Case C-211/22

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:

17 March 2022

Referring court:

Tribunal da Relação de Lisboa (Portugal)

Date of the decision to refer:

24 February 2022

Appellants:

Super Bock Bebidas, S.A.

AN

BQ

Respondent:

Autoridade da Concorrência (Competition Authority)

Subject matter of the main proceedings

The issue to be disposed of, which is whether or not the proven facts constitute the infringement provided for in Article 9(1) of the Lei da Concorrência (Law on competition) [Lei n.º 19/2012, de 8 de maio, que aprovou o Novo Regime Jurídico da Concorrência (Law No 19/2012 of 8 May 2012 establishing a new legal framework for competition; 'the NRJC')] and Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), calls for an examination first and foremost of whether an agreement or practice contrary to competition, within the meaning of those legal provisions, is present in the dispute in the main proceedings.

Subject matter and legal basis of the request

In this case, the Competition Authority accused Super Bock Bebidas, S.A., AN (a member of its board of directors) and BQ (the head of one of its two commercial departments) ('the appellants') of breaching competition law by committing an administrative infringement as defined and made punishable under Articles 9(1)(a) and 68(1)(a) and (b) of the NRJC. Article 9 is based on Article 101 TFEU, the content of which it virtually reproduces. The Tribunal da Concorrência, Regulação e Supervisão de Santarém (Court of Competition, Regulation and Supervision, Santarém, Portugal) upheld that accusation.

The Competition Authority and the Court of Competition, Regulation and Supervision, Santarém, took the view that, in the distribution contracts it concluded with its distributors, Super Bock had put into practice, during at least the period from 15 May 2006 until 23 January 2017, an agreement the object of which was restrictive of competition.

The Court of Competition, Regulation and Supervision, Santarém, ordered the appellants to pay the following fines: a fine of EUR 24 000 000 for SUPER BOCK BEBIDAS, S. A.; a fine of EUR 12 000 for AN; and a fine of EUR 8 000 for BQ.

The appellants appealed against that decision on the ground that they had not committed any infringement, since the respondent had not proved either that the conduct/agreement found to be restrictive of competition was sufficiently harmful or that it had anti-competitive effects, and seek to have the fines imposed on them cancelled or at least reduced.

Questions referred for a preliminary ruling

1. Does the vertical fixing of minimum prices constitute in and of itself an infringement by object which does not require a prior analysis of whether that agreement is sufficiently harmful?

2. In order to demonstrate that the 'agreement' element of the infringement consisting in the (tacit) fixing of the minimum prices to be charged by distributors is present, is it necessary to show that the distributors actually charged the fixed prices in the case in question, in particular by direct evidence?

3. Do the following factors constitute sufficient evidence of the commission of an infringement consisting in the (tacit) fixing of the minimum prices to be charged by distributors: i) the sending of lists containing minimum prices and margins for distribution; ii) asking distributors for information on the selling prices they charge; iii) complaints from distributors (where they consider the resale prices imposed on them to be uncompetitive or find that competing distributors do not adhere to them); iv) the existence of price-tracking mechanisms

(as a minimum); and v) the existence of retaliatory measures (even though it has not been demonstrated that these have actually been applied)?

4. In the light of Article 101(1)(a) TFEU, Article 4(a) of Regulation No 330/2010, the European Commission's Guidelines on Vertical Restraints and the case-law of the European Union, can an agreement between a supplier and its distributors which (vertically) fixes minimum prices and other terms of business applicable to resale be presumed to be sufficiently harmful to competition, without prejudice to an analysis of any positive economic effects arising from such a practice, within the meaning of Article 101(3) TFEU?

5. Is it compatible with Article 101(1)(a) TFEU and the case-law of the European Union for a judicial decision to find that the presence of the objective defining element of an 'agreement' between a supplier and its distributors is proved on the basis of:

i) the fixing and imposition, by the former on the latter, on a regular, universal and unchanging basis during the period of the practice, of the terms of business which the latter must fulfil when reselling the products they acquire from the supplier, in particular the prices they charge their customers, principally in terms of minimum prices or average minimum prices;

ii) the fact that the resale prices imposed are notified either verbally or in writing (via e-mail);

iii) the fact that distributors are unable to fix their resale prices independently;

iv) the customary and universal practice whereby the supplier's employees ask distributors (by telephone or in person) to adhere to the prices indicated;

v) the universal adherence by distributors to the resale prices fixed by the supplier (other than in the event of occasional disagreements) and the finding that the conduct of distributors on the market is generally in keeping with the terms laid down by the supplier;

vi) the fact that, in order not to breach the terms laid down, distributors themselves often ask the supplier to tell them what resale prices to charge;

vii) the finding that distributors frequently complain about the prices set by the supplier rather than simply charging other prices;

viii) the fixing by the supplier of (reduced) distribution margins and the assumption by distributors that those margins correspond to the level of remuneration payable for their business;

