Case C-306/20

Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

9 July 2020

Referring court:

Administratīvā apgabaltiesa (Regional Administrative Court, Latvia)

Date of the decision to refer:

4 June 2020

Applicant:

SIA Visma Enterprise

Defendant:

Konkurences padome (Competition Council, Latvia)

Subject matter of the main proceedings

An action under national competition law brought by the Latvian company SIA Visma Enterprise before the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia) seeking annulment of a decision of the Latvijas Republikas Konkurences padome (Competition Council of the Republic of Latvia, 'the Council') fining that company on the grounds that the agreements it concluded with the distributors of its products (two accounting software programs) provided that customers would be retained or reserved for the distributor concerned for a specified period of time (of up to six months) before the purchase contract was concluded, that is to say, the time taken for the sale process to take place.

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

In this case, which concerns a situation internal to the [Member] State but in which the national rules to be applied are, in essence, similar to the EU

competition rules, the referring court, relying on Article 267 TFEU, seeks interpretation of Article 101(1) TFEU and Article 2 and Article 4(b) of Regulation No 330/2010, in order to clarify:

– whether an agreement between a producer and a number of distributors, under which a distributor who has registered a potential customer transaction with the producer enjoys priority in progressing the sale process with the customer concerned for 6 months from that registration, unless the customer objects, must be found to be a prohibited agreement;

– whether, and under what circumstances, such an agreement can benefit from the exemptions under EU legislation, including those relating to exclusive distribution systems;

– what significance should be attached in that respect to the fact that (i) the other contracting parties (the distributors) have not been fined; (ii) the market share held by the distribution network does not exceed 30%; and (iii) the distributor's customer may object to the advantage concerned, and other circumstances of the case under analysis.

Questions referred

1) On a correct interpretation of the Treaty on the Functioning of the European Union, may the agreement to which this case relates, between a producer and a number of distributors (under which the distributor who was first to register a potential transaction with the producer enjoys priority in progressing the sale process with the end user concerned for 6 months from that registration, unless the user objects) be regarded as an agreement between undertakings which has as its object the prevention, restriction or distortion of competition within the meaning of Article 101(1) [TFEU]?

2) Does the agreement to which this case relates, between a producer and a number of distributors, interpreted in accordance with the Treaty on the Functioning of the European Union, contain indications from which it can be found not to be exempt from the general prohibition on collusion?

3) May the agreement to which this case relates, between a producer and a number of distributors, interpreted in accordance with the Treaty on the Functioning of the European Union, be found to constitute an exception? Does the exception permitting the conclusion of vertical agreements which restrict active sales into the exclusive territory or to an exclusive customer group that the supplier has reserved exclusively for itself or has allocated exclusively to another buyer, where such a restriction does not limit sales by the customers of the buyer and where the market share of the supplier (the applicant) does not exceed 30%, apply only to exclusive distribution systems?

4) May the agreement to which this case relates, between a producer and a number of distributors, interpreted in accordance with the Treaty on the Functioning of the European Union, constitute a prohibited agreement on the basis solely of the unlawful conduct of a single economic operator? Is it possible to find evidence in the circumstances of this case, interpreted in accordance with the Treaty on the Functioning of the European Union, that a single economic operator participated in a prohibited agreement?

5) In the circumstances of this case, interpreted in accordance with the Treaty on the Functioning of the European Union, is it possible to find evidence that competition was reduced (distorted) within the distribution system, that there was an advantage benefiting the applicant or that competition was adversely affected?

6) In the circumstances of this case, interpreted in accordance with the Treaty on the Functioning of the European Union, if the market share of the distribution network does not exceed 30% (the applicant is a producer, and its market share therefore also includes the sales volumes of its distributors), is it possible to find evidence of negative effects on competition in the distribution system and elsewhere, and is that agreement subject to the prohibition on collusion?

7) In accordance with Article 101(3) of the Treaty on the Functioning of the European Union and Article 2 in conjunction with Article 4(b) of Commission Regulation No 330/2010 of 20 April 2010:

– Does the exemption apply to a distribution system under which i) the distributor (trader) itself chooses the potential customer with which it is going to work; ii) the supplier has not previously determined, on the basis of clearly known and verifiable objective criteria, a specific group of customers to which each distributor will provide its services; iii) the supplier, at the request of the distributor (trader) reserves potential customers for that distributor; iv) the other distributors are not aware that the potential customer has been reserved or are not previously informed of that fact; under which v) the sole criterion on the basis of which a potential customer is reserved and on which the resulting exclusive distribution system favouring a specific distributor is established is not a decision by the supplier but a request by that distributor; or under which vi) the reservation remains in force for 6 months from registration of the potential transaction (after which the distribution ceases to be exclusive)?

