

**Case C-632/22**

**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:**

10 October 2022

**Referring court:<sup>2</sup>**

Tribunal Supremo (Spain)

**Date of the decision to refer:**

7 October 2022

**Appellant:**

AB Volvo

**Respondent:**

Transsaqui S. L.

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**Subject matter of the main proceedings**

Revision of judgment – ‘Fraudulent contrivance’ – Trucks cartel – Action for damages for infringement of competition law – Defendant domiciled in another Member State – Service of process at defendant’s subsidiary’s place of business situated in the applicant’s Member State – Unity of undertakings

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

Request for a preliminary ruling on interpretation – Article 267 TFEU – Charter of Fundamental Rights of the European Union, Articles 47 and 53 – Right to an effective remedy – Article 101 TFEU

**Questions referred for a preliminary ruling**

1.- In the circumstances surrounding the litigation relating to the trucks cartel, described in this order, is it possible to interpret Article 47 of the Charter of Fundamental Rights of the European Union, in conjunction with Article 101 of the

Treaty on the Functioning of the European Union, in such a way that service of process on a parent company against which an action for damages for the harm caused by a restrictive trade practice has been brought is considered to have been properly effected when such service was effected (or attempted) at the place of business of the subsidiary company established in the State in which the legal proceedings were brought, while the parent company, which is established in another Member State, has not entered an appearance in the proceedings and has remained in default?

2.- If the previous question is answered in the affirmative, is that interpretation of Article 47 of the Charter compatible with Article 53 of the Charter, in the light of the case-law of the Spanish Tribunal Constitucional (Constitutional Court) on the service of process on parent companies established in another Member State in disputes relating to the trucks cartel?

**Provisions of European Union law and case-law relied on**

Charter of Fundamental Rights of the European Union.

Article 47: ‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.’

Article 52(3): ‘In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’

Treaty on the Functioning of the European Union. Article 101.

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. Article 17(1).

Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000.

Article 5. Translation of documents.

‘The applicant shall be advised by the transmitting agency to which he forwards the document for transmission that the addressee may refuse to accept it if it is not in one of the languages provided for in Article 8.

The applicant shall bear any costs of translation prior to the transmission of the document, without prejudice to any possible subsequent decision by the court or competent authority on liability for such costs.’

Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents). Article 9.

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Article 45(1)(b).

Judgment of the Court of Justice of 6 October 2021, Case C-882/19, EU:C:2021:800, paragraphs 33 to 37, 39, 41, 43, 51 and 52.

Judgment of the Court of Justice of 2 March 2017, Case C-354/15, EU:C:2017:157, paragraph 72.

Judgment of the Court of Justice of 16 September 2015, Case C-519/13, EU:C:2015:603, paragraphs 24, 30 to 33 and 43.

Judgment of the Court of Justice of 8 May 2008, C-14/07, EU:C:2008:264, paragraphs 64, 76 and 78.

Judgment of the Court of Justice of 26 February 2013, Case C-399/11, EU:C:2013:107, paragraph 55 et seq.

European Court of Human Rights, judgments of 19 March 1997, *Hornsby v. Greece* (CE:ECHR:1997:0319JUD001835791), paragraphs 40 and 41, and of 26 February 2002, *Del Sol v. France* (CE:ECHR:2002:0226JUD004680099), paragraph 21.

### **Provisions of national law and case-law relied on**

Spanish Constitution.

Article 24

‘1. Everyone has the right to obtain the effective protection of the judges and the courts in the exercise of his or her legitimate rights and interests, and in no case may due process be denied.

2. Likewise, all persons have the right of access to the ordinary judge predetermined by law; to a defence and to the assistance of a lawyer; to be informed of the charges against them; to a public trial without undue delay and with full guarantees; to the use of evidence appropriate to their defence; not to incriminate themselves; not to plead guilty; and to the presumption of innocence.’

Law 1/2000 on Civil Procedure (Ley 1/2000 de Enjuiciamiento Civil) of 7 January 2000.

Article 155: ‘Service of notices on parties who have not yet entered an appearance or are not represented by a court agent. Address.’

‘1. Where the parties are not represented by a court agent or on the occasion of the initial service of process or an order to attend on the defendant, notices shall be served by reference to the parties’ addresses.

...

3. For the purposes of the service of notices, the following may be designated as an address for service: the address which appears in local authority records or is officially recorded for other purposes, or the address which appears in the official register or in publications of professional associations in the case, respectively, of undertakings and other entities or of persons who practise a profession in which membership of a professional association is compulsory. The place where a non-temporary professional or employment activity is carried out may also be designated as an address for those purposes.

