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CASE CARD | 4 October 2021

CEPSA (C-279/06)

Genuine agency

1. CASE SUMMARY

A. Summary of facts

On 7 February 1996, CEPSA and Tobar concluded an agreement for (among others) the supply of fuels on a commission?agent basis. Tobar undertook to purchase exclusively from CEPSA petroleum products, for resale in its service station in accordance with the retail prices, conditions and sales and business methods stipulated by CEPSA.

The contract was concluded for a period of 10 years, which could be extended for successive five?year periods. The contract also included a non?competition clause which prohibited Tobar from selling or promoting competing products or from participating in such campaigns, both inside its service station and in the surrounding area.

Tobar was required to pay CEPSA the price of the petroleum products within nine days from the date of their delivery to the service station. Tobar was also required to take out and present, on the date of the first delivery, a bank guarantee for a total amount equivalent to 15 days' supply, which could be enforced by CEPSA if Tobar should fail to pay on time. If enforcement of that guarantee were necessary, Tobar would then be required to pay for supplies in advance. Tobar received, by way of remuneration, the market commission in force for each service station. The payments to CEPSA, determined on the basis of the number of litres delivered to the service station, were made by deducting from the retail price fixed by CEPSA, including VAT, the amount of the commission, including VAT.

As regards the clauses relating to the allocation of costs and risks, Tobar was obliged to assume the risks associated with the petroleum products as soon as they were received from the supplier in the storage tanks, including the risk of discrepancies in volume, and to keep them in the conditions necessary to ensure that they underwent no loss or deterioration. Tobar was liable, both to the supplier and to third parties, for any loss, contamination or adulteration which might affect the quality of those products and for any damage caused by them. Moreover, Tobar guaranteed and was responsible for customers who had signed up, through Tobar, for the use of the CEPSA CARD (credit card) or who had been allowed direct credit. It also contributed to the financing of a small proportion of the costs relating to use of the CEPSA loyalty card.

CEPSA bore the cost of transporting the petroleum products and the cost of installing and maintaining its brand image in the service station. It transferred to Tobar the fuel tanks and pumps which Tobar was obliged to use only

to sell CEPSA's products and which it had to hand back to CEPSA at the end of the contract. Tobar was required to provide a 'guarantee on first demand' in favour of CEPSA to cover the value of the technical installations.

On 2 November 2001 CEPSA sent a letter to Tobar authorizing it to lower the sale prices of the petroleum products but without reducing CEPSA's receipts. After sending several letters to CEPSA, Tobar ceased obtaining supplies from CEPSA and concealed CEPSA's logo on the service?station installations.

Tobar brought an action against CEPSA for annulment of the contract claiming that it was incompatible with Article 101 TFEU and that its purpose was unlawful by reason of the fact that the determination of the sale price of the petroleum products was left to the sole discretion of CEPSA. Tobar also applied for damages.

The Court of First Instance of Madrid annulled the contract on the ground that it was not compatible with Article 101(1) TFEU or with Regulations 1984/83 and 2790/1999. CEPSA appealed against that judgment. The appeal court referred several questions to the ECJ on the applicability of Article 101 TFEU and Regulation 1984/83 to commercial agency agreements in light of the facts of the case, envisaging different hypotheses depending on how the contract was categorized (agency contract versus contract between autonomous undertakings).

B. Legal analysis

The ECJ assessed the question whether Article 101(1) TFEU must be interpreted as applying to an exclusive supply contract for petroleum products having the characteristics of that at issue in the main proceedings (i) in the event that that contract is not a genuine agency contract (as concluded between two independent undertakings), by reason of the fact that the retail price of those products is fixed by the supplier and (ii) in the event that that contract is to be regarded as a genuine agency contract, by reason of the fact that it provides for an exclusive supply clause. (§33)

B.1 - Article 101(1) TFEU – agency contract and fixing of the retail price

The ECJ relied on its judgment in *CEEES* (case C-217/05) to provide guidance on the assessment of the qualification of the contract. The ECJ reiterated that (§35-42):

- Vertical agreements are covered by Article 101(1) TFEU only where the operator is regarded as an independent operator (agreement between two undertakings).
- The decisive factor for determining whether the operator is independent is to be found in the implied or express clauses of the contract relating to the assumption of the financial and commercial risks linked to the sales of goods to third parties.
- The question of risk is to be analysed case-by-case, taking account of the real economic situation rather than the legal categorisation.

