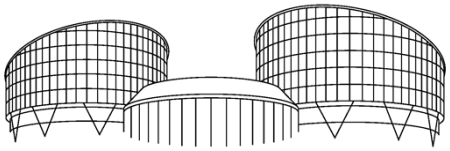

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF SA-CAPITAL OY v. FINLAND

(Application no. 5556/10)

JUDGMENT

STRASBOURG

14 February 2019

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of SA-Capital Oy v. Finland,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Linos-Alexandre Sicilianos, *President,*
Ksenija Turković,
Krzysztof Wojtyczek,
Armen Harutyunyan,
Pauliine Koskelo,
Tim Eicke,
Jovan Ilievski, *judges,*

and Renata Degener, *Deputy Section Registrar,*

Having deliberated in private on 15 January 2019,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 5556/10) against the Republic of Finland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Finnish limited liability company SA-Capital Oy ("the applicant"), on 25 January 2010.

2. The applicant was represented by Mr Ari Huhtamäki, a lawyer practising in Helsinki. The Finnish Government ("the Government") were represented by their Agents, first Mr Arto Kosonen and then Ms Krista Oinonen, both from the Ministry for Foreign Affairs.

3. The applicant alleged, in particular, under Article 6 §§ 1 and 3 (d) of the Convention that it had not had a fair trial as it had been ordered to pay penalty payments in competition law proceedings on the basis of hearsay evidence but without being able to examine or have examined the persons at the origin of this evidence, and as the shifting of the burden of proof to it had violated its presumption of innocence under Article 6 § 2 of the Convention.

4. On 26 September 2011 the application was communicated to the Government. On 4 February 2014, at the applicant's request, the examination of the case was adjourned pending the outcome of the connected domestic compensation proceedings.

INTRODUCTION

5. The case arises from proceedings concerning restrictions of competition, conducted against several companies operating in the asphalt

sector in Finland and accused of having operated a nationwide cartel involving price-fixing by means of territorial allocation of markets, bid rigging and other restrictive practices in public and private sector contracts for asphalt works and supplies. In the proceedings, lodged by the Competition Authority before the Market Court in the first instance and concluded before the Supreme Administrative Court, on appeals brought by both the Competition Authority and the respondent companies, the existence of a cartel was found established and financial penalties were imposed on the companies involved, including the applicant company. In terms of the scope and effects of the cartel, however, the assessment of the Supreme Administrative Court was more severe than that of the Market Court and, as a result, the Supreme Administrative Court, endorsing the motions put forward by the Competition Authority, increased the amount of the financial penalties imposed on the respondent companies, including the applicant company.

6. The applicant complains under Article 6 of the Convention, alleging that in the proceedings before the Supreme Administrative Court, the latter had relied on hearsay evidence which the applicant was not able to have cross-examined. The applicant also alleges that the standard of proof applied by the Supreme Administrative Court was contrary to Article 6 § 1 and that the burden of proof had been shifted to it in violation of Article 6 § 2 of the Convention.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant company has its seat in Rovaniemi.

8. The applicant company is a limited liability company which was carrying out business in the asphalt sector until February 2000. In 2002 the Finnish Competition Authority (*kilpailuvirasto, konkurrensverket*) started to investigate whether the applicant company, among others, had been involved in nationwide or regional cartels in this sector.

9. On 31 March 2004 the Competition Authority lodged an application before the Market Court (*markkinaoikeus, marknadsdomstolen*), requesting that the court impose a penalty payment on the applicant company, among others, on the grounds that it had participated in a cartel from 1995 to 2000.

A. Competition law proceedings

1. The Market Court

10. Between 14 November and 18 December 2006 the Market Court held an oral hearing in the course of which forty-eight witnesses were heard. Documentary evidence, including telephone recordings were also presented to the court.

11. On 19 December 2007 the Market Court found, *inter alia*, that the applicant company had taken part in a cartel in respect of asphalt contracts commissioned by the central government authorities, by participating in territorial allocation of markets, by participating to a minor degree in price-fixing activities and by participating in restrictions on the supply of asphalt mass. A penalty payment (*seuraamusmaksu, påföljdsavgift*) of 75,000 euros (EUR) was imposed on the applicant company. With regard to the allegation of territorial allocation and price-fixing in the markets for local government and private sector asphalt contracts, the Market Court found that the applicant company had not participated in a cartel.

12. The Market Court found that the territorial allocation of the markets and the bid-rigging between the companies involved in the cartel had amounted to a single continuous infringement of competition law rules, and that they were not to be regarded as individual unconnected infringements. According to the court, the infringements of competition law rules had lasted for more than seven years. Although some companies had participated in the infringements for a longer time than others, all the companies had infringed the competition law rules for three years at least. In addition, geographically, the infringements covered the entire country in respect of central government asphalt contracts, and several regions of the country in respect of local government and private sector contracts.

13. The Market Court found it established that between 1996 and 2000 the applicant company had agreed with three other asphalt companies about the allocation of central government asphalt contracts, and had done the same with three more asphalt companies between 1999 and 2000. Moreover, from 1996 until the end of 2000, the applicant company had agreed with another cartel company in advance the prices to be offered in competitive bidding, and had tendered accordingly. Between 1996 and 2000, as far as central government asphalt contracts were concerned, it had also agreed with the other cartel companies that none of them would supply asphalt mass to companies outside the cartel. The court held that the applicant company had infringed the prohibition on the division of markets by its above-mentioned conduct regarding central government asphalt contracts.

14. When considering the amount of the penalty payment the Market Court took into account, for each company, its turnover from the asphalt business in Finland during the last year of its participation in the

infringement of competition law rules. In addition, considering the relatively low turnover of the applicant company, its market position, and the regionally limited scope of the related restriction of competition, the Market Court held that it was not justifiable to penalise the applicant company with a penalty payment exceeding the normal scale.

15. Concerning the evidence, the Market Court noted that evidence in competition law cases could be either direct or indirect, such as economic evidence. As direct evidence was not always available, an assessment was to be made of whether indirect evidence was sufficient to prove the existence of a cartel. The court found that, in the present case, the economic evidence alone was not sufficient to prove the existence of a cartel. The court also found that the existence of a cartel could not be proved on the basis of hearsay evidence. In the present case, the Market Court reached its conclusion in respect of the central government asphalt contracts by relying, *inter alia*, on the testimonies of eight witnesses. However, to the extent that those testimonies contained hearsay evidence, such evidence was not taken into account. As far as local government and private sector contracts were concerned, the Market Court analysed the evidence for restrictions of competition region by region and found it sufficient in respect of certain regions while insufficient in respect of others. As regards the regions where the applicant company was doing business (Northern Finland and North Karelia), the Market Court found that the evidence in support of a cartel was not sufficient. In this context, the Market Court stated, *inter alia*, that the testimonies of two witnesses who had been heard on this matter had been based solely on what the witnesses had heard from other people, whereas other witnesses had not given evidence that was capable of substantiating the existence of a cartel for local government and private sector contracts in this particular region.

2. The Supreme Administrative Court

16. In January 2008, the Competition Authority and the defendant companies, including the applicant company, lodged appeals at the Supreme Administrative Court (*korkein hallinto-oikeus, högsta förvaltnings-domstolen*). In its appeal, the Competition Authority contested the interpretation adopted by the Market Court as regards the scope of the cartel, arguing that there was nothing to suggest that the territorial allocation of markets did not encompass contracts in all the above mentioned categories of works and pointing out that the exclusion of supplies of asphalt mass outside the cartel companies affected competition in the entire sector. The Competition Authority maintained that there had been a single, nationwide cartel encompassing the entire market for state, local authority and private sector asphalt contracts. In so far as evidence was concerned, the Competition Authority argued, *inter alia*, that even hearsay evidence should have been taken into account by the Market Court. The company which had

been found to play a leading role in the cartel lodged a partial appeal. In its appeal, the applicant company claimed that the Market Court had drawn the wrong conclusions from the evidence, as the Competition Authority had not been able to show that the company had participated in a cartel. In its response to the appeal brought by the Competition Authority, the applicant company reiterated its submissions already made before the Market Court and argued, *inter alia*, that reliance on any elements of hearsay in the evidence should remain excluded.

17. On 25 February 2009 the Supreme Administrative Court held a preparatory meeting with the parties for the oral hearing of the case. The oral hearing itself was held between 20 and 23 April 2009, at which the court again heard six key witnesses. Four of them had been called by the Competition Authority, and two by one of the asphalt companies. The parties, including the applicant company, did not ask the court to hear any other persons.

18. On 29 September 2009 the Supreme Administrative Court overturned the Market Court's decision. In its judgment, the Supreme Administrative Court held that the Competition Authority's application was well-founded in respect of all but one of the defendants. *Inter alia*, the Supreme Administrative Court concluded that the applicant company had participated in a nationwide cartel between May 1995 and 15 February 2000, and the applicant company was ordered to pay a penalty payment of EUR 500,000.

19. In regard to matters of procedure, the Supreme Administrative Court noted that the concept of "criminal charge" had an autonomous meaning in the established case-law of the European Court of Human Rights on Article 6 § 1 of the Convention, and that therefore certain sanctions imposed in administrative-law proceedings fell within the scope of Article 6. The court stated that in the light of that case-law, the procedure for imposing a penalty payment under the Restriction of Competition Act had to be considered to fall within the scope of Article 6 (see *Jussila v. Finland* [GC], no. 73053/01, § 43, ECHR 2006-XIV). The court further noted that the Court of Justice of the European Communities, when applying Article 6 as a part of the general principles of Community law, had held that the proceedings under Community competition law had to comply with the requirements of Article 6. The Supreme Administrative Court, citing the case of *Jussila,* considered that while Article 6 of the Convention under its criminal limb thus applied to proceedings imposing a penalty payment, in such cases the Article 6 requirements were not necessarily identical to the requirements which were applicable in the core areas of criminal procedure.

