

Case C-260/24**Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

15 April 2024

Referring court:

Administrativen sad Sofia-oblast (Bulgaria)

Date of the decision to refer:

15 April 2024

Applicant:

‘LUKOIL Bulgaria’ EOOD

Defendant:

Komisia za zashtita na konkurentsia

Subject matter of the main proceedings

Action brought by ‘LUKOIL Bulgaria’ EOOD (‘Lukoil Bulgaria’) against Decision No 184/16.02.2023 of the Komisia za zashtita na konkurentsia (Commission on Protection of Competition, Bulgaria; ‘the KZK’), by which ‘Lukoil Bulgaria’ was found to have infringed Article 21 of the Zakon za zashtita na konkurentsia (Law on the Protection of Competition; ‘the ZZK’) and Article 102 TFEU, and by which a financial penalty was imposed on the applicant.

Subject matter and legal basis of the request

Interpretation of EU law under Article 267 TFEU

Questions referred for a preliminary ruling

1. Must Article 102 TFEU and the principles of the rights of the defence, legal certainty and the protection of legitimate expectations, including the presumption

of innocence, be interpreted as meaning that, in the event of an unlawful margin squeeze, the relevant markets (the markets in which the infringement was committed) are **two vertically related markets, namely an upstream market and a downstream market**, and that it is **precisely in relation to those two relevant markets** that the competition authority is required, when making the accusation and adopting the final decision, to make **statements of fact relating to the size of those markets, the participants in those markets and the market shares of those participants, including the market shares of the undertaking to which it imputes a dominant position on those markets?**

2. Must Article 102 TFEU, interpreted in conjunction with the principles of the rights of the defence, legal certainty and the protection of legitimate expectations, including the presumption of innocence, be interpreted as meaning that, **in proceedings under Article 102 TFEU, that article does not allow products between which there is neither demand-side nor supply-side substitutability to be included in one and the same national product market, as the KZK did in the present case by including diesel fuel and A-95H petrol in a single product market for motor fuels?**

3. If it is permissible to include in a single national product market motor fuels between which there is no demand-side or supply-side substitutability, is it permissible not to include in the product market for motor fuels the third main motor fuel in the national market, namely propane/butane gas (LPG), which has a market share in the national market that is equal to the market share of petrol?

Provisions of European Union law and case-law relied on

Treaty on the Functioning of the European Union (TFEU), in particular point (b) of the second paragraph of Article 102 and Article 267

Charter of Fundamental Rights of the European Union, in particular Article 47

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty, in particular Articles 3 and 27

Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, in particular paragraphs 13 to 15, 75 and 82

Judgment of 26 November 1998, *Bronner*, C-7/97, EU:C:1998:569

Provisions of national law relied on

Administrativnoprotsesualen kodeks (Code of Administrative Procedure), in particular Articles 6 and 168

Zakon za zashtita na konkurentsiaata (Law on the Protection of Competition; ‘the ZZK’), especially Articles 8 and 20 and Article 21(2) and (5)

Zakon za aktsizite i danachnite skladove (Law on excise duties and tax warehouses)

Metodika za izvarshvane na prouchvane i opredelyane na pazarnoto polozhenie na predpriatiata na saotvetnia pazar (Methodology for conducting a market investigation and determining the position of undertakings on the relevant market; ‘the methodology’), adopted by means of KZK decision No 393/21.04.2009

