Case C-606/23

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:

4 October 2023

Referring court:

Administratīvā apgabaltiesa (Latvia)

Date of the decision to refer:

2 October 2023

Applicants:

AS Tallinna Kaubamaja Grupp

AS KIA Auto

Defendant:

Konkurences padome

Subject matter of the main proceedings

Action for annulment of the decision of the Konkurences padome (Competition Council, Latvia) finding various infringements of competition law.

Subject matter and legal basis of the request

Pursuant to Article 267 TFEU, the referring court requests the interpretation of Article 101(1) TFEU.

Questions referred for a preliminary ruling

1) In accordance with Article 101(1) TFEU, for the purposes of determining the existence of a prohibited agreement establishing restrictions in respect of car warranties which, in order for the car's warranty to remain valid, oblige or induce car owners to carry out the repair and maintenance of that car solely at authorised

representatives of the car's manufacturer and to use the original spare parts of that manufacturer in its servicing, must the competition authority demonstrate the existence of actual and real restrictive effects on competition?

2) In accordance with Article 101(1) TFEU, for the purposes of determining the existence of the agreement mentioned in the first question referred, is it sufficient for the competition authority to demonstrate solely the existence of potential restrictive effects on competition?

Provisions of European Union law relied on

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

Commission notice 2010/C 130/01 of 19 May 2010, *Guidelines on Vertical Restraints* ('the Guidelines on Vertical Restraints'): paragraphs 96, 97, 110 and 111.

Commission notice 2010/C 138/05 of 28 May 2010, *Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles*, paragraphs 1, 2, 60 and 69.

Case-law

Judgments of the Court of Justice of:

Judgment of 15 December 1994, *DLG*, C-250/92, EU:C:1994:413, paragraph 31

Judgment of 28 May 1998, *Deere v Commission*, C-7/95 P, EU:C:1998:256, paragraphs 76 and 77

Judgment of 23 November 2006, *Asnef-Equifax and Administración del Estado*, C-238/05, EU:C:2006:734, paragraphs 49 and 50 and the case-law cited

Judgment of 20 November 2008, *Beef Industry Development and Barry Brothers*, C-209/07, EU:C:2008:643, paragraph 17

Judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraphs 34 and 36 to 38 and the case-law cited

Judgment of 11 September 2014, *MasterCard and Others v Commission*, C-382/12 P, EU:C:2014:2201, paragraphs 161, 165 and 166 and the case-law cited

Judgment of 26 November 2015, *Maxima Latvija*, C-345/14, EU:C:2015:784, paragraphs 29 and 30

Judgment of the General Court of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 378 and 443

Opinion of Advocate General Bobek in *Budapest Bank and Others*, C-228/18, EU:C:2019:678, point 28 and the case-law cited

Opinion of Advocate General Kokott in *Generics (UK) and Others*, C-307/18, EU:C:2020:28, points 184 and 198

Provisions of national law relied on

Konkurences likums (Law on competition; 'the Competition Law'): Article 11(1)(7)

Succinct presentation of the facts and procedure in the main proceedings

1 The Estonian company AS KIA Auto is the sole authorised importer of cars of the KIA brand in Latvia. AS KIA Auto selects and approves the authorised representatives who market KIA cars and carry out repairs under the warranty, charged to the manufacturer or importer.

2 The Competition Council began a procedure to determine the existence of an infringement after receiving a complaint from the owner of a vehicle who had been denied the possibility of doing a repair covered by the warranty after having carried out the maintenance of his car at an independent garage.

3 In the booklet on maintenance and repairs aimed at customers, the members of the distribution network for cars of the KIA brand in Latvia – that is, AS KIA Auto, in its capacity as the importer, and the authorised representatives (distributors of cars of the KIA brand and authorised repairers) – included the conditions of the warranty, which stipulated that the warranty would remain valid as long as the maintenance and repair of the vehicle was carried out solely by authorised garages and provided that only original KIA spare parts were used, and also that the details of each instance of maintenance would have to be certified by means of the signature of the representative of an authorised garage. It also stipulated in the booklet that spare parts installed by independent repairers would not be changed free of charge.

4 By a decision of 7 August 2014 ('the contested decision'), the Competition Council found that the conduct of AS KIA Auto violated the prohibition established in Article 11(1)(7) of the Competition Law and it imposed various legal obligations and fines on it.

