



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

FOURTH SECTION

CASE OF THE FORTUM CORPORATION v. FINLAND

(Application no. 32559/96)

JUDGMENT

STRASBOURG

15 July 2003

FINAL

15/10/2003

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 the Fortum Corporation v. Finland,

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

Sir Nicolas BRATZA, *President*,

Mr M. PELLONPÄÄ,

Mrs E. PALM,

Mr M. FISCHBACH,

Mr R. MARUSTE,

Mr S. PAVLOVSKI,

Mr L. GARLICKI, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 24 June 2003,

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

PROCEDURE

1. The case originated in an application (no. 32559/96) against the Republic of Finland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a limited liability company domiciled in Finland, Neste Oy, on 28 May 1996. Having merged with another company, it renamed itself Fortum Oil And Gas Oy and eventually became the Fortum Corporation.

2. The applicant was represented by Mr Marc van der Woude, a lawyer practising in Brussels. The Finnish Government ("the Government") were represented by their Agents, Mr Holger Rotkirch, then Director-General for Legal Affairs in the Ministry for Foreign Affairs, and subsequently by Mr Arto Kosonen, Director in the same Ministry.

3. The applicant company alleged, in particular, that it was denied a fair hearing within the meaning of Article 6 of the Convention on account of the Supreme Administrative Court's failure to provide it with an opportunity to comment on documents which the court had received from the first-instance body.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1).

7. By a decision of 12 November 2002, the Court declared the application partly admissible.

8. The applicant, but not the Government, filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant is a multinational company specialising, *inter alia*, in the wholesale of petrochemical products, as was Neste at the time of relevance to the case.

10. In light of submissions lodged by another company in the field – Suomalainen Energiaosuuskunta (“SEO”) – the Competition Office (*kilpailuvirasto, konkurrensverket*), on 11 October 1993, initiated proceedings before the Competition Council (*kilpailuneuvosto, konkurrensrådet*), requesting that Neste be ordered to cease abusing its dominant position on the Finnish market for motor engine fuel. In the view of the Competition Office the reductions in Neste's wholesale prices discriminated against some of its clients, thereby violating the 1992 Act on Competition Restrictions (*laki kilpailunrajoituksista, lag om konkurrensbegränsningar* 480/1992). The Competition Office therefore requested that Neste be ordered to cease and desist from applying certain pricing criteria.

11. In a further submission of 11 February 1994 the Competition Office requested that an administrative fine (*seuraamusmaksu, påföljdsavgift*) be imposed. As a new fact the Competition Office referred to Neste's unwillingness to concede that it had been violating the relevant provisions and accordingly to change the price of fuel sold to SEO.

12. On 16 June 1994 the Competition Council held that Neste had abused its dominant position on the relevant market but found no reason to impose a fine on the company. Neste, SEO and the Competition Office all appealed to the Supreme Administrative Court (*korkein hallinto-oikeus, högsta förvaltningsdomstolen*). Neste maintained that it did not hold a dominant position on the market in question and in any case had not been abusing it. SEO appealed in so far as the Competition Council had accepted certain of Neste's criteria for price differentiation. The Competition Office contended that a fine should have been imposed.

13. On 9 and 14 September 1994 Neste forwarded to the Competition Office its interpretation of the Competition Council's decision as to the pricing criteria to be applied in light of the latter's decision. On 17 October 1994 the Competition Office replied that its interventions were limited to questions of principle. It could therefore not pronounce itself on Neste's proposed interpretation regarding the acceptable pricing criteria.

14. On 14 and 30 November 1994 Neste again drew the Competition Office's attention to its difficulties in interpreting the Competition Council's decision.

15. In a submission to the Supreme Administrative Court dated 26 June 1995 Neste demanded equality of arms in the proceedings. Reference was made to a telephone conversation between Neste's representative and a legal officer of the Supreme Administrative Court from which it had transpired that a secret memorandum of the Competition Office dated 19 June 1995 had been filed with the Supreme Administrative Court. The memorandum discussed Neste's conduct following the Competition Council's decision. The document had been released to Neste by the Competition Office itself on 22 June 1995 in response to the company's request.

16. In a further submission to the Supreme Administrative Court dated 24 July 1995 Neste challenged the accuracy of the Competition Office's memorandum, including the conclusions drawn. Neste again objected to the Supreme Administrative Court's failure to hear it formally in respect of the Competition Office's observations and apparently other memoranda.