Succinct presentation of the facts and procedure in the main proceedings

- 1 The KZK received requests asking it to determine whether ‘Lukoil Bulgaria’ had infringed Article 21 of the ZZK and Article 102 TFEU; in October 2021, it received a complaint from ‘OMV Bulgaria’ OOD concerning a pricing policy towards wholesalers aimed at driving competitors out of the market, and in April 2022 ‘Insa Oil’ EOOD followed suit with a complaint of predatory pricing of diesel fuel and gas oils. The KZK joined the two cases into a single procedure.
- 2 The KZK found that ‘Lukoil Bulgaria’ is a market leader in the wholesale market for motor fuels (petrol and gas oil/diesel) in Bulgaria, with a relatively high market share, in the 40 to 50% or 50 to 60% bracket, in each half-year of the investigation period. In addition, it found that there were high barriers in that market to entry by potential competitors and to expansion by existing competitors during the period under investigation. Switching to another provider, though possible, is only conceivable for the future and only for particular regions of the country. Furthermore, such a switch would involve a considerable increase in costs for the competitors and customers of ‘Lukoil Bulgaria’.
- 3 In the view of the KZK, the activities of ‘Lukoil Bulgaria’ are characterised by vertical integration. The ‘Lukoil’ group, it stated, is active throughout the fuel production chain from production to sale of the end product. For example, ‘Lukoil Neftohim Burgas’ AD has the only crude oil refinery in Bulgaria and is Bulgaria’s largest producer of automotive fuel. At the same time, ‘Lukoil Bulgaria’ not only acts as a wholesaler but also operates one of the largest petrol station chains with a nationwide reach. The ‘Lukoil’ group had nationally unique logistical, storage and transport infrastructure in a strategic geographical location, giving ‘Lukoil Bulgaria’ an exceptional competitive edge in the wholesale motor fuel trade and enabling that company to engage in nationwide wholesale trade with very low transport costs.
- 4 By Decision No 184/16.02.2023, the KZK found that ‘Lukoil Bulgaria’ had infringed Article 21 of the ZZK and Article 102 TFEU by abusing a dominant market position and subjecting its competitors to a margin squeeze in connection with the wholesale trade in motor fuel in the national territory, which was liable to

prevent, restrict or distort free competition in the fuel markets and harm the interests of consumers.

- 5 In the view of the KZK, ‘Lukoil Bulgaria’ was applying the margin squeeze between two vertically related markets, namely the sub-market for the trade in motor fuels (automotive petrol and gas oil/diesel) released for consumption, that is to say, after excise duty had been paid (downstream market), and the sub-market for the trade in motor fuels on which excise duty had not been paid and which were marketed under suspension of excise duty (upstream market). According to the KZK, prices in the downstream market were lower than upstream prices, which led to a negative margin and hence to the existence of an infringement in the form of a margin squeeze. The KZK found that ‘Lukoil Bulgaria’ has a dominant position in the upstream market (the wholesale market for motor fuels on which no excise duty has been paid) and in the common wholesale market for motor fuels.
- 6 ‘Lukoil Bulgaria’ brought an action against the decision of the KZK before the referring court, the Administrativen sad Sofia-oblast (Administrative Court, Sofia Province, Bulgaria).

The essential arguments of the parties in the main proceedings

- 7 The parties disagree as to how the relevant market should be defined. Their remarks on the characteristics and particularities of the products, the market participants, price levels, the absence of separate corporate structures and the results of the hypothetical monopolist test are summarised below.
- 8 According to the applicant, it is not possible to distinguish two separate vertical product markets in the segment for wholesale trade in motor fuels in the light of the characteristics and particularities of the products traded under suspension of excise duty and those traded after excise duty has been paid. There is in fact, it asserts, only one wholesale market with two horizontal sub-markets: (a) for diesel and (b) for petrol, propane/butane (known as LPG – liquefied petroleum gas) and methane. The applicant argues that such a division of the market on the basis of the tax arrangements under the Law on excise duties and tax warehouses is mechanical. According to that company, the fuels propane/butane and methane, which, in the light of their characteristics, purpose and prices, are substitutable for automotive petrol, can be included in the product market. The failure to take those fuels into account when defining the product market, it contends, has led to a sharp increase in the market share of ‘Lukoil Bulgaria’, since the undertaking’s sales of those products through wholesale trade are insignificant.
- 9 The applicant also states that there is no such vertical segmentation in the real economy. It is clear from the evidence produced, it claims, that, during a given month, its customers purchased and received liquid fuels under both excise duty regimes and that the services provided were absolutely identical in both cases, and

under the same conditions, which confirms the conclusion that it is a single market without vertical segmentation.