5 In the contested decision, the Competition Council found that, at least since 1 January 2004 – that is, for more than 10 years – AS KIA Auto, in its capacity as

the importer, and the authorised representatives (distributors of cars of the KIA brand and authorised repairers) had coordinated with each other to impose warranty conditions which oblige or induce car owners, during the warranty period, to carry out all routine maintenance of the vehicle planned by the manufacturer, KIA, and all repairs not covered by the warranty at authorised representatives (repairers) of KIA, in order for the warranty to remain valid, and to use original KIA spare parts in the routine maintenance carried out during the warranty period, to that same end.

6 The contested decision held that such restrictions create obstacles to independent repairers accessing the Latvian market for maintenance and repair services not covered by the warranty, during the warranty period, and to independent producers of spare parts accessing the Latvian market for the distribution of spare parts, thereby restricting competition between the distributors of original KIA spare parts and the distributors of similar spare parts. In the opinion [of the Competition Council], the elimination or impeding of competition with regard to independent repairers is also detrimental to consumers, as it reduces their capacity to choose between various providers of repair and maintenance services, which reduces or inhibits the pressure on the prices of such services. There are often significant differences in price between the original spare parts sold and resold by the car manufacturers and similar spare parts. The consumer benefits considerably if the use of similar spare parts from competitors, of equivalent quality, is not restricted during the warranty period.

7 In the contested decision, the Competition Council found that, within the KIA network, there is a vertical agreement relating to the warranty conditions: 1) for the car's warranty to remain valid, car owners are required to have all routine maintenance of the car that is planned by the producer, KIA, during the warranty period, carried out solely by authorised KIA representatives, which impedes competition in the market for repair and maintenance services; and 2) in the case of repairs and maintenance carried out during the warranty period, only original spare parts from the producer, KIA, must be used, which impedes competition in the market for the distribution of spare parts.

8 The Competition Council held that the agreement at issue *restricts competition through its effects* and, at the same time, found that *the standard of proof for a prohibited agreement* does not require evidence of the effects actually produced. The negative effects on competition are derived from the very nature of the restrictive conditions. According to the Competition Council, car owners will always wish the warranty to remain valid, especially for a product such as a car, the repair of which may involve considerable expense for the owner. The Competition Council therefore considered that, faced with restrictive conditions such as those identified by that body in this case, the owner will comply with those conditions and, consequently, opt not to carry out maintenance or repairs that are not covered by the warranty at independent garages and will not allow non-original spare parts to be used in any repairs. Consequently, independent repairers and distributors of alternative spare parts find themselves excluded from

the market. The Competition Council therefore held that, in the present case, it was not necessary to prove the actual effects [of that practice].

9 Given that AS KIA Auto and AS Tallinna Kaubamaja Grupp did not agree with the contested decision, they brought a challenge against it; however, the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia) rejected that challenge in a judgment of 10 March 2017.

10 The Augstākās tiesas Senāta Administratīvo lietu departaments (Supreme Court (Senate), Department of Administrative Cases, Latvia; 'the Supreme Court'), by a judgment of 22 December 2021 ('the judgment of the Supreme Court'), set aside the judgment of the Regional Administrative Court of 10 March 2017 and held that, given that it is the Competition Council itself that has to show that an infringement of competition law has been committed, which instruments it chooses in order to prove that an infringement has occurred is a matter for it alone. Therefore, according to the Supreme Court, it is at the discretion of that institution to determine how the agreement is to be classified: if it does not find a sufficiently sound basis for maintaining that the agreement restricts competition due to its object, it is only logical that that institution should focus on the restrictive effects of the agreement, without carrying out a preliminary assessment based on the object of the agreement.

11 The Supreme Court concluded that, in the present case, the question of whether the reasons set out in the contested decision were sufficient to determine the existence of a prohibited agreement on account of its effects had to be settled. The Supreme Court examined whether the Regional Administrative Court had been guided in that regard by relevant criteria, derived from legal rules and from case-law.