...

If the action is brought against a legal person, the address of anyone who is listed as a director, manager or agent of the company, or as a chairperson, member or representative of the board of any association listed in an official register may also be indicated as an address for service; Article 510(1)(4) and Article 394(2).’

Article 510(1)(4):

‘A final judgment shall be revised where:

4. The case has been won unfairly as a result of bribery, violence or fraudulent contrivance.’

Law 15/2007 on the Protection of Competition (Ley 15/2007 de Defensa de la Competencia) of 3 July 2007. Articles 71 and 72. Those articles essentially transpose Articles 2 and 3 of Directive 2014/104, relating to liability for infringements of competition law and the right of injured parties to compensation.

**Succinct presentation of the facts and procedure in the main proceedings**

- 1 On 12 July 2018, the company TRANSSAQUI, S.L. ('TRANSSAQUI'), brought an action before Juzgado Mercantil No 1 de Valencia (Commercial Court No 1, Valencia, Spain) against the Swedish company AB VOLVO, claiming damages for the harm suffered as a result of the surcharge imposed on it when it purchased two vehicles in 2008, in the context of the trucks cartel which was identified in infringement proceedings commenced by the European Commission.
- 2 As the legal basis for its action, TRANSSAQUI relied on Articles 72 and 76 of the Spanish Law on the Protection of Competition (Law 15/2007), the Commission Decision of 19 July 2016 relating to proceedings under Article 101 of the TFEU and Article 53 of the EEA Agreement (Case AT.39824 – Trucks) and imposing fines for infringements of competition law on, inter alia, the company AB VOLVO, and Directive 2014/104/EU. The amount claimed came to EUR 24 420.69, being the amount of that surcharge.
- 3 Despite the fact that the registered office of AB VOLVO is situated at 405 08 Göteborg, Sweden, the applicant indicated as the defendant's address for service of process for the purposes of lodging a defence the address of that company's subsidiary in Spain, VOLVO GROUP ESPAÑA, S.A.U. (Sociedad Anónima Unipersonal), situated at calle Basauri, 7-9, Madrid (Spain).
- 4 The Valencia Commercial Court gave leave for the action to proceed, following which copies of the application and the documents lodged with it were sent, by registered post, to the business address of VOLVO GROUP ESPAÑA, S.A.U, at calle Basauri, 7-9, Madrid. However, acceptance of the postal item was refused by means of a handwritten note indicating the address of AB VOLVO in Sweden, in light of which the Valencia Commercial Court granted TRANSSAQUI a hearing so that it could make submissions on the subject. TRANSSAQUI argued that the conduct of VOLVO GROUP ESPAÑA, S.A.U., consisting in refusal of service of process for the purpose of lodging a defence in the action brought against AB VOLVO, was simply a stratagem in bad faith to delay the proceedings, in view of the fact that the latter held 100% of the former's share capital, meaning that the two constituted a single undertaking in accordance with competition law. The Valencia Commercial Court ordered, by decision of 22 May 2019, that service be effected on the defendant, AB VOLVO, at the business address of its subsidiary VOLVO GROUP ESPAÑA, S.A.U., in accordance with the 'principle of the unity of undertakings'.
- 5 An attempt was made, through the Madrid courts, to effect service at that address on 5 September 2019, but a lawyer who identified himself as the 'legal representative of VOLVO GROUP ESPAÑA, S.A.U.' refused to accept service, stating that service had to be effected at AB VOLVO's offices in Sweden. A second attempt by the Madrid courts to effect service at the subsidiary's place of business in Madrid, at calle Basauri, 7-9, on 30 October 2019, was successful as it was accepted by a person who stated that they were from the legal department.

