Case C-716/19

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:

26 September 2019

Referring court:

Juzgado de lo Mercantil No 2 de Madrid (Spain)

Date of the decision to refer:

29 July 2019

Applicants:

ZA

AZ

BX

CV

DU

ET

Defendant:

Repsol Comercial de Productos Petrolíferos, S.A.

Subject matter of the main proceedings

Unfair competition proceedings brought against the company Repsol Comercial de Productos Petrolíferos, S.A. (‘Repsol’) (Articles 101 and 102 TFEU) for the illegal fixing of the retail price of fuel.

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

Interpretation 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 ('Regulation No 1/2003'), in relation to evidence and the burden of proof.

Questions referred for a preliminary ruling

1) Is it possible to conclude, in the light of Regulation (EC) No 1/2003, that the facts as investigated and established in a decision given by a national competition authority of an EU Member State — where that authority acts in accordance with Articles 101 TFEU and 102 TFEU within the remit granted to it pursuant to that regulation, the Notice on the co-operation between the Commission and the courts of the EU Member States, and the Commission Notice on cooperation within the Network of Competition Authorities (OJ 2004 C 101, p. 3) of 27 April 2004 — which is subsequently upheld by a higher court and becomes final, have the probative force of full proof and have a constraining or prejudicial effect on the adjudication by another court in subsequent proceedings relating to the same facts?

2) If the national competition authority gives a decision on the existence of an infringement in relation to a network of agreements, must it be presumed, in the absence of evidence to the contrary from the infringer, that all the agreements which make up that network are affected by the wording of the decision? In other words, do decisions given in relation to networks of agreements result in the reversal of the burden of proof?

Provisions of EU law relied on

Articles 101 and 102 TFEU

Regulation No 1/2003

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

Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ('Directive 2014/104')

European Commission Guidelines on Vertical Restraints (OJ 2010 C 130, p. 1) ('Guidelines on Vertical Restraints')

Paragraph 13:

'The determining factor in defining an agency agreement for the application of Article 101(1) is the financial or commercial risk borne by the agent in relation to the activities for which it has been appointed as an agent by the principal. In this respect it is not material for the assessment whether the agent acts for one or several principals. Neither is material for this assessment the qualification given to their agreement by the parties or national legislation.'

Paragraph 17:

'[…] where the agent incurs one or more of the risks or costs […], the agreement between agent and principal will not be qualified as an agency agreement […]. If contract-specific risks are incurred by the agent, it will be enough to conclude that the agent is an independent distributor […].'

Paragraph 21:

'Where the agent bears one or more of the relevant risks […], the agreement between agent and principal does not constitute an agency agreement for the purpose of applying Article 101(1). In that situation, the agent will be treated as an independent undertaking and the agreement between agent and principal will be subject to Article 101(1) as any other vertical agreement.'

Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ 2004 C 101, p. 54) ('Notice on co-operation')

Commission Notice on cooperation within the Network of Competition Authorities (OJ 2004 C 101, p. 43)

Provisions of national law relied on

Ley 16/1989 de Defensa de la Competencia (Law 16/1989 on the protection of competition) of 17 July 1989

Article 1: 'Prohibited conduct

'1. The following are prohibited: all agreements, decisions, collective recommendations or concerted or consciously synchronised practices, which have as their object or which result in or may result in the prevention, restriction or distortion of competition in all or part of the national market and, in particular, those which:

a) directly or indirectly fix prices or other commercial or service conditions;

b) limit or control production, distribution, technical development or investments;

c) share markets or sources of supply;

d) apply, in commercial or service relationships, dissimilar conditions for equivalent operations which place some competitors at a disadvantage vis-à-vis others;

e) make the conclusion of contracts subject to the acceptance of supplementary obligations which do not, whether according to their character or according to commercial practice, have any connection with the purpose of those contracts;

[…]'

Succinct presentation of the facts and the main proceedings

1 By judgment of 11 July 2001, the Tribunal de Defensa de la Competencia (Competition Court, Spain; 'TDC'), in the proceedings in case No 490/00, imposed a fine on Repsol of EUR 3 005 060.52 for engaging directly, since 1993, in the vertical fixing of the retail price of fuel for distributing service stations, independent undertakings, under the cloak of purported commission or agency contracts — owners of service stations would assume de facto significant risks associated with the sale of fuel to third parties — concluded with them. Repsol was further ordered to cease that practice. A penalty was also imposed on the oil company Cepsa in the same proceedings. The two companies control more than 50% of the hydrocarbon market, while Repsol has a market share of more than 30%.

