OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 13 July 2006 [1]

I — Introduction

1. The background to this reference for a preliminary ruling is the question whether, and if so subject to what conditions, an oil company can impose on service-stations it supplies fixed prices for the sale of its fuel to final consumers. These fixed prices are provided for in agreements described as commission or commercial agency agreements which the Spanish oil company Compañía Española de Petróleos S.A. (Cepsa) enters into with service-station operators. The Confederación Española de Empresarios de Estaciones de Servicio (Spanish Service Station Business Confederation, 'the Confederation') regards this as being anti-competitive and has therefore lodged a complaint about it in Spain.

2. Thus, following the recent decision of the European Commission in the case of *Repsol*, [2] the legal relationship between a Spanish oil company and the operators of service stations it supplies is once again under scrutiny by reference to competition law. This topic has been many times before the Spanish authorities and courts having jurisdiction for competition issues under national law, with widely varying results.

II — Legal framework

A — *Community law*

3. In terms of primary law it is necessary to refer to Article 81 EC, which provides as follows:

'1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions

1 — Original language: German.

2 — Commission Decision of 12 April 2006 in case COMP/B-1/38.348 — Repsol CPP OJ 2006 L 176, p. 104.

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 common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

...

2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings,

— any decision or category of decisions by associations of undertakings,

— any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.'

4. In terms of secondary law, two of the Commission's block exemption regulations are significant: Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the

application of Article 85(3) [3] of the Treaty to categories of exclusive purchasing agreements [4] ('Regulation No 1984/83') and Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices ('Regulation No 2790/1999'). [5]

5. Regulation No 1984/83 was in force until 31 December 1999. [6] Title III ('Special Provisions for Service-Station Agreements') provided inter alia:

'*Article 10*

Pursuant to Article 85(3) of the Treaty and subject to Articles 11 to 13 of this Regulation, it is hereby declared that Article 85(1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby one party, the reseller, agrees with the other, the supplier, in consideration for the according of special commercial or financial advantages, to purchase only from the supplier, an undertaking connected with the supplier or another undertaking entrusted by the supplier with the distribution of his goods, certain petroleum-based motor-vehicle fuels or certain petroleum-based motor-vehicle and other fuels specified in the agreement for resale in a service station designated in the agreement.

Article 11

Apart from the obligation referred to in Article 10, no restriction on competition shall be imposed on the reseller other than:

(a) the obligation not to sell motor-vehicle fuel and other fuels which are supplied by other undertakings in the service station designated in the agreement;

(b) the obligation not to use lubricants or related petroleum-based products which are supplied by other under-

3 — Now Article 81(3) EC.

4 — OJ 1983 L 173, p. 5. This Regulation was enacted under the enabling power in Regulation No 19/65/EEC of 2 March of the Council on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices (OJ English Special Edition Series I Chapter 1965-1966, p. 35; most recently amended by 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 ('Regulation No 1/2003'), OJ 2003 L 1, p. 1). See also the Commission notice concerning Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution and exclusive purchasing agreements (originally published in OJ 1983 C 355, p. 7, and completely reprinted in OJ 1984 C 101, p. 2).

5 — OJ 1999 L 336, p. 21. This Regulation was likewise enacted under the power in Regulation 19/65 enabling block exemptions.

6 — Originally, Regulation No 1984/83 was in force until 31 December 1997, as is apparent from Article 19(2) thereof. Its applicability was subsequently extended to 31 December 1999 (see Article 2 of Commission Regulation (EC) No 1582/97 of 30 July 1997 amending Regulations (EEC) No 1983/83 and No 1984/83 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements and exclusive purchasing agreements respectively, OJ 1999 L 214, p. 27). In addition, under Article 12(1) of Regulation No 2790/1999 the exemptions provided for in Regulation No 1984/83 continued in force until 31 May 2000.

takings within the service station designated in the agreement where the supplier or a connected undertaking has made available to the reseller, or financed, a lubrication bay or other motor-vehicle lubrication equipment;

(c) the obligation to advertise goods supplied by other undertakings within or outside the service station designated in the agreement only in proportion to the share of these goods in the total turnover realized in the service station;

(d) the obligation to have equipment owned by the supplier or a connected undertaking or financed by the supplier or a connected undertaking serviced by the supplier or an undertaking designated by him.

