SUPREME COURT OF NORWAY

O R D E R

given on 27 November 2019 by the Supreme Court composed of

Justice Erik Møse
Justice Wilhelm Matheson
Justice Henrik Bull
Justice Knut H. Kallerud
Justice Kine Steinsvik

HR-2019-2206-A case no. 19-023426SIV-HRET
Appeal against Borgarting Court of Appeal's order 4 December 2018

I.
Bring Express Sverige AB
Bring Cargo Inrikes AB
Bring Linehaul AB
Bring Frigo Åkeri AB
Svebol Logistics AB
Bring Åkeri AB
Bring Trucking a.s. (Counsel Ole Rasmus Asbjørnsen)

v.

Iveco S.p.A
Iveco Magirus AG
CNH Industrial N.V.
Fiat Chrysler Automobiles N.V. (Counsel Aksel Joachim Hageler)

Volvo Lastvagnar Ab
Renault Trucks SAS
Volvo Group Trucks Central Europe GmbH
AB Volvo (Counsel Kaare Andreas Shetelig)

DAF Trucks N.V.
DAF Trucks Deutschland GmbH (Counsel Karl Oddmundson Wallevik)

Daimler AG (Counsel Ole-Andreas Torgersen)

MAN Truck & Bus Deutschland GmbH
MAN SE
Man Truck & Bus Ag (Counsel Thomas Gjølberg Naalsund)

II.
Iveco S.p.A
Iveco Magirus AG
CNH Industrial N.V.
Fiat Chrysler Automobiles N.V. (Counsel Aksel Joachim Hageler)

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Daimler AG (Counsel Ole-Andreas Torgersen)

MAN Truck & Bus Deutschland GmbH
MAN SE
Man Truck & Bus Ag (Counsel Thomas Gjølberg Naalsund)

v.

Bring Cargo AS
Bring Linehaul AS
Bring Gudbrandsdalen AS
Bring Transportløsninger AS
Posten Norge AS
Espeland Transport AS (Counsel Ole Rasmus Asbjørnsen)

(1) Justice **Matheson:** The case concerns the question whether a claim against foreign defendants due to illegal price collusion can be brought before Norwegian courts under Article 6 (1) of the Lugano Convention.

(2) The claimants are Posten Norge AS and 12 subsidiaries in the Posten group, hereinafter referred to as the Posten companies. Five of the subsidiaries are Norwegian and seven are foreign. The foreign claimants are domiciled in Sweden and Slovakia, respectively.

(3) The defendants are companies engaged in the sale of trucks. The companies are part of the truck manufacturing groups MAN, Volvo/Renault, DAF, Daimler and Iveco. Among the defendants, only Volvo Norge AS is Norwegian with ordinary venue in Norway. The others are foreign companies having their ordinary venues in other states bound by the Lugano Convention.

(4) On 19 July 2016, the European Commission made a decision fining the foreign defendants for long-term price collusion. Paragraphs 1 and 2 of the decision read:

> **"(1) This Decision relates to a single and continuous infringement of Article 101 of the Treaty on the Functioning of the European Union ('TFEU') and Article 53 of the Agreement on the European Economic Area ('EEA Agreement').**
>
> **(2) The infringement consisted of collusive arrangements on pricing and gross price increases in the EEA for medium and heavy trucks; and the timing and the passing on of costs for the introduction of emission technologies for medium and heavy trucks required by EURO 3 to 6 standards. The infringement covered the entire EEA and lasted from 17 January 1997 until 18 January 2011."**

(5) Through a settlement with the European Commission, the foreign defendants together were fined in excess of EUR 2.9 billion. For the MAN companies, the fine according to paragraph 2 (a) of the decision was set at EUR 0. This was partially because the MAN companies had been the first to report the infringement in accordance with Commission Notice 2006/C 298/11 on Immunity from fines and reduction of fines in cartel cases. According to the Commission decision, these companies were therefore granted such immunity.

(6) The foreign Volvo/Renault companies' cooperation with the European Commission also gave rise to partial immunity for parts of the infringement period and a reduction of the fine. The same applied to certain other companies that had participated in the price collusion.

(7) The defendant Volvo Norge AS is not an addressee of – and thus not covered by – the Commission decision, see item 1.2.4, paragraph 19 and Article 1 of its conclusion.

(8) The Posten companies together have purchased a large number of trucks from the defendants. In a writ to Oslo District Court of 18 July 2017, they held that the trucks, during the period in which the collusion took place, were sold at an excessive price and that the defendants, including Volvo Norge AS, were jointly and severally liable for loss sustained by the Posten companies.

(9) Volvo Norge AS agreed before the District Court that it could be sued by all claimants in Norwegian courts, see Article 2 of the Lugano Convention. The foreign defendants, however, held that they could not be sued in Norway since the conditions for joint proceedings under Article 6 (1) of the Lugano Convention were not met.

