Case C-25/21

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:

15 January 2021

Referring court:

Juzgado de lo Mercantil de Madrid No 2 (Spain)

Date of the decision to refer:

30 November 2020

Applicants:

ZA

AZ

BX

CV

DU

ET

Defendant:

Repsol Comercial de Productos Petrolíferos, S. A.

Subject matter of the main proceedings

Application for a declaration that an agreement for the exclusive supply of motor-vehicle and other fuels to a service station owned by the applicants, contained in a series of connected contracts, is automatically void in accordance with Article 101(2) TFEU on the ground that it infringes Article 101(1) TFEU, and for damages.

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

Request for a preliminary ruling on interpretation – Article 267 TFEU – Competition – Article 101(1) and (2) TFEU – Regulation (EC) No 1/2003 – Article 2 – Action for damages – Action for a declaration of nullity – Means of proof – Burden of proof – National case-law which, in actions for a declaration of nullity, does not regard final decisions of the national competition authority as irrefutable proof of an infringement.

Questions referred for a preliminary ruling

(1) If the applicant establishes that its exclusive supply contract under a brand name (on a commission basis or an executed sale basis with a discounted reference resale price) with REPSOL falls within the territorial and temporal scope examined by the national competition authority, **must the contractual relationship be found to be covered by the decision of the Tribunal de Defensa de la Competencia (Competition Court, Spain) of 11 July 2001 (case 490/00 REPSOL) and/or by the decision of the Comisión Nacional de la Competencia (National Competition Commission, Spain) of 30 July 2009 (case 652/07 REPSOL/CEPSA/BP), the conditions laid down in Article 2 of Regulation (EC) No 1/2003 regarding the burden of proof of the infringement being deemed to be satisfied pursuant to those decisions?**

(2) If the previous question is answered in the affirmative, and it is established in the specific case that the contractual relationship is covered by the decision of the Competition Court of 11 July 2001 (case 490/00 REPSOL) and/or the decision of the National Competition Commission of 30 July 2009 (case 652/07 REPSOL/CEPSA/BP), **must the necessary consequence be a declaration that the agreement is automatically void in accordance with Article 101(2) TFEU?**

Provisions of EU law relied on

Article 101(1) and (2) TFEU

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty: in particular, recitals 5 and 22 and Article 2

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: in particular, recitals 3, 4, 11, 14 and 34 and, implicitly, Article 9

Provisions of national law relied on

Ley 16/1989, de 17 de julio, de Defensa de la Competencia (Law 16/1989 of 17 July 1989 on the Protection of Competition; the 'LDC 1989'): Article 1(1)

Ley 15/2007, de 3 de julio, de Defensa de la Competencia (Law 15/2007 of 3 July 2007 on the Protection of Competition; presumably the 2017 version; the 'LDC 2007'): Article 75(1)

Summary of the facts and procedure in the main proceedings

Preliminary observation

1 The referring court submitted a request for a preliminary ruling in connection with the same main proceedings in 2019. By order of the Court of Justice of 28 October 2020, *Repsol Comercial de Productos Petrolíferos* (C-716/19, not published, EU:C:2020:870), that request was deemed inadmissible on the ground that, in essence, the conditions laid down in Article 94 of the Rules of Procedure of the Court of Justice were not satisfied. The present request for a preliminary ruling is intended to satisfy those conditions.

Liberalisation of the petroleum sector

2 In 1927, the Monopolio de Petróleos del Estado (State Petroleum Monopoly) was created in Spain and Compañía Arrendataria del Monopolio de Petróleos, S. A. (CAMPSA) was given responsibility for its administration.

3 In 1970, under that monopoly, a system of State concessions was set up for the retail sale of petroleum products through service stations; that system was also administered by CAMPSA.

4 In anticipation of Spain's entry into the European Economic Community (EEC) and the liberalisation of the petroleum sector, national refining undertakings (including the defendant, REPSOL) were, in 1984, permitted to become shareholders of CAMPSA. Therefore, those refining undertakings were placed in a privileged position and they began to prepare for the opening up of the market to competition by encouraging the then concessionaires of service stations to sign documents to join their respective networks.

5 In 1991, with the approval of the European Commission, the commercial assets of CAMPSA were segregated in favour of a number of the refining undertakings' subsidiaries, which assumed the rights and obligations of CAMPSA under the supply contracts concluded by it with service station proprietors.

6 The liberalisation process concluded in 1993: it was declared that the State monopoly was terminated and that activities in the sector were fully open to

competition. For concessionaires, the termination of the monopoly meant the termination of the rights and obligations derived from the concessions.

The contracts at issue

7 During and after that liberalisation process, Mr KN concluded four contracts (in 1987, 1996, 1997 and 2001) with the defendant, REPSOL, for the exclusive supply of motor-vehicle and other fuels to the service station which Mr KN owned in Galicia. Subsequently, the applicants, Mr KN's heirs, signed two similar contracts with REPSOL (in 2006 and 2009, the latter for a term of five years).

