Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

5 December 2024*

(Reference for a preliminary ruling – Competition – Agreements, decisions and concerted practices – Article 101(1) TFEU – Vertical agreements – Restriction 'by effect' – Agreement establishing restrictions in respect of car warranties – Obligation for the competition authority to demonstrate anticompetitive effects – Actual effects and potential effects)

In Case C-606/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia), made by decision of 2 October 2023, received at the Court on 4 October 2023, in the proceedings

'Tallinna Kaubamaja Grupp' AS,

'KIA Auto' AS

v

Konkurences padome,

THE COURT (Tenth Chamber),

composed of D. Gratsias, President of the Chamber, I. Jarukaitis, President of the Fourth Chamber, and Z. Csehi (Rapporteur), Judge,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– 'Tallinna Kaubamaja Grupp' AS and 'KIA Auto' AS, by I. Azanda, advokāte,

– the Latvian Government, by J. Davidoviča and K. Pommere, acting as Agents,

– the Spanish Government, by L. Aguilera Ruiz, acting as Agent,

* Language of the case: Latvian.

– the European Commission, by P. Berghe, I. Naglis and D. Viros, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 101(1) TFEU.

2 The request has been made in the context of a dispute between, on the one hand, 'Tallinna Kaubamaja Grupp' AS and 'KIA Auto' AS and, on the other hand, Konkurences padome (Competition Council, Latvia) concerning a fine imposed for the conclusion of a vertical agreement establishing restrictions in respect of car warranties.

Legal context

3 Under Article 11(1) of the Konkurences likums (Law on Competition) of 4 October 2001 (*Latvijas Vēstnesis*, 2001, No 151):

'Agreements between operators which have as their object or effect the prevention, restriction or distortion of competition within Latvian territory shall be prohibited and null and void *ab initio*, including agreements relating to:

…

(7) actions (or failures to act) which oblige another operator to leave a given market or impede the entry of a potential operator in a given market.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

4 KIA Auto, a company incorporated under Estonian law, is the sole authorised importer of cars of the KIA brand in Latvia. That company selects and approves the authorised representatives who market KIA cars and carry out repairs under the warranty granted by the manufacturer or importer.

5 By decision of 7 August 2014, the Competition Council imposed a fine in the amount of EUR 134 514.43 on KIA Auto due to an infringement of Article 11(1)(7) of the Law on Competition, of which EUR 96 150.92 was imposed jointly and severally on Tallinna Kaubamaja Grupp, the parent company.

6 The Competition Council found that KIA Auto, as the importer authorised by the manufacturer of cars of the KIA brand, and the authorised dealers and repairers of those cars ('the authorised representatives') coordinated with each other to impose warranty conditions which oblige or induce car owners, in order for the warranty to remain valid, to carry out all routine maintenance of the vehicle planned by the manufacturer, KIA, and all repairs not covered by the warranty at those authorised representatives during the warranty period and to use original KIA spare parts in the routine maintenance and repairs carried out during the warranty period.

7 The Competition Council thus found that, within the KIA network, there is a vertical agreement relating to the warranty conditions, impeding, on the one hand, access to independent repair services in the Latvian market not covered by the warranty, during the warranty period for repair services, and, on the other hand, access to independent producers of spare parts in the market for the distribution of those parts in Latvia, and restricting competition between the distributors of spare parts.

8 The Competition Council held that the agreement at issue restricts competition by effect, emphasising, in that regard, that the standard of proof applicable does not require actual effects to be demonstrated. According to the Competition Council, the negative effects on competition arise from the very nature of the restrictive clauses, and it is not necessary to demonstrate the effects which actually occurred.

9 The applicants in the main proceedings brought an action against the decision imposing a fine on them before the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia), the referring court, which dismissed that action by judgment of 10 March 2017.

10 The applicants in the main proceedings lodged an appeal on a point of law before the Senāta Administratīvo lietu departaments (Supreme Court (Senate), Department of Administrative Cases, Latvia), which set aside the judgment of the referring court by judgment of 22 December 2021 and referred the case back to that court for reconsideration.