17. By decision of 30 November 1995 (reported in its 1995 Yearbook A, p. 246) the Supreme Administrative Court, without commenting on Neste's procedural objections of 26 June and 24 July 1995, upheld the Competition Council's decision in large part. The court found, *inter alia*, that Neste, being in a dominant position on the relevant market, could in principle have objectively justifiable grounds for treating its clients differently according to certain criteria. In the case under examination Neste had not, however, shown any convincing grounds for differentiating between its clients on any ground other than on the basis of the volume of fuel purchased. By applying other pricing criteria Neste had accordingly abused its dominant position.

18. Having concluded that a fine should have been imposed on Neste, the Supreme Administrative Court referred the fixing of its amount to the Competition Council. It further ordered that Neste's conduct after 16 June 1994, in respect of which the court had received "substantial new information", was to be taken into account. The court declined to examine itself what significance should be given to that information.

19. The Supreme Administrative Court's case-file indicates that it deliberated on 22 and 30 May as well as on 14 June 1995.

20. On 4 December 1995 the Competition Council confirmed to the parties that the sole question which remained to be decided was the size of the fine to be imposed on Neste. In January 1996 the Competition Office

proposed a fine in the amount of 100,000,000 Finnish Marks (FIM) (approximately 16,819,000 euros (EUR)). This proposal was rejected by the Competition Council. The Competition Office then filed a new proposal in which the amount of the fine was maintained but on different grounds.

21. In the beginning of 1996 Neste's representative found in the Supreme Administrative Court's case-file a copy of further observations drawn up by the Competition Office and dated 6 March 1995. They bore a stamp indicating that they had been received by the Supreme Administrative Court on 8 March 1995. The Competition Office had forwarded a copy to the Competition Council but not to Neste. The observations sought to refute Neste's arguments by highlighting the salient points of a 1994 decision of the European Commission in the case *Texaco v. Norsk Hydro* which the Competition Office argued supported the Competition Council's decision of 16 June 1994. The Supreme Administrative Court had not heard Neste in respect of those observations.

22. Following an oral hearing the Competition Council, by decision of 30 October 1996, fixed Neste's fine at FIM 2,000,000 (about EUR 336,000). It noted that Neste's pricing practice from 1 January to 8 February 1993 had clearly discriminated against SEO and had been found to be unlawful under the 1992 Act. While the prohibited pricing practice had not been significant in nature, it had not been so insignificant as to justify a waiver of the fine.

23. As regards Neste's conduct from 17 June 1994 to 30 November 1995 the Competition Council found that it had not deviated to such an extent from its decision of 16 June 1994 as to justify the imposition of a fine. In addition, Neste's attempts to obtain approval of its amended pricing practice had been in vain, since the Competition Office had failed in its obligation to direct and supervise the implementation of that decision. Accordingly, no fine was imposed for Neste's conduct during that period.

24. On 5 July 2000 the Supreme Administrative Court refused, in extraordinary proceedings, the applicant company's request for an annulment of its decision of 30 November 1995 in the ordinary proceedings under the 1992 Act. The court found that no procedural error had taken place and reasoned, *inter alia*, that in so far as it had ordered that the fine to be imposed on Neste should take account of its conduct between the Competition Council's decision of 16 June 1994 and the court's decision of 30 November 1995, it had not become evident that the court had based itself on material in respect of which Neste had not been heard. Moreover, the court had expressly declined to draw any conclusion as to whether the supplementary information received by it should be taken into account when considering the amount of the fine to be imposed.

II. RELEVANT DOMESTIC LAW

A. Hearing of parties to administrative proceedings

25. At the time of the proceedings before the Supreme Administrative Court, domestic law contained no general provisions on the manner in which parties to administrative proceedings were to be heard in writing. Even in the absence of such provisions it was considered an essential feature of fair administrative proceedings that all parties were properly heard. The hearing requirement was considered to include the right of a party to be informed of a matter affecting him or her, of the progress of the proceedings and of any evidence adduced. It entitled a party to submit observations on any evidence adduced by other parties but only if that evidence could affect the outcome of the case. Whenever such evidence had been adduced, the court could not rely on it unless the other party had been heard. A party needed not be heard when a certain claim was not examined on its merits or was rejected immediately.

26. The Act on the Supreme Administrative Court (74/1918) provided, *inter alia*, that the court could request an opinion or other observations for the purpose of seeking evidence. The cases were dealt with by respecting “lawful court procedure” (sections 14-15).

27. As from 1 December 1996 the Act on Administrative Court Procedure (*hallintolainkäyttölaki, förvaltningsprocesslag* 586/1996) applies to proceedings before the Supreme Administrative Court. It contains explicit provisions on the hearing of parties. Provisions on parties' right to be heard can also be found in section 21 (2) of the Constitution (*Suomen Hallitusmuoto, Regeringsform för Finland* 731/1999; section 16 (2) of the former Constitution as amended by Act no. 969/1995).