Article 12

(1) Article 10 shall not apply where:

(a) the supplier or a connected undertaking imposes on the reseller exclusive purchasing obligations for goods other than motor-vehicle and other fuels or for services, except in the case of the obligations referred to in Article 11(b) and (d);

(b) the supplier restricts the freedom of the reseller to obtain, from an undertaking of his choice, goods or services, for which under the provisions of this title neither an exclusive purchasing obligation nor a ban on dealing in competing products may be imposed;

(c) the agreement is concluded for an indefinite duration or for a period of more than 10 years;

(d) the supplier obliges the reseller to impose the exclusive purchasing obligation on his successor for a longer period than the reseller would himself remain tied to the supplier.

(2) Where the agreement relates to a service station which the supplier lets to the reseller, or allows the reseller to occupy on some other basis, in law or in fact, exclusive purchasing obligations or prohibitions of

competition indicated in this title may, notwithstanding paragraph 1(c), be imposed on the reseller for the whole period for which the reseller in fact operates the premises.'

6. With effect from 1 June 2000 Regulation No 1984/83 and other block exemptions in force at that time were replaced by Regulation No 2790/1999, which introduced a general block exemption valid until 31 May 2010 [7] for certain vertical agreements [8] to the extent that they fell within the scope of application of Article 81 EC and contained vertical restrictions [9] ('the new block exemption').

7. Article 3 of Regulation No 2790/1999 provides that the new block exemption does not apply where market share exceeds 30%. In addition, Article 4(1)(a) of Regulation No 2790/1999 provides that the new block exemption does not apply to vertical agreements which have as their object the restriction of the buyer's ability to determine its sale price.

B — *National law*

8. As regards Spanish law, it is necessary to refer to Law No 16/1989 of 17 July 1989 on the Protection of Competition (Ley de Defensa de la Competencia), [10] Article 1(1) of which is closely based on Article 81(1) EC for the definition of 'prohibited conduct' and provides as follows:

'The following are prohibited: all agreements, decisions and collective recommendations, and all concerted or deliberately parallel practices, which have as their object or effect or which may cause the prevention, restriction or distortion of competition in all or part of the national market, and in particular those which:

(A) directly or indirectly fix prices or any other commercial or service conditions;

...'

7 — See Article 13 of Regulation No 2790/1999. Article 12(2) provided for a transitional period until 31 December 2001 in respect of agreements already in force on 31 May 2000 which did not satisfy the conditions for exemption provided for in Regulation No 2790/1999 but which did satisfy those provided for in Regulation No 1984/83.

8 — In short, vertical agreements are agreements between undertakings each of which operates at a different level of the production or distribution chain; for details, see Article 2(1)(1) of Regulation No 2790/1999.

9 — In short, vertical restraints are restrictions on competition contained in vertical agreements (see above, footnote 8); for details, see Article 2(1)(2) of Regulation No 2790/1999.

10 — BOE No 170 of 18 July 1989, p. 22747.

9. A Royal Decree, namely Real Decreto No 157/1992 of 21 February 1992,[11] was enacted to implement the Ley de Defensa de la Competencia. Under the heading 'Block exemptions', Article 1(1) thereof provided:

'In accordance with Article 5(1)(A) of Law 16/1989 of 17 July on the Protection of Competition, agreements shall be authorised to which only two undertakings are party and which, belonging to one of the following categories, affect only the national market and satisfy the conditions laid down below for each one:

...

(B) exclusive purchasing contracts under which one party agrees with another party to purchase, for resale, certain products only from that party, an undertaking connected with that party, or another undertaking entrusted by the supplier with the distribution of his goods, provided that the agreement complies with the provisions laid down in [Regulation No 1984/83].