– Should it be found that passive sales are not restricted where the agreement between the supplier and the distributor includes a term providing that the buyer (final user) may object to the reservation in question but that buyer has not been informed of the term in question? Can the behaviour of the buyer (final user) influence (justify) the terms of the agreement between the supplier and the distributor?

Provisions of EU law relied upon

Article 101(1) of the Treaty on the Functioning of the European Union.

Article 2 and Article 4(b) of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ 2010, L 102, p. 1).

Case-law of the Court of Justice

Judgment of 14 March 2013, *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160, paragraph 20).

National legal framework

Articles 1, 2 and 11 of the Konkurences likums (Competition Law) (*Latvijas Vēstnesis*, No 151, 23 October 2001, as amended) ('the Competition Law') (the wording of Article 11(1) of that law is, in essence, similar to the wording of Article 101(1) TFEU).

Ministru kabineta 2008.gada 29.septembra noteikumi Nr. 797 'Noteikumi par atsevišķu vertikālo vienošanos nepakļaušanu Konkurences likuma 11. panta pirmajā daļā noteiktajam vienošanās aizliegumam' (Decree No 797 of the Council of Ministers of 29 September 2008 enacting 'Regulations Regarding Non-subjection of Certain Vertical Agreements to the Prohibition of the Agreement Specified in Article 11(1) of the Competition Law') (*Latvijas Vēstnesis*, Nr. 153, 2 October 2008) ('Decree No 797'), Article 8(2)(1) (the wording of that article is similar to that of the exception in Article 4(b)(i) of Regulation No 330/2010).

Brief summary of the facts and the main proceedings

1 The applicant, SIA Visma Enterprise (created by the merger of two companies fined in the contested decision, that is to say, SIA FMS Software and SIA FMS), holds the copyright in two accounting programs: *Horizon* and *Horizon Start* ('the products at issue').

2 The applicant distributed the products at issue both itself and through distributors, by concluding standard cooperation agreements with the distributors ('the agreement at issue' or 'the agreements at issue').

3 Clause 4.1 of the agreement at issue ('the clause at issue') provided as follows (in that agreement, the applicant is referred to as 'supplier' and the distributor as 'partner'):

‘When it commences the sale process with a particular final user, the partner must register the potential transaction in the database created by the supplier, sending the electronic application form laid down in Annex 1 to the agreement, containing as much as possible of the available information referred to in Annex 1. Where potential transactions are registered, the partner that has registered the transaction first will be given priority in progressing the sale process with the final user in question, unless the final user objects. That advantage will continue for 6 months from the date on which the potential transaction is registered.’

4 By a decision of 9 December 2013 (‘the contested decision’), the Council found the clause at issue to infringe the prohibition under Article 11(1) of the Competition Law and, in consequence, that the agreements at issue should be characterised as prohibited agreements that restricted competition between distributors. The same decision imposed a fine of EUR 64 029.23 (LVL 45 000) on the applicant. The Council did not find it appropriate or necessary to hold the distributors liable as co-participants in the prohibited agreement. The Council also observed that the infringement had continued for over 5 years and had ended at the initiative of the applicant.

5 The applicant appealed the contested decision to the referring court. By a judgment of 8 May 2015, the referring court partially upheld the applicant’s claim in so far as concerned the imposition of a fine jointly and severally on the two entities (the two companies that merged to form the applicant), but dismissed the appeal in all other respects.

6 After hearing the appeals on points of law brought by both parties, by a judgment of 16 June 2017 the Senāta Administratīvo lietu departaments (Supreme Court, Administrative Cases Department, Latvia) set aside the judgment of 8 May 2015 of the referring court and referred the case back to it for reconsideration. By a judgment of 13 September 2018 the referring court again dismissed the appeal, holding that the contested decision was lawful and well-founded. After hearing the applicant’s subsequent appeal on a point of law, by a judgment of 26 November 2019 the Senāta Administratīvo lietu departaments (Supreme Court, Administrative Cases Department) likewise set aside the referring court’s judgment of 13 September 2018, stating that this judgment had failed properly to examine the applicant’s claims relating to the nature of the agreement and its legal and economic context and to take into account the evidence on its implementation in practice.