(10) On 1 July 2018, Oslo District Court gave judgment with the following conclusion:

> **"Case no. 17-115740TVI-OTIR/02 may proceed."**

(11) The defendants appealed to Borgarting Court of Appeal, which on 4 December 2018 issued the following order after a written hearing:

> **"1. The action by the foreign claimants (Bring Linehaul AB, Svebol Logistics AB, Bring Frigo Åkeri AB, Bring Åkeri AB, Bring Express Sverige AB, Bring Cargo Inrikes AB and Bring Trucking a.s) v. the foreign defendants (DAF Trucks N.V., DAF Trucks Deutschland GmbH, MAN SE, Man Truck & Bus AG, MAN Truck & Bus Deutschland GmbH, Daimler AG, AB Volvo, Volvo Group Trucks Central Europe GmbH, Volvo Lastvagnar AB, Renault Trucks SAS, CNH Industrial N.V., Fiat Chrysler Automobiles N.V, Iveco Magirus AG and Iveco S.p.A) may not proceed.**
>
> **2. On all other counts, the appeal is dismissed.**
>
> **3. Costs are awarded in neither the District Court nor the Court of Appeal."**

(12) Both the foreign claimants and the foreign defendants have appealed the order – which partially rejected and partially allowed the actions – to the Supreme Court.

(13) On 7 March 2019, the Supreme Court's Appeals Selection Committee decided to refer the entire appeal to a division sitting with five justices, see section 5 subsection 2 of the Courts of Justice Act.

(14) In my discussion of the parties' submissions, I will present the foreign defendants' arguments first, similar to the order during the hearing.

(15) The foreign defendants – *MAN SE, Man Truck & Bus AG, MAN Truck & Bus Deutschland GmbH, AB Volvo, Volvo Group Trucks Central Europe GmbH, Volvo Lastvagnar AB, Renault Trucks SAS, DAF Trucks Deutschland GmbH, DAF Trucks N.V., Daimler AG, CNH Industrial N.V., Fiat Chrysler Automobiles N.V, Iveco Magirus AG and Iveco S.p.A* – contend:

(16) Article 6 (1) of the Lugano Convention must be interpreted restrictively. If not, the main rule on jurisdiction in Article 2 is undermined.

(17) The assessment of whether the claims are so closely connected as is required under Article 6 (1), corresponds to the assessment of procedural contentions under Norwegian law. The claimant's contentions regarding the proximity of the claims must be examined before being assumed. Substantive contentions are also subject to certain examination under Article 6.

(18) The Court of Appeal's opinion of whether the connection requirement is met is based on the level of likelihood that the Posten companies may succeed with a claim against Volvo Norge AS. Such an approach has no support in case law.

(19) There is no relevant connection factor between the claims in the case at hand apart from the claimants' allegations regarding the liability of the Norwegian defendant. Allegations are not sufficient. The Court of Appeal has interpreted Article 6 (1) incorrectly when failing to attribute decisive importance to the fact that Volvo Norge AS is not an addressee of the

Commission decision. Since Volvo Norge AS is not covered by the decision's reference to "a single and continuous infringement" of the competition rules, there is no objective connection between the claims.

(20) Against this background, companies covered by the decision on the one hand and Volvo Norge AS on the other, are not in the same situation of fact and law. Thus, there is no risk that separate hearings of the claims will result in irreconcilable judgments within the meaning of Article 6 (1).

(21) In addition, as opposed to what the decision shows with regard to the foreign defendants, the claim against Volvo Norge AS is based on allegations, and not on evidence. The claimants' attempt to establish such a claim by way of extensive requests for evidence is, according to case law, incompatible with Norwegian procedural standards.

(22) Since Volvo Norge AS is not covered by the decision, proceedings in Norway have also not been foreseeable for the foreign companies.

(23) Under any circumstances, the Court of Appeal has examined the possible liability of Volvo Norge AS for a single and continuous infringement of the competition rules with too little intensity and thus applied an incorrect threshold under Article 6. Volvo Norge AS is not covered by the decision because the European Commission, after a broad investigation, found no evidence of the company's participation in the cartel. The Court of Appeal has overlooked the negative evidentiary value of this. The criteria for establishing a single and continuous infringement are incorrectly interpreted. Liability must be assessed individually for each company, subject to a strict evidence requirement. As the threshold for joint proceedings is too low under Article 6 (1), the Lugano Convention has been interpreted in breach of the principle that exceptions from the main rule on jurisdiction in Article 2 must be interpreted restrictively. The Court of Appeal's general application of the law reduces the effectiveness of the Convention.

(24) Nor is there a basis for making Volvo Norge AS the anchor defendant based on alleged strict corporate liability under competition law. Volvo Norge AS cannot, based on the competition law concept of "undertaking", be held liable for the actions of its parent company Volvo AB or other group companies. A claim based on group affiliation does not in any case arise from the same situation of fact and law as the other claims in this case.

(25) There is no reason for distinguishing between the claims of Posten Norge AS and the claims of the foreign claimants against the foreign defendants, as the Court of Appeal has done in item 1 of its conclusion. Accordingly, neither of the types of claims may proceed under Article 6.

(26) If a distinction such as that made by the Court of Appeal is necessary, the order is correct on this point.

(27) The foreign defendants have submitted coinciding prayer for reliefs, but so that companies belonging to the same group have submitted theirs together.

(28) MAN SE, MAN Truck & Bus AG and MAN Truck & Bus Deutschland GmbH have submitted this prayer for relief:

"In the appeal:

1. The Court of Appeal's order item 2 is to be set aside.
2. MAN SE, MAN Truck & Bus AG and MAN Truck & Bus Deutschland GmbH are to be awarded costs in all instances.