- 6 Since the Valencia Commercial Court took the view that service had been properly effected and since the defendant AB VOLVO, which had been served with the documents, failed to enter an appearance in the proceedings within the period indicated, the defendant was ruled to be in default and the case proceeded. An attempt was made to serve the relevant decision on AB VOLVO at the business address of its subsidiary, VOLVO GROUP ESPAÑA, S.A.U., but that company again refused service on the ground that it was not the correct address. On 26 February 2020, the Valencia Commercial Court gave judgment upholding the action brought by TRANSSAQUI and ordered AB VOLVO to pay TRANSSAQUI damages in the amount of EUR 24 420.69 plus statutory interest and to pay the costs.
- 7 The Valencia Commercial Court notified that judgment to AB VOLVO by letter sent by registered post to the subsidiary's place of business at calle Basauri, 7-9, Madrid which was received by a person present at the address who signed the acknowledgement of receipt on 10 March 2020. Then, since the judgment was final, and on application by TRANSSAQUI, the costs, which included inter alia the lawyer's and court agent's fees and the fees for the expert's report submitted with the application, were taxed. The court served notice on AB VOLVO at the address in Madrid, for the purpose of submissions, and the acknowledgement of service was signed. Since the defendant did not contest the costs within the time limit indicated, the court approved those costs in the amount of EUR 8 310.64 and notified its order to AB VOLVO by letter sent by registered post to the subsidiary's place of business in Madrid, where the acknowledgement of receipt was signed. On application by TRANSSAQUI, the judgment was executed and an order for payment was issued against AB VOLVO's assets by court orders which were served at the business address of the subsidiary VOLVO GROUP ESPAÑA, S.A.U., at calle Basauri, 7-9, Madrid, on 17 March 2021.
- 8 In a series of letters sent to the Valencia Commercial Court in response to each attempt at service of a judicial notice, VOLVO GROUP ESPAÑA S.A.U. explained the reasons for its refusal to accept service of the documents and notices addressed to AB VOLVO, since the latter's registered office is in Sweden. It argued, inter alia, that, first, although VOLVO GROUP ESPAÑA, S.A.U. and AB VOLVO are part of the same group of undertakings, each has a separate legal personality and the former does not have the status of director of the latter and nor is it authorised to accept service on the latter's behalf; second, in accordance with Spanish procedural legislation, the defendant must be served with process at its registered office, and the Spanish courts, in proceedings relating to the trucks cartel, have ruled that service at the registered office of the defendant parent company situated in another Member State, rather than at the business address of a subsidiary in Spain, is correct notwithstanding the links between the companies; third, where the defendant company is established in another Member State of the European Union, service must be effected in accordance with Regulation (EC) No 1393/2007; and fourth, the applicant may not circumvent the rules which govern the service of process by using alternative addresses which do not belong to the defendant since, otherwise, there are grounds for revision of the judgment

given, in accordance with Article 510(1)(4) of the Law on Civil Procedure, or else it may lead to a judgment given in default of appearance which may not be recognised in another Member State, pursuant to Article 45(1)(b) of Regulation (EU) 1215/2012.

- 9 On 15 June 2021, AB VOLVO filed with the referring court an application for revision of the final judgment handed down by the Valencia Commercial Court in default of appearance and ordering the defendant to pay damages to TRANSSAQUI for breach of competition law. AB VOLVO argued that it was filing that application within the statutory period of three months from the date on which it became aware of the ground for revision, in so far as it became ‘indirectly aware’ of the judgment finding against it at the time when the orders executing the judgment were served at the business address of its subsidiary in Spain on 17 March 2021.

### **Essential arguments of the parties in the main proceedings**

- 10 In the revision proceedings, AB VOLVO claims a ‘fraudulent contrivance’ within the meaning of Article 510(1)(4) of the Law on Civil Procedure, pursuant to which ‘a final judgment shall be revised where ... [t]he case has been won unfairly as a result of ... fraudulent contrivance.’ That conduct consists in having notified the court of an address for service which was not the business address of AB VOLVO in Sweden but rather that of a subsidiary in Spain, such that judgment was given against the defendant *in absentia* without the defendant having had the opportunity to defend itself in the proceedings. AB VOLVO further contends that, even if service on the parent company at the business address of the subsidiary company in the Member State where the proceedings were brought may be considered to satisfy the requirements under Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’), it must be accepted that the legal system of a Member State may provide for a higher standard of protection of the fundamental right than that which flows from the Charter. Accordingly, in AB VOLVO’s submission, in this case it is necessary to comply with the standard of protection of the right to an effective remedy laid down by the Spanish Constitutional Court, which is more stringent than the minimum standard stipulated in the Charter, in relation to service on the parent company of the notice to enter an appearance in the proceedings and to lodge a defence. In accordance with Article 53 of the Charter, ‘nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by ... the Member States’ constitutions.’
- 11 For its part, TRANSSAQUI argues that AB VOLVO has adopted a malicious procedural strategy, the sole aim of which is to delay the proceedings in the light of the high number of claims lodged by small and medium undertakings as a result of the trucks cartel. TRANSSAQUI submits that the defendant parent company and its subsidiary in Spain should be treated as a single undertaking for the

