Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 10 September 2020[1]

Case C-450/19

Kilpailu- ja kuluttajavirasto
in the presence of:
Eltel Group Oy,
Eltel Networks Oy

(Request for a preliminary ruling
from the Korkein hallinto-oikeus (Supreme Administrative Court, Finland)

(Reference for a preliminary ruling – Determining the duration of a competition infringement – Criteria – Cartels whose effects continue after they have formally ceased to be in force – Conditions – Determining the economic effects of anti-competitive behaviour – Completion of works several years after the contract is entered into – Instalments paid after the works)

I. Introduction

1. The subject matter of this reference for a preliminary ruling is, in essence, as follows: where an alleged infringement of Article 101 TFEU takes the form of cooperation in the submission of tenders in a procurement procedure for construction works, how should the date on which that cooperation ceased be determined? Can that date occur before the works in question are completed, or before they are fully paid for?

II. Legal context

A. Regulation No 1/2003

2. Article 25 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty[2] reads as follows:

‘1. The powers conferred on the Commission by Articles 23 and 24 shall be subject to the following limitation periods:

(a) three years in the case of infringements of provisions concerning requests for information or the conduct of inspections;

(b) five years in the case of all other infringements.

1 Original language: French.

2 OJ 2003 L 1, p. 1.

2. Time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.

3. Any action taken by the Commission or by the competition authority of a Member State for the purpose of the investigation or proceedings in respect of an infringement shall interrupt the limitation period for the imposition of fines or periodic penalty payments. The limitation period shall be interrupted with effect from the date on which the action is notified to at least one undertaking or association of undertakings which has participated in the infringement. Actions which interrupt the running of the period shall include in particular the following:

(a) written requests for information by the Commission or by the competition authority of a Member State;

(b) written authorisations to conduct inspections issued to its officials by the Commission or by the competition authority of a Member State;

(c) the initiation of proceedings by the Commission or by the competition authority of a Member State;

(d) notification of the statement of objections of the Commission or of the competition authority of a Member State.

4. The interruption of the limitation period shall apply for all the undertakings or associations of undertakings which have participated in the infringement.

5. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 6.

6. The limitation period for the imposition of fines or periodic penalty payments shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice.'

B. Finnish law

3. Paragraph 1a of the kilpailunrajoituslaki (Law prohibiting restraints of competition) provides that 'the provisions of Articles 81 and 82 of the [EC Treaty] are to be applied if the restraint of competition is capable of affecting trade between Member States of the European Community.'

4. Paragraph 4 of that law is worded as follows:

'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.

Agreements, decisions or practices are prohibited in particular where they:

(1) directly or indirectly fix selling prices or any other trading conditions;

(2) limit or control production, markets, technical development, or investment;

(3) share markets or sources of supply;

(4) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or

(5) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'

5. Paragraph 22 of the Law prohibiting restraints of competition provides that 'a fine cannot be imposed for, inter alia, an infringement of Paragraph 4 of … this law or Articles 81 or 82 of the EC Treaty 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.'

III. The dispute in the main proceedings and the question referred

6. Fingrid Oyj is the main customer for electricity transmission works in Finland. It owns and is responsible for developing the high voltage network used for mains electricity transmission. On 16 April 2007 it published an invitation to tender for the construction works for the 400 kV transmission line between Keminmaa and Petäjäskoski. Tenders had to be submitted no later than 5 June 2007, and 12 November 2009 was set as the date for completion of the works.

7. On 4 June 2007, the Finnish undertaking Eltel Networks Oy submitted the tender for which the contract was awarded. It was stated in the tender that the project would be completed in full and handed over to the customer by 12 November 2009. It is apparent from the decision of the kilpailu- ja kuluttajaviratso (competition and consumer protection authority, Finland, 'the competition authority') that before the tender in question was submitted there had been prior collusion with another undertaking [3] participating in the alleged prohibited cartel. Eltel Networks and Fingrid concluded the construction contract on 19 June 2007. The works were completed on 12 November 2009. The last instalment was paid on 7 January 2010.