20. In its judgment, the Supreme Administrative Court made a number of general statements about the assessment of evidence in competition proceedings. It emphasised at the outset that the domestic legislation in this regard was based on the principle of free assessment of evidence. This

meant, *inter alia*, that the court was to take into account all evidence adduced before the Market Court, in addition to the evidence adduced in its own proceedings, while also bearing in mind the finality of the Market Court's findings to the extent that it had not been challenged by a party on appeal.

21. The court also referred to the particular difficulties in obtaining evidence of practices aimed at restricting competition. In this context, it cited the relevant case-law of the Court of Justice of the European Union. The court thus recalled that as the prohibition of anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities relating to restrictive practices and agreements to take place in a clandestine fashion, for meetings to be held in secret, and for the associated documentation to be reduced to a minimum. Evidence of unlawful contact between economic operators will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together and in the absence of another plausible explanation, may constitute evidence of an infringement of the competition rules (see *Aalborg Portland and Others v. the Commission*, Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, ECLI:EU:C:2004:6, §§ 55-57). Accordingly, the competent court was not precluded from taking into account circumstantial evidence, or from drawing inferences from various elements of proof, including testimony containing references to what the witness has heard from others. Various factual elements attesting to similar events or patterns occurring in a given market, alongside other kinds of circumstantial evidence may, in the absence of any other reasonable explanation, demonstrate the existence of restrictive practices. Furthermore, the court cited case-law of the General Court of the EU emphasising that while the competition authority must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement of competition rules took place, it is not necessary for every item of evidence produced to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on, viewed as a whole, meets that requirement (see *JFE Engineering Corp. and Others v. the Commission,* Joined cases T-67/00, T-68/00, T-71/00 and T-78/00, ECLI:EU:T:2004:221, §§ 179-180).

22. The court stated that the evidence provided in a competition law case could not be subject to the same requirements as evidence in criminal cases, *inter alia,* because Finnish competition law was a part of EU competition law. In this regard, the court also cited case-law of the General Court of European Union (see *BPB plc v. the Commission*, Case T-53/03, ECLI:EU:T:2008:254, § 64), according to which a standard of proof beyond

reasonable doubt cannot be required in competition cases. It further cited case-law of the Court of Justice of the European Union according to which it is incumbent on the Commission as competition authority to prove the infringements of competition rules and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement, and where such evidence had been presented the court was entitled to consider that it was for the defendant to provide another explanation for the incriminating circumstances. This did not unduly reverse the burden of proof or set aside the presumption of innocence (see *Montecatini Spa v. the Commission*, Case C-235/92 P, ECLI:EU:C:1999:362, §§ 179-181).

23. According to the Supreme Administrative Court, circumstantial evidence as well as inferences could also be relied on for establishing prohibited cooperation in the absence of any alternative reasonable explanation. When drawing such inferences, the court was not precluded from taking into account hearsay evidence alongside other scattered evidence. It was essential to take a holistic approach to the evidence presented. When it came to the duration of the infringement of competition law rules, it was sufficient that the presented evidence related to facts sufficiently close in terms of time, in order that it could be established with reasonable certainty that the suspected infringement had continued without interruption between the dates when the alleged cartel had started and ended.

24. In this case, the Supreme Administrative Court had at its disposal all written evidence, including economic and financial evidence, as well as the records of statements made by all of the witnesses heard by the Market Court. The court also heard six witnesses in person. The gist of testimonies relied on is cited in the judgment. The court's findings indicate, *inter alia*, that independently of each other, a number of witnesses mentioned examples from different geographical regions in different parts of Finland where the companies had agreed about the allocation of markets either by geographical regions or by the volumes of contracts. The witnesses expressed a common understanding that a cartel had dominated the Finnish asphalt markets throughout the country in respect of both local government and private sector contracts and central government contracts. Several witnesses also reported consistently on the practices by which the cartel companies had agreed the price to be offered by each of them in competitive bidding. The witnesses reported that the practices followed in competitive bidding had been intended to ensure that the markets were divided as agreed. The reported tendering practices were confirmed by the recordings of telephone calls presented as evidence, and by the written evidence relating to certain competitive biddings. Furthermore, the witnesses reported consistently on how the cartel had supervised the geographical division of the markets. In addition, three witnesses testified before the court about

their experience regarding the alleged division of the markets, the related false invoices and the supply of cost-free asphalt mass, as well as some consistent hearsay. They testified that if the contracted works had not corresponded to the amounts agreed in advance, the company which had been awarded too many contracts would pay compensation to those which had received too few contracts, for example by means of false invoices. These witnesses also testified about the pressure exerted by cartel members on smaller companies to join the cartel and about measures taken to conceal the infringements.

25. On the basis of the evidence before it, the Supreme Administrative Court found that a single nationwide cartel had existed between 1994 and 2002 in respect of central and local government as well as private sector asphalt contracts. It found that the Competition Authority had presented extensive evidence of the existence of the cartel, by means of witness statements, documents, telephone recordings and other evidence. Although the evidence provided by the Competition Authority had not covered all incidents in the asphalt markets during the period covered by its application, either geographically or in terms of time, it had nevertheless permitted the court to get an overall picture of the functioning of the asphalt markets during the period in question. The evidence had excluded the possibility that the established facts were a matter of similar practices which had coincided accidentally. Taking into account what is generally known about the functioning of cartels on the basis of earlier experience and research, the most credible explanation for the similarity between the events which had occurred in different regions and the observations made by the witnesses was that the asphalt companies had agreed about the territorial allocation of the asphalt markets in the whole of Finland, as well as about the measures for implementing the agreed allocation in practice. In its final conclusion, the court stated that the Competition Authority had adduced extensive evidence of the existence of a cartel, while the defendants had not been able to refute the credibility or reliability of that evidence, nor the conclusions which the Competition Authority had drawn from it.

26. As to the applicant company's participation in the cartel, the Supreme Administrative Court held that:

> "(1274) [o]n the basis of [the three witness] statements adduced before the Market Court and the Supreme Administrative Court and the written evidence consisting of the [chart on the geographical division of the markets], it has been shown that [the applicant company] took part in the cartel, in particular in Lapland and the North Karelia region. It had been agreed that the area of Northern Finland was allocated to [the applicant company], and in general the other cartel companies had no right to do business there.
>
> (1275) In addition, it has been shown that there were restrictions in respect of works on central government contracts as well as the supply of asphalt mass. When taking into account that works commissioned by the State were executed throughout the

country, the restrictions relating to such contracts necessarily affected the whole State territory.

(1276) On the above-mentioned grounds, [the applicant company] has participated in the nationwide cartel the existence of which the Supreme Administrative Court has found established in Part 9 of the present judgment."

27. It further held that the applicant company had taken part in this cartel for almost five years. It had been established that the applicant company through its representatives had been an active operator in the cartel, taken initiatives for agreements regarding bidding for contracts, hampered the business of new and smaller companies in the market and exerted pressure on other companies to join the cartel.

28. The Supreme Administrative Court based its above mentioned findings concerning the applicant company on one witness statement given directly before it, which was corroborated by several witness statements given before the Market Court. The court noted that witnesses heard before it and the Market Court had given evidence about matters based on what they had experienced, heard or inferred concerning the applicant company's conduct. Those statements could not be excluded when assessing the nature and extent of the restrictions of competition in which the applicant company had been involved. The court specifically stated that the economic evidence of the applicant company's unusual financial performance was not taken into account as evidence of the existence of the cartel. Moreover, the court found that the applicant company had not been able to present any credible alternative explanations for its behaviour on the markets, or to refute the Competition Authority's conclusions.

29. The applicant company had thus participated in a very serious and extensive cartel, which had aimed to eliminate all functioning competition in the Finnish asphalt markets and which had been particularly harmful for this sector. However, in determining the penalty payment, account was taken of the relatively small market share of the applicant company and the regional and temporal dimensions of the applicant company's infringements, which were smaller than those of the prime participants in the cartel.

B. Compensation proceedings

30. After the Supreme Administrative Court's decision of 29 September 2009, and on the basis of that decision, the Finnish State and several municipalities brought compensation claims in the civil courts against the participants in the cartel, including the applicant company. Those claims amounted to several million euros in total.

31. On 28 November 2013 the Helsinki District Court (*käräjäoikeus, tingsrätten*) rejected the Finnish State's claims against all asphalt companies, including the applicant company. The Finnish State was ordered

to pay the asphalt companies' litigation costs, some EUR 2.6 million. On the other hand, most of the municipalities won their cases against the asphalt companies. The applicant company lost two out of the four cases brought against it, but it was not ordered to pay any compensation to either of those two municipalities, since another asphalt company had already been ordered to do so.

32. The Finnish State appealed against the District Court judgment. Also, in three of the four cases which the municipalities had brought against the applicant company appeals were lodged with the Court of Appeal (*hovioikeus, hovrätten*).

33. On 20 October 2016 the Helsinki Court of Appeal accepted the claims of the Finnish State against the asphalt companies in four cases out of seven. The applicant company was among those asphalt companies which lost their case against the State, and it was ordered to pay some EUR 1.7 million in compensation to the State. Moreover, the Court of Appeal rejected the appeals of most of the municipalities. The applicant company thus won all of its three cases against the municipalities before the Court of Appeal.