12 The Supreme Court held that, when checking whether the contested decision had reached a well-founded conclusion that the agreement in question was a prohibited agreement due to its effects, the Regional Administrative Court had based its examination on assessment criteria which had to be taken into consideration in the case of a prohibition due to the effects, but which were not correct (or on an erroneous understanding of those criteria). In those circumstances, the Supreme Court held that the Regional Administrative Court could not properly determine whether the basis for the decision was sufficient.

The essential arguments of the parties in the main proceedings

13 After the Supreme Court had given that judgment, the Competition Council told the Regional Administrative Court that there was uncertainty in the present case regarding the delimitation of the restriction of competition by the effects and the interpretation of Article 11(1) of the Competition Law in those cases in which prohibited agreements have to be identified by their effects. In its opinion, an unambiguous understanding of the concept of restriction of competition by object and by effect is of vital importance for the correct application of competition law,

regardless of whether Article 11 or Article 13 (prohibition of abuse of a dominant position) of the Competition Law is applied. In the opinion of the Competition Council, the conclusions contained in the judgment of the Supreme Court differ substantially from those contained in the case-law of the Court of Justice of the European Union, and, therefore, the content of the restriction of competition by the effects [of the agreement] and the standard of proof arising from that concept is unclear. Consequently, in order to ensure lawful and uniform practice (in accordance with that of the Court of Justice of the European Union) in future, it considers it necessary to refer a question to the Court of Justice for a preliminary ruling.

14 The Competition Council also refers to another case, namely the case *Maxima*, in which the Supreme Court gave judgment on 29 December 2015 and in which that court not only adopted a restrictive interpretation of the object of the restrictions of competition, but it also expressed its opinion on the need to demonstrate actual effects. In the case *Maxima*, the Supreme Court adhered to the assessment of the Court of Justice of the European Union, according to which the argument made by the claimant that, when assessing the effects of an agreement, only the restriction of competition actually occurring must be assessed was unfounded. Nor, in the opinion of the Competition Council, did the Supreme Court have reasons to disagree as regards the application of Article 11(1) of the Competition Law, since the general objective of paragraph 1 of that article is to deal with agreements that restrict competition, regardless of their actual effects. The assessment of the effects, including the potential effects, is, in such a case, a tool to understand the nature of the agreement (regardless of whether it is restrictive of competition by its object or by its effects), not to assess the damage to competition that has been caused.

15 The Competition Council refers to the conclusions reached with regard to the assessment of the effects, in particular to the judgment of the General Court in Case T-612/17, *Google Shopping*, although it should be borne in mind that that case related to an infringement of Article 102 TFEU. In that judgment, the General Court held that the European Commission is not immediately obliged, even in response to a counterfactual analysis put forward by the undertaking being challenged, systematically to establish a counterfactual scenario in the sense referred to in that judgment. That would, moreover, oblige it to demonstrate that the conduct at issue had actual effects, which is not required in the case of an abuse of a dominant position, where it is sufficient to establish that there are potential effects. That judgment also states that the Commission was not required to demonstrate that possible consequences of the elimination or restriction of competition actually manifested themselves, for example in the form of less innovation or price increases that could only be explained by the lack of competition.

16 The Competition Council considers that a similar approach should be followed when applying and interpreting Article 101 TFEU and, therefore, Article 11 of the Competition Law, since, in its opinion, the conclusions mentioned indicate, in

general, that, when assessing the impact of an agreement on competition on account of its effects, it is not possible, nor is it appropriate, to reduce the assessment of an agreement and of all the circumstances relevant to a particular case to the determination of the actual and measurable negative effects on competition, and that such an approach de facto does away with the possibility of the competition authority preventing the existence of restrictions of competition which *have not yet* produced negative effects that can be determined materially.

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

17 In its judgment of 22 December 2021, referred to above, the Supreme Court referred to the case-law mentioned below.

18 When interpreting Article 81(1) of the Treaty establishing the European Community and Article 101(1) TFEU, and clarifying the nature of the concepts of object and effect, the Court of Justice has also delineated a distinction between those concepts and the circumstances which must be established in each case.

19 Thus, the Court of Justice has held that the distinction between 'infringements by object' and 'infringements by effect' arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition (judgment in Case C-209/07, paragraph 17). Accordingly, where the anti-competitive object of the agreement is established it is not necessary to examine its effects on competition. Where, however, the analysis of the content of the agreement does not reveal a sufficient degree of harm to competition, the effects of the agreement should then be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent (judgment in Case C-32/11, paragraph 34 and the case-law cited).