2 The Servicio de Defensa de la Competencia (Department for the Protection of Competition) was supervising the implementation of that judgment and, by decision of 30 July 2009, the Comisión Nacional de la Competencia (National Competition Commission; 'CNC') (now the Comisión Nacional de los Mercados y la Competencia (National Markets and Competition Commission)) penalised Repsol with a fine of EUR 5 000 000 for 'having indirectly fixed the retail price for independent undertakings operating under its brand, thereby restricting competition between service stations in its network and between the remaining service stations' and ordered it to cease the practices complained of.

3 By judgment of 22 May 2015, the Tribunal Supremo (Supreme Court, Spain) upheld that judgment which therefore became final.

4 In parallel, in 2004 the Commission had commenced a procedure under Article 81 TEC in relation to Repsol, which concerned the supply of fuel to service stations in Spain. Pursuant to Commission Decision COMP/B-1/38.348 of 12 April 2006, the commitments proposed by Repsol in that procedure were made binding, in accordance with Article 9(1) of Regulation No 1/2003, and the procedure was terminated.

5 On 30 May 2007, the Confederación Española de Empresarios de Estaciones de Servicio (Spanish Confederation of Service Station Undertakings; 'CEEES') and the Asociación de Gestores de Estaciones de Servicio (Association of Service

Station Operators; 'AGES') lodged a complaint with the Commission, claiming that an agreement between fuel suppliers existed contrary to Article 101 TFEU, that Repsol was imposing minimum resale prices on service stations contrary to Articles 101 TFEU and 102 TFEU, and that Repsol had failed to fulfil its binding commitment, laid down in the Commission decision of 12 April 2006, not to restrict the purchaser's right to determine the sale price. The complainants asked the Commission to reopen the procedure in relation to the commitments under Article 9(2) of Regulation No 1/2003.

6 By decision of 28 April 2011, the Commission rejected the complaint lodged by CEEES and AGES. The complainants brought an action contesting that decision before the General Court of the European Union, which dismissed the action by judgment of 6 February 2014 (Case T-342/11).

7 The applicants in the present proceedings allege that Repsol continues to carry out illegal price fixing.

Main arguments of the parties to the main proceedings

8 The applicants submit that Repsol is in breach of the decisions of the CNC and that it is seeking to convert its network of service stations into 'genuine (in other words, not fictitious) agents' which assume the risks of the business, and, instead of concluding contracts for resale linked to the Platts index, which would ensure the competitiveness of the sector, to conclude pure agency contracts and thereby to control the retail price throughout the national territory, in view of its market share. The applicants seek a reference for a preliminary ruling to the Court of Justice.

9 Repsol submits that the right of the service stations in question to apply discounts which are deducted from their commission makes illegal fixing of the retail price impossible and that only the contracts expressly examined by the competition authority are affected by its decisions, which, although final, do not constitute prima facie proof of the infringement committed.

Brief summary of the basis for the request for a preliminary ruling

10 It is a matter of determining the probative force which Regulation No 1/2003 attaches to the facts as established in a final decision of a national competition authority of a Member State of the European Union in the context of a procedure under Articles 101 TFEU and 102 TFEU.

11 From the outset, in the proceedings which culminated in the judgment of the TDC of 11 July 2001 (case No 490/00), Repsol has been accused of illegal price fixing based on the imposition of general conditions by way of standard-form contracts which are never negotiated by the distributor, who is purported to be an 'agent'. The national competition authority examined a sample of the types of contract

used for the distribution of fuel by Repsol. In the judgment of the Tribunal Supremo (Supreme Court) of 17 November 2010, by means of which the judgment in question became final, that court held that 'once it has been established that what the disputed contracts refer to as an "agent" or "commission agent" is in fact an independent undertaking which assumed risks and that the supplier fixed the final sale prices, there can be no doubt […] that the appellants cannot rely on the block exemption laid down in the former Regulation No 1984/83 […]. The fixing of prices by Repsol specifically features in a number of contracts, the so-called commission contracts, and […] during the procedure before the [Servicio de Defensa de la Competencia] it consistently claimed that it would impose the sale prices […] before finally stating, in relation to the resellers who represent approximately 2.5% of its distribution network, that that imposition of prices related to a maximum price consistent with the fact that the owner of the service station may reduce that price by deducting it from its commission. That practice, which has been included in contracts concluded after 1997 and at the request of the Commission, does not undermine the reality of the classification made by the TDC which this court must confirm in full.'