34. The applicant company appealed against the judgment of the Court of Appeal in respect of the claim by the Finnish State which it had lost. Two of the three cases brought by the municipalities against the applicant company were also appealed against to the Supreme Court (*korkein oikeus, högsta domstolen*).

35. On 6 September 2017 the Supreme Court refused the applicant's request for leave to appeal. The judgment of 20 October 2016 by the Court of Appeal thus became final in respect of the applicant company.

C. Extraordinary proceedings

36. On 25 September 2014 the applicant company requested the Supreme Administrative Court to annul its decision of 29 September 2009.

37. On 3 January 2017 the Supreme Administrative Court decided to suspend the proceedings until the Strasbourg Court renders a decision in the present case.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Restriction of Competition Act

38. At the material time, the Restriction of Competition Act (*laki kilpailunrajoituksista, lagen om konkurrensbegränsningar*, Act no. 480/1992, as in force at the relevant time) was applicable to the case. This Act was subsequently repealed by the Competition Act (*kilpailulaki,*

konkurrenslagen, Act no. 948/2011) that entered into force on 1 November 2011.

39. In accordance with sections 5 § 1 and 6 of the Restriction of Competition Act:

Section 5 § 1

"In carrying out an economic activity, it shall be prohibited to implement an agreement or any other concerted practice under which competitive bidding for the sale or purchase of good or for the rendering of a service requires

(1) that a person refrain from making a tender;

(2) that a person submit a tender which is higher or lower than [that of] another person, or;

(3) that the price tendered or an advance or credit term applied shall otherwise be based on collusion among the tenderers."

Section 6

"Undertakings or associations of undertakings operating at the same level of production or distribution shall not, whether by virtue of an agreement, a decision or any similar procedure

(1) fix or recommend prices or rentals to be charged or paid in relation to an economic activity;

(2) restrict production, divide markets, or divide sources of supply, unless it is indispensable to do so with regard to arrangements which contribute to the efficiency of production or distribution or make for technical or economic development and which mainly benefit customers or consumers."

40. Section 8 §§ 1-2 of the Restriction of Competition Act provided as follows:

Section 8 §§ 1-2

"A penalty payment [penalty for the infringement of competition] shall be imposed on an undertaking or an association of undertakings which infringes the provisions of any [parts] of sections 4 to 7, unless the infringement must be deemed to be insignificant, or unless the imposition of a penalty must otherwise be deemed unjustifiable from the point of view of safeguarding competition.

In determining the amount of the penalty, account shall be taken of the nature and scope of the restraint on competition, as well as its duration. The amount of the penalty shall be between FIM 5,000 [EUR 840.94] and FIM 4,000,000 [EUR 672,751.70]. Where the restraint on competition and the circumstances of the case so warrant, the above maximum may be exceeded. The maximum penalty shall not, however, exceed 10% of the previous year's total turnover of each of the undertakings or associations of undertakings that have participated in the restrictive practice."

41. A penalty payment is imposed by the Market Court on the basis of an application by the Competition Authority. It is payable to the State.

42. According to the preparatory works of the Restriction of Competition Act (HE 162/1991 vp), a penalty payment is a punitive type of payment which is imposed in administrative-law proceedings. The amount of a penalty payment should exceed the amount of profit obtained as a result of the anti-competitive measures.

43. According to a preparatory working group report (KTM mietintö 1991:15), a penalty payment should be severe enough for an economic operator not to be able to draw any economic benefits from an intentional breach of competition law rules. As the sanction is to be imposed in administrative-law proceedings, legal guarantees need to be adequate. Legal principles applied within the field of criminal law are to be applied. In this regard, particular attention should be paid to the principles of substantive criminal law relating to the exclusion of liability in certain circumstances. Furthermore, the proceedings in the administrative courts have to satisfy the criterion of foreseeability, and the reasoning in their decisions must be clear and sufficient.

B. The Administrative Judicial Procedure Act

44. In accordance with section 15a of the Restraint of Competition Act, the provisions of the Administrative Judicial Procedure Act (*hallintolainkäyttölaki, förvaltningsprocesslagen*, Act no. 586/1996) are applicable to competition law cases.

45. Section 33 of the Act provides the following:

Section 33 – Scope of review

> "The appellate authority is responsible for reviewing the matter. Where necessary, it shall inform the party or the administrative authority that made the decision of the additional evidence that needs to be presented.
>
> The appellate authority shall, on its own initiative, obtain evidence as far as the impartiality and fairness of the procedure and the nature of the case so require."

46. It is stated in the reasoning for the Government Bill concerning the Administrative Judicial Procedure Act (HE 217/1995 vp) that the review under section 33 refers to an investigation of facts which is possible within the limits of the powers of investigation, the special features of the legal remedy in question, and other circumstances of a similar type. According to the reasoning, the provision mainly describes how the procedure must be conducted in order to enable the court to find out the substantive truth.

47. According to the reasoning for the Government Bill, the Administrative Judicial Procedure Act is founded on the principle that the parties must present the facts supporting their claims or counterclaims. If the court considers that a normal exchange of pleadings does not clarify the facts sufficiently, it must continue to examine the case. The primary way to

proceed is to inform the parties about the additional evidence to be presented.

48. Section 34 of the Act provides the following:

Section 34 – Hearing the parties

"Before the resolution of the matter, the parties shall be reserved an opportunity to comment on the demands of other parties, and on evidence that may affect the resolution of the matter.

The matter may be resolved without hearing a party if his claim is dismissed without being considered on its merits or is immediately rejected, or if the hearing is for another reason manifestly unnecessary.

Separate provisions shall apply to the restraints on a party's access to official documents that are not public."

49. In accordance with section 51 of the Act:

Section 51 – Resolution

"The appellate authority shall resolve all the demands made in the matter in its decision. It shall review all evidence available and determine on which grounds the resolution can be based."

C. Ruling by the Supreme Administrative Court

50. In the judgment rendered in this case, the Supreme Administrative Court has stated that in the interpretation and application of the above mentioned procedural rules account must be taken of the fact that in proceedings such as the present ones the court is called upon to examine an application lodged by the Competition Authority, instead of an appeal lodged against a decision taken by an administrative authority.

D. Precedent of the Supreme Court in criminal proceedings

51. In precedent case KKO:2008:68, the Supreme Court took a stand on hearsay evidence in criminal proceedings. According to the court, hearsay evidence refers to a situation where a witness reports on something communicated to him or her by another person and where it is the veracity of the latter person's observations or declarations that is to be established. Finnish legislation does not prohibit hearsay evidence, but such evidence is also assessed in accordance with the principle of free assessment of evidence.

52. The Supreme Court considered that hearsay evidence was problematic to any court, because the assessment of the existence of such a fact would be based on an assessment of the reliability and credibility of a person not attending the hearing. The court would thus be deprived of a

possibility to observe that person directly and to assess his or her credibility and reliability when delivering the statement.

53. The Supreme Court pointed out that hearsay evidence was also problematic with regard to the defendant against whom such hearsay evidence was used. The Supreme Court explicitly stated that, in accordance with Article 14, paragraph 3 (e) of the United Nations International Covenant on Civil and Political Rights and Article 6, paragraph 3 (d) of the European Convention on Human Rights, everyone accused of a crime must have the right to question witnesses who were testifying against him or her. The Supreme Court referred to the extensive case-law of the Court, and held that the right to a fair trial was violated if a conviction was based mainly on witness statements which the defendant had not had the chance to question in order to clarify the reliability and credibility of such witnesses. The Supreme Court referred in particular to cases *Unterpertinger v. Austria*, 24 November 1986, Series A no. 110; *Delta v. France*, 19 December 1990, Series A no. 191-A; and *Rachdad v. France*, no. 71846/01, 13 November 2003. The Supreme Court concluded that these Conventions and this case-law needed to be taken into account when assessing the role of hearsay evidence in an individual criminal case.

54. In the precedent case in question, the Supreme Court held that, in the circumstances of the case, a conviction could not be based decisively on hearsay evidence. As the rest of the evidence admitted in that case supported the charges only weakly, the Supreme Court held that the charges had not been proven beyond reasonable doubt.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 OF THE CONVENTION

55. The applicant company complained under Article 6 §§ 1 and 3 (d) of the Convention that the Supreme Administrative Court had relied on hearsay evidence from unidentified sources which the applicant company had not been able to examine or have examined.

56. The Court, being the master of the characterisation to be given in law to the facts of the case (see *Söderman v. Sweden* [GC], no. 5786/08, § 57, ECHR 2013, and *Moretti and Benedetti v. Italy*, no. 16318/07, § 27, 27 April 2010), considers that the applicant company's complaints should be examined solely under Article 6 § 1 of the Convention which, in so far as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

57. The Government contested that argument.

A. Admissibility

58. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant company

59. The applicant company maintained that, by accepting hearsay evidence, the Supreme Administrative Court had failed to fulfil the requirements of the Convention. Although the Supreme Administrative Court had acknowledged in its decision that it needed to take the Convention into account, it had still failed to do so in practice. The applicant company had been able to actively use its right to cross-examine the witnesses, but since all of them had only offered hearsay evidence, it had naturally been impossible to have the initial sources examined, some of whom had even remained unidentified.

