JUDGMENT OF THE COURT (Second Chamber)

14 March 2019 (*)(i)

(Reference for a preliminary ruling — Competition — Article 101 TFEU — Compensation for the damage caused by a cartel prohibited by that article — Determination of the undertakings liable to provide compensation — Succession of legal entities — Concept of 'undertaking' — Economic continuity test)

In Case C-724/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Korkein oikeus (Supreme Court, Finland), made by decision of 19 December 2017, received at the Court on 22 December 2017, in the proceedings

Vantaan kaupunki

v

Skanska Industrial Solutions Oy,

NCC Industry Oy,

Asfaltmix 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, E. Levits, M. Berger and P.G. Xuereb, Judges,

Advocate General: N. Wahl,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 16 January 2019,

after considering the observations submitted on behalf of:

– Vantaan kaupunki, by N. Mickelsson and O. Hyvönen, asianajajat,

– Skanska Industrial Solutions Oy, by A.P. Mentula and T. Väätäinen, asianajajat,

– NCC Industry Oy, by I. Aalto-Setälä, M. Kokko, M. von Schrowe and H. Koivuniemi, asianajajat,

– Asfaltmix Oy, by S. Hiltunen, A. Laine and M. Blomfelt, asianajajat,

– the Finnish Government, by J. Heliskoski and S. Hartikainen, acting as Agents,

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

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by C. Vollrath, H. Leupold, G. Meessen and M. Huttunen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 February 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 101 TFEU and the principle of effectiveness of EU law with regard to the rules in Finnish law applicable to actions for damages in respect of infringements of EU competition law.

2 The request has been made in proceedings between Vantaan kaupunki (City of Vantaa, Finland) and Skanska Industrial Solutions Oy, NCC Industry Oy and Asfaltmix Oy concerning compensation for damage resulting from a cartel in the Finnish asphalt market.

Legal context

3 Pursuant to Paragraph 1 of Part 2 of the Vahingonkorvauslaki 412/1974 (Law 412/1974 on compensation) any person who deliberately or negligently causes damage to another is liable to pay compensation to the latter.

4 Under Paragraph 6(2) of that law, if the damage was caused by two or more persons, or if two or more persons are ordered to pay compensation for the same damage they are jointly and severally liable.

5 In accordance with Finnish Company law, every limited liability company is a separate legal person with its own property and its own liability.

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

6 Between 1994 and 2002 a cartel in the asphalt market was set up in Finland ('the cartel in question'). That cartel, which agreed on dividing up contracts, prices and tendering for contracts, covered the whole of that Member State and was also liable to affect trade between Member States. The aforementioned cartel included, among others, Lemminkäinen Oyj, Sata-Asfaltti Oy, Interasfaltti Oy, Asfalttineliö Oy and Asfaltti-Tekra Oy.

7 On 22 March 2000, Asfaltti-Tekra, which changed its name to Skanska Asfaltti Oy from 1 November 2000, acquired all the shares in Sata-Asfaltti. On 23 January 2002, the latter was wound up due to a voluntary liquidation procedure in the course of which its business was transferred to Skanska Asfaltti on 13 December 2000. Skanska Asfaltti also took part in the cartel in question. On 9 August 2017, that company changed its name to Skanska Industrial Solutions ('SIS').

8 Interasfaltti was a 100% owned subsidiary of Oy Läntinen Teollisuuskatu 15. On 31 October 2000, NCC Finland Oy acquired the shares in Läntinen Teollisuuskatu 15. On 30 September 2002, Interasfaltti was merged with Läntinen Teollisuuskatu 15 which, on that occasion, changed its name to Interasfaltti. On 1 January 2003, NCC Finland was split into three new companies. One of them, NCC Roads Oy, received the ownership of all the shares in Interasfaltti. On 31 December 2003, Interasfaltti was wound up following a voluntary liquidation procedure, pursuant to which its commercial activities were transferred to NCC Roads with effect from 1 February 2003. On 1 May 2016, that company changed its name to NCC Industry ('NCC').