12 As regards that reference to the fact that distributing service stations were not genuine agents, the Commission observed in footnote 10 of the Commission decision of 12 April 2006, concerning Repsol's commitments, which terminated the parallel procedure relating to Repsol under Article 81 EC, that that fact 'would require a more detailed analysis in order to confirm whether some service stations can be regarded as "agents" and are entitled to grant discounts' and then went on to refer to the outcome of the national proceedings in which it was found that the so-called 'agency contracts' concluded between some service stations and Repsol were not genuine agency contracts.

13 The decision of the CNC of 30 July 2009 listed a number of factors which had a bearing on the indirect fixing of the retail price, namely, the formation of the purchase or transfer price of the product; the setting of commissions and margins; the system for communicating maximum or recommended prices; the assignment to the operator of the service station owner's obligations in relation to invoicing; the role of oil undertakings in the tax treatment of discounts; and the application of discounts to the maximum or recommended price.

14 It was concluded in that decision that the conduct examined amounted to vertical fixing of the retail price, contrary to Article 1 of the LDC and Article 81(1) TEC, in that it discouraged distributors from departing from the recommended maximum prices and led them to apply those prices as fixed or minimum prices, as reflected by the adoption of such recommended maximum prices by the vast majority of service stations. The CNC conducted its investigation in accordance with the applicable EU legislation (Treaty, regulation and guidelines) and the case-law of the Court of Justice, by examining the financial and legal context in which the contracts were concluded, the types of contract and the financial rules laid down in the contracts, and all the contractual terms and obligations entered into by the parties. Accordingly, the CNC carried out the assessment provided for

in paragraph 47 of the Guidelines on vertical restraints, in order to determine whether the conditions stipulated by the operator — in this case, Repsol — converted the maximum prices into fixed or minimum prices, and it also complied with the guidance in heading 2.8 and paragraphs 226 to 228 of those Guidelines as regards the threshold of 30% of market share.

15 The CNC did not confine itself to examining only whether service stations linked to the Repsol, Cepsa and BP network could give discounts which were deducted from the commission but also, in accordance with the case-law laid down by the Court of Justice, it carried out an exhaustive analysis of all the mechanisms indicated by it which could result in the price stated to be the maximum or recommended price actually acting as a fixed or minimum price.

16 The applicants have submitted the standard form contract offered by Repsol to its entire network of service stations — and not only to those examined — in order to comply with the decision of the CNC, in support of the argument that that decision affects the whole network, which uses the same clauses, and not only the contracts examined by the CNC.

17 The problem arises that the case-law of the Spanish Tribunal Supremo (Supreme Court) to date on the assessment of whether or not vertical price fixing exists in the application of EU competition law is contradictory, with the legal uncertainty which that entails. The question arises of whether the decisions of national competition authorities — whose conduct is governed by the basic principles of cooperation, coordination and uniformity in the application of EU legislation — constitute an important indication, if not prima facie evidence, of the incompatibility with the rules on competition of the agreement between undertakings in question.

18 It is perfectly clear from the case-law laid down by the Court of Justice that, where an agreement is not covered by the block exemption, it must fulfil the conditions laid down in Article 81(3) TEC, and if it does not fulfil those conditions or is not covered by an individual authorisation, the agreement is prohibited and automatically void pursuant to Article 81(2) TEC.