8. By a decision of 31 October 2014, as required under Finnish law, the competition authority submitted an application to the markkinaoikeus (Market Court, Finland) to impose a fine of EUR 35 million jointly and severally on Eltel Networks and Eltel Group Oy (collectively, 'Eltel') for their alleged participation in a prohibited cartel. [4] According to the decision of the competition authority, that cartel came into being in October 2004 at the latest and continued uninterruptedly at least until March 2011. Eltel thereby infringed Paragraph 4 of the Law prohibiting restraints of competition and Article 101 TFEU by entering into agreements with another undertaking regarding prices, profit margins and the allocation of design and construction works relating to power transmission lines in Finland.

3 In 2013, the other undertaking at issue submitted a leniency application to the competition authority, which led to that authority investigating the cartel. On 31 October 2014 the competition authority granted that other undertaking lenient treatment and it was exempted from all sanctions.

4 It should be noted that it is apparent from the case file that it has not yet been conclusively established in law that there was a prohibited cartel between Eltel and the other undertaking that allegedly participated in such a cartel. Eltel has argued before both the referring court and the Court of Justice that in its decision of 31 October 2014 the competition authority failed adequately to demonstrate the existence of such a cartel. The Markkinaoikeus (Market Court), for its part, held that the cartel related only to the design work for the power transmission line put out to tender, in contrast to the assessment by the competition authority and the referring court. Since it is not for the Court of Justice to determine whether or not such a cartel in fact existed or to determine the scope of any such cartel, all references in this Opinion to a cartel in which Eltel participated must be understood in all cases to be references to an alleged cartel.

9. On 30 March 2016 the Markkinaoikeus (Market Court) dismissed the competition authority's application to impose a fine. According to that court, Eltel had ceased to participate in the alleged restraint of competition before 31 October 2009 and the competition authority had not provided any evidence that the infringement continued after that date. It can be seen from Paragraph 22 of the Law prohibiting restraints of competition that the competition authority must submit an application to impose a fine to the Markkinaoikeus (Market Court) within five years from the time at which the restraint of competition ceased. According to that court, the alleged cartel related to the design work for the power transmission line in question and not to the construction works themselves. That design work was completed in 2007.

10. The competition authority appealed that decision to the referring court. The competition authority claims, in essence, that the agreement between Eltel and the other undertaking participating in the cartel was entered into before Eltel submitted the tender and related to pricing. That prohibited form of coordination lasted until the date of the last payment (that is to say, 7 January 2010), since the contract implementing the unlawful pricing was still in force at that time. In the alternative, the competition authority claims that the reference date should be the date on which the works were completed (that is to say, 12 November 2009). The cartel continued to have economic effects, within the meaning of the Court's case-law, and Fingrid suffered harm up to those dates as a result of the price paid. In the specific case of procurement, cartels have concrete and long-lasting effects because the price is paid in stages. According to the authority, the harmful effects of the cartel are felt each year in which an instalment is due and have an annual impact on the costs of the activities of the undertaking that is the victim of the cartel and on its results. The increased costs caused by the price paid, on account of the cartel, is also passed on to the customers of the grid operator. The competition authority contends that because it submitted its application to impose a fine to the Markkinaoikeus (Market Court) on 31 October 2014, it acted within the time limit laid down by Paragraph 22 of the Law prohibiting restraints of competition.

11. Eltel, for its part, refutes that line of argument and maintains, in essence, that the duration of the infringement should be assessed in terms of the period during which the undertakings in the cartel were engaged in the infringing behaviour. For works put out to tender, the limitation period begins to run from the date on which the tender is submitted, that is to say, in the present case, 4 June 2007. In the alternative, it may run from the date on which the contract is concluded (here, 19 June 2007), but once those two events have occurred the price tendered or agreed in the contract no longer has any effect on the market. Neither the pace at which the works advanced nor the payment timetable has any effect on competition on the market, since those factors have no effect on the price payable. Any different interpretation, such as that proposed by the competition authority, would be unconnected with the restraint of competition arising from the cartel and would infringe the principle of legal certainty. The competition authority's application to impose a fine was therefore, according to Eltel, submitted out of time to the Markkinaoikeus (Market Court).