9 On 20 June 2000, Siilin Sora Oy, which changed its name to Rudus Asfaltti Oy, with effect from 17 October 2000, acquired all the shares in Asfalttineliö. On 23 January 2002, Asfalttineliö was wound up following a voluntary insolvency procedure, pursuant to which its commercial activities were transferred to Rudus Asfaltti from 16 February 2001. On 10 January 2014, that company changed its name to Asfaltmix.

10 On 31 March 2004, the Kilpailuvirasto (Competition Authority, Finland) proposed that fines should be imposed on seven companies. By judgment of 29 September 2009, the Korkein hallinto-oikeus (Supreme Administrative Court, Finland), in accordance with the economic continuity test recognised by the case-law of the Court of Justice, imposed fines, inter alia, on SIS for its

own conduct and that of Sata-Asfaltti, on NCC for the conduct of Interasfalt, and on Asfaltmix for the conduct of Asfalttineliö.

11 On the basis of the judgment of the Korkein hallinto-oikeus (Supreme Administrative Court), the City of Vantaa, which had concluded agreements with Lemminkäinen for asphalt works for the years 1998 to 2001, brought an action for damages against, inter alia, SIS, NCC and Asfaltmix, on 2 December 2009, before the Käräjäoikeus (District Court, Finland), claiming that those three companies were jointly and severally liable for the additional costs which it had to pay for asphalt works due to overpricing resulting from the cartel in question. SIS, NCC and Asfaltmix claimed that they were not liable for the damage caused by the legally independent companies involved in the cartel in question, and argued that the claim for compensation should have been lodged in the liquidation proceedings of the latter companies.

12 The Käräjäoikeus (District Court) ordered SIS to pay damages on the basis of its own conduct and that of Sata-Asfaltti, NCC for the conduct of Interasfaltti and Asfaltmix for the conduct of Asfalttineliö. That court held that, in a situation such as that at issue in the main proceedings, it is practically impossible or unreasonably difficult for the party who has suffered damage as a result of an infringement of EU competition law to obtain compensation for the damage suffered as a result of that infringement under Finnish civil liability and company law. That court held that, in order to ensure the effectiveness of Article 101 TFEU, the economic continuity test must be applied to the determination of liability for damage in the same way as that for the imposition of fines.

13 On appeal, the Hovioikeus (Court of Appeal, Finland) held that the principle of effectiveness cannot call into question the fundamental characteristics of the Finnish rules on civil liability and that the economic continuity test applied in relation to the imposition of fines cannot be applied to actions for damages in the absence of detailed rules or more specific provisions. That court therefore dismissed the City of Vantaa's claims in so far as they were directed against SIS, on account of Sata-Asfaltti's conduct and NCC and Asfaltmix.

14 The City of Vantaa appealed to the Korkein oikeus (Supreme Court, Finland) against the judgment of the Hovioikeus (Court of Appeal).

15 The Korkein oikeus (Supreme Court) observes that Finnish law does not lay down rules on the attribution of liability for damage caused by an infringement of EU competition law in a situation such as that at issue in the main proceedings. The rules on civil liability in Finnish law are based on the principle that only the legal entity that caused the damage is liable. In the case of legal persons, it is possible to derogate from this basic rule by lifting the corporate veil. However, that approach is only possible if the operators

concerned used the group structure, the relationship between the companies or the shareholder's control in a reprehensible or artificial manner, resulting in the avoidance of legal liability.

16 The referring court observes that it is clear from the case-law of the Court that any person may claim compensation for damage resulting from an infringement of Article 101 TFEU if there is a causal link between that damage and the infringement and it is for the domestic legal order of each Member State to lay down the detailed rules for exercising that right.