60. The applicant company further argued that none of the provisions in Finnish legislation gave any right to assume that hearsay evidence was admissible. On the contrary, the Supreme Court had come to a different conclusion in precedent case KKO:2008:68, which, according to the Supreme Administrative Court, was also applicable to civil and administrative-law proceedings. The Supreme Administrative Court had relied on a "holistic approach" and had based the conviction on hearsay evidence "alongside other scattered evidence". There was no justification for that in EU law or in EU competition law in particular.

61. In the applicant company's case, this other evidence had consisted of an ambiguous document, the origin of which was not clear, and of financial evidence which in fact had shown that, in the applicant company's case, the financial evidence did not support any findings regarding the existence of a cartel. None of the telephone recordings related to the applicant company. The outcome of the case dealt with by the Market Court had been different because the court had not accepted any hearsay evidence. The Court's findings in the case of *Delta v. France*, cited above, supported this latter approach.

(b) The Government

62. The Government observed that, when examining the applicant company's case, the Supreme Administrative Court had considered that the matter was comparable in principle to criminal charges to which Article 6 of the Convention applied. Both the Market Court and the Supreme Administrative Court had held an oral hearing in the matter to hear witnesses, and the applicant company had actively used its right to cross-examine those witnesses. The applicant company had not asked the Supreme Administrative Court to hear any witnesses other than those it had heard.

63. The Government stressed that, in accordance with domestic legislation, there was free assessment of evidence, which meant that each court considered what evidentiary value was to be given to each piece of evidence. Hearsay evidence was not expressly forbidden, but, like any other evidence, was to be assessed freely. Hearsay evidence was also not ruled out by the Court's case-law. In the present case, the Supreme Administrative Court had held that it was essential to take a holistic approach to the evidence presented, and also that inferences could be drawn in order to substantiate prohibited cooperation in a competition law case. In competition issues, careful account had to be taken not only of the relevant domestic legislation, but also of EU competition law and the case-law of the EU courts in particular. The Supreme Administrative Court had done so by linking the principles governing the assessment of evidence seamlessly with the case-law of the Court of Justice of the European Union on competition law. In the Government's view, the judgment of the Supreme Administrative Court thus complied with the requirements for the processing of competition law cases which the Court of Justice of the European Union had laid down in its case-law.

64. The Government submitted that the Supreme Administrative Court had not exclusively or decisively based its decision on hearsay evidence. It had relied on documentary evidence, oral testimonies which had been based on the experience of the witnesses heard by the court, and financial analysis. The hearsay evidence had thus not been the sole and decisive evidence in the case (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, §§ 128 and 147, ECHR 2011). Nor was the court's decision based on witness statements which the applicant company could not have examined during the proceedings.

2. The Court's assessment

(a) The applicability of the criminal limb of Article 6

65. The Court notes first of all that the Government did not dispute the applicability of the criminal limb of Article 6 to the present case. In fact, the Government submitted that when examining the applicant company's case,

the Supreme Administrative Court, referring to the Court's judgment in *Jussila* (cited above), had considered that the matter was in principle comparable to criminal charges to which Article 6 of the Convention applied. It is therefore not disputed that the matter at hand falls within the criminal limb of Article 6 of the Convention.

(b) General principles

66. The Court has emphasised that the adversarial principle and the principle of equality of arms, which are closely linked, are fundamental components of the concept of a "fair hearing" within the meaning of Article 6 § 1 of the Convention. They require a "fair balance" between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (see, *inter alia*, *Regner v. the Czech Republic* [GC], no. 35289/11, § 146, 19 September 2017, and *Salov v. Ukraine*, no. 65518/01, § 87, ECHR 2005-VIII).

67. The rights deriving from these principles are not absolute. While the Contracting States enjoy a certain margin of appreciation in this area, it is for the Court to determine in the last instance whether the requirements of the Convention have been complied with. Even in criminal cases the Court has held that there may be competing interests which must be weighed against the rights of the party to the proceedings. However, only measures restricting the rights of a party to the proceedings which do not affect the very essence of those rights are permissible under Article 6 § 1. For that to be the case, any difficulties caused to the applicant party by a limitation of his or her rights must be sufficiently counterbalanced in the procedures followed by the judicial authorities (see *Fitt v. the United Kingdom* [GC], no. 29777/96, §§ 45-46, ECHR 2000-II).

68. In the Court's case-law, the autonomous interpretation adopted by the Convention institutions of the notion of a "criminal charge" under the so-called *Engel* criteria has led to a gradual broadening of the scope of the criminal limb of Article 6 to cases not strictly belonging to the traditional categories of criminal law (see, *inter alia*, *Jussila*, cited above, § 43). Cases relating to the enforcement of competition and similar domains of law have often been examined under the criminal head of Article 6 (see *Deweer v. Belgium*, 27 February 1980, §§ 46-47, Series A no. 35; *Société Stenuit v. France*, no. 11598/85, §§ 59-67, Commission's report of 30 May 1991; *Lilly France S.A. v. France* (dec.), no. 53892/00, 3 December 2002; *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, 27 September 2011; *Dubus S.A. v. France*, no. 5242/04, §§ 37-38, 11 June 2009; and *Grande Stevens and Others v. Italy*, nos. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, §§ 99-101, 4 March 2014).

69. As the Court has often emphasised, ensuring the fairness of the proceedings as a whole is its primary concern under paragraph 1 of Article 6

(see, *inter alia*, *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08, 50571/08, 50573/08 and 40351/09, §§ 250-251, ECHR 2016, and *Simeonovi v. Bulgaria* [GC], no. 21980/04, § 113, ECHR 2017). In criminal proceedings the guarantees contained in paragraph 3 of Article 6 are specific aspects of the general concept of a fair trial set forth in paragraph 1. The various rights, of which a non-exhaustive list appears in paragraph 3, reflect certain of the aspects of the notion of a fair trial in criminal proceedings, exemplifying the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases. They are, however, not aims in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole (see, *inter alia*, *Correia de Matos v. Portugal* [GC], no. 56402/12, §§ 119-120, 4 April 2018; *Ibrahim and Others*, cited above, § 251). The Court therefore considers complaints under Article 6 § 3 under paragraphs 1 and 3 of Article 6 taken together (see, *inter alia*, *Correia de Matos,* cited above, § 119).

70. In this assessment, the Court will, *inter alia*, look at the way in which the evidence was obtained, taking into account the rights of the defence, but also the interests of the public and the victims in seeing crime properly prosecuted (see *Schatschaschwili v. Germany* [GC], no. 9154/10, §§ 100 and 101, 15 December 2015, and *Paić v. Croatia*, no. 47082/12, § 27, 29 March 2016) and, where necessary, the rights of the witnesses (see, for example, *Al-Khawaja and Tahery*, cited above, § 118).

71. The Court has also acknowledged, not least in view of the fact that the range of proceedings which are considered to fall under the criminal limb of Article 6 has expanded, that there are "criminal charges" of differing weight and that, while the requirements of a fair hearing are strictest concerning the hard core of criminal law, there are cases where despite their falling under the criminal head the procedural guarantees do not necessarily apply with their full stringency (see *Jussila*, cited above, § 43; *Mamidakis v. Greece,* no. 35533/04, § 30, 11 January 2007; *Chap Ltd v. Armenia*, no. 15485/09, § 41, 4 May 2017; and *Özmurat İnşaat Elektrik Nakliyat Temizlik San. ve Tic. Ltd. Şti. v. Turkey,* no. 48657/06, § 28, 27 November 2017). A differentiated approach in this regard can be seen to reflect the Court's above-mentioned general focus on regarding, as its primary concern, the fairness of the proceedings as a whole, with a view to ensuring the rights of defence while also remaining mindful of the interests of the public and the victims in the proper enforcement of the laws in question (see paragraph 69 above).

72. The Court furthermore recalls that is has consistently held that the obligation to comply with Article 6 of the Convention does not preclude a "penalty" being imposed by an administrative authority in the first instance, provided that decisions taken by an authority which does not itself satisfy the requirements of Article 6 § 1 of the Convention must be subject to

subsequent control by a judicial body which does meet the said requirements and has full jurisdiction of review (see, *inter alia*, *A. Menarini Diagnostics S.R.L.*, cited above, §§ 58-59, and *Grande Stevens and Others*, cited above, § 139). Thus, in the light of the Court's established case-law, it is not a requirement under Article 6 of the Convention that proceedings such as those concerning sanctions for breaches of competition law be conducted according to the classic model of a criminal trial.

73. Turning to questions of evidence in criminal proceedings, the Court recalls at the outset that according to its established case-law, Article 6 does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Schenk v. Switzerland,* 12 July 1988, §§ 45-46, Series A no. 140; *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 83, 11 July 2017; and *Seton v. the United Kingdom*, no. 55287/10, § 57, 31 March 2016). The Court has also consistently held that, as a general rule, it is a matter for the domestic courts to assess the evidence before them (see, for instance, *Vidal v. Belgium*, 22 April 1992, § 33, Series A no. 235-B). Thus, the Court will not, in principle, intervene in issues concerning the assessment of evidence and the establishment of the facts, nor in the interpretation of domestic law, unless the decisions reached by the domestic courts appear arbitrary or manifestly unreasonable and provided that the proceedings as a whole were fair as required by Article 6 § 1 (see, for instance, *Ajdarić v. Croatia*, no. 20883/09, § 32, 13 December 2011).