12. The referring court, for its part, proceeds on the assumption that the tendering procedure in which the contract was awarded to Eltel relates to a construction contract for a power transmission line. In that specific context, it is uncertain up until what point in time the alleged bid-rigging and consequent unlawful pricing can be considered to have had economic effects. According to national case-law, the five-year limitation period under Paragraph 22 of the Law prohibiting restraints of competition begins to run on the date on which the most recent action connected with the infringement ceases. That court enquires how that circumstance is to be assessed in a situation in which a cartel participant enters 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. It notes that the case-law of the Court offers no obviously applicable solution.

13. First, the Court held in its judgment in *Quinn Barlo and Others* v *Commission*,[5] that the economic effects of a restraint of competition could continue until the end of the period in which the unlawful prices were applied, and that the period in which the unlawful prices were applied could be taken into account when assessing the duration of the infringement.[6] Accordingly, what matters is the economic effects of the anti-competitive behaviour rather than its legal form. Were it to be found that those effects can continue even after a complex continuous infringement has formally ceased, and must be taken into account in calculating the duration of the infringement, the thesis advanced by the competition authority could prosper. However, the referring court notes that the restraint of competition at issue in the *Quinn Barlo* judgment[7] was quite different from that in the case in the main proceedings.

14. Secondly, in *EMI Records*[8] the Court held that, in the case of cartels that are no longer in force, in order to establish the duration of the infringement it is sufficient that those cartels continue to produce their effects beyond the formal cessation, for example 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 cartel and it produces the same result as the cartel itself.[9] If, as Eltel argues, the prices charged in procurement procedures and the effects of cartels on competition continue only up until the date on which the tender was submitted, or until the contract was entered into, it is then Eltel's thesis instead that should prevail, and the competition authority should then be found to have submitted its application to impose a fine to the Markkinaoikeus (Market Court) out of time.

15. The referring court also observes that the issue of the duration of an alleged competition infringement should not be confused with that of any harm suffered by the victims of the alleged cartel.[10]

16. Under those circumstances the Korkein hallinto-oikeus (Supreme Administrative Court, Finland) stayed the proceedings and, by a decision received at the Registry of the Court on 13 June 2019, referred the following question to the Court for a preliminary ruling:

'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?'

IV. The proceedings before the Court of Justice

17. The competition authority, Eltel, the Finnish, German, Italian and Latvian governments and the European Commission filed written observations with the Court.

5 Judgment of 30 May 2013 (C-70/12 P, not published, EU:C:2013:351).

6 Judgment of 30 May 2013, *Quinn Barlo and Others* v *Commission* (C-70/12 P, not published, EU:C:2013:351, paragraph 40).

7 Judgment of 30 May 2013 (C-70/12 P, not published, EU:C:2013:351).

8 Judgment of 15 June 1976 (51/75, EU:C:1976:85).

9 The referring court is making reference here to paragraphs 30 and 31 of the judgment of 15 June 1976, *EMI Records* (51/75, EU:C:1976:85).

10 The referring court points out here that under Finnish law the date on which the contract is entered into, rather than the date on which the price is paid, is regarded as the date on which the harm occurred (and therefore as the date on which the limitation period begins to run for the purposes of damages).

18. Following the decision of 16 April 2020 of the Second Chamber of the Court to vacate the hearing initially set to be heard before the Court, that Chamber, on the one hand, and the Advocate General, on the other, issued questions to be answered in writing by all the participants in the written phase of this reference for a preliminary ruling. The competition authority, Eltel, the Finnish, Italian and Latvian governments and the Commission sent their replies to those questions to the Court.