20 As regards the determination of the existence of a restriction by object, the Court of Justice has held the following: in order to determine whether an agreement involves a restriction of competition 'by object', regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question. Although it is not necessary to establish the existence of an intention, there is nothing to prevent it being done. Moreover, in order for the agreement to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition, that is to say, that it be capable in an individual case of resulting in the prevention, restriction or distortion of competition within the internal market. Whether and to what extent, in fact, such an effect results can only be of relevance for determining the amount of any fine

and assessing any claim for damages (judgment given in Case C-32/11, paragraphs 36 to 38 and the case-law cited).

21 As regards the determination of the existence of a restriction by the effects [of the agreement], the Court of Justice has held the following: to determine whether an agreement is to be considered to be prohibited by reason of the distortion of competition which is its effect, the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement in dispute. An agreement's conformity with the competition rules cannot be assessed in the abstract. Indeed, when appraising the effects of coordination between undertakings, it is necessary to take into consideration the actual context in which the relevant coordination arrangements are situated, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question. It follows from this that the scenario envisaged on the basis of the hypothesis that the coordination arrangements in question are absent must be realistic. From that perspective, it is permissible, where appropriate, to take account of the likely developments that would occur on the market in the absence of those arrangements (judgment given in Case C-250/92, paragraph 31, and judgment given in Case C-382/12 P, paragraphs 161, 165 and 166 and the case-law cited). The Court has likewise held that, while Article 81(1) EC does not restrict such an assessment to actual effects alone, as that assessment must also take account of the potential effects of the agreement or practice in question on competition within the common market, an agreement will, however, fall outside the prohibition in Article 81 EC if it has only an insignificant effect on the market (judgment given in Case C-238/05, paragraph 50 and the case-law cited).

22 From that case-law, the Supreme Court deduced that, in the event that the competition protection authority reaches the conclusion that it cannot find a restriction of competition by object, it must establish whether the agreement has had restrictive effects on competition. That, in turn, implies that *the authority in question must obtain a body of evidence that shows that competition has actually been restricted. Indeed, it is incumbent on that authority to establish whether the agreement actually had restrictive effects on competition*, which it should not do in the event that a restriction of competition by object is found to exist. To establish that, the authority must examine the competition conditions in the real context in which they occur, without the influence of the agreement at issue, essentially carrying out a market analysis. That assessment must not be theoretical and abstract, but rather it must be based on the actual circumstances of the particular market and the competition, since, otherwise, the assessment could be considered to be based on suppositions.

23 The Supreme Court observed that the Competition Council had not explained what it understood by the concept of 'potential effects', which it used, nor how the assessment of such effects had been expressed in the decision. In any event, according to the Supreme Court, that concept must not be identified with the

assessment carried out when examining whether the object of an agreement is to restrict competition, since, otherwise, the boundary between the standard of proof in respect of the object and that in respect of the effects would become blurred, which must not happen.

24 It also drew attention to the fact that the concept of potential or possible effects is linked, in the case-law of the Court of Justice, to potential competition and that it is subject to the same standard of proof as that applicable to actual effects.

25 The Supreme Court pointed out that, from the Guidelines on Vertical Restraints, it may also be inferred that the European Commission establishes the actual and possible effects of an agreement according to the same standard of proof.

26 The Regional Administrative Court agrees with the Competition Council that, given the existence of an essentially similar legal context and in view of the objective, acknowledged by the legislature, of harmonising the rules of Latvian competition law with those of the European Union, the application of Article 11(1) of the Competition Law must not differ from that of Article 101(1) TFEU. In applying Article 11(1) of the Competition Law, the considerations of the Court of Justice in relation to the application of Article 101(1) TFEU should be taken into account.

27 The applicants indicated to the Regional Administrative Court that they believed it was appropriate to refer a question to the Court of Justice for a preliminary ruling.

28 In view of the fact that, in the present case, the parties have made reasoned observations regarding the interpretation of a provision of EU law which is not so clear that it could not give rise to a degree of reasonable uncertainty, the Regional Administrative Court considers it appropriate to refer questions regarding the interpretation of Article 101(1) TFEU to the Court of Justice.