...'

11 — BOE No 52 of 29 February 1992, p. 7106.

10. This Royal Decree has since been repealed by Real Decreto No 378/2003 of 28 March 2003,[12] which implemented the new Community law provisions, including in particular Regulation No 2790/1999.

III — Facts and main proceedings

11. On 4 May 1995 the Confederation lodged a complaint with the Spanish Ministry of the Economy[13] against certain Spanish oil undertakings, including Cepsa, alleging that they engaged in practices which were restrictive of competition in the service-station sector. The Confederation complained, inter alia, that commission and commercial agency contracts in the terms normally entered into between Cepsa and the service-station undertakings it supplied in Spain, and which — according to the unchallenged evidence of the Confederation — applied for 95% of the Cepsa service-station network, restricted competition.

12. Although not all the contracts have the same wording, according to the national

12 — BOE No 90 of 15 April 2003, p. 14851.

13 — Ministerio de Economía y Hacienda, Servicio de Defensa de la Competencia.

court most of them have the following features:

— The service-station operator undertakes to sell Cepsa's motor-vehicle and other fuels exclusively in accordance with the retail prices, conditions, and sales and business methods stipulated by Cepsa.

The operator is prohibited, for so long as the contract remains in force, from authorising or participating in, directly or indirectly, sales or promotional transactions involving products in competition with the products covered by the exclusive purchasing arrangement, which take place or which it is attempted to carry out within the boundaries (or in the surrounding area) of the service station to which the contract relates.

— The operator assumes the risk associated with the products covered by the exclusive arrangement as soon as he receives those products from Cepsa and the said products 'flow past the connecting flange of the storage vessels or tanks at the service station'.

From that moment, the operator assumes the obligation to keep the products in the conditions necessary to ensure that they undergo no loss or deterioration and the operator is liable, where applicable, to Cepsa and to third parties for any loss, contamination or adulteration which may affect the products and for any damage arising as a result thereof.

— The service-station operator is required to pay Cepsa the cost of the motor-vehicle and other fuels nine days from the date of their delivery to the service station, by negotiable payment instrument issued by Cepsa.

— The operator receives from Cepsa the 'market commission' applicable to service stations at the relevant time. That commission, including the guarantee commission, is a specified sum per litre (according to whether the product concerned is petrol, diesel and red diesel, or heating oil) plus an annual fixed-rate commission. Commission is paid by Cepsa nine days after delivery to the service station.

13. On 7 November 1997 the proceedings brought as a result of the Confederation's complaint were stayed in part. The Confed-

eration raised administrative proceedings challenging this before the Tribunal de Defensa de la Competencia (Competition Court), and was initially unsuccessful, and was unsuccessful also in its action before the Audiencia Nacional (National High Court). The Confederation's appeal in cassation against the Audiencia Nacional's judgment is presently pending before the Tribunal Supremo. [14]

IV — Reference for a preliminary ruling and proceedings before the Court

14. By order dated 3 March 2005 the Tribunal Supremo stayed its proceedings and referred the following question to the Court for preliminary ruling:

'Must Articles 10 to 13 of Regulation No 1984/83 be construed as meaning that they include within their scope contracts for the exclusive distribution of motor-vehicle and other fuels which are nominally classified as commission or agency contracts and which contain the following clauses?

(a) The service-station operator undertakes to sell the supplier's motor-vehicle and other fuels in accordance with the retail prices, conditions, and sales and business methods stipulated by the supplier.

(b) The service-station operator assumes the risk associated with the products as soon as he receives them from the supplier in the storage tanks at the service station.

(c) Once he has received the products, the operator assumes the obligation to keep the products in the conditions necessary to ensure that they undergo no loss or deterioration and is liable, where applicable, both to the supplier and to third parties for any loss, contamination or adulteration which may affect the products and for any damage arising as a result thereof.

(d) The service-station operator is required to pay the supplier the cost of the motor-vehicle and other fuels nine days after the date of their delivery to the service station.'