17 However, it is not clear from that case-law whether persons who are required to provide compensation for such damage must be determined by direct application of Article 101 TFEU, or whether the detailed rules laid down by the domestic legal order of each Member State are applicable.

18 If the persons liable to provide compensation for damage resulting from an infringement of Article 101 TFEU are to be determined by direct application of that article, it is not clear to the referring court which persons may be held liable for the infringement of that article.

19 In that context, it is possible to establish the liability of the person infringing the competition rules or the liability of an 'undertaking', within the meaning of Article 101 TFEU. According to the case-law of the Court, when an undertaking consisting of several legal persons infringes the competition rules, it is for that undertaking to answer for the infringement, in accordance with the principle of personal liability. According to that case-law, liability for an infringement of Article 101 TFEU may be attributed to the entity which has continued the business of the entity responsible for the infringement in question, if the latter has ceased to exist.

20 According to the referring court, if the persons liable for the damage caused by an infringement of Article 101 TFEU are not to be determined by direct application of that article, that court must attribute liability for the damage caused by the cartel in question in accordance with the rules of Finnish law and the principle of effectiveness of EU law.

21 In that regard, the referring court asks whether that principle requires that liability for an infringement of EU competition law is to be attributed to the company which has acquired the share capital and business of a company which has been wound up and which participated in the cartel. The question then arises as to whether the principle of effectiveness precludes a national rule, such as that described in paragraph 15 of the present judgment, and, if so, whether it can be held that the company which continued the business of the company participating in the cartel is to be held liable only if the former

company knew or should have known, when it acquired the share capital of the latter company that the latter had committed such an infringement.

22 In those circumstances, the Korkein oikeus (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(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?

(3) If the entities liable are to be determined on the basis of national provisions of a Member State, are national rules under which a company which, after acquiring the entire share capital of a company which took part in a cartel contrary to Article 101 TFEU, dissolved the company in question and continued its activity is not liable for compensation for the damage caused by the anticompetitive conduct of the company in question, even though obtaining compensation from the dissolved company is impossible in practice or unreasonably difficult, contrary to the EU law requirement of effectiveness? Does the requirement of effectiveness preclude an interpretation of a Member State’s domestic law making it a condition of compensation for damage that a transformation of the kind described has been implemented unlawfully or artificially in order to avoid liability for compensation for damage under competition law or otherwise fraudulently, or at least that the company knew or ought to have known of the competition infringement when implementing the transformation?’

Consideration of the questions referred

23 By its first and second questions, which it is appropriate to examine together, the national court asks essentially whether Article 101 TFEU must be interpreted as meaning that, in a case such as that in the main proceedings, in which all the shares of the companies which have participated in a cartel prohibited by that article were acquired by other companies, which dissolved

the former companies and carried on their commercial activities, the acquiring companies may be held liable for the damage caused by that cartel.

24 In that regard, it should be noted that Article 101(1) and Article 102 TFEU produce direct legal effects in relations between individuals and directly create rights for individuals which national courts must protect (judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 20 and the case-law cited).

25 It is settled case-law that the full effectiveness of Article 101 TFEU and, in particular, the practical effect of the prohibition laid down in paragraph 1 of that provision would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition (judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 21 and the case-law cited).

26 Any person is thus entitled to claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 101 TFEU (judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 22 and the case-law cited).

27 It is true that in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an agreement or practice prohibited under Article 101 TFEU, provided that the principles of equivalence and effectiveness are observed (see, to that effect, judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 24 and the case-law cited).

28 However, as the Advocate General has pointed out in points 60 to 62 of his Opinion, the determination of the entity which is required to provide compensation for damage caused by an infringement of Article 101 TFEU is directly governed by EU law.

29 It is clear from the wording of Article 101(1) TFEU that the authors of the Treaties chose to use the concept of an ‘undertaking’ to designate the perpetrator of an infringement of the prohibition laid down in that provision (see, to that effect, judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314, paragraph 46).