- The national court should take account, first, of the risks linked to the sale of goods and, second, of the risks linked to investments specific to the market (i.e. those required to enable the service-station operator to negotiate or conclude contracts with third parties).
- The fact that the operator bears a negligible share of the risks does not render Article 101(1) TFEU applicable.
- Even in the case of an agency contract, only the obligations imposed on the intermediary concerning the sale of the goods to third parties on behalf of the principal, including the fixing of the retail price, fall outside the scope of Article 101 TFEU. By contrast, exclusivity and non?competition clauses which concern the relationship between the agent and the principal as independent economic operators are capable of infringing the competition rules in so far as they entail locking up the market concerned. The prohibition laid down in Article 101 TFEU is therefore applicable to those clauses.

If the examination of the risks leads to the conclusion that there is an agreement between independent undertakings, the fixing of the retail price of goods constitutes a restriction of competition expressly provided for in Article 101(1)(a) TFEU which brings that agreement within the scope of the prohibition laid down in that provision. (§42)

Based on the above, the ECJ provided as an answer that an exclusive supply contract for petroleum products is capable of falling within the scope of Article 101(1) TFEU where the service?station operator assumes, in a non?negligible proportion, one or more financial and commercial risks linked to the sale of those products to third parties and where that contract contains clauses capable of infringing competition, such as that relating to the fixing of the retail price. (§44) If the service?station operator does not assume such risks or assumes only a negligible share of them, only the obligations imposed on the operator in the context of services as an intermediary offered by the operator to the principal, such as the exclusivity and non?competition clauses, are capable of falling within the scope of Article 101(1) TFEU. (§44)

B.2 - Block exemption regulation – fixing of the retail price

The performance of the contract in the *CEPSA* case fell in a transitional period of the application *ratione temporis* of Regulation 1984/83 and Regulation 2790/1999.

In the case of a genuine agency relationship, the obligations concerning the sale of goods to third parties on behalf of the principal, although capable, at least as regards some of them, of infringing the competition rules if they were concluded between two independent undertakings, must not be taken into account when examining the applicability of a block exemption regulation. In the case of a distribution contract between two independent undertakings, it is necessary to examine the contract in its entirety in order to decide whether the block exemption is applicable. (§48)

The application of the block exemption is precluded if, in addition to an exclusive supply clause, the contract concluded between those undertakings contains a clause providing for the fixing of the retail price by the supplier. (§64) Applied to the case at hand, the fixing by CEPSA of the retail price of the petroleum products would constitute a restriction on competition not covered by the exemption provided for in Regulation 1984/83. (§65) However, it was apparent that on 2 November 2001 CEPSA sent Tobar a letter authorizing it to lower its sale prices without affecting the supplier's receipts. (§66)

It follows that it is necessary to ascertain (as to the conditions for exemption under Regulation 2790/1999, in force on the date when CEPSA gave its authorization) whether the fixing of the maximum sale price did not remain, in reality, a fixed or minimum sale price, account being taken of all the contractual obligations and the conduct of the parties in the main proceedings. (§70)

2. QUOTES

"*The Court held, at paragraph 38 of CEEES, that vertical agreements such as the agreements between CEPSA and service-station operators were covered by Article [101 TFEU] only where the operator is regarded as an independent economic operator and there is, consequently, an agreement between two undertakings.*

The decisive factor for the purposes of determining whether a service-station operator is an independent economic operator is to be found in the agreement concluded with the principal and, in particular, in the clauses of that agreement, implied or express, relating to the assumption of the financial and commercial risks linked to sales of goods to third parties. The question of risk must be analysed on a case?by-case basis, taking account of the real economic situation rather than the legal categorisation of the contractual relationship in national law (CEEES, paragraph 46).

The Court also set out the criteria to enable the national court to assess, in the light of the factual circumstances of the case before it, the actual allocation of the financial and commercial risks between the service?station operators and the fuel supplier.