7 The Senāta Administratīvo lietu departaments (Supreme Court, Administrative Cases Department) found inter alia that the referring court had erred in finding that the ‘unless the final user objects’ proviso in the clause at issue was irrelevant. In its view it was in fact important, for the purposes of determining the nature, scope and limits of the agreement, to ascertain how the participants in the agreement had intended to perform it and, in particular, how any objections by customers would be handled and what limits would be placed on the seller’s conduct in response to an objection expressed by a customer. Furthermore, it was

in its view irrelevant whether or not the customer was aware of that proviso or whether or not it was aware of the terms of the agreement more generally. What mattered was how the agreement provided that the sellers should act, in the sale process, if such objections were received. The Senāta Administratīvo lietu departaments (Supreme Court, Administrative Cases Department) added that the terms of the agreement had to be assessed in the light both of its literal wording and of any evidence tendered in the proceedings by both parties that demonstrated the true nature of the agreement.

Principal arguments of the parties in the main proceedings

The existence of an infringement

8 According to **the Council**, the system established in the clause at issue — according to which, by registering a potential transaction in a customer database belonging to the applicant, the distributor obtains 'priority in progressing the sale process' and that advantage continues for a specified period, namely 6 months — reduces competition between distributors and the competitive pressure between them. Because it concerns only potential customers, the distributors cannot compete between each other to offer the products at issue on more favourable terms. Granting that advantage is tantamount to a coordinated sharing of customers between distributors by the applicant, thereby restricting competition between them. According to the Council, since the clause at issue has as its object to restrict competition, the agreement at issue is a restriction by object and it is therefore unnecessary to analyse the actual implementation or effects of the clause at issue. According to the Council, the expression 'unless the final user objects' in the clause at issue is irrelevant for the purposes of assessing the standard of proof applicable to a restriction on competition. Were that condition to be taken into account when determining the standard of proof applicable in this case, any restriction on competition would depend on how the agreement was performed in practice in the case of each specific distributor. However, hard-core restrictions on competition exist independently of a customer's behaviour.

9 **The applicant** refutes the claim that its conduct has as its object the prevention, restriction or distortion of competition. The agreement at issue does not establish a system in which registering a potential transaction eliminates or restricts competition, because no mutual agreement has been concluded according to which the distributors will not submit offers to a customer registered (reserved) by another distributor and the applicant has not promised to refrain from consulting another distributor in relation to the customer concerned. According to the applicant, registration does not in the slightest prevent other distributors from actively dealing with customers whose needs have already been addressed by one of the distributors or by the applicant itself, including in relation to subsequent periods. A customer is therefore entitled to choose any distributor, and there is therefore no possibility of the market being shared. There are no other circumstances (apart from the agreement at issue) such as to establish a common

purpose of sharing the market in respect of customers. If a distributor has not been informed of a specific reservation made by a different distributor, it is neither subject to a restriction in practice nor incited to refrain from making an offer to the customer. Competition between distributors is therefore not in any way diminished. The agreement at issue establishes neither a mechanism of coercion nor any penalties. The applicant further states that, although the Court of Justice of the European Union has examined market-sharing terms in the context of a selective distribution system based on the distribution of luxury goods, its findings on the lawfulness of market-sharing conditions apply to all legally justified distribution systems, whether selective or exclusive.

Justification for the clause at issue (legitimate aim)

10 **The applicant** is of the view that if an agreement that limits a reseller's opportunities for sales, including to specific customers, has a legitimate aim and is applied proportionately, that agreement is not prohibited under Article 11(1) of the Competition Law. It claims that the advantage conferred by the clause at issue encouraged the distributors to be active in distributing the products at issue; in other words, the distributors were actively marketing the products, in competition with each other. The applicant states that it treated all the distributors equally since it imposed the same sales terms on all its authorised distributors on a first come first served basis. The clause at issue was necessary as a result of the specific features of the sector and the products at issue. Indeed, it asserts, the products at issue are complex accounting programs which need updating regularly and which, in certain circumstances, must be tailored to the specific needs of the customer in question. In order to ensure that the customer receives a high-quality effective product (a matter which goes to the reputation of the product) not only does the applicant need to monitor the work of the distributors, but the applicant and the distributors need to consult regularly on installation of the product at issue and specific solutions to be proposed. In addition, the clause at issue enabled the applicant, as producer, to plan its income, identify potential customers, decide on investment to develop its product, use resources effectively, establish equivalent terms for cooperation with the distributors and grant customers a producer discount requested by the distributor.

