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Judgment of the Court of Justice in Case C-260/07

Pedro IV Servicios v. Total España SA

**A SERVICE STATION AGREEMENT LASTING LONGER THAN FIVE YEARS
CANNOT BENEFIT FROM A BLOCK EXEMPTION IF THE SUPPLIER LETS THE
SERVICE STATION TO THE RESELLER BUT IS NOT THE OWNER OF BOTH THE
STATION AND THE LAND**

That was not the case under Regulation No 1984/83 which expired on 31 December 1999

Article 81(1) EC prohibits certain agreements and concerted practices between undertakings. However, under Article 81(3) EC, and subject to certain conditions, that prohibition may be declared inapplicable to any category of agreements between undertakings or concerted practices which contribute to the improvement of the production or distribution of goods, while allowing consumers a fair share of the resulting benefit.

In that respect, Regulation No 1984/83¹ exempted, from the prohibition laid down in Article 81(1) EC, certain categories of exclusive purchasing agreements and concerted practices. In particular, it was possible to apply the block exemption for which it provided in the case of a service station agreement, the duration of which exceeded 10 years, provided that the supplier had let the service station to the reseller, or had granted him, in law or in fact, occupancy of the service station.

Since 1 January 2000, Regulation No 1984/83 has been replaced by Regulation No 2790/1999². That regulation establishes an exemption from the prohibition laid down in Article 81(1) EC for vertical agreements, that is to say, agreements entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and which relate to the conditions under which the parties may purchase, sell or resell certain goods or services. However, the regulation states that the block exemption is not applicable to any non-compete obligation the duration of which exceeds five years, unless the contractual goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that

¹ Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article [81](3) of the Treaty to categories of exclusive purchasing agreements (OJ 1983 L 173, p. 5 and corrigendum OJ 1983 L 281, p. 24) as amended by Commission Regulation (EC) No 1582/97 of 30 July 1997 (OJ 1997 L 214, p. 27).

² Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ 1999 L 336, p. 21).

the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer.

In any event, agreements in which the supplier fixes the retail price or imposes a minimum sale price on the reseller are ineligible for the block exemptions established by Regulations Nos 1984/83 and 2790/1999.

In 1989, Pedro IV entered into four contracts with Total, a supplier of petroleum-based products. Under the terms of those contracts, Pedro IV granted, in favour of Total, a 'right to build', for 20 years on a plot of land owned by Pedro IV. Under that right, Total was able to build a service station on that land. That station became Total's property for 20 years in return for a monthly payment to Pedro IV. In the meantime, the service station owned by Total was let to Pedro IV. At the end of that period of 20 years, the station built will again become the property of Pedro IV.

At the same time, pursuant to those contracts, Pedro IV undertook to operate the service station from the time when that station was handed over to it, obtaining its supplies of fuel exclusively from Total. The exclusive supply agreement was entered into for a period of 20 years. Under that agreement, Total, first, was to determine the price of the fuel which it supplied to Pedro IV on the most advantageous terms agreed by it with other service stations which might be established in Barcelona and, second, was to guarantee that the price would never be higher than the average of the prices fixed by other suppliers with a significant presence on the market. By adding to that price a distribution margin for the service station operator, which it considered appropriate, Total thus obtained the retail price which it then recommended Pedro IV apply.

Pursuant to the contract, a service station was built and was supplied exclusively by Total for a period of 12 years. In 2004, Pedro IV brought an action for annulment of the legal relationship established by the four contracts described above on the grounds that they included clauses which seriously restricted competition, that is to say, a duration in excess of the maximum permitted under Community law for exclusive supply agreements, and an indirect fixing of the sale price. In those circumstances, the Audiencia Provincial de Barcelona (Provincial Court, Barcelona), the court seised of the matter on appeal, asked the Court to clarify whether the contractual clauses at issue were eligible for the block exemptions provided for respectively by Regulations Nos 1984/83 and 2790/1999.

Concerning the period of exclusivity

As regards Regulation No 1984/83, the Court finds that, for the purposes of applying the exemption which that regulation laid down, the provision did not require the supplier to be the owner of the land on which he built the service station which he let to the reseller.

In relation to Regulation No 2790/1999, at the outset, the Court notes that the exemption laid down in that regulation applies on condition that the market share held by the supplier does not exceed 30% of the relevant market on which he sells the contractual goods or services. Thus, before proceeding to an assessment based on other conditions laid down in that regulation, it is for the referring court to ascertain whether, from the entry into force of Regulation No 2790/1999, Total had such market share, taking account of shares it may have had in the capital of other suppliers of petroleum products on the same market.

Then, the Court states that, in a situation such as that at issue in the main proceedings, it appears that the conditions for the application of Regulation No 2790/1999, in relation to the duration of the non-compete obligation, are not met. However, the Court points out that it is for the national

court to ascertain whether, in the present case, the conditions for exemption laid down in Regulation No 2790/1999 are met, having regard, inter alia, to Total's argument that the right to build conferred on it, not only ownership of the service station, but also ownership of the land on which it was built.

In addition, in the event that the referring court reaches the conclusion that the agreements concluded between the parties to the main proceedings met the conditions for exemption laid down in Regulation No 1984/83, but not those laid down in Regulation No 2790/1999, the Court states that it will be necessary to hold those agreements exempt until 31 December 2001 under the transitional scheme provided for in Regulation No 2790/1999.

Concerning the fixing of the retail price

In that regard, the Court holds that contractual clauses relating to the retail price, such as those at issue in the main proceedings, are eligible for the block exemptions under Regulations Nos 1984/83 and 2790/1999 where the supplier restricts himself to imposing a maximum sale price or to recommending a sale price and where, therefore, it is genuinely possible for the reseller to determine the retail price. On the other hand, such clauses are ineligible for those exemptions where they lead, directly or by indirect or concealed means, to the fixing of a retail price or the imposition of a minimum sale price by the supplier. Thus, it is for the national court to determine whether such obligations constrain the reseller, taking account of all of the contractual obligations in their economic and legal context, and of the conduct of the parties to the main proceedings.

Finally, in relation to both the clause concerning the exclusivity period and the clause concerning the fixing of the retail price, the Court points out that, in the event that the clauses at issue do not satisfy all the conditions provided for by an exempting regulation, they will be caught by the prohibition laid down in Article 81(1) EC only if their object or effect is perceptibly to restrict competition within the common market and if they are capable of affecting trade between Member States.

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Languages available: ES, DE, EL, EN, FR, IT, PT

The full text of the judgment may be found on the Court's internet site

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-260/07>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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