11 The Senāta Administratīvo lietu departaments (Supreme Court (Senate), Department of Administrative Cases) found that the referring court, by examining whether the decision imposing the fine rightly led to the conclusion that the agreement was prohibited due to its effects, had relied on inaccurate assessment criteria in relation to those which must be taken into account in the case of restrictive effects. In those circumstances, the Senāta Administratīvo lietu departaments (Supreme Court (Senate), Department of Administrative Cases) held that the referring court could not properly assess whether that decision was sufficiently reasoned.

12 The referring court, relying on the additional submissions of the Competition Council following the judgment of the Senāta Administratīvo lietu departaments (Supreme Court (Senate), Department of Administrative Cases), notes that the findings of that judgment substantially differ from those of the case-law of the Court of Justice, with the result that the content of the restriction of competition by effect and the associated standard of proof cannot be regarded as evident. The referring court therefore finds it necessary to make a reference to the Court of Justice for a preliminary ruling in order to clarify the questions relating to the proof of concerted practices by effect.

13 In particular, as is clear from the Competition Council's observations, it is appropriate to adopt an approach similar to that adopted by the General Court of the European Union in the judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)* (T-612/17, EU:T:2021:763), which concerned an infringement of Article 102 TFEU, for the purposes of the application and interpretation of Article 101 TFEU and, consequently, Article 11 of the Law on Competition. In that judgment, the General Court noted that the European Commission is not required to demonstrate that possible consequences of the elimination or restriction of competition actually manifested themselves; rather, it is sufficient for it to establish that there are potential effects. Accordingly, it follows from that judgment that, when assessing the effects of an agreement on competition, there is no need to reduce all the relevant circumstances of the case to

the finding of actual and measurable negative effects on competition, since such an approach de facto removes the possibility for the competition authority concerned to put an end to restrictions of competition which have not yet produced negative effects that can be determined materially.

14 In those circumstances, the Administratīvā apgabaltiesa (Regional Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice 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?'

The jurisdiction of the Court

15 The referring court notes that the application of Article 11(1) of the Law on Competition must not differ from that of Article 101(1) TFEU, since those two provisions are, in essence, of a similar legal context. Consequently, the considerations of the Court in relation to the application of Article 101(1) TFEU should be taken into account.

16 According to settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which the dispute has been brought which must bear the responsibility for the subsequent judicial decision, to determine, in the light of the special features of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is bound, in principle, to give a ruling (judgment of 18 November 2021, *Visma Enterprise*, C-306/20, EU:C:2021:935, paragraph 42 and the case-law cited).

17 However, it is also settled case-law that it is for the Court to examine the conditions in which the case has been referred to it by the national court, in order to assess whether it has jurisdiction (judgment of 18 November 2021, *Visma Enterprise*, C-306/20, EU:C:2021:935, paragraph 43 and the case-law cited).

18 In that regard, it should be borne in mind that the Court has, on many occasions, held that it had jurisdiction to give preliminary rulings on questions concerning provisions of EU law in situations in which the facts of the cases before the national courts fell outside the direct scope of that law, provided that those provisions had been rendered applicable by national law, which had adopted, for purely internal situations, the same approach as that provided for under EU law (judgment of 18 November 2021, *Visma Enterprise*, C-306/20, EU:C:2021:935, paragraph 44 and the case-law cited).

19 That jurisdiction is justified by the manifest interest of the EU legal order that, in order to forestall future differences of interpretation, provisions taken from EU law should be interpreted uniformly (judgment of 13 October 2022, *Baltijas Starptautiskā Akadēmija and Stockholm School of Economics in Riga*, C-164/21 and C-318/21, EU:C:2022:785, paragraph 35 and the case-law cited).