B. Publicity of documents

28. According to section 2, subsection 1 of the Act on Publicity of Official Documents (*laki yleisten asiakirjojen julkisuudesta, lag om allmänna handlingars offentlighet* 83/1951), as in force at the relevant time, any document prepared and issued by an authority as well as any document sent or handed in to an authority and remaining in its possession was to be deemed an official document. Under section 9, however, a document could be ordered to be kept secret by Decree, for example when this was deemed necessary in order to safeguard business activities.

29. The Decree on Certain Exceptions to the Publicity of Official Documents (*asetus sisältävä eräitä poikkeuksia yleisten asiakirjain julkisuudesta, förordning innefattande vissa undantag i fråga om allmänna handlingars offentlighet* 650/1951) stipulated, *inter alia*, that documents

containing information about commercial or industrial activities, the pursuit of a trade or profession or about the financial position of a private person were to be kept secret, unless the concerned company or person consented to disclosure (section 1).

30. On the one hand, a party within the meaning of section 19 of the Act on Publicity of Official Documents (whose interest, right or obligation the matter concerned) had the right to obtain information even from a document not designated as publicly accessible, if that information could influence, or could have influenced, the consideration of the case. On the other hand, it was possible to withhold from a party information appearing even in an document of the aforementioned nature, if disclosure thereof would have been contrary to a particularly important public or private interest.

31. The 1951 Act and Decree were replaced, on 1 December 1999, by a new Act on the Public Character of Activities Conducted by Public Authorities (*laki viranomaisten toiminnan julkisuudesta, lag om offentlighet i myndigheternas verksamhet* 621/1999) which contains comparable provisions on private economic interests and on parties' right of access to documents.

32. According to the Act on the Competition Office (711/1988), the Office shall publish its findings to the extent deemed appropriate. Information regarded as a business or professional secret shall not be disclosed, unless the concerned party has consented thereto (section 3).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

33. The applicant company complained that its predecessor Neste had been denied a fair hearing within the meaning of Article 6 §§ 1 and 3 (a) and (b) of the Convention in the proceedings before the Supreme Administrative Court ending with its decision of 30 November 1995. The memoranda of 6 March and 19 June 1995 which the Competition Office had submitted to the court had not been communicated to Neste for possible comments. The business secrets contained in the memoranda had nevertheless concerned Neste directly and should have been communicated to the company of the court's own motion. As they had not been so communicated Neste had not been fully informed of the accusations against it.

34. The applicant company furthermore contended that the Supreme Administrative Court had not just failed to communicate the memoranda on receipt thereof: one of its legal officers had refused to disclose the second

memorandum to Neste despite the company's explicit request to that effect. Even though the court had already deliberated on the case prior to receiving that memorandum, it could still have influenced the final drafting of the decision.

35. Article 6 of the Convention reads, in so far as potentially relevant to this case, as follows:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law. ...

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence; ...”

36. The Government did not contest the applicability of Article 6 and conceded that the two memoranda had not been communicated to Neste, having been submitted to the Supreme Administrative Court of the Competition Office's own motion. The memoranda had contained sensitive business information and had been secret under domestic law. In competition law proceedings the parties often submitted voluminous documentation of their own motion, rendering it difficult for the court to decide the case. Had the court received such further observations at its own request, Neste would have been heard.

37. The Government argued that at any rate, Article 6 had not been violated as the memoranda in question had had no bearing on the Supreme Administrative Court's decision of 30 November 1995. The memorandum of 19 June 1995 had mainly assessed the activities of Neste after 16 June 1994, when the decision of the Competition Council had been rendered. The Supreme Administrative Court, however, in leaving open the question of the fine to be imposed for the period between the Competition Council's decision and its own, had explicitly declined to examine the relevance of the further evidence which it had received concerning Neste's market conduct. The memorandum of 6 March 1995 had contained no such new information or evidence which could have affected the outcome of the proceedings ending on 30 November 1995. As the contents of the two memoranda had been largely identical and as Neste had in fact commented on the second memorandum before the Supreme Administrative Court's decision had been rendered, the company had effectively commented on both documents. In so far as the court had referred the case back to the Competition Council, Neste had been given a further opportunity to present its views on the matter.

38. The Government furthermore noted that in refusing Neste's annulment request the Supreme Administrative Court had found that no procedural error had taken place in the proceedings ending on 30 November

1995. The court had expressly found that the decision of that date had not been based on evidence in respect of which Neste had not been heard.