V. Analysis

19. The referring court asks the Court of Justice, in essence, how to determine the point in time at which an alleged infringement of Article 101(1) TFEU ceased where the infringement consisted of an agreement between undertakings participating in a bid-fixing cartel concerning a design and works contract relating here to the construction of a power transmission line. That question has been referred to the Court in the context of an application by the competition authority to impose a fine on Eltel, in a situation in which the parties in the main proceedings disagree as to the date on which the limitation period for the fine expired.

A. Preliminary observations

20. Before considering that question, I would make two series of preliminary observations, one concerning a clarification of national law and the other the decentralised implementation of EU competition policy.

21. First, as regards the national law in force, at first sight, even though there is a strong presumption that questions referred to the Court for a preliminary ruling are relevant to resolution of the dispute in the main proceedings,[11] it could be seen from the case file put before the Court that Paragraph 22 of the Law prohibiting restraints of competition established two possible starting points for the five-year limitation period, that is to say, either the time at which the infringement ceased or the point at which the competition authority became aware of the anti-competitive behaviour. That authority in fact became aware of the behaviour in question on 31 January 2013 and submitted its application to impose a fine on 31 October 2014. If the limitation period must be found to begin on the second date laid down in Paragraph 22 of the Law prohibiting restraints of competition, there would be reason to doubt that the Court's reply to the question referred would be of use in resolving the dispute in the main proceedings.

22. The additional information received by the Court in response to its questions has nevertheless generated a number of doubts. Indeed, it appears to be common ground for Eltel and the Finnish Government that, in the case of a single continuous infringement that has already ceased, only the first start date for the five-year limitation period applies – that is to say, the date on which the infringement ceased. No doubt remains therefore that the question posed is of use in resolving the dispute in the main proceedings.

23. Secondly, this is a situation in which the implementation of EU competition policy is decentralised. It must be emphasised at the outset that, inherently, the limitation provisions applicable to actions brought by national competition authorities are not organised by EU law.

11 Among plentiful case-law, judgments of 31 January 2017, *Lounani* (C-573/14, EU:C:2017:71, paragraph 56 and the case-law cited), and of 27 February 2020, *Land Sachsen-Anhalt (Remuneration of officials and judges)* (C-773/18 to C-775/18, EU:C:2020:125, paragraph 28 and the case-law cited).

24. Admittedly, Chapter VII of Regulation No 1/2003 is given over to limitation. However, the limitation rules it lays down apply only to the Commission. Specifically, Article 25(1) of that regulation provides that the powers to impose penalties conferred *on the Commission* are subject to a five-year limitation period in relation to infringements of Article 101 TFEU. The limitation period begins to run from the date on which the infringement was committed or, in the case of continuing or repeated infringements, on the day on which the infringement ceases.[12] It emerges from the case file that the national legislature chose to confine actions by the competition authority to the same limitation period as that set by the EU legislature for the Commission, that is to say, five years.

25. Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market,[13] whilst it does not lay down a limitation period, enshrined the principle that, in order to ensure the effective enforcement of Article 101 TFEU, there is a need to provide for 'workable rules' consisting in particular of a system under which 'national limitation periods should be suspended or interrupted for the duration of proceedings before [national competition authorities] of another Member State or the Commission', although without thereby preventing Member States from maintaining or introducing absolute limitation periods, provided that those limitation periods do not 'render the effective enforcement of [Article 101 TFEU] practically impossible or excessively difficult.'[14] Article 29 of Directive 2019/1 confirms those stipulations. Determining the national limitation period is therefore, in the mind of the EU legislature, a matter within the responsibility of the Member States and, therefore, governed by the principle of procedural autonomy.

26. It can be seen, however, that the question referred concerns less the duration of the limitation period than the point at which that period begins to run. As alluded to above, under Regulation No 1/2003 that period begins to run at the time the infringement ceased. Determining the duration of the alleged infringement of Article 101(1) TFEU is therefore quite clearly a matter of EU law.