ix) the finding that, by imposing low margins, the supplier imposes a minimum resale price, as the distribution margins would otherwise be negative;

x) the supplier's policy of granting discounts to distributors on the basis of the resale prices actually charged by them — the minimum price previously fixed by the supplier being the level of [the price of] restocks at sell-out;

xi) the need for distributors — in the light in many cases of the negative distribution margin — to adhere to the resale price levels imposed by the supplier; the practice of lower resale prices is followed only in very specific circumstances and where the distributors ask the supplier for a further discount at sell-out;

xii) the fixing by the supplier of, and the adherence by distributors to, the maximum discounts which are to be applied to the distributors' customers, which has the effect of imposing a minimum resale price, as the distribution margin would otherwise be negative;

xiii) the direct contact between the supplier and the distributors' customers and the fixing of the terms of business subsequently imposed on distributors;

xiv) the supplier's intervention, on the distributors' initiative, inasmuch as it is the supplier that makes the decision to apply certain trade discounts or renegotiates the terms of business for resale; and

xv) the fact that distributors ask the supplier to authorise them to conclude a particular transaction on certain terms in order to ensure their distribution margin?

6. Is an agreement on the fixing of minimum resale prices which exhibits the characteristics described above and covers almost the entire national territory capable of affecting trade between Member States?

Provisions of European Union law relied on

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

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): Article 4.

Commission notice – Guidelines on vertical restraints (SEC/2010/0411 final)

Provisions of national law relied on

Lei n.º 19/2012, de 8 de maio, que aprova o novo regime jurídico da concorrência, revogando as Leis n.ºs 18/2003, de 11 de junho, e 39/2006, de 25 de agosto, e procede à segunda alteração à Lei n.º 2/99, de 13 de janeiro (Law No 19/2012 of 8 May 2012 establishing a new legal framework for competition, repealing Laws Nos 18/2003 of 11 June 2003 and 39/2006 of 25 August 2006 and amending for the second time Law No 2/99 of 13 January 1999): Article 9.

Article 9(1):

‘The following shall be prohibited: agreements between undertakings, concerted practices between undertakings and decisions by associations of undertakings which have as their object or effect the prevention, distortion or significant restriction of competition in all or part of the national market, in particular those which consist in:

a) directly or indirectly fixing purchase or selling prices or other trading conditions; […]’

Succinct presentation of the facts and procedure in the main proceedings

1 Super Bock manufactures and markets beverages, more specifically beers, bottled waters (still and sparkling), soft drinks, iced teas, wines, sangrias and ciders, which it distributes in Portugal in two sectors, the grocery sector (also known as the off-trade sector) and the HORECA sector (also known as the on-trade sector).

2 As regards the grocery (off-trade) sector, which covers purchases made in hypermarkets, supermarkets, wholesalers’ outlets, traditional shops and discount stores for consumption at home, Super Bock applies its trading policy directly, which is to say that it supplies directly to a restricted set of customers, known as ‘direct customers’ or ‘large retail customers’, which generally demand to negotiate directly with Super Bock because of the volume of their purchases.

3 As regards the HORECA (on-trade) sector, which covers purchases in ‘hotels, restaurants and cafés’ for consumption away from home, Super Bock relies largely on a network of independent distributors which buy its products in order to resell them in the national territory, except in those areas, indicated below, in which Super Bock distributes its products directly: Lisbon, Porto, Madeira, Coimbra (until 2013) and (since 2014) the Faial and Pico islands in the Azores.

4 As part of the business relationship which Super Bock has with its network of independent distributors (‘distributors’), the latter buy from it a varied range of beverages including beers, bottled waters, juices and soft drinks, ciders and wines, mainly for retail resale in the HORECA sector.

5 The business relationship between Super Bock and its distributors (which do not form part of the Super Bock group) is based on exclusive distribution contracts for a given geographical sales area.

6 Those contracts have a term of one year, extendable for equal and successive periods, and can be terminated by the parties at any time.

7 In that context, Super Bock negotiates with its distributors annual sales targets per product category which, if not met, allow the appellant to terminate the distribution contract in question.

8 In the course of its business relationship with its distributors, Super Bock fixed and imposed regularly, universally (on the entire network of distributors) and without change, during the period from at least 15 May 2006 until 23 January 2017, the terms of business which those distributors were compelled to apply when reselling products they had purchased from Super Bock, in particular the prices to be charged to their retail customers, either by indicating a specific price or by setting minimum prices or minimum average prices.

9 Super Bock expressly reserves for itself the right to fix the resale prices of the products which it markets and, in practice, distributors are given no decision-making power.

10 Super Bock conducts this practice through its employees, who are appointed internally by network managers, area managers or market managers, depending on the positions they hold.

11 In most cases, Super Bock employees impose resale prices on distributors verbally or in writing by e-mail.

12 Super Bock determines the resale prices it imposes on distributors so as to maintain a stable and consistent minimum pricing level throughout the national market.

