

Case C-308/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

15 April 2019

Referring court:

Înalta Curte de Casație și Justiție (Romania)

Date of the decision to refer:

14 February 2019

Appellant:

Consiliul Concurenței

Respondent:

Whiteland Import Export SRL

Subject matter of the main proceedings

Appeal lodged by the Consiliul Concurenței (Competition Authority, Romania) with the Înalta Curte de Casație și Justiție — Secția de contencios administrativ și fiscal (High Court of Cassation and Justice — Chamber for administrative and tax matters, Romania) against the civil judgment of the Curtea de Apel București (Court of Appeal, Bucharest, Romania) which upheld the administrative action brought by Whiteland Import Export SRL and annulled Decision No 13 of 14 April 2014 of the Competition Authority in so far as concerned that company.

Subject matter and legal basis of the request for a preliminary ruling

An interpretation of Articles 4(3) TEU and 101 TFEU is requested pursuant to Article 267 TFEU in order to establish the conformity with those provisions of national legislation under which only the formal action of initiating an investigation into an anti-competitive practice, and not subsequent actions in the course of that procedure, constitutes an action interrupting the limitation period.

Question referred

Must Articles 4(3) TEU and 101 TFEU be interpreted as requiring the courts of the Member States to interpret the provisions of national law governing the time-limit on the Competition Authority's right to impose administrative penalties in accordance with provisions of Article 25(3) of Regulation (EC) No 1/2003 and as precluding the interpretation of a provision of national law as meaning that an action interrupting the limitation period means only the formal action of initiating the investigation into an anti-competitive practice, without the subsequent actions taken for the purpose of such investigation falling within the same scope of the actions interrupting the limitation period?

Provisions of EU law relied on

Article 4(3) TEU and Article 101(1) TFEU

Article 25 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

Provisions of national law cited

Legea concurenței nr. 21/1996 (Law No 21/1996 on competition) republished in the Monitorul Oficial, Part I, No 742 of 16 August 2005, Article 5(1) and Articles 58 and 59, in the version in force at the material time. Furthermore, those provisions are reproduced in the version in force at the time the contested decision was issued and taken into account by the Court of Appeal, which became, following the amendment of the law and its republication in the Monitorul Oficial al României, Part I, No 240 of 3 April 2014, Article 5(1) and Articles 61 and 62, and in the current version in force after the decision of the Court of Appeal, in which they have become Article 5(1) and Articles 63 and 64, following the amendment of the law and its republication in the Monitorul Oficial al României, Part I, No 153 of 29 February 2016. The cited Article 5 lays down, inter alia, a prohibition on agreements between undertakings having the object or effect of restricting, hindering or distorting competition on the Romanian market, in particular those which directly or indirectly fix a sale or purchase price. The Competition Authority's right to impose penalties for matters such as those alleged against the respondent is limited, under Article 58 (which became Article 61 and is now 63), paragraph 1, subparagraph (b), to five years which, under paragraph 2 of that article, starts to run from the date of the final anti-competitive action or matter in question. Article 59 (which became Article 62) provided, essentially, that any action taken by the Competition Authority for the purpose of a preliminary examination or for the purpose of initiating an investigation into a specific infringement of the law interrupted the limitation period; such actions include in particular requests for information, the order to initiate an investigation and the initiation of legal proceedings. That article, which

has become, in the current version of the law, Article 64, now stipulates that ‘any action taken by the Competition Authority for the purpose of a preliminary examination or investigation of an infringement of the law shall interrupt the limitation period’; these actions shall include, mainly, requests for information, the order to open an investigation, the conduct of inspections and the communication of the investigation reports.

Brief outline of the facts and the main proceedings

- 1 On 7 September 2009, the Competition Authority initiated, of its own motion, four investigations into the market for the retail sale of food products vis-à-vis several companies, including the respondent Whiteland Import Export SRL.
- 2 On 12 August 2014, the Competition Authority communicated the investigation report to the respondent and the hearings before the Authority in plenary session were held on 23 October 2014. On 9 December 2014, the Competition Authority approved, as part of its deliberations, the draft ruling and, by Decision No 13 of 14 April 2015, found that the respondent, together with several undertakings, had concluded anti-competitive agreements to distort or hinder competition on the market by setting the sale/resale price for suppliers’ products in breach of Article 5(1) of Law No 21/1996 on competition and Article 101(1) TFEU, and imposed on them a fine of 324 484 Romanian lei (RON), amounting to 0.55% of the turnover in 2013.
- 3 The respondent brought an action against that decision with the Curtea de Apel București — Secția a VIII - a de contencios administrativ și fiscal (Court of Appeal, Bucharest — Eighth Chamber for administrative and tax matters), claiming that the decision should be annulled in so far as it was concerned. The appellant raised primarily, together with other pleas concerning illegality which were not examined by the Court of Appeal, the plea relating to the time-limit on the right to impose the penalty.
- 4 By judgment of 19 January 2016, the Court of Appeal ruled that the Competition Authority’s right to impose administrative penalties is time-barred and ordered the annulment of Competition Authority Decision No 13 of 14 April 2015 in so far as it concerns the appellant and freed it from payment of the fine.
- 5 That court considered that the five-year limitation period laid down in Article 61(1)(b) of Law No 21/1996 on competition started to run from 15 July 2009, the date on which, according to the Competition Authority’s findings, the final anti-competitive action was carried out by the appellant, and that that period was interrupted on 7 September 2009 by the order to initiate the investigation, thus starting a new five-year period.
- 6 The Court of Appeal considered that Article 62(1) of Law No 21/1996 on competition, under which ‘any action taken by the Competition Authority for the purpose of a preliminary examination or for the purpose of initiating an