20 In the present case, it is apparent from the order for reference that Article 11(1) of the Law on Competition lays down a legal framework identical to that established by Article 101(1) TFEU and that, in Latvian law, Article 11(1) of the Law on Competition is to be given the same interpretation as that of Article 101(1) TFEU. In addition, it should be recalled that the Court has already held that it had jurisdiction to give preliminary rulings concerning the interpretation of Article 101(1) TFEU in situations to which Article 11(1) of the Law on Competition applied independently of the question of whether there was an impact on trade between Member States (see, to that effect, judgment of 18 November 2021, *Visma Enterprise*, C-306/20, EU:C:2021:935, paragraph 47 and the case-law cited).

21 It follows that, in the present case, the Court has jurisdiction to rule on the questions concerning the interpretation of Article 101(1) TFEU.

Consideration of the questions referred

22 By those questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as meaning that it requires the competition authority of a Member State, when assessing whether an agreement establishing restrictions in respect of car warranties which 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, in order for the car's warranty to remain valid, may be characterised as a restriction of competition by effect, within the meaning of that provision, to demonstrate the existence of specific and actual restrictive effects on competition, or whether it is sufficient to demonstrate the existence of potential restrictive effects on competition.

23 In that regard, it should be recalled that Article 101(1) TFEU states that all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are incompatible with the internal market and are prohibited.

24 In order to find, in a given case, that an agreement, a decision by an association of undertakings or a concerted practice is caught by the prohibition laid down in Article 101(1) TFEU, it is necessary to demonstrate, in accordance with the very wording of that provision, either that that conduct has as its object the prevention, restriction or distortion of competition, or that that conduct has such an effect (judgment of 21 December 2023, *International Skating Union* v *Commission*, C-124/21 P, EU:C:2023:1012, paragraph 98 and the case-law cited).

25 To that end, it is appropriate to begin by examining the object of the conduct in question. If, at the end of that examination, that conduct proves to have an anticompetitive object, it is not necessary to examine its effect on competition. Thus, it is only if that conduct is found not to have an

anticompetitive object that it will be necessary, in a second stage, to examine its effect (judgment of 21 December 2023, *International Skating Union* v *Commission*, C-124/21 P, EU:C:2023:1012, paragraph 99 and the case-law cited).

26 The analysis to be made differs depending on whether the conduct at issue has as its 'object' or 'effect' the prevention, restriction or distortion of competition, with each of those concepts being subject to different legal and evidentiary rules (judgment of 21 December 2023, *International Skating Union* v *Commission*, C-124/21 P, EU:C:2023:1012, paragraph 100 and the case-law cited).

27 In the present case, the referring court, which starts from the premiss, the merits of which it is for that court to verify, that the purpose of the agreement at issue is not to restrict competition, states that it is for that court to assess whether that agreement has an anticompetitive effect.

28 In that regard, it is settled case-law that the concept of conduct having an anticompetitive 'effect' comprises any conduct which cannot be regarded as having an anticompetitive 'object', provided that it is demonstrated that that conduct has as its actual or potential effect the prevention, restriction or distortion of competition, which must be appreciable (judgment of 21 December 2023, *International Skating Union* v *Commission*, C-124/21 P, EU:C:2023:1012, paragraph 109 and the case-law cited).

29 To that end, it is necessary to assess the way the competition would operate within the actual context in which it would take place in the absence of the agreement, decision by an association of undertakings or concerted practice in question (judgments of 18 November 2021, *Visma Enterprise*, C-306/20, EU:C:2021:935, paragraph 74, and of 21 December 2023, *International Skating Union* v *Commission*, C-124/21 P, EU:C:2023:1012, paragraph 110 and the case-law cited), by defining the market(s) in which that conduct is liable to produce its effects, then by identifying those effects, whether they are actual or potential. That assessment itself entails that all relevant facts must be taken into account.

30 When appraising the effects of an agreement between undertakings in the light of Article 101 TFEU, it is thus necessary to take into consideration the actual context in which the agreement is 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 that the counterfactual scenario, envisaged on the basis of the absence of that agreement, must be realistic and credible (judgment of 27 June 2024, *Commission* v *Servier and Others*, C-176/19 P, EU:C:2024:549, paragraph 341 and the case-law cited).