74. The Court notes, however, that there is a distinction between the admissibility of evidence, that is, the question of which elements of proof may be submitted to the competent court for its consideration, and the rights of defence in respect of evidence which in fact has been submitted before the court (see, for instance, *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, § 68, Series A no. 146; *Lüdi v. Switzerland*, 15 June 1992, § 43, Series A no. 238; and *C.B. v. Switzerland*, no. 27741/95, Commission decision of 17 January 1997). There is also a distinction between the latter, that is, whether the rights of defence have been properly ensured in respect of the evidence taken, and the subsequent assessment of that evidence by the court once the proceedings have been concluded. From the perspective of the rights of defence, issues under Article 6 may therefore arise in terms of whether the evidence produced for or against the defendant was presented in such a way as to ensure a fair trial (see, for instance, *Horvatić v. Croatia*, no. 36044/09, § 78, 17 October 2013, and *Barım v. Turkey* (dec.), no. 34536/97, 12 January 1999).

75. An assessment of the fairness of the proceedings may thus depend, *inter alia*, on whether the defendant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. In this context, the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances

cast doubt on its reliability or accuracy (see, for instance, *Bykov v. Russia* [GC], no. 4378/02, § 89, 10 March 2009, and *Erkapić v. Croatia*, no. 51198/08, §§ 72-73, 25 April 2013).

(c) Application of the general principles to the present case

76. With a view to the particular domain of competition proceedings, the Court observes that the present case arises from the context of domestic legislation under which the power to impose financial penalties in such cases is entrusted, in the first instance, to a court, the decisions of which are subject to appeal at a further judicial instance with full jurisdiction. The Court notes, however, that this is not the prevailing situation in the States Parties, as in many of those jurisdictions similar penalties are instead imposed by an administrative authority in the first instance.

77. In light of the general principles above, the question before the Court in the present case is whether the proceedings before the domestic courts, when examining in particular issues concerning the scope of the impugned restrictions of competition, the applicant company's implication in unlawful restrictive practices and the requisite financial penalty, were fair from the point of view of the rights of defence, given the applicant company's complaint about the Supreme Administrative Court having relied on evidence which could not be tested before it. The Court is called upon to consider the questions of fairness in view of the domestic proceedings as a whole, bearing in mind that the Supreme Administrative Court was examining those issues as second, final judicial instance following appeals both by the Competition Authority and the applicant company, the latter contesting its involvement in a cartel, and taking into account that the outcome of the case for the applicant was aggravated on appeal in comparison with the judgment of the Market Court in first instance. In this context, the Court is further called upon to assess those issues with due regard to the particular nature of competition proceedings.

(i) Preliminary considerations

78. The Court emphasises that the fairness of the proceedings should be assessed as a whole, by taking into account the specific nature and circumstances of the case, and that the question whether the rights of defence, in particular, have been ensured in a manner consonant with Article 6 must be considered in the light of all the relevant elements in the case. In this context, the Court acknowledges that cases concerning restrictions of competition typically involve complex and often wide-ranging economic matters and related factual issues, which means that the relevant elements of evidence will also be multifaceted. The Court is also aware of the strong public interest involved in the effective enforcement of competition law. Moreover, it is mindful of the fact that as a rule, the financial penalties applicable in this field are not imposed on natural

persons but on corporate entities, quantified on the basis of the harmful effects of the anti-competitive conduct and taking into account the business turnover of the entities found to be in breach of competition rules.

79. In the present context, the Court considers it appropriate to examine, first, the reasons behind the extent to which evidence by witnesses was examined; secondly, the importance of the untested indirect evidence in the establishment of the facts; and thirdly, the fairness of the proceedings as a whole with a particular emphasis on the rights of defence.

(ii) The reasons behind the extent to which evidence by witnesses was examined

80. The Court notes, firstly, that at the first instance level, a large amount of evidence was adduced by the Competition Authority and the defendants and examined before the Market Court in adversarial proceedings. According to the court record, the Competition Authority in its application had attached sixty-eight pieces of documentary evidence, adduced further written evidence in the course of the hearing and called fifteen witnesses, about half of whom were persons having served in the management or as employees of some of the companies concerned, while the rest were persons having served in relevant public sector organisations and involved in asphalt sector works. The defendant companies in turn had called over thirty witnesses and adduced written evidence.

81. Secondly, the Court notes that in its judgment, the Market Court concluded that the defendant companies, including the applicant company, had participated in the operation of a nationwide cartel in the market for central government contracts in the asphalt sector, albeit that the applicant's participation insofar as price-fixing was concerned was limited. By contrast, as regards the market for local government and private sector asphalt works and supplies, the Market Court conducted a separate analysis of the evidence concerning the existence of a cartel in that market segment on a regional basis and found that there was sufficient evidence of a cartel in that segment only in respect of certain regions, none of which were areas where the applicant company was doing business, whereas the evidence was not considered sufficient in respect of a cartel concerning that market segment for other regions of the country. Consequently, while the Market Court did find the applicant company in breach of competition rules for participating in the nationwide cartel for central government contracts, it did not make a similar finding in respect of the alleged cartel for local government and private sector contracts.

82. In this context, the Court further observes that in its appeal to the Supreme Administrative Court, the Competition Authority contested, in particular, the interpretation adopted by the Market Court as regards the scope of the cartel, arguing that there was nothing to suggest that the territorial allocation of markets did not encompass contracts in all the above mentioned segment of the asphalt market and pointing out that the exclusion

of supplies of asphalt mass outside the cartel companies affected competition in the entire sector. Thus, the main issue raised by the Competition Authority's appeal in respect of which the applicant company risked a potential aggravation of the outcome of the case for its part was not merely a question of fact, or evidence relating to certain facts, but involved wider questions concerning the relevant market and its functioning as well as the nature and effects of the alleged restrictive practices. In other words, it cannot be said that the key issue before the Supreme Administrative Court from the point of view of the applicant company was limited to an assessment of evidence only. Rather, the issues on appeal concerned a complex set of issues which required an assessment of several elements and involved a range of economic, factual as well as legal considerations.

83. Thirdly, the Court observes that before the Supreme Administrative Court, the applicant company had the opportunity to influence the extent to which evidence was to be adduced and examined on appeal. Prior to the hearing of the case on appeal, a preparatory meeting was held by Supreme Administrative Court in order to afford the parties the opportunity to make submissions in this regard. The applicant had the opportunity of weighing up in advance, taking into consideration all the issues and arguments raised in the Competition Authority's appeal, the need for and the availability of additional evidence with a view to supporting its position at the appeal stage. The applicant company did not request the hearing of any further witnesses apart from the six persons who were called to appear before the Supreme Administrative Court, although at that stage it was well aware of both of the judgment of the Market Court, the content of the Competition Authority's submissions on appeal as well as the fact that the outcome of the Market Court's decision could be changed to its detriment before the Supreme Administrative Court (see *Vilches Coronado and Others v. Spain*, no. 55517/14, § 42, 13 March 2018).

84. Furthermore, the Court is also mindful of the fact that given the nature and purpose of competition law, proceedings for its enforcement depend on a variety of evidence that must be considered and assessed together, whereupon the role of evidence taken from witnesses may vary. As it is not the Court's task to enter into the assessment of evidence, its scrutiny of whether the defendants' rights of defence have been adequately safeguarded in regard to evidence from witnesses must also take account of the fact that such evidence is only part of the proof on which the assessment of these kinds of cases rests.

85. In view of these considerations, the Court concludes that the manner and extent to which evidence from witnesses was examined before the Supreme Administrative Court was not without justification.

(iii) Importance of the untested indirect evidence

86. The Court notes that in its judgment, the Supreme Administrative Court made certain general statements about the assessment of evidence in competition proceedings, emphasising at the outset that the domestic legislation in this regard is based on the principle of free assessment of evidence. That court further addressed the particular evidentiary difficulties arising in the context of practices which are aimed at restricting competition, citing also the relevant case-law of the Court of Justice of the European Union. The Supreme Administrative Court emphasised that the evidence in a competition case could not be subject to the same requirements as evidence in criminal cases, *inter alia*, because the domestic competition law was a part of the competition of law of the European Union. Accordingly, circumstantial evidence as well as inferences could also be relied on for establishing prohibited cooperation in the absence of any alternative reasonable explanation. When drawing such inferences, the court was not precluded from taking into account hearsay evidence alongside various other pieces of evidence. It was essential to take a holistic approach to the evidence presented (see paragraphs 20-22 above). Thus, the Court accepts at the outset that the domestic court carefully considered and explained the principles which according to it must govern the assessment of evidence in these types of cases in view of both domestic and EU law.

87. The Court further observes that in this case, the Supreme Administrative Court heard, as witnesses for the Competition Authority, three persons who at the relevant time had held positions in the management or as employees of some of the defendant companies having their main business in different parts of the country. From the Supreme Administrative Court's judgment, it transpires that one of these witnesses, a former owner of one of the companies concerned, had directly implicated the applicant company as a participant in the cartel. In addition, the Supreme Administrative Court relied on transcripts of testimonies by further witnesses given before the Market Court, including an employee of one of the companies concerned as well as one former manager and one former employee of the applicant company itself, whose testimonies corroborated the evidence inculpating the applicant company. The witnesses and the gist of their testimonies were cited in the Supreme Administrative Court's judgment.