In the response to the appeal:

1. The appeal is to be dismissed.
2. MAN SE, MAN Truck & Bus AG and MAN Truck & Bus Deutschland GmbH are to be awarded costs in all instances."

(29) AB Volvo, Volvo Group Trucks Central Europe GmbH, Volvo Lastvagnar AB and Renault Trucks SAS have submitted this prayer for relief:

"In the appeal:

1. The Court of Appeal's order item 2 is to be set aside.
2. AB Volvo, Volvo Group Trucks Central Europe GmbH, Volvo Lastvagnar AB and Renault Trucks SAS are to be awarded costs in all instances.

I the response to the appeal:

1. The appeal is to be dismissed.
2. AB Volvo, Volvo Group Trucks Central Europe GmbH, Volvo Lastvagnar AB and Renault Trucks SAS are to be awarded costs in all instances."

(30) DAF Trucks Deutschland GmbH and DAF Trucks N.V. have submitted this prayer for relief:

"In the appeal:

1. The Court of Appeal's order item 2 is to be set aside.
2. DAF Trucks Deutschland GmbH and DAF Trucks N.V. are to be awarded costs in all instances.

In the response to the appeal:

1. The appeal is to be dismissed.
2. DAF Trucks Deutschland GmbH and DAF Trucks N.V. are to be awarded costs in all instances."

(31) Daimler AG has submitted this prayer for relief:

"In the appeal:

1. The Court of Appeal's order pkt. 2 is to be set aside.
2. Daimler AG is to be awarded costs in all instances.

I response to the appeal:

1. The appeal is to be dismissed.
2. Daimler AG is to be awarded costs in all instances."

(32) CNH Industrial N.V., Fiat Chrysler Automobiles N.V, Iveco Magirus AG and Iveco S.p.A have submitted this prayer for relief:

"In the appeal:

1. The Court of Appeal's order item 2 is to be set aside.
2. CNH Industrial N.V., Fiat Chrysler Automobiles N.V, Iveco Magirus AG and Iveco S.p.A are to be awarded costs in all instances.

I response to the appeal:

1. The appeal is to be dismissed.
2. CNH Industrial N.V., Fiat Chrysler Automobiles N.V, Iveco Magirus AG and Iveco S.p.A are to be awarded costs in all instances."

(33) The Norwegian claimants – *Posten Norge AS, Bring Cargo AS, Bring Linehaul AS, Bring Gudbrandsdalen AS, Bring Transportløsninger AS and Espeland Transport AS* – and the foreign claimants – *Bring Linehaul AB, Svebol Logistics AB, Bring Frigo Åkeri AB, Bring Åkeri AB, Bring Express Sverige AB, Bring Cargo Inrikes AB and Bring Trucking a.s.* – contend:

(34) A precondition for a risk of irreconcilable judgments within the meaning of Article 6 (1), is that the claims arise from the same situation of fact and law. A difference in the evidentiary situation does not, in our case, constitute any difference in the factual situation. The defendants could nonetheless foresee that they risked being sued in a Convention State where at least one of them is domiciled.

(35) The claims against the foreign defendants and against Volvo Norge AS are sufficiently closely connected. No specific degree of likelihood of the claim against Volvo Norge AS succeeding is required. When deciding the jurisdiction issue, the claimant's allegations must be taken into account without further assessment. This is a firm principle under Norwegian procedural law and corresponds to CJEU case law. Case law on the assessment of contract venue is not transferable to Article 6 (1) and the criteria for establishing connected claims. Consequently, the Court of Appeal's assessment of whether the claims are likely to succeed is more extensive than necessary to consider the issue of joint proceedings.

(36) All the defendants have, in contravention of the prohibition against cartels in Article 53 of the EEA Agreement and Article 101 of the Treaty of the Functioning of the European Union – TEUF – participated in the same price collusion. For that reason alone, the claims in the present case arise from the same situation of fact and law.

(37) The CJEU judgment in Case C-352/13 CDC does not prevent a claim against a non-addressee of a Commission decision on price fixing from being heard together with a claim against the addressees. This is confirmed by numerous English rulings on claims against anchor defendants that have not been subject to a Commission decision.

(38) Volvo Norge AS must have known about the collusion and participated in or contributed to its implementation. Companies that jointly cause harm by infringing the competition rules will be jointly and severally liable for the harm.

(39) The Norwegian Volvo company is nonetheless part of the Volvo group constituting one undertaking. The term "undertaking" under competition law implies that no legal entities within the undertaking may claim themselves exempt from liability for lack of knowledge of the infringement.