B. The duration of the infringement in a context such as that of the dispute in the main proceedings

27. In order to determine the duration of the alleged infringement of Article 101(1) TFEU in the context of the dispute in the main proceedings it is necessary to recall the fundamental characteristics of that alleged infringement. It consisted of a form of bid rigging in tendering procedures for public works contracts. The contract was entered into in the same month as the tender was submitted. However, both the works and the payments were spread over several years: the works were completed two years and five months after submission of the tender and conclusion of the contract, whilst the last payment took place two years and seven months after those two events.

1. The duration of an infringement in the case-law of the Court

28. The question of the duration of cartels, per se, frequently arises before the Court since the severity of the penalty depends inter alia on the duration of the infringement, with the effect that undertakings alleged to have committed practices in breach of Article 101(1) TFEU often advance arguments relating to that duration with a view to reducing the penalty.

12 See Article 25(2) of Regulation No 1/2003.

13 OJ 2019 L 11, p. 3. It should be noted that the time limit for transposing that directive has not yet expired (Article 34(1) of that directive).

14 Recital 70 of Directive 2019/1.

29. As the referring court highlighted, the Court has held that in order for Article 101 TFEU to apply to a cartel that is no longer in force, it is sufficient that the cartel continues to produce its effects after it has formally ceased to be in force.[15] Specifically, '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'.[16]

30. The Court used that case-law and applied it in the field of publishing in *Binon*,[17] in which it held on that basis that Article 101 TFEU also applied 'if parallel conduct on the part of publishers were continued after the termination of the former agreement and in the absence of its replacement by a new agreement … [since] the system of competition rules established by Article [101 et seq. TFEU] is concerned with the economic effects of agreements or of any comparable form of concerted practice or coordination rather than with their legal form.'[18] Article 101 TFEU therefore had to be found to apply if the effect of the set of agreements in question in that case was that 'in practice the approval of retail sales outlets [was] a matter for that agency or a body set up by it within the framework of the said agreements.'[19]

31. In its more recent judgment, *Quinn Barlo and Others* v *Commission*,[20] the appellants claimed that the General Court had disregarded the general principle of the presumption of innocence when it extended the duration of the first period of their participation in the cartel beyond the date of the second cartel meeting, whereas the General Court had found that at that meeting in June 1998 the participants had agreed on a price increase for October 1998.[21] The Court of Justice held that 'it is settled case-law that the system of competition established by Articles 101 TFEU 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* … In other words, the General Court could in theory have found there to be an infringement, for example, *throughout the whole period in which the unlawful prices were applied*, which would have led, in the present case, to a result objectively less favourable to the appellants' interests.'[22]

32. Although the three abovementioned judgments offer a number of helpful pointers for our analysis, none of them is sufficient on its own to answer the question referred for a preliminary ruling. The Court of Justice case-law on which the referring court has relied heavily must be contextualised, that is to say, considered in the circumstances of each cartel in question, none of which is comparable to the cartel in the dispute in the main proceedings. Accordingly, in the case which gave rise to the judgment in the *EMI* case,[23] it could be inferred that there were elements of concerted practice and coordination. In *Binon*,[24] the cartel had formally ceased but a de facto cartel appeared to remain in force. Lastly, in *Quinn Barlo and Others* v *Commission*,[25] although the Court summarised its case-law on cartels that have ceased to be in force but which continue to produce effects, it then made the very specific finding that an agreement on future pricing had been concluded at the last collusive meeting.

15 Judgment of 15 June 1976, *EMI Records* (51/75, EU:C:1976:85, paragraph 30).

16 Judgment of 15 June 1976, *EMI Records* (51/75, EU:C:1976:85, paragraph 31).

17 Judgment of 3 July 1985 (243/83, EU:C:1985:284).

18 Judgment of 3 July 1985, *Binon* (243/83, EU:C:1985:284, paragraph 17).

19 Judgment of 3 July 1985, *Binon* (243/83, EU:C:1985:284, paragraph 18).

20 Judgment of 30 May 2013, *Quinn Barlo and Others* v *Commission* (C-70/12 P, not published, EU:C:2013:351).

21 Judgment of 30 May 2013, *Quinn Barlo and Others* v *Commission* (C-70/12 P, not published, EU:C:2013:351, paragraphs 32 and 33).