8 Although the initial [three] contracts were described as executed resale or sale contracts (since, once the product had been delivered, it became the property of Mr KN, who assumed the risk in the products supplied), those contracts stipulated that the proprietor of the service station would receive remuneration in the form of commission. In particular, in the second contract, REPSOL undertook to communicate a 'recommended' retail price (RP), which would be the same as the RP recommended to service stations having the same characteristics in the same geographical area. The price payable by Mr KN to REPSOL for the product was the result of applying a discount to the 'recommended' RP. In short, in the initial contracts concluded between the parties, the financial basis of the contract changed from resale to commission with the only alteration being that relating to the proprietor's remuneration.

9 In the following three contracts, now called 'commission-based' contracts, the financial basis was merely 'assumed' commission, because the commission agent assumed the risk in the product and was required to pay the cost of the products ordered (the RP set by REPSOL minus commission on every litre supplied) in advance, regardless of when the product was actually sold to consumers. Moreover, since the commission agent owned the installations, he was responsible for maintaining and replacing those installations. The commission agent's right to effect discounts deducted from his commission was formally acknowledged in every contract, but the amount payable to REPSOL for the products was calculated by subtracting the commission from the RP set by REPSOL.

Administrative and judicial competition proceedings

10 The conclusion of contracts with service stations following the liberalisation of the sector gave rise to a number of proceedings. In April 1999, an Andalusian association of service station proprietors submitted to the Servicio de Defensa de la Competencia (Department for the Protection of Competition; the 'SDC') a document complaining that REPSOL and CEPSA (another refining undertaking) had infringed national and Community competition legislation. As regards REPSOL, that complaint was resolved by decision of the Tribunal de Defensa de la Competencia (Competition Court; the 'TDC') of 11 July 2001 (case 490/00 REPSOL).

11 In that decision, the TDC ruled that, by setting the RP for fuel for distributors which worked with it on an assumed commission or agency basis, REPSOL had engaged in a practice prohibited by Article 1(1) of the LDC 1989, and ordered REPSOL to cease fixing prices in its relationships with service stations to which it was tied by contracts with similar features.

12 REPSOL appealed against that decision to the Audiencia Nacional (National High Court, Spain) (appeal No 866/01), which dismissed the appeal on 11 July 2007. REPSOL brought an appeal in cassation before the Tribunal Supremo (Supreme Court, Spain) (appeal No 6188/2007), which, on 17 November 2010, also dismissed the appeal.

13 While the court proceedings were underway, REPSOL sent a communication in November 2001 to all the 'assumed' commission agents in its network, including the applicants, expressing its intention to comply with the orders made in the decision of the TDC of 2001 and formally granting the distributors-commission agents in its network the right to effect discounts deducted from their commission. By decision of 2006, the TDC ruled that as a result of the sending of that communication, the orders made in its decision of 2001 were deemed to have been complied with, but warned that the SDC was conducting an investigation to establish whether the changes announced by REPSOL had actually been carried out. In that investigation, it was confirmed that the defendant was continuing to infringe national and Community competition rules.

14 Therefore, the Comisión Nacional de Competencia (National Competition Commission; the 'CNC') (now the Comisión Nacional de los Mercados y la Competencia (National Markets and Competition Commission; the 'CNMC')), by decision of 30 July 2009, imposed a fine on REPSOL, in addition to CEPSA and BP OIL ESPAÑA (which were also investigated), for 'having indirectly fixed the retail price for independent traders operating under its brand name, thereby restricting competition between service stations in its network and between all other service stations' and ordered it to cease the practices complained of.

15 The CNC's decision of 30 July 2009 was confirmed by the courts and is, therefore, final.

16 In the subsequent monitoring procedure, the CNMC issued three decisions (of 20 December 2013, which became final following confirmation in February 2020 by the Third Chamber of the Supreme Court; of 27 July 2017 and of 12 June 2020). It is apparent from those decisions that REPSOL continued the unlawful practice for more than 10 years.

Essential arguments of the parties to the main proceedings

17 The applicants have brought an action for a declaration that the connected contracts in existence between the parties are void, and the applicants claim damages on the ground that REPSOL directly or indirectly fixed the RP of the

motor-vehicle and other fuels exclusively supplied to the service station owned by them, which is contrary to Article 101(1) TFEU. As evidence of the unlawful practice, the applicants have submitted final decisions of the national competition authority (decision of the TDC of 2001 and decision of the CNC of 2009; the 'decisions concerned').

Summary of the grounds for the request for a preliminary ruling

18 The case requires determination of the probative force that Regulation No 1/2003 attaches to facts as established in a final decision of a national competition authority of a Member State of the European Union in the context of proceedings for the application of Article 101 TFEU.

19 As stated, to support their claim that the contracts they entered into with REPSOL are void, the applicants submitted, as evidence of REPSOL's unlawful conduct, the decisions concerned, which were confirmed by the courts and are final. Those decisions were given in administrative proceedings in which the applicants' specific contracts were not examined.