- 10 The applicant considers that petrol and diesel are not substitutable, stating that a vehicle with a diesel engine cannot run on petrol and vice versa. The owner of a vehicle with one type of engine would not be able to switch quickly and simply to the other fuel if the latter were cheaper. Such a switch would not be possible unless that vehicle were replaced by a vehicle with the other type of engine which could be filled with the cheaper fuel.
- 11 The KZK, by contrast, takes the view that, given the wholesale pricing structure for motor fuels that are subject to different customs arrangements, petrol and diesel belong to a common product market, with no need for further segmentation. Even though, from the perspective of final consumers, the KZK argues, the different motor fuels have different intended uses, that is to say, are distinguishable, from the perspective of the competitors of 'Lukoil Bulgaria', which, as wholesalers, are also customers of 'Lukoil Bulgaria', the two products form part of a common product market, since traders earn revenue regardless of which of the two fuels they purchase as a matter of priority. Besides, the two products have one and the same purpose, namely subsequent resale, as well as the same marketing conditions down the supply chain to the final consumer. On the supply side, according to the KZK, if demand for either product increases, the seller can start to supply it without incurring additional costs. As regards demand, it finds, wholesalers buy the two motor fuels in order to resell them to other traders and are influenced by demand and not by the consumption of the products they sell.
- 12 The KZK does not share the applicant's view that no distinction is made, in the real economy, between sales of motor fuel under suspension of excise duty and sales of motor fuel on which excise duty has been paid. It considers that the customs arrangements and the different characteristics of motor fuels (with or without bio-additives) result also in diversity of functional purpose between fuels sold under suspension of excise duty and those on which excise duty has been paid, and determine the distinction of various levels in the wholesale trade in motor fuels. Furthermore, it states there is no provision for payment of excise duty in trade under suspension of excise duty, since the motor fuel placed on the market at that level is earmarked for transfer to another tax warehouse, that is to say, for subsequent resale, and not for immediate consumption. That fuel, it says, is mineral, has not been mixed with the bio-additives prescribed by law and can be stored for a longer period. By contrast, when motor fuel is sold after payment of excise duty, the customers are not traders with tax warehouses but mainly petrol stations or transport undertakings. The KZK argues, moreover, that the applicant itself, by setting different discount rates and prices according to the different customs arrangements, makes a distinction in practice between the diverse levels/sub-markets of the wholesale trade in motor fuel, as the discount constitutes an element of the product price, and the product price in turn is one of the binding

factors to be taken into account when the substitutability of the relevant products is assessed in the process of defining the product market.