(40) Posten Norge AS, Bring Cargo AS, Bring Linehaul AS, Bring Gudbrandsdalen AS, Bring Transportløsninger AS, Espeland Transport AS, Bring Linehaul AB, Svebol Logistics AB, Bring Frigo Åkeri AB, Bring Åkeri AB, Bring Express Sverige AB, Bring Cargo Inrikes AB and Bring Trucking A.S. have submitted this prayer for relief:

> **«1. In the appeal from the foreign Posten companies:**
>
> **The action from Bring Linehaul AB, Svebol Logistics AB, Bring Frigo Åkeri AB, Bring Åkeri AB, Bring Express Sverige AB, Bring Cargo Inrikes AB and Bring Trucking A.S. is to be allowed.**
>
> **2. In the appeal from the defendants:**
>
> **The appeal is to be dismissed.**
>
> **3. In both cases:**
>
> **Posten Norge AS, Bring Linehaul AB, Bring Cargo AS, Bring Transportløsninger AS, Bring Gudbrandsdalen AS, Espeland Transport AS, Bring Linehaul AB, Svebol Logistics AB, Bring Frigo Åkeri AB, Bring Åkeri AB, Bring Express Sverige AB, Bring Cargo Inrikes AB and Bring Trucking A.S. are to be awarded costs in the District Court, the Court of Appeal and the Supreme Court.»**

(41) The case is before the Supreme Court is similar to that before the District Court and the Court of Appeal.

(42) *My view*

(43) *The issue at hand*

(44) The issue at hand is whether the Posten companies' claim against Volvo Norge AS and the same companies' claim against the foreign defendants are "so closely connected" that they may be heard together in the court of the Norwegian Volvo company, Oslo District Court, see Article 6 (1) of the Lugano Convention.

(45) *The Supreme Court's jurisdiction*

(46) In item 2 of its order, the Court of Appeal stated that the conditions for a joint hearing are met for the *Norwegian Posten companies'* claim against the foreign defendants and agreed – like the District Court – to hear the case on this point. This has been appealed by the *foreign defendants* by way of a second-tier appeal. The Supreme Court's jurisdiction after a second-tier appeal is limited, see section 30-6 of the Dispute Act. In connection with an appeal against the application of the law, like here, the jurisdiction is limited to "the general legal interpretation of a written legal rule", see section 30-6 (c) of the Dispute Act. It is generally accepted in the legal world that the term "written legal rule" also includes international conventions, see for instance the Supreme Court judgment HR-2018-869-A paragraph 68. The Supreme Court may, for this part of the case, only consider the Court of Appeal's general understanding of Article 6 (1) of the Lugano Convention.

(47) The Court of Appeal concluded in item 1 of its order – unlike the District Court – that the conditions for a joint hearing are not met for *the foreign Posten companies'* action against the foreign defendants. It therefore refused to hear this part of the case. The foreign Posten companies have appealed against the refusal to hear the claim against the foreign

defendants. In this particular issue, the Supreme Court has full jurisdiction, see section 30-6 (a) of the Dispute Act.

(48) *General comments on Article 6 (1) of the Lugano Convention*

(49) According to section 4-8 of the Dispute Act, the Lugano Convention applies as Norwegian law. In an area like this, where the Convention applies as law – so-called sector monism – the provisions therein on international venue replace, within their scope, the same provisions in the Dispute Act, see also HR-2018-869-A paragraph 70 on the Convention's prevalence as *lex specialis*.

(50) When interpreting the Convention's rules, "due consideration" must be had to CJEU judgments and judgments from national courts dealing with Regulation 44/2001 – Brüssel I – on which the Convention is based, see the Supreme Court judgment Rt-2015-129 paragraph 24 *Arrow.* To the extent the provisions are similar, the same must apply to Regulation 1215/2012, which in the EU has replaced Regulation 44/2001. Article 8 (1) in the new Regulation corresponds to Article 6 (1) of the Lugano Convention.

(51) The starting point under Article 2 (1) is that persons domiciled in a state bound by the Convention "shall, whatever their nationality, be sued in the courts of that State". Likewise, under Article 60 of the Convention, a legal person is domiciled at the place where it its statutory seat, central administration or principal place of business. A foreign national may consequently sue Volvo Norge AS in Norway, see also the general provisions on ordinary venue in section 4-4 of the Dispute Act.

(52) Article 6 (1) is an exception from the main rule in Article 2 and reads:

> **"A person domiciled in a State bound by this Convention may also be sued: 1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;"**

(53) The condition that "the claims are so closely connected" that it is expedient to hear and determine them together to "avoid the risk of irreconcilable judgments resulting from separate proceedings" is often referred to as the "connection requirement".

(54) The state of the law when it comes to Article 6 (1) is summarised in the CJEU judgment 21 May 2015 in Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA* – hereinafter only *CDC*. In my discussion, I will use this judgment as a starting point.

(55) The CJEU establishes in *CDC* paragraph 16 et seq. that the provision "must be interpreted independently, by reference to its scheme and purpose". This implies that it is the provisions and the system of the Convention – and not of national law – that must form the basis for interpretation.

(56) Furthermore, in paragraph 18, it is pointed out that Article 6 (1) is a special rule derogating from the principle stated in Article 2. The provision "must be strictly interpreted and cannot be given an interpretation going beyond the cases expressly envisaged by that regulation".

(57) The objective of joint proceedings is to avoid the risk of irreconcilable judgments that may arise from separate hearings. In paragraph 20 this is described as ascertaining whether "there is a connection of such a kind" between the claims that may create such a risk. The following is also set out in the same paragraph:

> **"In that regard, in order for judgments to be regarded as irreconcilable, it is not sufficient that there be a divergence in the outcome of the dispute, but that divergence must also arise in the context of the same situation of fact and law."**

(58) It is thus required that *the same situation of fact and law* creates a risk of diverging judgments if the claims are heard separately. According to paragraph 23, a difference in legal basis due to differences in the individual Member State's choice of law rules "does not, in itself, preclude the application of Article 6 (1) …, provided that it was foreseeable by the defendants that they might be sued in the Member State where at least one of them is domiciled".