22 Judgment of 30 May 2013, *Quinn Barlo and Others* v *Commission* (C-70/12 P, not published, EU:C:2013:351, paragraph 40). Emphasis added.

23 Judgment of 15 June 1976 (51/75, EU:C:1976:85).

24 Judgment of 3 July 1985 (243/83, EU:C:1985:284).

25 Judgment of 30 May 2013 (C-70/12 P, not published, EU:C:2013:351).

2. Duration of the infringement and the legal interest protected

33. As well as those three judgments needing therefore to be considered in their proper context in terms of their significance for resolution of this case, the judgment in T-Mobile Netherlands and Others [26] warrants attention. In that case the Court of Justice held that:

'Article [101 TFEU], like the other competition rules laid down in the Treaty, is designed to protect not uniquely the immediate interests of individual competitors or consumers, but also to protect the structure of the market and thus competition as such.

… in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and consumer prices.

… a concerted practice pursues an *anti-competitive object* for the purpose of Article [101(1) TFEU] where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition within the common market. It is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices. An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.' [27]

34. The *T-Mobile Netherlands and Others* judgment therefore offers a different perspective from which to consider the matter of the duration of the infringement compared with the judgments in *EMI*, [28] *Binon* [29] and *Quinn Barlo and Others* v *Commission*, [30] in so far as one of the fundamental questions to be answered in order to determine the duration of the infringement is what legal interest is being protected, that is to say, the customer's freedom of choice, the ability to obtain the best offers on the best terms possible under free competition, as the Commission among others notes in its written observations. There is therefore an infringement so long as the collusion restricts that ability, whether formally or in practice. In order to determine the duration of the infringement it is accordingly necessary to assess the impact of the infringement on the protected legal interest and therefore, ultimately, the exact scope of the cartel, which it is for the referring court to ascertain.

35. Applying the conclusions reached in *T-Mobile Netherlands*, [31] if the cartel described in the request for a preliminary ruling related only to the contract for the design and construction of the Keminmaa-Petäjäskoski 400 kV transmission line, the anti-competitive object of the cartel falls away once the contract was entered into at the latest. Once the contract had been entered into, there was effectively no continuing agreement between the cartel participants, [32] and nor therefore could the collusive pricing, in other words, the embodiment of the intention of the cartel participants to fix the prices to be charged for future contracts, be regarded as still being 'in force' within the meaning of *Quinn Barlo and Others* v *Commission*. [33] The period during which the impugned undertakings were engaged in prohibited conduct, likewise within the meaning of that judgment, therefore ended when the contract was entered into.

26 Judgment of 4 June 2009 (C-8/08, EU:C:2009:343).

27 Judgment of 4 June 2009, *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343, paragraphs 38, 39 and 43). Emphasis added.

28 Judgment of 15 June 1976 (51/75, EU:C:1976:85).

29 Judgment of 3 July 1985 (243/83, EU:C:1985:284).

30 Judgment of 30 May 2013 (C-70/12 P, not published, EU:C:2013:351).

31 Judgment of 4 June 2009 (C-8/08, EU:C:2009:343).

32 That is so in the case of either a formal or a de facto agreement.

33 Judgment of 30 May 2013 (C-70/12 P, not published, EU:C:2013:351).

36. Subject to the verifications which it will be for the referring court to carry out, such a finding might be justified in the light of the characteristics peculiar to each construction contract, without prejudice to any evidence there may be that a cartel existed in relation to the construction contract at issue in the main proceedings and other future construction contracts.[34] If, as Eltel claims, it must be found that the price under the contract for the construction of the Keminmaa-Petäjäskoski line had been determined on the basis of the characteristics peculiar to that contract (namely that it concerned completion of a single project, in a particular geographical area, within a specific period and using a defined technical methodology), it would in my view be impossible to consider that the price in question had on the market, now construed broadly, effects that went beyond the contract for which that price had been set.