investigation into a specific infringement of the law' is to have the effect of interrupting the limitation period, should be interpreted strictly and the actions listed by way of example in paragraph 2 of that provision can be interpreted solely as supplementing and supporting paragraph 1, and cannot be dissociated from the statutory definition which the legislature places on cases of interruption. Consequently, no such effect of interrupting the limitation period was attached to the Competition Authority's actions following the initiation of the investigation.

- 7 The Court of Appeal considered that Article 25 of Regulation (EC) No 1/2003 is not applicable since it concerns only cases in which the Commission initiates an investigation.
- 8 That court found that the limitation period expired on 7 September 2014 so that the appellant's right to impose penalties was time-barred at the time of the deliberation of 9 December 2014 and the adoption of the decision of 14 April 2015.
- 9 Since the Court of Appeal wrongly assumed that the date of the final anti-competitive action carried out by Whiteland Import Export SRL was 15 July 2009 rather than 31 December 2009, and misinterpreted the provisions on the interruption of the limitation period laid down Law No 21/1996, the Competition Authority lodged an appeal against the judgment of the Court of Appeal with the referring court.

The essential arguments of the parties to the main proceedings

- 10 In the view of the Competition Authority, actions which interrupt the limitation period are any procedural measures taken to investigate the infringement so that the order to initiate an investigation is not the final action which interrupts the limitation period. The expression 'for the purpose of initiating an investigation' contained in Article 62(1) of the law cannot be construed as referring solely to the issue of the order to initiate an investigation since what is meant is a genuine investigation into infringements of the law and the actions which interrupt the limitation period set out in Article 62(2) of the law are listed by way of example and not exhaustively; evidence to this effect is the use in Article 62(2) of the expression 'mainly' which precedes the relevant list.
- 11 Therefore, the interpretation that the order to initiate the investigation constitutes the final action when interrupting the limitation period entails a non-uniform application of the relevant provisions of national and EU law. If the European Commission had itself investigated the infringement in question of Article 10 TFEU, the cases of interruption of the limitation period would have been applied pursuant to Article 25 of Regulation (EC) No 1/2003, under which the actions interrupting the limitation period are those taken for the purposes of establishing the infringement.

- 12 Therefore the Competition Authority asked the national court to submit a request for a preliminary ruling to the Court of Justice, which is admissible since the attainment of the objectives of the treaty requires that the provisions of EU law be applied effectively and with identical effects throughout the territory of the European Union.
- 13 In its view, the interpretation which the Court of Appeal places on the provisions of national law concerning the time-limit on the right to apply penalties relating to competition prevents EU law from having practical effect.
- 14 Furthermore, it maintains that a reference to the Court of Justice for a preliminary ruling is useful since, following Decision No 13 of 14 April 2015, ten cases have been brought before the Court of Appeal, Bucharest, in five of which it was found that the right to apply the sanction is time-barred, whilst in the other five the decision under appeal has been upheld.
- 15 Whiteland Import Export SRL considers that Article 25 of Regulation (EC) No 1/2003 applies only in the case of penalties imposed by the Commission under Articles 101 and 102 TFEU, and not in the case of penalties imposed by national competition authorities. Consequently, the request for a preliminary ruling to the Court of Justice must be rejected since it concerns the interpretation of certain provisions of national law and not EU law. Furthermore, those provisions of national law are not rules of substantive law which can be the subject of any harmonisation at EU level, but rather rules of procedural law which fall exclusively within the scope of national law.
- 16 In the view of the respondent, the absence in Regulation No 1/2003 of penalties for the application by a national competition authority of Article 101 TFEU is a practical expression of the principle of procedural autonomy of the Member States.
- 17 As regards penalties, it is not currently necessary to align the provisions of national law with those of EU law since competition authorities act solely pursuant to the rules available in domestic legislation.