- 13 As regards autogas (propane/butane, methane), the KZK, having found in previous decisions that autogas is not fully substitutable for petrol on the demand side, did not consider it in the present procedure. Propane/butane, it states, is not a natural gas but a petroleum product obtained from petroleum refining, a by-product of petrol and diesel production. Its production, the KZK submits, is subject to pronounced seasonal fluctuations, which do not coincide with the demand for the main fuels, so that, at certain times, refineries reach the limits of their capacities for its storage. In those cases, it asserts, they have the choice either to destroy it or to sell it below the market price. The product quality of propane/butane and methane used as automotive fuel is not tested by the Darzhavna agentsia 'Metrologichen i Tehnicheski nadzor' (National Metrological and Technical Supervision Agency, Bulgaria), since there is no binding quality standard corresponding to that for petrol and diesel.
- 14 'Lukoil Bulgaria' argues that, from the perspective of participants in the wholesale market for motor fuel, no distinction can be made between two separate vertical product markets in the wholesale motor fuel segment. The KZK, it says, does not refer to a single participant operating in the two supposedly vertically related markets within the wholesale market for motor fuels but refers broadly to the participants in the general wholesale market for motor fuels. Although such a market does in fact exist, 'Lukoil Bulgaria' contends that it is divided horizontally, by product, into a diesel market and a market for petrol, propane/butane and methane. The participants in that market are at least 270 active economic operators registered in accordance with the Zakon za gorivata (Law on Fuel). It submits that there are no traders in that market who purchase the fuels exclusively under suspension of excise duty or exclusively after payment of excise duty.
- 15 In response, the KZK states that the substitutability of the products/services at issue is not determined by the number of participants in the relevant market, including the number of traders and their category in terms of the tax arrangements under which they market the respective fuels. It made no specific distinction, it states, between the participants in the two sub-markets, namely for motor fuel sold under suspension of excise duty and for motor fuel on which excise duty has been paid, since one and the same undertaking often operates at more than one level of motor fuel sale, as indeed the applicant confirms in its complaints. The KZK has identified as participants in each market only those undertakings supplying fuels intended for initial national distribution, since the inclusion of any further sale of the same quantities of fuel would distort the data on volumes sold. It is precisely at that upstream level, it states, that one finds the wholesalers which supply the largest fuel volumes and on which the scale of fuel sales to the next participants down the supply chain depends.

- 16 The applicant considers that, because of the price levels in the wholesale market for motor fuels, it is not possible to draw a line between two separate vertical markets for products in the wholesale motor fuel segment (one for products sold under suspension of excise duty and the other for products sold after payment of excise duty). It is apparent from the replies of 30 participants in the wholesale motor fuel market, the applicant argues, that none of them differentiate their pricing on the basis of whether excise duty has been paid on the products they sell. In business, it submits, price differentiation based on other criteria is observable, such as volume discounts and reductions for advance payments (which 'Lukoil Bulgaria' also practises), preferential prices for selected customers, etc., but it is never based on whether excise duty has been paid on the products.
- 17 The KZK considers that motor fuels sold under suspension of excise duty and motor fuels sold after payment of excise duty are not substitutable in terms of price either, since, unlike motor fuels on which excise duty has been paid, which contain bio-additives and are intended for final consumption, fuels sold under suspension of excise duty are normally mineral, that is to say, they contain no bio-additives and have not been subjected to excise duty, which means that they are not ready to be released for consumption. Given the high rates of excise duty and because of the bio-additives, it argues, motor fuels on which excise duty has been paid are significantly more expensive than those stored under suspension of excise duty. What the KZK goes on to assert is not that the products on the two relevant sub-markets have one and the same price but that the basic product, namely the mineral fuel, has the same price in both types of trade, namely under suspension of excise duty and after payment of excise duty. When the motor fuel acquired from 'Lukoil Bulgaria' under suspension of excise duty is resold, wholesalers have no means of making any profit, since they obtain practically zero discount from 'Lukoil Bulgaria', and have to base the price of the fuel after payment of excise duty on the following formula: 'Lukoil Bulgaria' price plus mark-up. The mark-up is intended to cover their costs for the supply and insertion of the bio-additives, including financial and administrative expenses – costs which, the KZK finds, are not incurred in the sale of motor fuels after excise duty has been paid, because they are already included in the sale prices of 'Lukoil Bulgaria'. When wholesalers purchase mineral fuel under suspension of excise duty from 'Lukoil Bulgaria', they have no means of benefiting from the discount on motor fuel on which excise duty has been paid, which makes them unable to compete with 'Lukoil Bulgaria' in the sub-market for the sale of motor fuel on which excise duty has been paid, since their prices must also include the abovementioned additional costs, which were previously covered by the volume discount granted by 'Lukoil Bulgaria'. The KZK therefore finds that 'Lukoil Bulgaria', through that policy, is applying a margin squeeze to its customers, which are also in competition with it in the sub-market for wholesale trade in motor fuel on which excise duty has been paid. Economic rationale, it argues, leads to the conclusion that this will lead in the future to a reduction in those wholesalers' share of the market to the benefit of the share of 'Lukoil Bulgaria', since there is a high probability of their ceasing to operate because of the losses they sustain.

