period corresponds to the period up to the date of signature of the contract concluded between the undertaking and the contracting authority on the basis of the concerted bid submitted by that undertaking. It is for the national court to ascertain the date on which the essential characteristics of the relevant contract and, in particular, the total price to be paid for the work, have been definitively determined.

[Signatures]