15. Before the Court the Confederation and Cepsa as well as the Commission of the European Communities submitted written and oral observations.

14 — Hereafter also referred to as 'the national court'.

V — Analysis

A — *Admissibility of the reference for a preliminary ruling*

16. Cepsa and the Commission doubt that the reference for a preliminary ruling is admissible.

The reference in national law to provisions of Community law

17. First, Cepsa emphasised that the present case concerned a purely internal situation, which was to be decided purely by reference to national law. Community law was not applicable and had not, for example, been declared applicable by Royal Decree No 157/1992. Instead, Article 1(1)(B) of Royal Decree No 157/1992 merely referred to Regulation No 1984/83. Cepsa was therefore of the view that the Court had no jurisdiction to answer the question referred.

18. I am not persuaded by this view.

19. It is solely for the national court to determine in the light of the particular circumstances 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. The Court can refuse to give a preliminary ruling on a question submitted by a national court only where it is quite obvious that the interpretation sought by that court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical and the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [15] Apart from such cases, the Court of Justice is, in principle, bound to give a ruling on questions concerning the interpretation of Community law. [16] This applies also to cases in which such provisions are relevant solely in consequence of a reference in national law. According to settled case-law, neither the wording of Article 234 EC nor the aim of the preliminary ruling procedure precludes answering questions as to the interpretation of provisions of Community law where national law refers to the content of that

15 — As the Court has consistently held: see Case C-415/93 *Union royale belge des sociétés de football association* v *Bosman* [1995] ECR I-4921, paragraphs 59 to 61, and Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 24.

16 — *Bosman* (cited above, footnote 15), paragraph 59, and *IATA and ELFAA* (cited above, footnote 15), paragraph 24.

provision in order to determine rules applicable to a situation which is purely internal. [17]

20. On the contrary, as the Court has recognised on numerous occasions, it is manifestly in the interest of the Community legal order that, in order to forestall future differences of interpretation, every Community provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied. [18]

21. In the area of competition law, this interest in interpreting and applying provisions in force at Community law level in, so far as possible, a uniform manner is particularly strong.

22. First, competition law is characterised by the fact that, not infrequently, both national provisions and Community law are applicable in parallel to the same set of facts. [19] This is always the case where the scope of application of national law and of Community law overlaps, that is where agreements between undertakings engage not only national competition law but also Article 81 EC, in particular because they may affect trade between Member States within the meaning of the latter provision.

23. Indeed, since Regulation No 1/2003 [20] came into force national competition law authorities and courts are expressly prohibited from applying solely their own domestic competition law in such cases. Article 3 of Regulation No 1/2003 instead requires that in such cases Article 81 EC must be applied in parallel to national competition law, [21] whereby higher-ranking evaluations made by Community law, including any existing block exemptions, are to be applied. [22]

24. Second, even for purely internal situations the national law of many Member

17 — Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraphs 34 to 36; Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraphs 19 to 25; Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, paragraphs 24 to 27; Case C-130/95 *Giloy* [1995] ECR I-4291, paragraphs 20 to 23; Case C-1/99 *Kofisa Italia* [2001] ECR I-207, paragraphs 20 to 22; Case C-170/03 *Feron* [2005] ECR I-2299, paragraph 11; and Case C-3/04 *Poseidon Chartering* v *Marianne Zeeschip and Others* [2006] ECR I-2505, paragraphs 14 and 15; to similar effect, see Case C-306/99 *Banque internationale pour l'Afrique occidentale* [2003] ECR I-1, paragraphs 88 to 90.

18 — To that effect, see *Dodzi*, paragraph 37, *Leur-Bloem*, paragraph 32, *Giloy*, paragraph 28, *Kofisa Italia*, paragraph 32, and *Poseidon Chartering*, paragraph 16 (each cited above, footnote 17).