(59) The specific situation in *CDC* was that the European Commission found that the defendants had participated in a "single and continuous infringement" of the prohibition of cartel in Article 81 EC and Article 53 of the EEA Agreement, cf. paragraph 10. Differences in the rules of private international law could thus not prevent application of Article 6 (1), as the defendants "[i]n those circumstances … could have expected to be sued in the courts of a Member State in which one of them is domiciled", see paragraph 24.

(60) In paragraph 28, the CJEU states that "where claims brought against various defendants are connected" a joint hearing may be held "without there being any further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the Member State where one of the defendants is domiciled". The same is set out in other judgments, see for instance the minority's reference in the Supreme Court judgment to HR-2018-869-A paragraph 130 to the CJEU judgment 11 October 2007 in Case C-98/06 *Freeport* paragraph 51-54. In this judgment, the minority establishes that

> **"as long as the claims are so closely connected that it is expedient to hear and determine them together to avoid irreconcilable judgments, there cannot be yet another requirement that the co-defendants must not have been joined in the case only to prevent that their cases are decided by a different court."**

(61) Hence, there is no place for theory of misuse once the connection requirement in Article 6 (1) has been met. The majority had no reason to address the issue.

(62) The claimant carries the burden of proving that the criteria for a joint hearing are satisfied, see the CJEU judgment 13 July 2006 in Case C-539/03 *Roche* paragraph 39. This is for the referring court to assess, see the CJEU judgment 1 December 2011 in Case C-145/10 *Painer* paragraph 83.

(63) *The jurisdiction principle in Article 6 (1)*

(64) I will now discuss the principle for establishing whether the connection requirement in Article 6 (1) has been met; that is, the norm for determining whether "the claims are so closely connected" as the provision requires.

(65) In Norwegian civil procedure, when deciding whether to hear a claim, the court must "rely on the parties' allegations regarding the factual circumstances and legal rules on which the claim

is based", see the Supreme Court ruling HR-2018-1463-U paragraph 25. This paragraph also states:

> **"However, the court is to consider the allegations when they do not concern the tenability of the substantive claim submitted, but are merely significant to determine whether the conditions for proceedings have been met, see Schei, *Tvisteloven* [the Dispute Act], Commentary, 2nd edition 2013 page 51-52, Rt-2006-209 paragraph 15 and Rt-2006-220 paragraph 18."**

(66) In the Supreme Court judgment HR-2019-997-A paragraph 58, it is expressed in the same manner that the court relies on allegations regarding the merits of the case, "but not on whether procedural criteria are otherwise met". In other words, allegations regarding the procedure must be considered by the court.

(67) There is no case law on principles for assessing whether the procedural criterion in Article 6 (1) of the Lugano Convention that the claims must be "closely connected" is satisfied. However, in Rt-2015-129 *Arrow,* the Supreme Court dealt with a similar issue concerning the determination of international venue under *Article 5 (3)* of the Convention in matters relating to tort.

(68) In *Arrow* paragraph 27, it is set out that in actions forcing the defendants to defend themselves outside of their domicile state, the claimant's contentions may not automatically be relied on to decide the jurisdiction of the court in question. A reference is made to CJEU's statement with regard to *Article 5 (1)* that the court may examine "the essential preconditions for its jurisdiction, having regard to conclusive and relevant evidence adduced by the party concerned, establishing the existence or the inexistence of the contract" see the CJEU judgment 4 March 1982 in Case C-38/81 *Effer* paragraph 7, see also the CJEU judgment 28 January 2015 in Case C-375/13 *Kolassa* paragraph 61.

(69) Furthermore, it follows from *Arrow* paragraph 29 that, according to Supreme Court case law, "a relatively extensive hearing" is conducted to determine whether the court has territorial jurisdiction under the Lugano Convention. It is stated that this "at least mainly corresponds to practice during an ordinary hearing in Norwegian civil procedure, see section 4-5 of the Dispute Act on venues that may be elected by the claimant. In paragraph 30, this is specified as follows:

> **"What is expressed here does not imply that the claimant in a case dealing with whether the claim should be heard must present evidence of the merits of the case. In a dispute on rights to real property governed by Norwegian law, it is thus sufficient that the claimant substantiates that the dispute concerns real property at the place where the action is brought; next, it must be determined whether the claim for ownership may be heard. The Committee assumes that the principle is the same under the Lugano Convention …"**

(70) In the Supreme Court judgment Rt-2008-1207 paragraph 16 – which concerns Article 5 (1) of the Lugano Convention on matters relating to a contract – it is stated that "it is presumably sufficient with a certain substantiation" of the actual existence of a contractual obligation. Thus, whether or not one is dealing with a "matter relating to a contract", is here a criterion for jurisdiction.