20 According to Article 2 ('Burden of proof') of Regulation No 1/2003, in any national or Community proceedings for the application of Article 101 TFEU, the burden of proving an infringement of Article 101(1) TFEU is to rest on the party or the authority alleging the infringement. The same view is expressed in recital 5 of that regulation.

21 The referring court considers that, pursuant to Regulation No 1/2003, it is clear that the burden of proving an unlawful practice in matters relating to competition rests on the applicant. However, the referring court asks whether it is possible to discharge that burden of proof if it is established that the contractual relationship concerned comes within the subjective scope of final decisions of the national competition authority.

22 In that respect, the referring court states that Division 28 of the Audiencia Provincial de Madrid (Provincial Court, Madrid, Spain; the 'AP, Madrid'), in judgment No 381/2020 of 17 July 2020, given on appeal in proceedings similar to the present proceedings, did not attach any probative force to the decisions of the national competition authority. In that judgment, the AP, Madrid stated that it is for the applicant to demonstrate the existence and the circumstances of the agreements reached or of any pressure exerted, directly or indirectly, by the defendant petroleum company on the applicant. The AP, Madrid took the view that, in civil proceedings, where a declaration is sought that an individual contractual relationship is void, it is not sufficient to put forward general submissions regarding the operation of a commercial network which can be deduced from the administrative case file and that instead it is necessary to conduct an individual examination of the contractual relationship at issue in the dispute and to demonstrate that the applicant service station proprietor, and not another individual, has been the victim of a price-fixing practice. The AP, Madrid

held that there is no reason why administrative proceedings of the CNC, even where those proceedings were subsequently confirmed by the administrative courts, should result in the automatic nullity of absolutely every exclusive supply contract under a brand name concluded by petroleum operators subject to those proceedings. The AP, Madrid took the view that, otherwise, the absurd situation would arise in which administrative decisions – for example, the decisions concerned – could be deemed to lead inevitably to the nullity of thousands of supply contracts concluded by different petroleum operators, disregarding the specific relationship derived from each contract. The AP, Madrid concluded by drawing attention to the fact that civil proceedings of the kind before it are stand-alone actions for a declaration of nullity and not follow-on actions for damages for infringement of Community competition rules which only seek to compensate the injured party for an infringement already identified by the competition supervisory bodies.

23 The referring court believes that the AP, Madrid did not regard it as sufficient to establish that the service station in question fell within the subjective scope of a decision of the national competition authority and that instead the evidence forming part of the investigation of the specific administrative case must be reproduced before the civil court in each case. Therefore, even though the decisions of the national competition authority were confirmed by the courts, they do not, from the point of view of a civil court, constitute even an indication of the unlawful practice, in spite of the fact that the cases concluded by the decisions concerned found that the unlawful practice had been established as regards all the service stations which are assumed to be 'commission agents' in REPSOL's branded network.

24 The referring court states that that issue appears to be resolved as regards actions for damages, since, pursuant to Directive 2014/104, as transposed by Article 75(1) of the LDC 2007, 'an infringement of competition law found by a final decision of a Spanish competition authority or a Spanish court is deemed to be irrefutably established for the purposes of an action for damages brought before a Spanish court.'

25 Although the referring court acknowledges that these proceedings do not merely involve an action for damages but rather an action for a declaration of nullity of the contracts by application of Article 101(2) TFEU, it considers that refusal to recognise the probative force of the final decisions of the national competition authority has a twofold consequence: the maintenance in force of agreements which infringe Article 101 TFEU and failure to compensate the injured party for the prohibited practice, resulting in the unjust enrichment of the infringer.

26 The referring court is therefore uncertain whether the probative rigour applied by the AP, Madrid in actions for a declaration of nullity is compatible with EU law. The referring court does not call into question the need to satisfy the condition regarding the burden of proof laid down in Article 2 of Regulation No 1/2003, but it asks whether that condition can be deemed to be satisfied where it is established

that the contract concerned reflects the practices penalised and the classification of the contracts examined (exclusive supply under a brand name) as regards one of the undertakings penalised (REPSOL) over the period examined by the decisions (1999 to 2019) and in the territorial area in which the infringement occurred (Spain). A strict interpretation of that provision would create a kind of *probatio diabolica* which is impossible to satisfy.

27 The referring court points out that Article 101 TFEU has direct effect and argues that the principles of effectiveness and equivalence, as framed in the preamble to Directive 2014/104, should also apply to actions for a declaration of nullity.

28 The referring court concludes by stating that it is not the court of last instance but that the AP, Madrid, which will review its judgment at second instance, may be the court of last instance in practice in view of the extraordinary nature of appeals in cassation and the repeated rulings of inadmissibility handed down by the First Chamber of the Supreme Court when called on to review judgments on appeal relating to the fixing of the RP and the force which decisions of the national competition authority should have in Spanish law.