Succinct presentation of the reasons for the request for a preliminary ruling

- 18 The referring court notes that in ruling on the application it will have to give a final judgment which is not, under national law, subject to any appeal.
- 19 That court considers that in examining the application it will have to establish definitively whether, in the present case, Articles 61 and 62 of Law No 21/1996 on competition apply to the effect set out by the Court of Appeal, that is to say that any action taken by the Competition Authority for the purpose of a preliminary examination or for the purpose of initiating an investigation into a specific infringement of the law interrupts the limitation period laid down in Article 61, or whether those articles must be applied, also in the light of the

interpretation of Articles 4(3) TEU and 101(1) TFEU, in a manner consistent with Article 25(3) of Regulation (EC) No 1/2003, under which the limitation period is interrupted by any action carried out for the purpose of the investigation or proceedings in respect of an infringement.

- 20 Regulation (EC) No 1/2003 does not explicitly govern limitation periods as regards the application of penalties by the Member States' competition authorities in connection with the investigations that they carry out, or the interruption of those periods; it is only with regard to the interruption of limitation periods falling within the competences of the Commission that Article 25(3) provides that any action taken by the competition authority of a Member State for the purpose of the investigation or proceedings in respect of an infringement is to interrupt the limitation period.
- 21 On the one hand, the referring court notes that, in those circumstances, it can be argued that, under the principle of procedural autonomy, the Member States are free to regulate certain aspects associated with limitation periods in the application of penalties by national competition authorities.
- 22 On the other, having cited in succession Article 4(3) TEU, recitals 1, 8 and 11 of Regulation No 1/2003, paragraphs 20 to 22 of the judgment of the Court of Justice of 11 June 2009, *X*, C-429/07, Article 35(1) of Regulation No 1/2003 and points 19 to 24 of the judgment of the Court of Justice of 14 June 2011, *Pfleiderer*, C-360/09, the referring court concludes that the procedural rules laid down by the Member States must not undermine the objective of Regulation No 1/2003, which is to ensure the effective application of Articles 101 and 102 TFEU by the competition authorities and that the mechanisms for cooperation between the Commission, national competition authorities and the national courts are covered by the general principle of sincere cooperation.
- 23 The referring court notes that Articles 61 and 62 (ex 58 and 59) in question were incorporated into Law No 21/1996 by Ordonanța de urgență a Guvernului nr. 121/2003 (Government Emergency Order No 121/2003) for the purpose, as set out in the preamble thereto, of implementing the Community *acquis* relating to competition and for the provisional conclusion of the negotiations on the chapter on competition policy. However, as regards interruption of the limitation period, those articles provided that such interruption is to be effected as a result of any action of the Competition Authority for the purpose of a preliminary inspection or initiating an investigation, despite the fact that the rules of EU law refer to any action taken by the Commission or by the competition authority of a Member State for the purpose of the investigation or proceedings in respect of an infringement.
- 24 In that context, the referring court observes that following the decision under appeal Articles 61 and 62 in question were amended by Ordonanța de urgență a Guvernului nr. 31/2015 (Government Emergency Order No 31 of 2015) and at present the latter of those articles, which in the meantime has become Article 64

of the law, stipulates that ‘any action taken by the Competition Authority for the purpose of a preliminary examination or investigation of an infringement of the law shall interrupt the limitation period’. The explanatory memorandum to that order stated that the amendments were necessary since ‘it was necessary, as a matter of urgency, to lay down, at national level, a legal framework that ensured full compliance with the Competition Agency’s obligations vis-à-vis the European Commission and the national authorities’ obligations under Council Regulation (EC) No 1/2003’, whilst as regards the amendments and the supplements made to Articles 61 and 62 noted that their ‘role is to avoid confusion as to the time-limit on the right to act and the Competition Authority’s right to impose penalties’.

- 25 The issue of interpretation of the provisions of national law on interruption of the limitation period in conformity with the provisions of Regulation (EC) No 1/2003 as regards the competences of the Commission is all the more important since, under Article 11(6) of Regulation (EC) No 1/2003, the initiation by the Commission of proceedings for the adoption of a decision is to relieve the competition authorities of the Member States of their competence to apply Articles 101 and 102 of the Treaty even if a competition authority of a Member State is already acting on a case and, under Article 25(3) of that regulation, any action taken by the Commission or by the competition authority of a Member State for the purpose of the investigation or proceedings in respect of an infringement is to interrupt the limitation period for the imposition by the Commission of fines or periodic penalty payments.
- 26 The strict interpretation adopted by the Court of Appeal could lead to non-uniform application of the provisions on competition depending on whether the investigation was initiated by the Commission or by the national competition authority.
- 27 Recalling the non-uniform practice of the courts ruling on the merits in this regard and finding that the conditions laid down in Article 267 TFEU and the case-law of the Court of Justice on the requirements for making a reference for a preliminary ruling are fulfilled, the High Court of Cassation and Justice notes that the question must be asked whether the national court may interpret national legislation literally or whether it is obliged under Article 4(3) TEU, where the competition authority applies a penalty under Article 101 TFEU, to place on national law a broader meaning than that which arises from the terms used by the legislature; an interpretation which is in conformity with Article 25(3) of Regulation (EC) No 1/2003.