(71) Against this background, I conclude that when determining the international venue under Article 5 (1) of the Convention on matters relating to a contract or Article 5 (3) on matters relating to tort, the jurisdiction issue is assessed relatively thoroughly; more accurately: an

assessment of whether the mentioned criteria for proceedings can be satisfied to a certain extent. Hence, allegations regarding jurisdiction are not taken into account without an assessment. Some substantiation is required also when the issue is disputed. However, this does not entail that the court is to consider whether the claim is likely to succeed. The threshold will prevent that allegations are created primarily to establish jurisdiction.

(72) It is hard to see why the assessment of the procedural criterion that "the claims are so closely connected" as required in Article 6 (1), should derogate much from the assessment of the same under the options in Article 5.

(73) The CJEU judgment *Freeport* from 2007 supports this. In paragraph 41, the following is stated regarding the assessment under Article 6 (1):

> **"It is for the national court to assess whether there is a connection between the different claims brought before it, that is to say, a risk of irreconcilable judgments if those claims were determined separately and, in that regard, to take account of all the necessary factors in the case-file, which may, if appropriate yet without its being necessary for the assessment, lead it to take into consideration the legal bases of the actions brought before that court."**

(74) Related statements are found in *Painer* from 2011. There, the CJEU assessed whether actions mostly concerning similar violations of national copyright law, could be heard jointly under Article 6 (1). In paragraph 83, the following is stated with regard to the assessment:

> **"It is, in addition, for the referring court to assess, in the light of all the elements of the case, whether there is a connection between the different claims brought before it, that is to say a risk of irreconcilable judgments if those claims were determined separately. For that purpose, the fact that defendants against whom a copyright holder alleges substantially identical infringements of his copyright did or did not act independently may be relevant."**

(75) The main point of both statements is that the question of a joint hearing under Article 6 (1) must be determined in light of "all necessary factors in the case-file". These formulations express, in content, the same. In my opinion, both correspond to the Supreme Court's statement in Rt-2015-129 *Arrow* paragraph 29 that a "relatively thorough assessment" is required to determine whether a case falls within the scope of territorial jurisdiction under the Lugano Convention.

(76) As far as I can see, the statements in *Freeport* and *Painer* imply that the intensity of Norwegian courts' assessment of allegations regarding the requirement in Article 6 (1) cannot be weaker than the assessment under Article 5 (3). It is hard to see why allegations that "the claims are so closely connected" that there is a risk of irreconcilable judgments resulting from separate proceedings should be assessed less thoroughly than allegations that a case concerns "tort". The implication of Article 6 (1) is that it must be assessed whether there is a likelihood that the claim against the anchor defendant, legally and factually, is as connected as the claimant maintains. If the claimant's allegation to this effect should be taken into account unassessed, it would contravene the instruction in *CDC* paragraph 18 that Article 6 (1) must be strictly interpreted to avoid that the main rule in Article 2 on court of domicile is undermined.

(77) *Summary of the procedural criterion*

(78) Under Article 6 (1), a relatively exhaustive assessment must be made of whether the "claims are so closely connected", legally and factually, that it is expedient to hear and determine

them together "to avoid the risk of irreconcilable judgments resulting from separate proceedings". It is sufficient that the claimant demonstrates a certain likelihood that such a connection exists.

(79) *The significance of the Commission decision*

(80) The Court of Appeal has assumed that *CDC* does not preclude a joint hearing, even if some defendants are not addressees of the European Commission's decision on a single and continuous of the breach of the competition rules. The following is set out in the order:

> **"Although the anchor defendant in *CDC* was the addressee of the Commission decision, the Court of Appeal cannot see that premise 24 in that ruling can be interpreted antithetically to mean that the requirement of foreseeability is not met for others allegedly liable for the breach who are not registered as addressees of the Commission decision. The claims in *CDC* were directed only towards addressees of the decision, so that the issue in the case at hand was not relevant in that case."**

(81) As I understand the foreign defendants, they contend that *CDC* indicates that the absence of a Commission decision against Volvo Norge AS precludes a joint hearing of claims that are based on such a decision; thus, a necessary objective connective factor lacks between the claims.

(82) I do not endorse this reading of *CDC*. In *CDC*, all defendants were covered by a Commission decision concerning infringement of the competition rules. Differences in the legal bases for the claims against the defendants did not preclude a joint hearing, "provided that it was foreseeable by the defendants that they might be sued in the Member State where at least one of them is domiciled". In paragraph 24, the following is stated:

> **"That latter condition is fulfilled in the case of a binding decision of the Commission finding there to have been a single infringement of EU law and, on the basis of that finding, holding each participant liable for the loss resulting from the tortious actions of those participating in the infringement."**

(83) It follows from this that the requirement of being able to foresee a risk of being sued is met when the decision concerns "a single infringement". However, the statement does not preclude that the risk of being sued for a single infringement of the competition rules may also be foreseen in *other* cases; that is, in cases where such a decision is *not* present. Here, CJEU expresses the positive only, and not the negative.

(84) This interpretation is supported by the fact that EU and EEA citizens according to general case law have a right to direct enforcement of the European competition rules, see for instance the CJEU judgment 14 March 2019 in Case C-724/17 *Skanska* paragraph 24. There, it is pointed out that Article 101(1) and Article 102 TFEU, corresponding to the EEA Agreement's Articles 53 and 54, "produce direct legal effects in relations between individuals and directly create rights for individuals which national courts must protect". In the CJEU judgment 24 October 2018 in Case C-595/17 *Apple* paragraph 35, it is expressly stated that the right to claim damages "prejudiced by an infringement of competition law rules to seek compensation for the harm suffered is independent of the prior finding of such an infringement by a competition authority".