39. The Court recalls that the right to adversarial proceedings means in principle the opportunity for the parties to court proceedings falling within the scope of Article 6 to have knowledge of and comment on all evidence adduced or observations filed, with a view to influencing the court's decision (see, for example, *Kerojärvi v. Finland*, judgment of 19 July 1995, Series A no. 322, p. 16, § 42; *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 108, § 24).

40. In the circumstances of the present case and in light of the parties' agreement that Article 6 § 1 is applicable the Court need not determine whether this provision applies under its "civil" or "criminal" head.

41. It is common ground that the memoranda of 6 March and 19 June 1995 which the Competition Office had submitted to the Supreme Administrative Court were not formally communicated to Neste by that court with a view to enabling the company to submit its possible observations in reply. The Court notes that the memoranda in question constituted reasoned opinions on the merits of the company's appeal, manifestly aiming at influencing the Supreme Administrative Court's decision. Considering that the court's deliberations were held between 22 May and 14 June 1995, at least the memorandum of March 1995 was capable of affecting the outcome of the proceedings. Moreover, the Court would agree with the applicant company that even though the case had already been deliberated on prior to the Competition Office's submission of a second memorandum dated 19 June 1995, it cannot be entirely excluded that this document nevertheless influenced the final drafting of its decision.

42. The Court would underline however that whatever the actual effect of those memoranda on the Supreme Administrative Court's decision, it was for Neste to assess whether they required its comments. The onus was therefore on the Supreme Administrative Court to afford the company an opportunity to comment on the memoranda prior to deciding the case.

43. The Court notes furthermore that in a submission to the Supreme Administrative Court dated 26 June 1995 Neste had demanded that it be given an opportunity to respond to the memorandum of 19 June 1995 which had been disclosed to it by the Competition Office itself. In a further submission dated 24 July 1995 Neste had again objected to not being formally heard in respect of the Competition Office's submissions. In its decision the Supreme Administrative Court did not take an explicit stand on the company's objections.

44. The Court considers that while Neste on 24 July 1995 challenged in writing the accuracy of the conclusions drawn by the Competition Office in its memorandum of 19 June 1995, spontaneous submissions of this

character could not repair the various aforementioned deficiencies in the procedure in the Supreme Administrative Court.

45. The Court concludes that the applicant company was unable to participate properly in the proceedings before the Supreme Administrative Court and was thus deprived of a fair hearing within the meaning of Article 6 § 1 of the Convention. Accordingly, this provision has been violated.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

1. Non-pecuniary damage

47. The applicant company claimed the symbolic sum of one euro in non-pecuniary compensation for suffering caused by the alleged violation of Article 6. The company argued that the Supreme Administrative Court's decision had caused harm to its reputation as a law-abiding company and that the company was still being confronted with adverse publicity affecting its corporate reputation.

48. In the Government's view the finding of a violation would in itself constitute sufficient just satisfaction for any non-pecuniary damage sustained.

49. The Court considers that the finding of a violation of Article 6 constitutes sufficient just satisfaction for any non-pecuniary damage.

B. Costs and expenses

50. The applicant company claimed, in respect of the domestic proceedings, EUR 11,716.98 in costs and EUR 175.25 in expenses, which totalled EUR 14,508.51 after adding 22% value-added tax. In respect of the Convention proceedings the company claimed EUR 28,222.15 in costs and EUR 9,836.74 in expenses, totalling EUR 38,058.89. The total amount claimed thus totalled EUR 52,567.40.

51. The Government left it to the Court's discretion whether the applicant company had properly substantiated these claims. Moreover, a major part of the costs and fees claimed had related to the complaints

declared inadmissible. It was the Government's view that the total amount of compensation to be payable under this heading should not exceed EUR 5,500 (excluding value-added tax).

52. The Court reiterates that an award under this head may be made only in so far as the costs and expenses were actually and necessarily incurred in order to avoid, or obtain redress for, the violation found (see, among other authorities, *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports* 1998-VI, p. 2334, § 63). Not only the costs and expenses incurred before the Strasbourg institutions but also those incurred before the national courts may be awarded. However, only those fees and expenses which relate to a complaint declared admissible can be awarded (see, for example, *Mats Jacobsson v. Sweden*, judgment of 28 June 1990, Series A no. 180-A, p. 16, § 46).

53. The Court notes that the two other complaints lodged by the applicant company were declared inadmissible. In these circumstances and making its assessment on an equitable basis, the Court awards the applicant company EUR 10,000, to be increased by any relevant value-added tax.

C. Default interest

54. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 124, ECHR 2002-).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant company;
3. *Holds*
 - (a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros) in respect of costs and expenses plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a

rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 15 July 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President