19 — Case 14/68 *Walt Wilhelm and Others* [1969] ECR 1, paragraph 3; Joined Cases 253/78 and 1/79 to 3/79 *Giry and Guerlain and Others* [1980] ECR 2327, paragraph 15; Case C-67/91 *Asociación Española de Banca Privada and Others* [1992] ECR I-4785, paragraph 11; and Case C-7/97 *Oscar Bronner* v *Mediaprint Zeitungs- und Zeitschriftenverlag and Others* [1998] ECR I-7791, paragraph 19.

20 — Regulation No 1/2003 modernised the rules for implementing Articles 81 EC and 82 EC and required national authorities and courts to participate more fully in the application of European competition law: see, for example, the sixth, seventh and fifteenth recitals of Regulation No 1/2003 as well as Articles 5 and 6.

21 — Article 3(1) of Regulation No 1/2003.

22 — To this effect, see Article 3(2)(1) of Regulation No 1/2003.

States is aligned with the corresponding provisions of Community law. If this had already been the case, this tendency is now even more apparent, most recently following the entry into force of Regulation No 1/2003.

25. Such an alignment with Community law can also be seen in the provisions of Spanish competition law in dispute in the present case. Thus, as the national court states, Article 1(1) of Law No 16/1989 (Ley de Defensa de la Competencia) is closely aligned with Article 81(1) EC. As is clear from its preamble, [23] Royal Decree No 157/1992 was also intended to bring the scope of application of Spanish national law into line with that of Community law. [24] The express reference in Article 1(1)(B) of the Royal Decree to the competition law in force at Community level at that time, namely Regulation No 1984/83, should therefore be considered not least in that context. [25]

26. Precisely because a provision of national competition law which refers to a Community block exemption can be applicable in part on its own and in part in parallel to Community law, it is particularly important that the relevant Community law is uniformly interpreted and applied. What must be prevented are divergences in the interpretation of one and the same provision of Community law depending on whether it is indirectly relevant in the case (by means of a reference in national law) or is directly applicable (because in addition to the scope of application of national law, that of Article 81 EC is also engaged).

27. Against this background it is clear that a national court may seek a ruling from the Court under Article 234 EC on the interpretation of a provision of Community competition law, such as the block exemp-

23 — The second paragraph of the preamble to Royal Decree No 157/1992 states: 'Having regard to the time which has elapsed since the entry into force of [the Ley de Defensa de la Competencia], it is appropriate to enact into our legal system an exemption for agreements which are the object of an exemption under Community law under the same legal technique in so far as they fall within its scope of application. By this means ... the internal legal order and Community law may be aligned within their respective scopes of application ...' (unofficial translation).

24 — The same applies for Royal Decree No 378/2003, which repealed and replaced Royal Decree No 157/1992. Accordingly, the fourth and fifth paragraphs of the preamble to Royal Decree No 378/2003 emphasise the necessity of making the legal situation in relation to block exemptions the same in national law as it is at Community law level and of taking account of various significant changes at Community level, including the enactment of Regulation No 2790/1999.

25 — Contrary to Cepsa's view, this distinguishes the present case from *Kleinwort Benson*, in which there was no comparable reference in national law, which even expressly permitted divergence from the provisions in force at Community level (Case C-346/93 *Kleinwort Benson* [1995] ECR I-615, in particular paragraphs 16 to 19; the case concerned the Brussels Convention).
Moreover, it is solely for the national court to assess the precise extent of a reference in national law to Community law *Dzodzi* (cited above, footnote 17), paragraphs 41 and 42, and *Leur-Bloem* (cited above, footnote 17), paragraph 33).

tion under Regulation No 1984/83, even if it is only indirectly relevant to what is a purely internal situation, by virtue of a reference in national law. [26]

Whether, having regard to the relevant time, the question referred is necessary to enable the national court to give judgment

28. In the present case the Commission doubted whether an answer to the question referred was necessary in order to enable the national court to deliver judgment, on the ground that Regulation No 1984/83 had since been replaced by Regulation No 2790/1999 and its interpretation was therefore of little practical importance for the main proceedings.