(85) Here, I add that it is not the decision in itself that will constitute the basis for damages for the addressees thereof, but the infringements the enforcement body through its decision finds that

the companies have committed on the same occasion. In that case, it is the claimant that carries the burden of proving that companies other than the addressees of the decision have committed similar infringements relating to the same case – with the challenges this might entail to a defendant that is not an addressee of any Commission decision.

(86) Against this background, the Court of Appeal has based its ruling on a correct opinion of the law when not considering the absence of a Commission decision against Volvo Norge AS to be an independent obstacle for making the company the anchor defendant.

(87) *The assessment of whether "the claims are as closely connected" as required under Article 6 (1)*

(88) After an overall assessment, the Court of Appeal has concluded that the Norwegian Posten companies "to a reasonable extent have substantiated the allegation that Volvo Norge AS and the other defendants are jointly and severally liable for infringement of the competition rules". It has therefore found that the conditions for joint proceedings against the foreign defendants are met with regard to the claim against Volvo Norge AS.

(89) I find that the Court of Appeal has taken a correct legal starting point when it comes to criteria for hearing when stating that the allegation that Volvo Norge AS is jointly and severally liable is *not* sufficient, but that the claimant must substantiate such an allegation to a reasonable extent – also formulated as a requirement of "a certain substantiation", as I have previously accounted for.

(90) The foreign defendants find, however, that the Court of Appeal's individual assessment reflects an incorrect opinion of the law with regard to the criteria for establishing a single and continuous infringement of the competition rules.

(91) The Supreme Court's jurisdiction, as concerns the action from the Norwegian claimants, is limited to assessing the Court of Appeal's general interpretation of the law. The Court of Appeal's individual application of the law and presentation of facts may, however, shed light on the understanding of the rules, see the Supreme Court judgment HR-2017-833-A paragraph 23 with further references. I will look further into this next.

(92) It follows from the order that the Court of Appeal has assumed that joint and several liability for a single and continuous infringement of the competition rules "does not require extensive activities". It also finds that it is not a requirement that "Volvo Norge AS must have participated to the 'same extent' as the addressees of the decision". Furthermore, the Court of Appeal finds that "Norwegian tort law suggests joint and several liability for companies that have infringed the competition rules."

(93) Next, the following four factors are highlighted – referred to as the "objective factors" – as crucial for the assessment of whether the connection requirement is met:

– A large part of the cars procured by the Posten companies have been purchased or leased from Volvo Norge AS. The company is thus not a random choice in order to establish a venue in Norway.

– Volvo Norge AS has not complied with the Posten companies' requests for presentation of the European Commission's Statement of Objections or the public

versions of the Commission's decision. Thus, the Court of Appeal finds that the requirements for the factual basis for the assessment cannot be too strict.

– Volvo Norge AS is a company in the same group as several of the addressees of the Commission decision.

– The group relationship supports that the Posten companies' allegation of joint and several liability is reasonably substantiated. This applies in particular if persons connected to the addressees of the Commission decision have also had board positions and other senior positions in Volvo Norge AS. Volvo Norge AS has not presented the requested information on a possible cross-representation in the company's governing bodies. This lack of clarification must entail that, also on this point, the required factual basis for the assessment cannot be too strict.

(94) My understanding of the Court of Appeal's overall assessment is that the group relationship with companies covered by the Commission decision and the lack of clarification from Volvo Norge AS on cross-representation also explain the view that there is a certain likelihood that Volvo Norge AS has been familiar with acts forming the basis for the decision. I also understand that this could suggest a certain likelihood that the Norwegian company has sold cars with this knowledge. The individual finding of facts is not for the Supreme Court to assess. However, the foreign defendants have alleged that the lack of presentation of facts cannot be emphasised as long as the court has not yet determined whether it has jurisdiction. In my view, the defendants cannot be heard in this regard, as the determination of jurisdiction requires a certain substantiation of the proximity of the claims as required under Article 6 (1). Based on the principle of free assessment of evidence, the court will, in a larger perspective, be free to emphasise that presentation of the requested information on board membership could have shed light on the issue. However, the Supreme Court does not have jurisdiction to review the individual assessment on this point either.

(95) As for the principle for the assessment of whether a contention of joint and several liability for a single and continuous infringement is substantiated to a reasonable extent, the foreign defendants have referred among others to the CJEUs judgment 26 September 2018 in Case C-99/17 P *Infineon.* It is claimed that this judgment shows that the Court of Appeal, in its assessment, has applied an incorrect principle. According to the judgment's paragraph 172, such liability requires evidence

> **"that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participants and that it was aware of the offending conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to take the risk".**

(96) In my opinion, the Court of Appeal's view that limited activities are required to establish joint and several liability does not contravene CJEU case law stating that such liability necessitates a planned and illegal conduct with the knowledge that the other undertakings have pursued the same objectives. Even a low level of activity may take place on an informed basis and be carried out according to specific plans. The intensity of assessment promoted by the foreign companies therefore exceeds what "a certain substantiation" requires. When assessing the criteria for hearing, it is not necessary for the court to consider whether or not Volvo Norge AS has committed acts that may entail joint and several liability.