- 18 ‘Lukoil Bulgaria’ considers that, in the absence of separate corporate structures operating as sales entities in each of the two markets which the KZK believes to exist, it is not possible to distinguish two different vertical product markets in the wholesale motor fuel segment. All wholesale transactions of each trader questioned, including ‘Lukoil Bulgaria’, are conducted by the same teams, at the same sales outlets, with the same staff, etc. The absence of existing business infrastructure for sales in a particular market leads to the conclusion that there is no such market, the applicant argues, with the sales in that segment or those segments belonging to a larger market, in this case the wholesale market for motor fuels.
- 19 For the KZK, it is apparent from the definition in point 15(a) of the Supplementary Provisions to the ZZK and from point 2.3.1 of the methodology that the existence or absence of separate corporate structures/wholesaling entities for the wholesale trade under suspension of excise duty and of products on which excise duty has been paid is not one of the types of evidence which are relevant when it comes to assessing the demand-side substitutability of two products. Furthermore, as stated above, the KZK argues that motor fuel sold under suspension of excise duty and motor fuel sold after payment of excise duty are not substitutable in terms of either intended use or price.
- 20 ‘Lukoil Bulgaria’ takes the view that the KZK’s argument that there are two separate vertical product markets, namely wholesale trade in motor fuel on which excise duty has been paid and wholesale trade in motor fuel under suspension of excise duty, is refuted by the results of the hypothetical monopolist test (the SSNIP test). When that test is applied, ‘Lukoil Bulgaria’ submits, all products sold on the wholesale market for motor fuel from petrol are in the same product market.
- 21 The KZK assesses substitutability by reference not only to the objective characteristics of the products and services in question but also to the conditions of competition and the structure of supply and demand in the market. As set out in point 2.3.3 of the methodology, the hypothetical monopolist test is only one of the instruments for delimiting the relevant market. When applying that test, in order to delimit the geographically relevant product market, a small but significant and non-transitory increase in price (SSNIP) of the analysed product is assumed. This is considered to be a price increase of 5% to 10% if the other competitive conditions have stayed the same over the period covered by the analysis. As regards the requirement that ‘other competitive conditions have stayed the same’, motor fuels sold under suspension of excise duty and motor fuels sold after payment of excise duty, as the KZK has already found, are not substitutable in terms of characteristics, intended use and prices. In those circumstances, the KZK considers that the conditions for the application of the test are not met, since the differences between the two types of fuel in themselves already constitute grounds for delimiting two separate sub-markets for motor fuels.