11 According to **the Council**, the agreement at issue must be found to restrict competition by object since, in particular, the applicant has not provided any rational and economically coherent explanation justifying the need to limit a distributor's right to offer its services to a customer of which another distributor has previously informed the applicant and which that distributor has, therefore, reserved for itself. It is not imperative to reserve customers in order to identify potential customers and decide on investment in product development since it is possible, for example, to use historical information.

Exemption from the prohibition

12 **The applicant** takes the view that the agreement at issue is exempt (is an exception from the prohibition) under Article 8(2)(1) of Decree No 797.

13 **The Council** contests that claim, arguing that the agreement at issue restricts the customers to whom the distributors are authorised to market the products at issue. It observes, furthermore, that Article 8(2)(1) of Decree No 797 permits restrictions on active sales (distributor behaviour consisting of actively seeking customers, whether within an unrestricted territory or in relation to an unrestricted customer group) in exceptional cases but prohibits any restriction on passive sales (situations in which the distributor is contacted by a customer who does not belong to the territory or customers allocated exclusively to the distributor). The exception only applies where there is an exclusive distribution system. That provision may not be interpreted broadly, covering any situation in which an 'exclusive agreement' has been reached at the one and only time a product is sold to a specific customer. Therefore, according to the Council, the clause at issue does not establish an exclusive distribution system. It argues that the system at issue may not be regarded as exclusive because it is not defined in advance and because its exclusivity is determined selectively by the distributors themselves. Nor therefore are there any restrictions on passive sales. A distributor may not be prevented from competing for a specific customer where that distributor is in a position to offer a better price and a better-quality service. The reservation under analysis in this case does restrict the opportunity for the other distributors to offer lower prices and higher quality, and therefore imposes a restriction on competition by object.

The number of infringers

14 **The applicant** submits that, in order to find that the infringement occurred, the contested decision should have specified the number of actors involved in the infringement. Since the contested decision did not find the other distributors liable for an infringement, it only found against a single infringer. Nevertheless, in order to find that there had been a prohibited agreement, the Council was required to identify two or more infringers. The Council has no discretion as regards holding an actor liable for an unlawful act. In addition, the clause at issue was not imposed on the distributors since, amongst other factors, it was more beneficial to the distributors than to the applicant.

15 **The Council** believes that it was entitled not to attribute liability for the prohibited agreement to the distributors because they did not actively participate in concluding the agreement at issue and had negligible bargaining power compared with the applicant. In its view, it is not necessary to attribute liability to all the participants in an infringement of Article 11(1) of the Competition Law in order to find that the infringement occurred in the case of a prohibited agreement. The Council did not close the proceedings against the distributors because it found

their behaviour not to be an infringement of that article but for reasons of expediency.

Definition of the relevant market and market share

16 **The applicant** argues that, contrary to the legislation, the dictates of logic and its own findings on vertical agreements, the Council defined a single market in which both the applicant and its distributors operate, at wholesale and retail level respectively. This is, according to the applicant, a fundamentally mistaken definition of the relevant market for the product. The relevant market is crucially important since the Council was required to assess whether the exemptions under Decree No 797 applied.

17 **The Council** submits that the definition of the relevant market was irrelevant as regards the lawfulness of the contested decision since the prohibited agreement in question fell outside the exemption under Decree No 797 not because the market share thresholds laid down in that decree were exceeded but because it involved a restriction of competition by object.

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

18 The referring court notes that the agreement at issue in the main proceedings cannot affect trade between Member States. Nevertheless, because the applicable national provision, that is to say, Article 11(1) of the Competition Law, lays down the same legal framework as Article 101(1) TFEU, it is essential that a different test is not adopted in Latvia for finding the existence of vertical prohibited agreements.

19 Accordingly, relying on the case-law of the Court of Justice, in particular the judgment in *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160, paragraph 20), the referring court finds there to be a legal basis for raising the questions for a preliminary ruling to clarify whether the nature of an agreement such as that at issue in the main proceedings (which provides that, in the case of registered potential transactions, the distributor who is first to register the transaction has priority in progressing the sale process with the final user concerned, unless the final user objects, and that this advantage continues for 6 months after registration of the potential transaction) means that the agreement can objectively be found to have as its object the prevention, restriction or distortion of competition within the market.