13 The usual procedure for fixing and imposing prices on distributors is as follows: every month (as a rule), Super Bock's (the appellant's) Sales Department approves a list of minimum resale prices which Super Bock's network managers or market managers pass on to the relevant distributors with an indication, in most cases, that the prices indicated are mandatory, that distributors may not charge prices below the fixed minimum, and that, if they do, Super Bock's coordination and monitoring staff will notify their non-compliance to the Sales Department, which will take the appropriate measures.

14 In practice, distributors charge the selling prices fixed by Super Bock (either in the manner described above, or indirectly, as explained below).

15 It is the customary and universal practice of Super Bock employees to ask distributors expressly and directly (by telephone or in person) to adhere to the resale prices indicated by Super Bock.

16 Super Bock has put in place mechanisms for monitoring and tracking the resale prices charged by distributors.

17 The monitoring and tracking system introduced by Super Bock is based essentially on the obligation imposed on distributors to report their resales, including quantities and prices, which might take the form, for example, of requests for distributors to send invoices for their sales on a regular basis, and on the reporting of instances of non-compliance to the Sales Department by the team

of network managers and market managers and the coordination and monitoring team.

18 Super Bock threatens distributors with various retaliatory measures, such as removing financial incentives (for example, trade discounts on the purchase of products by distributors from Super Bock and the reimbursement of discounts applied by distributors to resales) and stopping the supply and replenishment of stocks, as means of compelling them to charge the resale prices it has fixed.

19 In the event of non-compliance with the terms of business applicable to resale which it has imposed, the appellant may go so far as to actually cut the supply of products to distributors and to discontinue the latter's contribution towards [the determination of] resale prices (that is to say, the resetting thereof).

20 In order to avoid non-compliance, distributors themselves often ask Super Bock to tell them the resale prices which they should charge, thus ensuring that Super Bock will not take against them the retaliatory measures they consider to be conceivable.

21 Clause 2(1) of the distribution contracts concluded between Super Bock and its distributors states that 'UNICER (now Super Bock) shall sell products to the distributor in accordance with UNICER's price lists and general terms and conditions of sale, which shall form an integral part of this contract for all purposes'.

22 In the period from at least 15 May 2006 until 23 January 2017, Super Bock regularly and universally imposed certain terms of business on distributors, guaranteeing positive distribution margins for them provided that they adhere to minimum resale prices.

23 The appellant's objective was to maintain a stable and consistent minimum level of pricing throughout the national market.

24 AN has been a member of Super Bock's board of directors since 31 March 2014 and BQ was head of Super Bock's commercial department with responsibility for sales in the HORECA sector from 4 February 2013.

Essential arguments of the parties in the main proceedings

The appellants claim in essence that:

– The referring court formed its conclusion as to the existence of an 'agreement' on the basis of purely indicative evidence, thus departing from EU case-law requiring it to be demonstrated that distributors have actually charged the minimum prices recommended, as established by the CJEU and the 'Guidelines on Vertical Restraints' – 2010/C130/01.

– The existence of an agreement requires proof that the supplier's policy has actually been applied in practice.

– From the facts deemed to be proved in the judgment under appeal no conclusion can be drawn as to the existence of direct or indirect price fixing.

– In order to be able to characterise the infringement as a restriction by object, it must be examined whether the conduct censured is sufficiently harmful, and to be able to do this it is necessary to know the economic context in which the allegedly anti-competitive practices took place, which is not apparent from the judgment.

The Competition Authority rejects the appellant's line of argument.

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

25 The appellants have been found to have infringed Article 9(1) of the NRJC, the wording of which is essentially the same as that of Article 101(1) TFEU, which forms part of the approximation and harmonisation of the rules applicable in the European Union to practices capable of significantly affecting trade between Member States, and, since national competition law is generally based almost entirely on the corresponding provisions of EU competition law, the CJEU has jurisdiction to hear and determine the request for a preliminary ruling (see the judgment of 26 November 2015 in *SAI Maxima Latvija*, C-345/14, EU:C:2015:784).

26 It is not clear whether the conduct described in the documents before this court constitutes an agreement or practice the object of which is restrictive of competition within the meaning of Article 9(1) of the NRJC and Article 101(1)(a) TFUE.

27 The judgments of the CJEU which the Court of Competition, Regulation and Supervision, Santarém, cites in its judgment (*Societé Technique Minière*, of 30 June 1966, 56/65, EU:C:1966:38; *Cartes Bancaires*, of 11 September 2014, C-67/13 P, EU:C:2014:2204, and *Budapest Bank and Others*, of 2 April 2020, C-228/18, EU:C:2020:265) do not relate to situations similar to that forming the subject of this case.

28 It is important determine whether that practice or agreement restricts competition by its nature and object, with the result that it is not necessary to examine its effects, or whether, in order for the conduct at issue to be capable of constituting a practice or agreement that is restrictive of competition, it falls to be demonstrated how harmful that conduct is or what its anti-competitive effects are.