30 Furthermore, it is settled case-law that EU competition law refers to the activities of undertakings (see, to that effect, judgments of 11 December 2007, *ETI and Others*, C-280/06, EU:C:2007:775, paragraph 38 and the case-law cited, and of 18 December 2014, *Commission* v *Parker Hannifin*

Manufacturing and Parker-Hannifin, C-434/13 P, EU:C:2014:2456, paragraph 39 and the case-law cited).

31 Since the liability for damage caused by infringements of EU competition rules is personal in nature, the undertaking which infringes those rules must answer for the damage caused by the infringement.

32 It follows from the foregoing consideration that the entities which are required to compensate for the damage caused by a cartel or practice prohibited by Article 101 TFEU are the undertakings, within the meaning of that provision, which have participated in that cartel or that practice.

33 That interpretation is not called into question by the European Commission's argument put forward at the hearing that it is clear from Article 11(1) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 (OJ 2014 L 349, p. 1), according to which Member States are to ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law, that it is for the legal system of each Member State to determine, in accordance with the principles of equivalence and effectiveness, the entity which is to compensate for that damage.

34 That provision of Directive 2014/104, which, moreover, does not apply *ratione temporis* to the facts of the case in the main proceedings, does not apply to the definition of entities which are required to compensate for such damage, but to the attribution of liability between those entities and, thus, does not confer on the Member States the power to carry out that determination.

35 To the contrary, that provisions confirms, like Article 1 of Directive 2014/104, entitled 'Subject matter, scope and definitions', in paragraph 1, first sentence thereof, that those responsible for damage caused by an infringement of EU competition law are specifically the 'undertakings' which committed that infringement.

36 That being said, it must be recalled that the concept of an 'undertaking', within the meaning of Article 101 TFEU covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed (judgment of 11 December 2007, *ETI and Others*, C-280/06, EU:C:2007:775, paragraph 38 and the case-law cited).

37 That concept, placed in that context, must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314, paragraph 48 and the case-law cited).

38 As regards the restructuring of an undertaking, such as that at issue in the main proceedings, in which the entity which committed the infringement of EU competition law has ceased to exist, it must be recalled that, when an entity that has committed an infringement of the competition rules is subject to a legal or organisational change, this change does not necessarily create a new undertaking free of liability for the conduct of its predecessor that infringed the competition rules, when, from an economic point of view, the two are identical (see, to that effect, judgments of 11 December 2007, *ETI and Others*, C-280/06, EU:C:2007:775, paragraph 42; of 5 December 2013, *SNIA* v *Commission*, C-448/11 P, not published, EU:C:2013:801, paragraph 22; and of 18 December 2014, *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraph 40).

39 It is therefore not contrary to the principle of individual liability to impute liability for an infringement to a company which has taken over the company which committed the infringement where the latter has ceased to exist (judgment of 5 December 2013, *SNIA* v *Commission*, C-448/11 P, not published, EU:C:2013:801, paragraph 23 and the case-law cited).

40 Furthermore, the Court has stated that, for the effective implementation of the EU competition rules, it may be necessary to consider that the purchaser of the offending undertaking is liable for the infringement of those rules if that offending undertaking ceases to exist by reason of the fact that it has been taken over by the purchaser, which as the acquiring company, takes over its assets and liabilities, including its liability for breaches of EU law (judgment of 5 December 2013, *SNIA* v *Commission*, C-448/11 P, not published, EU:C:2013:801, paragraph 25)

41 In that connection, Asfaltmix argues, in essence, that the case-law cited in paragraphs 36 to 40 of this judgment has been developed in a context in which the Commission imposes fines for the implementation of Article 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1), that case-law is not applicable to an action for damages such as that at issue in the main proceedings.

42 That argument cannot be accepted.

43 As stated in paragraph 25 of this judgment, the right to claim compensation for damage caused by an agreement or conduct prohibited by Article 101 TFEU ensures the full effectiveness of that article and, in particular, the effectiveness of the prohibition laid down in paragraph 1 thereof.