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

- 22 The high concentration of the wholesale market in motor fuels and the absence of significant market dynamics in the positions of market participants invite the conclusion that 'Lukoil Bulgaria' holds a dominant position in the national wholesale fuel market (automotive petrol and gas oil – diesel fuel), which enables the undertaking to behave independently of its competitors and customers and thereby influence competition in the vertically linked markets of the motor fuel marketing chain.
- 23 'Lukoil Bulgaria' holds a dominant position in the sub-market for wholesale trade in motor fuels under suspension of excise duty, since it is the main supplier of domestically produced fuels and since larger volumes of fuels are traded under suspension of excise duty, in respect of which an undertaking is required to have a tax warehouses where the respective activities are carried out so as enable it to release the fuels for consumption.
- 24 As regards the entire investigation period, the KZK decision contains no statements of fact concerning **the participants, the total size of the market and the market share** of 'Lukoil Bulgaria' in the upstream market (wholesale market in fuels sold under suspension of excise duty) and in the downstream market (wholesale market in fuels on which excise duty has been paid). In the case in the main proceedings, the KZK calculated (according to the applicant, on the basis of an incorrect method, yielding a finding that is inaccurate overall) the size of the market and the market share of 'Lukoil Bulgaria' solely in respect of the single wholesale market, which comprises both the upstream and the downstream market.
- 25 According to the applicant, such an approach is contrary to EU law in so far as an unlawful margin squeeze would affect both the upstream and the downstream market, and the KZK should therefore have defined them in accordance with the applicable market definition method, which includes setting out data on market size, market participants and the market share of the dominant undertaking. Finding that an undertaking has a dominant position without expressly indicating its market share is, according to the applicant, precluded by EU law, since a small market share suggests the absence of a dominant position.
- 26 The request for interpretation in the first question referred for a preliminary ruling is relevant because, if the KZK were required by EU law to conduct an investigation and make findings of fact on all the main characteristics of the markets by defining the market shares, market size and market participants for each of the two markets concerned, and it failed to comply with that obligation, that would vitiate the contested decision.
- 27 The KZK included in the national wholesale fuel distribution market two motor fuels which are not substitutable on either the demand or the supply side. This is contrary to all of the previous practice of the KZK of defining motor fuel markets

in Bulgaria on a three-tier scale as first-level markets (production and import), second-level markets (wholesale) and third-level markets (retail).

- 28 The applicant argues that non-substitutable products do not generally belong to the same product market, with the result that there are at least two wholesale markets, namely for petrol and for diesel, but no single market for motor fuels. That line of argument is supported by the SSNIP test, which, when applied, according to the applicant, does not reveal a shift in demand in the short term, since the final consumer whose vehicle has either a petrol or a diesel engine can use only one fuel and not the other.
- 29 The KZK acknowledges that, from the final consumer's perspective, motor fuels differ. Although it does not dispute, in essence, that petrol and diesel are not substitutable products, it considers that 'traders earn revenue regardless of which of the two fuels they purchase as a matter of priority'. Besides, it argues that 'both products have ... the same purpose, namely subsequent resale, as well as the same marketing conditions down the supply chain to the final consumer'.
- 30 The applicant considers that the KZK made a **formal logical error** when it assumed that revenue being earned from different products, that those products being resold at the wholesale level, which, the applicant states, is the rule in wholesale trade, and their distribution channels being identical (through petrol stations), lead to the conclusion that the products belong to one and the same product market.
- 31 If the inclusion of petrol and diesel in the same fuel market is permissible, argues the applicant, propane/butane and methane gas fuels, the market share of which in Bulgaria is equal to or even greater than that of petrol, must also be included in that market. The KZK does not agree with those assertions and responds by stating that propane/butane and methane gas are only partially substitutable for petrol and so should not be included in the motor fuel market. As regards autogas (**propane/butane, methane**), the KZK, in its decisions No 1059 of 2011, No 727 of 2017 and No 313 of 2019, stated **that it was an incomplete substitute for automotive fuels from the demand-side perspective, which was why it was not considered in the present procedure**. According to the applicant, diesel is **fully** not a substitute for petrol but has been included with it in the same product market, and so it is entirely illogical not to include a fuel that is partially substitutable for petrol in that market. The applicant argues that the KZK thus applied double standards in its assessment in order to inflate the applicant's market share.
- 32 Another reason why the request for interpretation is relevant is that if EU law prohibits the KZK from including non-substitutable fuels in the product market for the purpose of applying Article 102 TFEU, which the KZK did by including petrol and diesel in a common product market, that would vitiate the contested decision. Should such an approach be permissible under Article 102 TFEU, the KZK's refusal to include propane/butane and methane gas in the market would

have no objective justification and would vitiate the definition of the market and the decision as a whole, since petrol and diesel are entirely non-substitutable, whereas petrol is partly substitutable by propane/butane and methane, and all of those fuels are part of the national market for motor fuels, should such a market exist.

WORKING DOCUMENT