purposes of competition law, even though they have separate legal personalities. It further argues that, unlike the previous attempts at service of judicial notices, effected for the purposes of procedural economy, AB VOLVO considered that it had been notified of the existence of the judgment against it in the execution stage, despite the fact that that notice was served at the business address of VOLVO GROUP ESPAÑA, S.A.U. In addition, TRANSSAQUI claims that, in view of the fact that it is a small road haulage undertaking affected by the economic crisis, if it had had to pay the costs of a translation, as required by Regulation (EC) No 1393/2007, it would not have been able to bring the action to claim damages for the harm it suffered as a result of the conduct of the trucks cartel.

### **Succinct presentation of the reasoning in the request for a preliminary ruling**

- 12 Following publication of the Decision of the European Commission of 19 July 2016 (Case AT. 39824 – Trucks), in Spain thousands of proceedings for damages have been lodged by purchasers of vehicles affected by the trucks cartel. In 2021 alone, over 2 000 judgments were given at first instance and over 500 on appeal. On 15 July 2022, the registry of the Supreme Court had received 753 appeals on a point of law in this matter. The actions were brought in almost every case by small or medium undertakings which had purchased a very small number of trucks, or even just one truck, in the period in which the cartel operated. The undertakings (parent companies) penalised by the European Commission, none of which has its registered office in Spain, engaged the services of major law firms in Spain to conduct their defences.
- 13 Given that, in the majority of the proceedings, the amount claimed is not very high, the costs involved in having to translate the application and, where necessary, any annexes (as stipulated by Regulations (EC) No 1393/2007 and (EU) 2020/1784, since the defendants are established in other Member States), inter alia the expert reports, may be disproportionately high. To avoid such costs and the time delay entailed by the necessary international judicial cooperation, the applicants in those proceedings frequently request the service of process at the business address of the subsidiary company in Spain, even though the defendant parent company, which was penalised by the European Commission, is established in another Member State.
- 14 The Spanish courts have not responded in a uniform manner to the proceedings brought so far. Some have refused the request for service at the business address of the subsidiary company in Spain on the ground that service should be effected at the registered office of the defendant parent company. In other cases, the applicant's request has been granted and service of process has been attempted at the business address of the subsidiary company in Spain on the ground that the defendant parent company would in any event learn through its lawyers that legal proceedings had been instituted.

- 15 As regards the Spanish subsidiaries of the defendant parent companies, these have generally refused to accept service of process at their places of business, arguing that, although they constitute a single undertaking in accordance with competition law, they have separate legal personalities from the parent company and have not been authorised to accept service of process. Attempts to serve process through the lawyer representing the defendant parent company in Spain in other proceedings of the same nature have also been unsuccessful.
- 16 As regards the defendant parent company, if the court seized of the proceedings has held that service of process at the business address of the subsidiary in Spain is correct, or has been lawfully attempted and refused, once the proceedings have concluded, the defendant parent company frequently acknowledges that it is aware of the judgment handed down *in absentia* and brings some kind of appeal aimed at overturning the whole proceedings, namely, an appeal for revision of the judgment on grounds of fraudulent contrivance before the Supreme Court or an appeal for protection of constitutional rights before the Constitutional Court.
- 17 So far, in the appeals for protection of constitutional rights of which it has been seized, the Constitutional Court has given judgment in favour of the parent company. In that connection, in its judgments 179/2021 of 25 October 2021, ES:TC:2021:179, and 91/2022 of 11 July 2022, ES:TC:2022:91, the Constitutional Court ruled that the right to an effective remedy of Iveco, S.p.A. had been infringed because it had not been served with process, as the defendant, at its registered office in Italy and instead service had been attempted in Spain, at the business address of its subsidiary or the business address of its representative before the Spanish courts.
- 18 The Court of Justice has drawn attention in its case-law, in particular in its judgment of 6 October 2021, Case C-882/19, to the importance of the practical effect of Article 101 TFEU (see paragraphs 34 to 37) and of the concepts of ‘undertaking’ and ‘unity of conduct on the market’, which are relevant for the purposes of the application of competition law to groups of undertakings (see paragraphs 39, 41 and 43). The Court held that a person who has suffered harm as a result of conduct amounting to an infringement which is attributable to the parent company of the group is entitled to invoke the liability of the subsidiary company in certain circumstances (see paragraphs 51 and 52), namely when both companies constitute an economic unit.
- 19 In addition, in its judgment in Case C-354/15, the Court ruled, in connection with the interpretation of the system of service of judicial and extrajudicial documents in other Member States in civil and commercial matters, in the light of Article 47 of the Charter, that Regulation No 1393/2007 seeks to guarantee, ‘in each specific case, a fair balance between the interests of the applicant and those of the defendant, the addressee of the document, by reconciling the objectives of efficiency and speed of the service of the procedural documents with the need to ensure that the rights of the defence of the addressee of those documents are

adequately protected, through, inter alia, the guarantee of actual and effective receipt of those documents’ (paragraph 72).