(97) Finally, the Court of Appeal has pointed out that the claim against the foreign defendants concerns infringement comprising the entire EEA. Therefore, the foreign defendants have been able to foresee legal action from customers in any EEA State, irrespective of whether the relevant customers are domiciled in the state of the addressees of the Commission decision. In my view, the Court of Appeal has applied a correct legal starting point for its assessment of foreseeability. As mentioned, the Supreme Court does not have jurisdiction to review the individual assessment.

(98) The foreign defendants' appeal against the Court of Appeal's order stating that the connection requirement is met for the Norwegian Posten companies is thus dismissed.

(99) *The Posten companies' alternative basis of claim – the corporate liability*

(100) The Posten companies have as an alternative basis of claim submitted that Volvo Norge AS is liable solely due to its group relationship with companies liable for damages according to the Commission decision.

(101) The foreign defendants have – in addition to disputing the substantive contents of the submission – alleged that the alternative basis for the claim does not derive from the same situation of fact and law as the other claims in the matter.

(102) As I have concluded that the connection requirement is met as regards possible joint and several liability, Oslo District Court is established as an international venue for the foreign defendants in the relevant case. I cannot see that it is a procedural condition under Article 6 (1) that the alternative basis for the claim, too, must meet the connection requirement in the provision. Such a split will raise unclear issues regarding *litispendence* and legal force and generate high litigation costs. Therefore, it is not necessary to consider the objection made.

(103) *The foreign Posten companies' claim against the foreign defendants*

(104) In its judgment, the Court of Appeal has distinguished between the Norwegian and the foreign claimants. The distinction is made because the foreign Posten companies – that have not purchased cars from the Norwegian company – "have not adequately substantiated that their claim against Volvo Norge AS is as closely connected with the foreign claimants' claim against the remaining 14 foreign defendants" that the connection requirement is met.

(105) Article 6 (1) regulates joint proceedings on the defendant's side. The actions to be joined concern Volvo Norge AS's alleged joint and several liability as a participant in a single and continuous infringement. The allegation of joint and several liability means it is thus not necessary to direct the claim against the cartel participant from which the trucks were purchased. Thus, there is no basis for making a distinction such as that made by the Court of Appeal.

(106) However, the Court of Appeal's conclusion not to hear the case implies that the Supreme Court has full jurisdiction to clarify whether the procedural conditions have been met for the foreign Posten companies' action against the foreign defendants.

(107) The Commission decision contains a more detailed description of the collusive arrangement, its form and procedure. It also describes that the collusion and exchange of information has

taken place at a high level within the respective organisations, see for instance paragraph 51 on participation in meetings during the period 1997-2004 "involving senior managers of all Headquarters". In light of this and the fact that the Volvo companies have not presented information to clarify the claimants' submissions regarding cross-representation, I can only conclude that the Court of Appeal's requirement of a certain substantiation of the procedural criteria with regard to the action from the Norwegian claimants also applies to the action from the foreign claimants.

(108) Against this background, the action from the foreign claimants may proceed.

(109) *Conclusion and costs*

(110) The appeal from the foreign claimants has succeeded, while the appeal from the foreign defendants has not. The practical implication of this is that a Norwegian court has territorial jurisdiction to hear the Posten companies' action against all the defendants, as alleged in the Posten companies' writ of summons.

(111) The Posten companies have submitted a claim for costs. Based on the conclusion I have reached, the Posten companies have fully succeeded in the question whether the actions may proceed. According to section 20-8 subsection 2 second sentence of the Dispute Act, cf. section 20-2, the company is thus generally entitled to compensation for costs in the hearing of the rejection issue before all instances. However, the case has raised several issues of principle with regard to the application of Article 6 (1) of the Lugano Convention on international venue. This is a question not previously considered by the Supreme Court, and the defendants have had reason to obtain clarification. Consequently, I find that an exception from the main rule is justified, see section 20-2. Costs are therefore not awarded in any instance.

(112) I vote for this

O R D E R :

1. In the appeal from the foreign Posten companies:

   The action from Bring Linehaul AB, Svebol Logistics AB, Bring Frigo Åkeri AB, Bring Åkeri AB, Bring Express Sverige AB, Bring Cargo Inrikes AB and Bring Trucking a.s. is allowed.

2. In the appeal from the foreign defendants:

   The appeal is dismissed.

3. In both cases:

   Costs are not awarded in any instance.

(113) Justice **Bull:** I agree with Justice Matheson in all material respects and with his conclusion.

(114) Justice **Steinsvik:** Likewise.

(115) Justice **Kallerud:** Likewise.

(116) Justice **Møse:** Likewise.

(117) Following the voting, the Supreme Court gave this

O R D E R :

1. In the appeal from the foreign Posten companies:

   The action from Bring Linehaul AB, Svebol Logistics AB, Bring Frigo Åkeri AB, Bring Åkeri AB, Bring Express Sverige AB, Bring Cargo Inrikes AB and Bring Trucking a.s. is allowed.

2. In the appeal from the foreign defendants:

   The appeal is dismissed.

3. In both cases:

   Costs are not awarded in any instance.