3. Duration of the infringement and intention to infringe

37. It is nevertheless clear that the Court has little information about the component elements of the alleged infringing conduct in the dispute in the main proceedings. It has no information, for example, about any collusive meetings or contacts that may have continued after the contract was concluded. It appears from the additional information provided to the Court in the written replies to its questions merely that the bid rigging consisted of an agreement with the other undertaking participating in the cartel on the fixed price to be tendered, to the effect that the other party had to tender a price necessarily higher than that tendered by Eltel. Fingrid received a total of four tenders. Under those circumstances, if it is accepted that the cartel related only to that contract, the conclusion of the contract on completion of the tendering procedure not only crystallised implementation of the cartel, constituting the *culmination* of the resulting restraint of competition (since potential competitors for the contract were thereby ousted) but brought to an end the period during which the collusive prices were 'in force' within the meaning of the *Quinn Barlo and Others* v *Commission* case-law.[35]

38. In other words, the duration of the infringement cannot be decoupled from the intention to infringe of the undertakings participating in the cartel. In a quasi-criminal field such as the law on cartels[36] it appears unacceptable that the duration of the infringement should depend on a factor beyond the control of the infringers, such as the arrangements for performance and for executing the works or the payment timetable. Such a situation would be tantamount to depriving the parties of the choice that must be available to them to bring their infringing conduct to an end at any time. For example, had the contracting entity been unable or had it refused to pay the price agreed in the contract, would it be correct to extend the duration of the infringement by the corresponding period, and therefore potentially for an indefinite period, solely on the grounds that the collusive price remained payable? I think not.

39. That is why I am unpersuaded by the line of argument advanced by the competition authority and the Finnish Government. The economic effects of the cartel should not be confused with the harmful effects caused by it. The restrictive effects on competition occasioned by the market manipulation at issue in the main proceedings, which ousted competing tenderers and were capable of artificially

34 It nevertheless seems to be apparent from the documents placed before the Court, and from the five-year limitation period *from the point at which the restraint of competition ceased* (see Paragraph 22 of the Law prohibiting restraints of competition) which applies in the situation in the dispute in the main proceedings, that the alleged cartel did not continue beyond the construction contract at issue. It is in any event for the referring court to make that finding.

35 Judgment of 30 May 2013 (C-70/12 P, not published, EU:C:2013:351).

36 On that topic, see the Opinion of Advocate General Bot in *ThyssenKrupp Nirosta* v *Commission* (C-352/09 P, EU:C:2010:635, points 48 to 52) and the Opinion of Advocate General Kokott in *Schenker & Co. and Others* (C-681/11, EU:C:2013:126, point 40) and her View in Opinion 2/13 (*Accession of the European Union to the ECHR*, EU:C:2014:2475, point 149).

limiting the choice of the 'customer', must be distinguished from the wider economic effects caused to the customer and, incidentally, to the customers of the customer (such as the fact that the distorted price was passed on by the customer, which represented only one consequence of the infringing conduct attributable to Eltel and did not in itself prove that the conduct continued over time).[37]

40. Under those circumstances, for an infringement to continue beyond the point at which it formally ceased (namely, in the situation in the dispute in the main proceedings, conclusion of the contract), the prohibited conduct must also continue to be classifiable as prohibited conduct, although this does not mean that any effects not strictly related to the alleged anti-competitive conduct may constitute factors in that classification.

41. Lastly, in order to determine the point at which the infringement ceases in a context such as that at issue in the main proceedings, it is emphasised that, if the undertaking accused of anti-competitive conduct was ultimately not awarded the contract, the date on which the infringement ceased, in the absence of any other factor suggesting that the infringement continued beyond the contract at issue, may be the date on which the tender was submitted. In other words, the date on which the contract was entered into cannot in any event be regarded as decisive for determining cessation of the infringement, which must in all cases be assessed in the light of the subjective and objective elements of the infringement.