31 In that regard the Court has already made clear that the purpose of the counterfactual scenario is to establish the realistic possibilities with respect to the economic operators' conduct in the absence of the agreement at issue and to determine how the market will probably operate and be structured if that agreement is not concluded (judgments of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 120, and of 18 November 2021, *Visma Enterprise*, C-306/20, EU:C:2021:935, paragraph 76).

32 However, the character of the counterfactual scenario, which is both realistic and credible, does not call into question the possibility of taking into account purely potential effects of an agreement between undertakings to examine whether it constitutes a restriction of competition by effect. In that regard, the Court has held, inter alia, that to consider that, when an agreement between undertakings has been implemented, the potential effects of that agreement cannot be

taken into account to assess its restrictive effects on competition would fail to have regard to both the characteristics of the counterfactual method inherent in the assessment of a restriction of competition by effect and the case-law according to which restrictive effects on competition may be both actual and potential, but must be sufficiently appreciable (see, to that effect, judgment of 27 June 2024, *Commission* v *Servier and Others*, C-176/19 P, EU:C:2024:549, paragraphs 345 to 353).

33 It is thus sufficient, following an appropriate assessment of the way the competition would operate within the actual context in which it would take place in the absence of the agreement at issue, to be able to find potential restrictive effects on competition which are sufficiently appreciable (see, to that effect, judgments of 28 May 1998, *Deere* v *Commission*, C-7/95 P, EU:C:1998:256, paragraphs 77 and 78, and of 28 May 1998, *New Holland Ford* v *Commission*, C-8/95 P, EU:C:1998:257, paragraphs 91 and 92).

34 In those circumstances, it is for the referring court to assess whether the Competition Council correctly examined the manner in which the competition would have operated within the actual context in which it would have taken place in the absence of effects from the agreement at issue, by defining the markets in which that agreement produces effects and by identifying those appreciable effects, whether actual or potential.

35 Furthermore, the Court held, in paragraphs 65 and 66 of the judgment of 6 October 2015, *Post Danmark* (C-23/14, EU:C:2015:651), that, in order to establish whether a practice is abusive under Article 82 EC (now Article 102 TFEU), that practice must have an anticompetitive effect on the market, but the effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is an anticompetitive effect which may potentially exclude competitors who are at least as efficient as the dominant undertaking.

36 Thus, the interpretation of Article 101 TFEU, as stated in paragraphs 28 and 33 above, according to which it is sufficient to demonstrate the existence of potential anticompetitive effects, inter alia, effects which may hinder the arrival of potential competitors in the market, corresponds to that of Article 102 TFEU supported by the case-law cited in the preceding paragraph.

37 In the light of the foregoing considerations, the answer to the questions referred is that Article 101(1) TFEU must be interpreted as meaning that it does not require the competition authority of a Member State when assessing whether an agreement establishing restrictions in respect of car warranties which 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 the manufacturer in its servicing, in order for the car's warranty to remain valid, may be characterised as a restriction of competition by effect, within the meaning of that provision, to demonstrate the existence of specific and actual effects on competition. It is sufficient for that authority to demonstrate, in accordance with that provision, the existence of potential restrictive effects on competition, provided that they are sufficiently appreciable.

Costs

38 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

Article 101(1) TFEU

must be interpreted as meaning that it does not require the competition authority of a Member State, when assessing whether an agreement establishing restrictions in respect of car warranties which 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 the manufacturer in its servicing, in order for the car's warranty to remain valid, may be characterised as a restriction of competition by effect, within the meaning of that provision, to demonstrate the existence of specific and actual restrictive effects on competition. It is sufficient for that authority to demonstrate, in accordance with that provision, the existence of potential restrictive effects on competition, provided that they are sufficiently appreciable.

[Signatures]