88. In this context, the Court reiterates that the central issue before the Supreme Administrative Court on appeal concerned the question whether the Market Court had been right in its analysis of the scope of the restrictive practices, in particular in separating from each other the different segments of the market depending on whether the business concerned central government contracts or local government or private sector contracts (see paragraph 16 above). As stated above (see paragraph 88), this issue was not solely one of facts or evidence alone but one which largely required an

intricate analysis of market-related economic factors as well as relevant legal considerations. In its analysis, the Supreme Administrative Court arrived at a conclusion different from that of the Market Court, concluding that the asphalt sector was to be regarded as a whole in terms of the restrictive practices, and finding that there was a single cartel encompassing all the segments of the asphalt contracts.

89. In its judgment the Supreme Administrative Court held, as far as the applicant company was concerned (see paragraph 26 above), that it had participated in the cartel in particular in the regions of Lapland and North Karelia. The Court found that Northern Finland had been allocated to the applicant company, in the sense that other cartel companies were not allowed to carry out works there. The court also referred to established restrictive practices in the bidding and the supply of asphalt mass for central government contracts, stating that such restrictive practices have inevitably had nationwide effects.

90. The Supreme Administrative Court's judgment shows that its finding according to which the applicant company had participated in the cartel was reached on the basis of documentary evidence and the testimony of witnesses who were either heard before the court itself or before the Market Court and who, as insiders in the companies concerned, had told the courts about their own experiences in relation to the impugned restrictive practices. The relevant witnesses were named and the gist of their testimonies quoted, without there being any indication that the court had in any significant degree relied on testimony consisting of hearsay (see *Hedström Axelsson v. Sweden* (dec.), no. 66976/01, 6 September 2005). To the extent that the testimonies may also have included references to second-hand information received from others, the account provided in the Supreme Administrative Court's judgment of all the evidence on the basis of which its conclusions were reached does not support the allegation that the court's findings depended on such elements in the testimonies. Although the incriminating witnesses, who were cartel insiders, may also have related information based on hearsay, the Court is not persuaded that such elements played a decisive role in the Supreme Administrative Court's judgment.

91. The Court therefore concludes that the indirect evidence was not decisive for the outcome of the impugned proceedings.

(iv) The fairness of the proceedings as a whole

92. The Court recalls that as the fairness of the proceedings calls for them being assessed as a whole, despite its finding that the judgment rendered by the domestic court was not decisively based on untested indirect evidence, there is still a need to determine whether the defendant benefitted from sufficient factors counterbalancing any handicaps which reliance on such evidence might have entailed for the defence. This being said, the Court reiterates that the assessment of the rights of the defence is a

relative one and depends on the importance of the untested evidence as well as on the opportunity provided for the defence to comment on such evidence during an oral hearing and/or in written procedure (see *Seton,* cited above, § 68, and *Simon Price v. the United Kingdom*, no. 15602/07, §§ 127 and 131, 15 September 2016).

93. In the present case, the Court notes first of all that in its judgment, the Supreme Administrative Court carefully considered and explained the principles which under relevant domestic and EU law governed the assessment of questions of fact and evidence in competition proceedings. It also took into account the applicability of Article 6 of the Convention to such proceedings. Thus, the issues raised by the applicant were not overlooked by the domestic court. That court found that the evidence adduced by the Competition Authority was both extensive and consistent, and that the defendants had not been able to undermine the credibility or reliability of that evidence. It also found that the evidence which had been adduced excluded the possibility of an alternative explanation based on a coincidental, concurrent occurrence of business conduct by the companies concerned. As regards the Supreme Administrative Court's findings concerning the applicant company's participation in the cartel, the testimonial evidence which was relied on was identified, cited and quoted as given by witnesses who had been examined before the domestic courts.

94. As the Court has stated above, the judgment of the Supreme Administrative Court was principally based on conclusions drawn from documentary evidence and witness testimony of a kind which had been open for challenge by the applicant company, including cross-examination, in the course of the proceedings. The Court further observes that the applicant company's right to submit evidence in order to rebut the evidence presented by the Competition Authority and to explain extensively its own assessment of the evidence accepted by the domestic court was fully respected.

95. The Court concludes that in the written and oral proceedings before the Supreme Administrative Court, the applicant company had opportunity to exercise rights of defence providing adequate safeguards also in respect of the evidence on the basis of which the domestic court reached its judgment in the case.

(v) Conclusion

96. In the light of its findings above, the Court concludes that in the circumstances of the case, the extent to which the Supreme Administrative Court relied on the untested indirect evidence was not unjustified.

97. Accordingly, there has been no violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 2 OF THE CONVENTION

98. The applicant company also complained that the Supreme Administrative Court had accepted that in competition law cases the standard of proof could be lower than "beyond reasonable doubt", or, as in the present case, lower than the "preponderance of evidence" standard. It further complained that the shifting of the burden of proof to it by the Supreme Administrative Court had violated the presumption of innocence under Article 6 § 2 of the Convention.

99. Article 6 §§ 1 and 2 of the Convention read as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

100. The Government contested that argument.

Admissibility

1. The parties' submissions

(a) The applicant company

101. The applicant company argued that the standard of proof applied by the Supreme Administrative Court had failed to fulfil the requirements of Article 6 § 1 of the Convention, alleging that the standard of proof had fallen below the standard of "preponderance of evidence", although the case concerned financial penalties. Nothing could authorise the domestic courts to abandon the minimum level of the standard of proof, namely the standard of "preponderance of evidence".

102. The applicant company asserted that the Government had admitted in their observations that the applicant company should have proved its innocence in relation to the alleged infringements in order to be acquitted. A reversed burden of proof had thus been applied, and it had clearly violated the presumption of innocence under Article 6 § 2 of the Convention.

(b) The Government

103. The Government submitted that, in the present case, the domestic provisions concerning administrative judicial procedure were applicable. The domestic legislation did not prescribe any standard of evidence, nor were there any formal provisions on the allocation of the burden of proof applicable in administrative judicial procedures.

104. The Government stressed that, when assessing the sufficiency of the evidence in a competition law case, the problems of finding direct

evidence had to be taken into account, a fact that had specifically been mentioned in the Supreme Administrative Court's judgment. In that judgment, the court had held that the Competition Authority had provided extensive and consistent evidence of the operation of a cartel in breach of the Restriction of Competition Act in the asphalt sector from 1994 to 2002, this evidence deriving from documents, telephone recordings, witness statements and a financial analysis. It had further held that in order to prove their innocence in relation to the alleged infringements of the provisions of the Act, the applicant companies should have been able to present a credible alternative interpretation to refute the evidence provided by the Competition Authority or its conclusions from the evidence. Since the applicant companies had been unable to refute the evidence provided by the Competition Authority, or prove that the Competition Authority had drawn false conclusions from the evidence, in the light of the evidence provided by the Competition Authority, the Supreme Administrative Court had held that a nationwide cartel had operated in the Finnish asphalt markets in violation of sections 5 and 6 of the Restraint of Competition Act.

105. The Government maintained that the standard of proof used by the Supreme Administrative Court had fulfilled the requirements of Article 6 § 1 of the Convention, and that the court had not applied a reversed burden of proof. The court had found that the alleged violation of the Restriction of Competition Act had been substantiated on the basis of the evidence provided by the Competition Authority and that the defendant companies had not been able to present sufficient evidence to the contrary or provide a credible alternative interpretation. In the Government's view, the Supreme Administrative Court had respected the presumption of innocence guaranteed by Article 6 § 2 of the Convention.

2. The Court's assessment

106. The Court reiterates that, as a general rule, it is for the national courts to assess the evidence before them, to apply the relevant standard of proof, and to evaluate whether the admitted evidence is sufficient for a conviction. It is for the Court to ascertain that the proceedings, considered as a whole, were fair.

107. Fairness with regard to criminal proceedings also includes respecting the presumption of innocence. Article 6 § 2 requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. Thus, the presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence (see *Barberà, Messegué and Jabardo*, cited above, §§ 67-68 and 77; *Telfner v. Austria*, no. 33501/96, § 15, 20 March 2001; and *Natunen v. Finland*, no. 21022/04, § 53, 31 March 2009).

108. Furthermore, while it is incompatible with Article 6 to base a conviction in criminal proceedings solely or mainly on an accused's silence or his refusal to answer questions or give evidence himself, in situations which clearly call for an explanation from the accused, his silence or other response can be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution (see *John Murray v. the United Kingdom*, 8 February 1996, §§ 47 and 54, *Reports of Judgments and Decisions* 1996-I, and *Narinen v. Finland* (dec.), no. 13102/03, 13 December 2005).

109. In the present case, the Court notes that in its judgment the Supreme Administrative Court discussed the questions concerning the burden of proof and the applicable standard of proof (see paragraphs 21-22 above). Having examined all the evidence submitted to it, the court concluded that the Competition Authority had adduced extensive evidence of the existence of a cartel, while the defendants had not been able to refute the credibility or reliability of that evidence, nor the conclusions which the Competition Authority had drawn from it (see paragraph 25 above). In the light of the Supreme Administrative Court's judgment, the Court cannot find any indication that the principles adopted in it or their application conflicted with the requirements arising from Article 6 § 2. Nor is there any indication that the Supreme Administrative Court had a preconceived idea of the applicant company having been in breach of competition rules (see *Grande Stevens and Others*, cited above, § 159). In these circumstances, it cannot be said that the Supreme Administrative Court shifted the burden of proof to the applicant company (see, *a contrario*, *Telfner v. Austria*, cited above, § 18). Nor is there any indication in the case file that the standard of proof applied by the Supreme Administrative Court was in any way arbitrary.