- 20 Similarly, in its judgment in Case C-519/13, the Court of Justice held that ‘the aim of improving the efficiency and speed of judicial procedures and ensuring proper administration of justice’ pursued by Regulation No 1393/2007 cannot be attained ‘by undermining in any way the rights of the defence of the addressees, which derive from the right to a fair hearing, enshrined in the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms’, and therefore the national courts will be required ‘in each individual case, to ensure that the respective rights of the parties concerned are upheld in a balanced manner, by weighing the objective of efficiency and of rapidity of the service in the interest of the applicant against that of the effective protection of the rights of the defence on the part of the addressee’ (paragraphs 24, 30 to 33 and 43).
- 21 Lastly, in its judgment in Case C-399/11, the Court ruled on whether it was possible for ‘a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law.’
- 22 For its part, the European Court of Human Rights, interpreting Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which Article 47 of the Charter corresponds, has ruled that effective access to justice must not be limited to an appeal that is simply ‘theoretical or illusory’. See judgments of 19 March 1997, *Hornsby v. Greece* (CE:ECHR:1997:0319JUD001835791), paragraphs 40 and 41, and of 26 February 2002, *Del Sol v. France* (CE:ECHR:2002:0226JUD004680099), paragraph 21.
- 23 The referring court is uncertain whether it is possible to interpret Article 47 of the Charter, in conjunction with Article 101 TFEU, in such a way that service of process on the defendant parent company at the business address in Spain of a subsidiary company may be considered lawful where the existence of a single undertaking has been accepted for the purposes of competition law. First, in view of the need for translation of the application and of the extensive supplementary documentation into another language, with the expense that this entails, in addition to the time delay necessitated by the required international judicial cooperation, the right of those affected by the trucks cartel to an effective remedy is liable to be undermined, because it is too costly for them, and the practical effect of Article 101 TFEU diminished. Second, in view of the mechanism for the division of costs in proceedings for damages of this kind, there is no guarantee that the applicant will always recover the legal costs incurred, since sometimes the forms of order sought by the applicant may not be granted in their entirety and therefore there may be no order for costs. Article 17(1) of Directive 2014/104

provides for the amount of harm suffered to be estimated (on that point, see the request for a preliminary ruling in Case C-312/21, pending before the Court).

- 24 It should also be noted that service of process on a parent company at its registered office in another Member State does not necessarily afford that company any substantial advantage. The parent company may, to some extent, be able to obtain a better organised defence using law firms established in Spain, where the subsidiary has its office, for reasons of language and document management. The applicant's right to an effective remedy must therefore be balanced against the defendant's right to an effective remedy, in the light of the true value of the procedural steps affecting either party. In addition, since it has been held in the case-law of the Court of Justice that a person affected by an infringement of competition law may bring an action against a subsidiary company and that judgment may be given against that subsidiary company for the infringing conduct of its parent company, if the existence of a single undertaking is not disputed, it seems logical that the subsidiary company should be able to accept service of process and documents in legal proceedings that have been brought directly against the parent company.
- 25 The referring court has doubts regarding the interpretation of Article 53 of the Charter when it comes to weighing up the right to an effective remedy of the parent company, in this case AB VOLVO, as against that right of the person harmed by the conduct of the trucks cartel, and the attainment of the practical effect of Article 101 TFEU. The possible differing interpretations of EU law do not only occur in the Spanish courts and instead may affect the jurisdictions of other Member States when applications are made for the enforcement of foreign judgments given in default of appearance because the defendant was not served with the document instituting proceedings at its own address, leading, where relevant, to grounds for refusal under Article 45(1)(b) of Regulation (EU) No 1215/2012. If the referring court were required to grant the revision sought by AB VOLVO, the judgment finding against that company would be quashed and the proceedings would have to start again, which would mean that the application and the supplementary documents would have to be translated into the defendant's language and sent to its Member State of establishment.