42. In the same vein, the date on which the contract was entered into may be deemed to signal cessation of the infringement, or again the point at which the collusive prices ceased to be in force, provided the contract records with sufficient precision the intentions of the parties on that matter. Such an outcome assumes therefore that the contract is sufficiently clear as regards, in the present case, the price of the works.

4. Duration of the infringement, effective enforcement of Article 101 TFEU and EU law

43. The competition authority and the Finnish and German governments contend that to attribute too short a duration to an infringement in a situation such as that at issue in the dispute in the main proceedings would conflict with the requirement that Article 101 TFEU must be given full effect.

44. I am obviously sympathetic to that argument.

45. Nevertheless, I would note that since, in accordance with principles characteristic of the rule of law, EU law admits the fact – itself likewise a principle – that the actions available to its institutions, and to their national partners in the form of, for example, the national competition authorities, to prosecute and penalise infringements of Article 101 TFEU, are subject to limitation, it is necessary to abandon at the same time any notion that Article 101 TFEU might be absolutely enforceable and to concede therefore that certain infringements of that article will go unpunished. In other words, the end cannot always justify the means.[38]

37 It also seems to me that the impact of the collusive price on the customer's economic capacity or on the prices it may have passed on to its end customers should be assessed specifically in a context such as that of the dispute in the main proceedings, from which it appears that Eltel's tender was the lowest of the four tenders submitted to Fingrid. The fact that Eltel's tender was the lowest obviously makes it no less anti-competitive given that it had the effect of ousting the other tenderers (in the same vein, see the judgment of 21 February 1995, *SPO and Others* v *Commission* (T-29/92, EU:T:1995:34, paragraph 151)).

38 In the same vein, see the Opinion of Advocate General Kokott in *Toshiba Corporation and Others* (C-17/10, EU:C:2011:552, point 54).

46. Furthermore, I would add that the dispute in the main proceedings concerns a rather specific set of circumstances and that the five-year limitation period established by the national legislation appeared, at first glance, to preclude any intervention by the competition authority.[39] The need effectively to enforce Article 101 TFEU cannot justify artificially extending the duration of the infringement, in particular beyond the perpetrators' intention to infringe, for the purpose of enabling proceedings to be brought. The imperative is all the greater given that, as the Commission highlighted, the duration of the infringement is a factor to which regard is had in fixing the amount of the fine.[40]

47. It is therefore apparent from my analysis that Article 101 TFEU must 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, and where that cartel was limited to that contract, the competition infringement is deemed to have ceased, in principle, on the date on which the infringer undertaking submitted a tender for the works concerned or entered into a contract for execution of the works, as applicable. That interpretation is nevertheless subject to the referring court's assessment of the terms of that contract and their level of precision, in particular as regards pricing, the exact scope of the cartel, the objective and subjective elements that characterise it as such, its anti-competitive effects and analysis of the various forms of evidence of collusive conduct brought to light by the investigation carried out by the competition authority.

VI. Conclusion

48. In the light of the foregoing, I suggest that the Court of Justice should reply as follows to the question referred by the Korkein hallinto-oikeus (Supreme Administrative Court, Finland) for a preliminary ruling:

Article 101 TFEU must 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, and where that cartel was limited to that contract, the competition infringement is deemed to have ceased, in principle, on the date on which the infringer undertaking submitted a tender for the works concerned or entered into a contract for the execution of the works, as applicable. That interpretation is nevertheless subject to the referring court's assessment of the terms of that contract and their level of precision, in particular as regards pricing, the exact scope of the cartel, the objective and subjective elements that characterise it as such, its anti-competitive effects and analysis of the various forms of evidence of collusive conduct brought to light by the investigation carried out by the competition authority.

39 The Court has not been requested, in this reference for a preliminary ruling, to rule on whether the national limitation provisions are compatible with the principle that Article 101 TFEU must be given full effect. As the Commission has observed, the length of the limitation period is not the only criterion to be taken into account since other factors, such as those relating to the circumstances in which that period may be interrupted or suspended, are also decisive in that respect.

40 See Article 23(3) of Regulation No 1/2003.