110. It follows that these complaints are manifestly ill-founded and must therefore be declared inadmissible pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY

1. *Declares* the complaint under Article 6 § 1 of the Convention in respect of reliance on indirect evidence admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 14 February 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Linos-Alexandre Sicilianos
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinions of Judge Wojtyczek and Judge Koskelo are annexed to this judgment.

L.-A.S.
R.D.

CONCURRING OPINION OF JUDGE WOJTYCZEK

1. I fully agree with the view that the Convention has not been violated in the instant case. However, I have some hesitations concerning the approach adopted in the reasoning.

2. The Court has developed a rich case-law concerning the principle of formal immediacy (in German: *formelle Unmittelbarkeit*) as an element of a fair criminal trial (see Al-*Khawaja and Tahery v. the United Kingdom* [GC], 26766/05 and 22228/06; *Schatschaschwili v. Germany* [GC], no. 9154/10, ECHR 2015; and *Murtazaliyeva v. Russia* [GC], no. 36658/05, 18 December 2018). The present case concerns a different issue, namely the principle of the material immediacy (*materielle Umittelbarkeit*) of criminal proceedings, which requires that factual findings be based – to the greatest possible extent – upon sources of evidence in direct contact with the facts of a case.

There is no doubt that direct sources of evidence are preferable to indirect sources, such as hearsay witnesses (i.e. witnesses who report what other persons have told them), and that reliance upon indirect sources requires special caution. At the same time, however, I note that criminal proceedings in many European States are based upon the principle of free assessment of evidence. The free assessment of evidence is widely seen as one of most fundamental guarantees of a fair criminal trial. Under this principle, the criminal court has the power to determine which evidence is necessary to establish the facts, to assess the credibility of each piece of evidence and to determine the weight attributed to each of them.

The free assessment of evidence is usually combined in domestic law with the obligation to duly reason the factual findings. This obligation is another essential guarantee of a fair trial. Criminal courts are under an obligation to explain in detail why and how their factual findings stem from the evidence presented during the proceedings. In particular, a court which relies upon evidence from indirect sources must explain – as for any other piece of evidence – its assessment of the credibility of this evidence, the relevance of this evidence for establishing the facts of the case and its relationship with other items of evidence.

The guarantees of a fair trial are further reinforced by the right of appeal in criminal matters (as guaranteed by Article 2 of Protocol No. 7 to the Convention). The factual findings reached and reasoned by the first-instance court are reviewed by a second-instance court. Free assessment of evidence therefore means a rational assessment under the review of a higher-instance court.

Last but not least, the free assessment of evidence is combined with the presumption of innocence (Article 6 § 2). Where factual elements are subject to doubt, they cannot be decided to the accused's disadvantage.

3. In paragraph 73 of the present judgment, the Court has correctly summarized the relevant principles concerning the assessment of evidence produced in domestic criminal proceedings in the following way:

> "the Court recalls at the outset that according to its established case-law, Article 6 does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140; *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 83, 11 July 2017; and *Seton v. the United Kingdom*, no. 55287/10, § 57, 31 March 2016). The Court has also consistently held that, as a general rule, it is a matter for the domestic courts to assess the evidence before them (see, for instance, *Vidal v. Belgium*, 22 April 1992, § 33, Series A no. 235 B). Thus, the Court will not, in principle, intervene in issues concerning the assessment of evidence and the establishment of the facts, nor in the interpretation of domestic law, unless the decisions reached by the domestic courts appear arbitrary or manifestly unreasonable and provided that the proceedings as a whole were fair as required by Article 6 § 1 (see, for instance, *Ajdarić v. Croatia*, no. 20883/09, § 32, 13 December 2011)."

4. The Court, in paragraph 96, reaches the conclusion "that in the circumstances of the case, the extent to which the Supreme Administrative Court relied on the untested indirect evidence was not unjustified". This conclusion is based on the implicit assumption that a criminal court may rely on hearsay witnesses only if this justified, and this justification is subject to review by the European Court of Human Rights. The review carried out in the instant case was based upon a three-stage test (see paragraph 79): "first, the reasons behind the extent to which evidence by witnesses was examined; secondly, the importance of the untested indirect evidence in the establishment of the facts; and thirdly, the fairness of the proceedings as a whole with a particular emphasis on the rights of defence".

5. In assessing the reasons for invoking hearsay evidence in a judgment and its relevance for establishment of the facts, the Court is entering the field of assessment of evidence, usually considered as belonging to a sphere in which the domestic criminal courts enjoy exclusive competence. The Court's approach consists in identifying parts of the evidentiary material which it considers as problematic and as requiring enhanced scrutiny on its part. In my view, this approach departs to a certain extent from the general principles set out in point 3 above. It may be perceived as a step towards introducing certain exceptions to the free assessment of evidence by the domestic courts. This general approach is adopted without a deeper and comprehensive analysis of the different principles concerning the assessment of evidence in criminal proceedings. I have doubts as to whether there is a sufficient rational justification for the approach adopted.

Moreover, the evidentiary material is usually to be viewed as a single whole, and the assessment of an individual piece of evidence cannot usually be carried out in isolation from the assessment of all other pieces of evidence. Nonetheless, the Court implicitly identifies a certain general type of "suspect" evidentiary material and subjects it to enhanced scrutiny in the

Strasbourg proceedings, while leaving the assessment of all other parts of the evidentiary material to the exclusive competence of the domestic courts and declaring it as immune – in principle – from "Strasbourg review". To put it differently: domestic judges may be fully trusted when they handle direct evidence but this trust is limited when they are required to handle indirect evidence. I do not perceive sufficient reasons for such a differentiation of the evidentiary material for the purpose of proceedings before the European Court of Human Rights.

More generally, the main problem with indirect evidence is the risk of judicial error. This is an issue of substantive rather than of procedural justice. The strict scrutiny of indirect evidence through the prism of procedural fairness is not sufficient to eliminate the risk that a domestic criminal judgment based on erroneous factual findings will be declared compliant with the Convention standards. At the same time, the mere admission of indirect evidence does not necessarily prejudice the position of the accused. On the contrary, under the system of free assessment of evidence it may be easier for the defence to call into question the credibility of indirect sources (especially if there are not corroborated by other pieces of evidence) than to challenge direct evidence.

I would like to reiterate here that the review of the correct application of the standards of formal immediacy by the domestic courts is, obviously, a completely different issue.

6. Turning to the circumstances of the instant case, I have doubts whether enhanced scrutiny of selected parts of the evidentiary material was necessary, given that the factual findings of the domestic courts were neither arbitrary nor manifestly unreasonable. In such a situation, it was sufficient to verify whether the proceedings as a whole were fair as required by Article 6 § 1.

7. The present judgment defines the object of the proceedings in the following way: "the Court is called upon to consider the questions of fairness in view of the domestic proceedings as a whole" (see paragraph 77). At the same time, it introduces the three-stage approach mentioned above in point 4 of this concurring opinion. I note in this context that the third element of this test coincides with the general object of the proceedings, namely the question of the overall fairness of the proceedings. It is not clear how the first two elements articulate with this general requirement of fairness. If the reasons for taking into account the testimony of the hearsay witness had been insufficient, would this have been a sufficient ground for finding a violation of Article 6? If the "untested indirect evidence" had been decisive for the establishment of the facts, would this have been a sufficient ground to conclude that Article 6 has been violated because the proceedings, considered as a whole, would have been unfair? Or are there other factors which may yet have tipped the balance in

favour of finding a non-violation? All those questions were left without clear answers.

The devised test raises further question. As stated above, the Court defines the first element of the test as follows: "the reasons behind the extent to which evidence by witnesses was examined". The problem does not stem, however, from the mere fact that a hearsay witness *was examined* by a court. It may instead stem from the fact that the hearsay part of his testimony was later assessed as credible and *relied upon* by a court for the purpose of establishing facts.

8. I note, moreover, that the fact that the indirect evidence was subject to enhanced scrutiny by the Court does not mean that the defence should enjoy broader rights in its respect than in respect of other pieces of evidence. The general panoply of defence rights applicable to all items of evidence was considered sufficient in this case.

9. The proceedings before the European Court of Human Rights cannot be compared to domestic criminal proceedings. In particular, the object of these two procedures and the nature of the factual circumstances to be established are completely different. Bearing in mind all of the fundamental differences between the two procedures, it is worth noting, however, that neither the principle of substantive immediacy nor the principle of formal immediacy apply in the proceedings before the European Court of Human Rights. Evidence from indirect sources, including, *inter alia*, witnesses' testimonies and other evidence gathered by non-governmental organisations, is often relied upon in the Court's proceedings (see, among many examples, NA. v. The United Kingdom, no. 25904/07, 17 July 2008; *Georgia v. Russia (I)* [GC], no. 13255/07, ECHR 2014 (extracts); *Paposhvili v. Belgium* [GC], no. 41738/10, 13 December 2016; and *J.R. and Others v. Greece*, no. 22696/16, 25 January 2018). This confirms that evidence from indirect sources may be of great value in establishing facts in judicial proceedings.

CONCURRING OPINION OF JUDGE KOSKELO

1. I agree with the present judgment. However, in respect of the complaint concerning the Supreme Administrative Court's alleged reliance on incriminating evidence consisting of "hearsay", I wish to add a few remarks relating to the reasoning that has been adopted.

2. As is well-known, and mentioned in paragraph 68 of the judgment, the Court embarked a long time ago on a line of case-law which, under its autonomous interpretation of the concept of a "criminal charge", has entailed a considerable expansion of the scope of the criminal limb of Article 6. As also mentioned in paragraph 71 of the judgment, the Court has acknowledged in this context that there are "criminal charges" of differing weight and that, while the requirements of a fair hearing are strictest concerning the hard core of criminal law, there are cases where, despite their falling under the criminal head, the procedural guarantees do not necessarily apply with their full stringency.