As regards, first, the risks linked to the sale of the goods, the service?station operator is presumed to bear them when he takes possession of the goods, at the time he receives them from the supplier, when he assumes directly or indirectly the costs linked to the distribution of the goods, particularly the transport costs, when he maintains stocks at his own expense, when he assumes responsibility for any damage caused to the goods, such as loss or deterioration, and for damage caused by the goods sold to third parties, or when he bears the financial risk linked to the goods in the event that he is required to pay the supplier the amount corresponding to the quantity of fuel delivered instead of that actually sold (see CEEES, paragraphs 51 to 58).

Second, as regards the risks linked to investments specific to the market, namely those required to enable the

service-station operator to negotiate or conclude contracts with third parties, it is necessary to establish whether that operator makes investments in premises or equipment, such as a fuel tank, or in advertising campaigns. If so, such risks are transferred to the operator (CEEES, paragraphs 51 and 59).

It must, however, be pointed out that the fact that the operator bears only a negligible share of the risks does not render Article [101 TFEU] applicable (see, to that effect, CEEES, paragraph 61), since such an operator does not become an independent economic operator when selling fuel to third parties. In that case, the relationship between the operator and the supplier is identical to that between an agent and his principal.

It also follows from paragraphs 62 and 63 of CEEES that, even in the case of an agency contract, only the obligations imposed on the intermediary concerning the sale of the goods to third parties on behalf of the principal, including the fixing of the retail price, fall outside the scope of Article [101 TFEU]. By contrast, exclusivity and non?competition clauses which concern the relationship between the agent and the principal as independent economic operators are capable of infringing the competition rules in so far as they entail locking up the market concerned. The prohibition laid down in Article [101(1) TFEU] is therefore applicable to those clauses.

If an examination of the risks leads to the conclusion that there is an agreement between undertakings within the meaning of Article [101 TFEU], as regards the sale of goods to third parties, the fixing of the retail price of those goods constitutes a restriction of competition expressly provided for in Article [101(1)(a) TFEU] which brings that agreement within the scope of the prohibition laid down in that provision to the extent to which all the other conditions for the application of that provision are satisfied, namely that that agreement has as its object or effect to restrict appreciably competition within the common market and is capable of affecting trade between Member States (see, to that effect, Case C?230/96 Cabour [1998] ECR I?2055, paragraph 48).

[…]

In the light of the foregoing considerations, the answer to Question 1(a) and 2(a) must be that an exclusive supply contract for petroleum products is capable of falling within the scope of Article [101(1) TFEU] where the service?station operator assumes, in a non?negligible proportion, one or more financial and commercial risks linked to the sale of those products to third parties and where that contract contains clauses capable of infringing competition, such as that relating to the fixing of the retail price. If the service?station operator does not assume such risks or assumes only a negligible share of them, only the obligations imposed on the operator in the context of services as an intermediary offered by the operator to the principal, such as the exclusivity and non?competition clauses, are capable of falling within the scope of that provision. It is for the referring court to ascertain, moreover, whether the contract at issue in the main proceedings has the effect of preventing, restricting or distorting competition within the meaning of Article [101 TFEU]." (§35-44)

"*As stated at paragraph 41 of this judgment, in the case of a genuine agency relationship, only the exclusivity and*

non?competition clauses concerning the relationship between the agent and the principal as independent economic operators are capable of falling within Article [101 TFEU]. By contrast, the obligations concerning the sale of goods to third parties on behalf of the principal, although capable, at least as regards some of them, of infringing the competition rules if they were concluded between two independent undertakings, must not be taken into account when examining the applicability of that regulation. In the case of a distribution contract between two independent undertakings, it is necessary to examine the contract in its entirety in order to decide whether the block exemption is applicable.

[…]

It must be recalled at the outset, as has been stated at paragraph 42 of this judgment, that, in the case of a contractual relationship between two undertakings, the application of the block exemption is precluded if, in addition to an exclusive supply clause, the contract concluded between those undertakings contains a clause providing for the fixing of the retail price by the supplier.

Article 11 of Regulation No 1984/83 listed exhaustively the obligations which, apart from an exclusivity clause, could be imposed on a reseller, but which did not include the fixing of the retail price. Under recital 8 in the preamble to that regulation, 'further restrictive obligations and in particular those which limit the reseller's … freedom to determine his prices … cannot be exempted under this regulation'. Consequently, the fixing by CEPSA of the retail price of the petroleum products would constitute a restriction on competition not covered by the exemption provided for in Article 10 of that regulation (see CEEES, paragraph 64).