44 That right strengthens the working of the EU competition rules, since it discourages agreements or practices, frequently covert, which are liable to restrict or distort competition, thereby making a significant contribution to the maintenance of effective competition in the European Union (judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 23 and the case-law cited).

45 As the Advocate General stated essentially, in point 80 of his Opinion, actions for damages for infringement of EU competition rules are an integral part of the system for enforcement of those rules, which are intended to punish anticompetitive behaviour on the part of undertakings and to deter them from engaging in such conduct.

46 Therefore, if the undertakings responsible for damage caused by infringement of the EU competition rules could escape liability by simply changing their identity through restructurings, sales or other legal or organisational changes, the objective pursued by that system and the effectiveness of those rules would be jeopardised (see, by analogy, judgment of 11 December 2007, *ETI and Others*, C-280/06, EU:C:2007:775, paragraph 41 and the case-law cited).

47 It follows that the concept of 'undertaking', within the meaning of Article 101 TFEU, which constitutes an autonomous concept of EU law, cannot have a different scope with regard to the imposition of fines by the Commission under Article 23(2) of Regulation No 1/2003 as compared with actions for damages for infringement of EU competition rules.

48 In the case in the main proceedings, it is apparent from the information provided by the referring court that SIS, NCC and Asfaltmix acquired all the shares in Sata-Asfaltti, Interasfaltti and Asfalttineliö respectively, which participated in the cartel in question and, subsequently, when those companies went into voluntary liquidation in 2000, 2001 and 2003, took over all those commercial activities of those companies and wound them up.

49 Therefore, it appears, subject to the definitive assessment by the referring court having regard to all the relevant evidence that, from an economic perspective, SIS, NCC and Asfaltmix, on one hand, and Sata-Asfaltti, Interasfaltti and Asfalttineliö respectively, on the other, are the same, and that the three latter companies have ceased to exist as legal persons.

50 It must therefore be held that, SIS, NCC and Asfaltmix, successors to Sata-Asfaltti, Interasfaltti, and Asfalttineliö respectively, have assumed liability for the damage caused by the cartel in question, as they have, as legal persons, ensured that those companies were able to continue their economic activities.

51 In the light of all the foregoing considerations, the answer to the first and second questions is that 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.

52 In view of the answer to the first and second questions, it is unnecessary to reply to the third question.

The request that the effects of the present judgment should be limited in time

53 At the hearing, NCC requested the Court to limit the temporal effects of the present judgment in the event that it considers that the economic continuity test applies to the determination of persons required to provide compensation for damage caused by an infringement of EU competition rules.

54 In support of its request, NCC argued that that interpretation could not have been foreseen, that it therefore had retroactive effect on those rules, and that it had unforeseen consequences for the conduct of undertakings.

55 In that connection, it should be recalled that, according to settled case-law of the Court, the interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to a rule of EU law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that rule before the courts having jurisdiction are satisfied (judgment of 22 September 2016, *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, paragraph 59 and the case-law cited).

56 It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict, for any person concerned, the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships

established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties (judgment of 22 September 2016, *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, paragraph 60 and the case-law cited).

57 More specifically, the Court has taken that step only in quite specific circumstances, notably where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with EU law by reason of objective, significant uncertainty regarding the implications of European Union provisions, to which the conduct of other Member States or the Commission may even have contributed (judgment of 22 September 2016, *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, paragraph 61 and the case-law cited).

58 In the present case, since the NCC has in no way substantiated its arguments, it has failed to establish that the criteria referred to in paragraph 56 of this judgment have been satisfied in the present case.

59 It is therefore not appropriate to limit the temporal effects of the present judgment.

Costs

60 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 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.

[Signatures]

* Language of the case: Finnish.

i The wording of paragraph 46 of this document has been modified after it was first put online.