29. I am not persuaded by this objection either. This is because, as already mentioned, [27] according to settled case-law it is solely for the national court to determine in the light of the particular circumstances 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. The Court can refuse to give a preliminary ruling on a question submitted by a national court only *where it is quite obvious* that the interpretation sought by that court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical and the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. Apart from such cases, the Court of Justice is, in principle, bound to give a ruling on the questions referred on the interpretation of provisions of Community law.

30. In the present case it is by no means *obvious* that the fact that Regulation No 1984/83 has since ceased to be in force means that the Tribunal Supremo's question is not necessary in order to enable it to deliver judgment. The dispute before the Spanish court is as to whether the proceedings following the complaint by the Confederation could be stayed in 1997. It seems not unjustifiable to assume that the lawfulness of a staying order made in 1997 is to be assessed by reference to the law in force at that time, namely Royal Decree No 157/1992 and Regulation No 1984/83 to which it refers.

31. Regardless of that, it is of course for the Court to provide the national court with all those elements for the interpretation of Community law which may be of assistance in adjudicating on the case pending before it. Accordingly, in its Judgment it may consider provisions of Community law to which the

26 — Again, see the case-law cited above, footnote 17.

27 — See above, paragraph 19, and the case-law cited in footnotes 15 to 17.

national court has not referred in its question.[28] It is thus open to the Court to supplement its answer to the question as to the interpretation of Regulation No 1984/83 with observations on Article 81 EC and on Regulation No 2790/1999,[29] without casting any doubt on the admissibility of the reference by the Tribunal Supremo for a preliminary ruling.

The description of the factual context in the order making the reference

32. The Commission also complains that the description of the factual context of the main proceedings is insufficiently detailed.

33. According to settled case-law, the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that in the order making the reference the national court define the factual (and legal) context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based.[30] The information must not least give the governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 23 of the Statute of the Court of Justice.[31] In that connection it must be borne in mind that only the decisions making references are notified to the interested parties.[32]

34. A precise definition of the factual (and legal) context is particularly essential in the area of competition, which is not infrequently characterised by complexity.[33] On the one hand, in precisely this area the Court ought not to impose excessively high requirements on national courts as regards the drafting of orders making references, lest it makes it practically impossible for them to

28 — See the consistent case-law of the Court, for example Case C-315/92 *Verband Sozialer Wettbewerb* v *Clinique Laboratoires and Estée Lauder* [1994] ECR I-317, paragraph 7; Case C-271/01 *Consorzio Produttori Pompelmo Italiano* [2004] ECR I-1029, paragraph 27; Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 38; and Case C-471/04 *Keller Holding* [2006] ECR I-2107, paragraph 26.

29 — See below, paragraphs 38 to 74.

30 — Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo* [1993] ECR I-393, paragraph 6; Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, paragraph 22; Case C-134/03 *Viacom Outdoor* v *Giotto Immobilier* [2005] ECR I-1167, paragraph 22; Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2006] ECR I-10423, paragraph 45; and Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraph 17, in each case with further references.

31 — Joined Cases 141/81 to 143/81 *Holdijk and Others* [1982] ECR 1299, paragraph 6; *Lehtonen and Castors Braine* (cited above, footnote 30), paragraph 23; *ABNA* (cited above, footnote 30), paragraph 47; and *Enirisorse* (cited above, footnote 30), paragraph 18; and the Orders in Case C-66/97 *Banco de Fomento e Exterior* v *Pechim and Others* [1997] ECR I-3757, paragraph 8; Case C-116/00 *Laguillaumie* [2000] ECR I-4979, paragraph 14; Case C-190/02 *Viacom Outdoor* v *Giotto Immobilier* [2002] ECR I-8287, paragraph 14; and Joined Cases C-438/03, C-439/03, C-509/03 and C-2/04 *Cannito* v *La Fondiaria Assicurazioni* [2004] ECR I-1605, paragraph 8.