19 In connection with the relevant case-law of the Court of Justice of the European Union, reference should be made to the judgments in the following cases:

Judgment of 23 November 2017, *Gasorba and Others*, C-547/16, EU:C:2017:891. The Court held that the Commission commitment decision, adopted on the basis of Article 9(1) of Regulation No 1/2003, could not 'legalise' the market behaviour of the undertaking concerned, and certainly not retroactively. In her Opinion, the Advocate General stated that the 'commitment decision adopted by the Commission does not in any way preclude the competition authorities and courts of the Member States from deciding upon the case, for which purpose they are permitted to apply Articles 101 and 102 TFEU and, where appropriate, to find that an infringement has been committed.' The advocate general also observed that the

national court may regard the Commission's analysis as prima facie evidence of the anticompetitive nature of the agreement between undertakings in question, although it may reach a totally or partially different conclusion on the same case after conducting further investigations and a more detailed examination.

20 Judgment of 11 September 2008, *Tobar e hijos*, C-279/06, EU:C:2008:485. After pointing out that 'since the categorisation of the contract at issue in the main proceedings in the light of the rules on competition is essential for the purpose of deciding the case before the referring court, it is for the Court of Justice to recall, first, the criteria relevant for such a categorisation', the judgment states that 'the decisive factor for the purposes of determining whether a service-station operator is an independent economic operator is to be found in the agreement concluded with the principal and, in particular, in the clauses of that agreement, implied or express, relating to the assumption of the financial and commercial risks linked to sales of goods to third parties. The question of risk must be analysed on a case-by-case basis, taking account of the real economic situation rather than the legal categorisation of the contractual relationship in national law (*CEEES*, paragraph 46).' Next, in paragraphs 67, 70 and 71, the Court sets out its findings as regards the checks to be made by the national courts in order to assess the manner in which the retail price was fixed, account being taken of all the contractual obligations and the conduct of the parties in the main proceedings, and to ascertain whether the alleged maximum sale price is not, in reality, a fixed or minimum sale price, fixed by indirect or concealed means.

21 Judgment of 2 April 2009, *Pedro IV*, C-260/07, EU:C:2009:215. The Court of Justice found that 'contractual clauses relating to the retail price […] 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. 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.'

22 Judgment of 14 December 2006, *CEEES*, C-217/05, EU:C:2006:784. The examination to be carried out by the national court is not confined to an assessment of whether the supplier made it possible to offer a discount in a derisory amount which would be deducted from the distributor's commission.

23 Judgment of 15 September 2005, *Daimler Chrysler*, T-325/01, EU:T:2005:322.

24 It clearly follows from the case-law that decisions of the national competition authority which have also become final must be treated as prima facie evidence of the incompatibility of the agreement with European Union competition legislation.

25 Furthermore, the spirit of cooperation which must apply between the competition authorities is made clear in the EU legislation and in the decisions adopted by the European Commission.

26 First, recitals 15 and 16 in the preamble to Regulation No 1/2003 point out, *inter alia*, that the Commission and the national competition authorities should form together a network of public authorities applying the Community competition rules in close cooperation, and that the exchange of information and the use of such information in evidence should be allowed, even where the information is confidential.

27 It is clear from Directive 2014/104 that the evidence obtained in any proceedings must serve as the basis for a claim, so that final administrative decisions declaring that an infringement of competition law has been committed must be binding on a civil court seised of an action resulting from that infringement.

28 Second, the Notice on cooperation pursues the uniform application of the law such that the parallel implementation of national competition law in relation to agreements cannot lead to different outcomes from those resulting from EU law.

29 Third, in response to the questions put to it by the Spanish courts in relation to disputes on which they were required to adjudicate, concerning the price fixing complained of and whether it was compatible with Article 81 TEC, the Commission repeatedly stated that it was not appropriate to make comments about an investigation pending before a national competition authority or about facts which are being adjudicated upon by the Spanish authorities.

30 In addition, in order to justify its decision of 28 April 2011 to reject the complaint lodged on 30 May 2007 by CEEES and AGES against Repsol, the Commission stated that that was a matter which the CNC had addressed in its decision of 30 July 2009, in which a fine was imposed on Repsol in respect of the same acts as those to which the compliant related, and that, therefore, it took the view that its intervention would amount to a duplication of work. That position was upheld by the General Court in Case T-342/11.

31 Accordingly, the referring court considers that a reference for a preliminary ruling to the Court of Justice of the European Union is essential.