3. The ensuing need for a differentiated approach is indeed both inevitable and reasonable. Yet the Court can hardly be credited with having so far developed any clear or coherent set of criteria or principles for what such a differentiated approach will mean in more concrete terms. The present judgment represents just one building block in a gradual evolution of the case-law in this area.

4. In the above-mentioned part of its complaint, the applicant company has relied on both Article 6 § 1 and Article 6 § 3(d) of the Convention. The issue raised in this context is that certain witnesses, whose testimony was part of the evidence against the applicant company, included in their statements – apart from matters of which they had direct knowledge – elements of "hearsay", in the form of information which the witness in question had heard from other persons, who themselves did not appear as witnesses before the court. The gist of this complaint is that the Supreme Administrative Court's reliance on such elements of evidence, the primary sources of which had not been available for testing by the applicant, violated the applicant's rights of defence under Article 6 § 1 and 6 § 3(d).

5. In the judgment, the Court has decided to examine this part of the complaint solely under Article 6 § 1 of the Convention (see paragraph 56). Under the general principles set out in paragraphs 66-75 of the judgment, the guarantees contained in Article 6 § 3 are referred to, together with a statement that the Court considers complaints under Article 6 § 3 under paragraphs 1 and 3 of Article 6 taken together. No explanation is provided as to why the complaint in the present case falls to be examined solely under Article 6 § 1. This I find unsatisfactory, not from the perspective of the outcome of the present case but from the perspective of transparency and with a view to future cases.

6. The special feature in the assessment of the fairness of proceedings under the criminal limb of Article 6 usually has to do with the rights of the defence, given that these types of proceedings concern the imposition of public-law sanctions for various kinds of unlawful conduct. Indeed, the specific guarantees provided for under paragraph 3 of Article 6 are all about the rights of the defence (which of course does not detract from the fact that some other important elements of the rights of the defence, such as the privilege against self-incrimination, are derived from paragraph 1 of Article 6 alone).

7. The present complaint is focussed on the rights of the defence in competition proceedings, specifically in relation to witness statements adduced before the Supreme Administrative Court, and has been brought before the Court in reliance on Article 6 § 3(d) together with Article 6 § 1. The unexplained announcement that the complaint falls to be examined solely under Article 6 § 1 of the Convention may therefore be a source of both query and uncertainty. In my view, it would have been preferable to address this point in the judgment. In particular, questions may arise as to whether the reasons behind the chosen approach have to do with issues of general methodology, or instead with the formal scope of Article 6 § 3(d) in relation to the circumstances complained of. I will therefore explore the latter question a bit more closely.

8. I would note at the outset that the situation in the present case is different from that examined by the Court in certain other cases where a person was heard as a witness before the trial court alongside other witnesses, and where the latter reported (conflicting) prior hearsay attributed to the former (see *Ajdaric v. Croatia,* no. 20883/09, 13 December 2011, and *Aho v. Sweden*, (dec.) no. 25514/15, 13 December 2016). In such circumstances, the issue did not concern a witness who was unavailable for examination before the court but rather the assessment of evidence taken at the trial and consisting of, on the one hand, the testimony given by the witness himself and, on the other, statements made by other witnesses who reported what the former had allegedly told them on previous occasions. Thus, those cases did not raise an issue under Article 6 § 3(d). In the present case, by contrast, the complaint concerns a situation where certain witnesses called by the Competition Authority who gave evidence before the domestic court introduced, in the course of their testimonies, statements containing hearsay from third persons (the sources) who themselves did not appear as witnesses.

9. Regarding the scope of Article 6 § 3(d), the Court's case-law makes it clear that the notion of "witness" is an autonomous one (see *Kostovski v. the Netherlands*, 20 November 1989, § 4, Series A no. 166). Primarily, this provision is applicable in respect of persons giving evidence in the course of the proceedings. The Court has, however, held that Article 6 § 3(d) extends to statements which were in fact made before the trial court

and taken into account by it (ibid. § 40; see *Delta v. France*, 19 December 1990, Series A no. 191-A, § 35, and *Lüdi v. Switzerland*, 15 June 1992, § 44, Series A no. 238). Thus, the provision has been applied in situations where information received from anonymous informants or other persons has been adduced at the trial, not by hearing the source but through the questioning of law-enforcement officials (see, for instance, *Delta,* cited above, § 37; *Haas v. Germany* (dec.), no. 73047/01, 17 November 2005; *Dzelili v. Germany* (dec.), no. 15065/05, 29 September 2009; *Hümmer v. Germany*, no. 26171/07, 19 July 2012; and *Scholer v. Germany*, no. 14212/10, 18 December 2014), or through written reports (see *Kostovski*, cited above, §§ 38 and 40; *Lüdi*, cited above, §§ 42 and 44; and *Guerni v. Belgium,* no. 19291/07, §§ 67 and 70, 23 October 2018).

10. Moreover, the Court has considered that this provision was engaged in respect of a person who had not made any statements but was merely the source of documentary information which had been relied on by the competent domestic authority in the context of proceedings for the imposition of an administrative sanction falling under the criminal limb of Article 6 (see *Chap Ltd v. Armenia,* no. 15485/09, §§ 46-48, 4 May 2017). Also, the provision has been applied in a situation where essential pieces of evidence, in the form of original documents and extracts from computer log files, were not adequately adduced and discussed at the trial in the applicant's presence (see *Georgios Papageorgiou v. Greece*, no. 59506/00, § 7, ECHR 2003-VI). In *Donohoe v. Ireland*, the Court considered that it was appropriate to be guided by the general principles articulated in relation to absent witnesses in a situation involving so-called "belief evidence", provided by a law-enforcement official and based on information received from unidentified sources (see *Donahoe v. Ireland*, no. 19165/08, § 78, 12 December 2013; see also *Kelly v. Ireland* (dec.), no. 41130/06, 14 December 2014).

11. As is clear from this overview, there are no crystal-clear boundaries regarding the circumstances in which Article 6 § 3(d) has been found applicable.

12. Regarding the substance of the guarantees provided under this provision, there is abundant case-law on the specific issues of reliance by courts in criminal proceedings on statements made by witnesses who are absent from the trial (or who refuse to give evidence on the grounds of the privilege against self-incrimination or their proximity to the accused) and whose testimony is therefore not available for direct examination or cross-examination at the trial. The relevant principles have been articulated by the Grand Chamber in *Al-Khawaja and Tahery v. the United Kingdom* (GC, nos. 26766/05 and 22228/06, §§ 119-147, ECHR 2011), and further in *Schatschaschwili v. Germany* (GC, no. 9154/10, §§ 110-131, 15 December 2015). Under this line of case-law, it is clear that reliance on so-called "hearsay" evidence which is not available for cross-examination before the

trial court may under certain conditions be compatible with the rights of the defence even in proceedings where the case examined undoubtedly falls under the "hard core" of criminal law.

13. It is true that in the present case the applicant's complaint regarding "hearsay" evidence does not arise from the "typical" situation envisaged in the above case-law, namely one where a witness has given a statement or deposition for the purposes, and at the stage, of the pre-trial investigation of the case but has not subsequently been available for questioning and cross-examination at the actual trial. Instead, the present complaint arises from a situation where certain witnesses who were available for cross-examination in the proceedings before the domestic courts have, in the course of their testimonies, related information which they claim to have obtained from sources who themselves were not available for such cross-examination before the courts.

14. Nevertheless, and irrespective of whether subparagraph 3(d) of Article 6 may as such be considered formally applicable in circumstances such as those in the present case, the alleged unfairness caused to the defence by a situation where incriminating information relating to primary facts in the case is introduced by certain "prosecution" witnesses and where such information originates from sources who themselves do not appear as witnesses before the court ("the untested indirect evidence", as it is referred to in the judgment) is akin to the problem addressed in the case-law developed under that provision. The potentially problematic feature from the perspective of the rights of the defence, namely the fact that the competent court might rely on incriminating information unavailable for direct testing by the defendant in the course of the proceedings, is of a similar nature.

15. Therefore, while it would not be appropriate to transpose the specific case-law mentioned in paragraph 12 above to contexts such as the present one, it is nevertheless appropriate that the consideration of the applicant's complaint should, in broad terms, be guided by the general principles underpinning the rights of the defence in those kinds of situations (cf. *Donahoe*, cited above, § 78). Within the framework of a "differentiated approach", this is essentially what the present judgment is about. In my view, it would have been desirable and helpful to explain this more clearly.

16. It is perhaps worth adding that although – as stated in the judgment (paragraphs 78 and 84) – the enforcement of competition law typically depends on a variety of evidence that must be considered and assessed together, evidence from witnesses and the rights of the defence in relation to information from sources who are or have been cartel "insiders" are nevertheless matters requiring attention. This is so not least because of the significant role played in this field by leniency policies, as a result of which those choosing to "blow the whistle" may have important financial and other incentives for doing so, namely for alerting the competent authorities

and for supplying key evidence to assist them in the enforcement process. In such circumstances, the manner in which incriminating evidence from sources inside a cartel is introduced in the proceedings, and the manner in which the rights of the defence are secured in this context, will accordingly be important matters for consideration in the assessment of the overall fairness of the proceedings. While there is a strong public interest in the effective enforcement of competition law, there is also a strong interest in not getting it wrong.