However, it is apparent from the order for reference that on 2 November 2001 CEPSA sent Tobar a letter authorising it to lower its sale prices without affecting the supplier's receipts. In its written and oral submissions, CEPSA states that such authorisation existed from the time of the conclusion of the contract at issue in the main proceedings and that Tobar had in actual fact made use of that authorisation even before that letter was sent. Tobar strongly disputes that claim and submits that it is impossible validly to amend that contract by way of a unilateral act.

[…]

It follows that it is necessary to ascertain whether the fixing of the maximum sale price does not remain, in reality, a fixed or minimum sale price, account being taken of all the contractual obligations and the conduct of the parties in the main proceedings."(§48-70)

"*An exclusive supply contract for motor?vehicle and other fuels, as well as lubricants and other related products, is capable of falling within the scope of Article [101(1) TFEU] EC where the service?station operator assumes, in a non?negligible proportion, one or more financial and commercial risks linked to the sale of those products to third parties and where that contract contains clauses capable of infringing competition, such as that relating to*

the fixing of the retail price. If the service?station operator does not assume such risks or assumes only a negligible share of them, only the obligations imposed on the operator in the context of services as an intermediary offered by the operator to the principal, such as the exclusivity and non?competition clauses, are capable of falling within the scope of that provision. It is for the referring court to ascertain, moreover, whether the contract concluded on 7 February 1996 between CEPSA Estaciones de Servicio SA and LV Tobar e Hijos SL has the effect of preventing, restricting or distorting competition within the meaning of Article [101 TFEU]." (§1 of the operative part)

"*An exclusive supply contract, such as that referred to in the preceding paragraph of this operative part, is capable of benefiting from a block exemption provided for in Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article [101(3) TFEU] of the Treaty to categories of exclusive purchasing agreements, as amended by Commission Regulation (EC) No 1582/97 of 30 July 1997, if it complies with the maximum duration of 10 years referred to in Article 12(1)(c) of that regulation and if the supplier grants the service?station operator, in return for exclusivity, substantial commercial advantages which contribute to an improvement in distribution, facilitate the establishment or modernisation of the service station and lower the distribution costs. It is for the referring court to assess whether those conditions are satisfied in the case in the main proceedings.*" (§2 of the operative part)

"*Articles 10 to 13 of Regulation No 1984/83, as amended by Regulation No 1582/97, must be interpreted as precluding the application of the block exemption to an exclusive supply contract which provides for the fixing of the retail price by the supplier. It is for the referring court to ascertain whether, under national law, the contractual clause relating to that sale price can be amended by unilateral authorisation of the supplier, such as that at issue in the main proceedings, and whether a contract which is automatically void may become valid following an amendment of that contractual clause which has the effect of bringing that clause into line with Article [101(1) TFEU] EC.*" (§3 of the operative part)

"*The automatic nullity provided for in Article [101(2) TFEU] affects a contract in its entirety only if the clauses which are incompatible with Article [101(1) TFEU] are not severable from the contract itself. Otherwise, the consequences of the nullity, in respect of all the other parts of the contract, are not a matter for Community law.*" (§4 of the operative part)

3. RELEVANT LEGISLATION

- Article 101 TFEU
- Regulation 1984/83

- Regulation 2790/1999

4. RELEVANT LITERATURE

On the applicability of Article 101 TFEU on agency agreements, see F. WIJCKMANS and F. TUYTSCHAEVER, *Vertical Agreements in EU Competition Law*, Oxford University Press, 2018, §9.136 – 9.167.

5. PRACTICAL RELEVANCE

The case clarifies:

- the conditions to be met to qualify as genuine agency;
- the extent to which restrictions imposed in a genuine agency setting fall outside Article 101 TFEU (distinction between restrictions relating to the sale of goods to third parties and restrictions linked to the relationship between the principal and the agent);
- that exclusivity and non-compete obligations fall, even in a genuine agency scenario, in the category of restrictions that may be caught by Article 101 TFEU;
- that, in a case of genuine agency, the principal is entitled to affix the price offered by the agent to the customer.

The principles set out in the *CEPSA* case were translated into the European Commission's Vertical Guidelines (§12-21).