32 — *Holdijk* (cited above, footnote 31), paragraph 6; *Lehtonen and Castors Braine* (cited above, footnote 30), paragraph 23; and *Enirisorse* (cited above, footnote 30), paragraph 18; and the Orders in *Banco de Fomento e Exterior* (cited above, footnote 31), paragraph 8, *Laguillaumie* (cited above, footnote 31), paragraph 14, *Viacom Outdoor* (cited above, footnote 31), paragraph 14, and *Cannito* (cited above, footnote 31), paragraph 8.

33 — *Lehtonen and Castors Braine* (cited above, footnote 30), paragraph 22; and *Viacom Outdoor* (cited above, footnote 30), paragraph 23; and the Orders in Case C-157/92 *Banchero* [1993] ECR I-1085, paragraph 5, *Laguillaumie* (cited above, footnote 31), paragraph 19, and *Viacom Outdoor* (cited above, footnote 31), paragraph 22.

refer questions for preliminary ruling; this is because the importance of judicial cooperation between national courts and the Court has increased rather than decreased with the entry into force of Regulation No 1/2003. [34] However, at the same time such cooperation requires the national courts to exercise particular care when formulating orders referring questions in the area of competition law. [35]

35. Certainly, in the order by which the Tribunal Supremo referred the case to the Court the facts of the main proceedings are described in the briefest of terms. The Commission was correct in emphasising that a comprehensive description would include, for example, information as to ownership of the petrol [36] Cepsa delivered as well as where the burden of transport costs and the investment necessary to obtain sales falls. In addition it would have been desirable to have information as to the length of time the petrol delivered remained in the reservoirs of the service stations having contracts with Cepsa.

36. However, despite these omissions the information in the order making the reference is in my view sufficient to understand what the main proceedings are concerned with. In any event, the analysis of the actual facts is a task not for the Court but for the national judge. [37] The Court need merely give the national court guidance as to the interpretation of the relevant provisions of Community law. [38] For this purpose the description of the factual context of the main proceedings is sufficient in the present case.

Interim conclusion

37. Accordingly, the reference for a preliminary ruling is admissible.

B — *Substantive analysis of the question referred*

1. Introduction

38. The dispute in the main proceedings is whether a Spanish competition authority was entitled to suspend its investigation into contracts concluded by Cepsa, and in particular into the retail prices it imposed

34 — On this point, see also above, footnote 20.

35 — See generally my Opinion in *Viacom Outdoor* (cited above, footnote 30), point 42.

36 — For reasons of simplicity, in the following I use only the term 'petrol'; the analysis is equally applicable to other fuels.

37 — Case 36/79 *Denkavit Futtermittel* [1979] ECR 3439, paragraph 12; Case C-265/04 *Bouanich* [2006] ECR I-923, paragraph 54; Case C-253/03 *CLT-Ufa* [2006] ECR I-1831, paragraphs 35 and 36; and Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* v *Giuseppe Calafiori* [2006] ECR I-2941, paragraph 69; to similar effect see Case 243/83 *Binon* v *Agence et messageries de la presse* [1985] ECR 2015, paragraph 21.

38 — *Gmurzynska-Bscher* (cited above, footnote 17), paragraph 21; Case C-250/91 *Hewlett Packard France* [1993] ECR I-1819, paragraph 9; and Case C-291/03 *MyTravel* [2005] ECR I-8477, paragraph 43.

on service stations it supplied. The question referred to the Court is to be seen against this background. By that question the Tribunal Supremo asks in substance whether Articles 10 to 13 of Regulation No 1984/83 which relate specifically to service-station contracts encompass also agreements which were in the terms usually agreed between Cepsa and the service-station operators it supplied and which were designated as commission or agency contracts.

39. Contracts of the nature described can be within the scope of application of Regulation No 1984/83 only if they contain *agreements between undertakings* [39] falling within Article 81(1) EC (formerly Article 85(1) of the EC Treaty). This is because Regulation No 1984/83 contains a block exemption within the meaning of Article 81(3) EC (formerly Article 85(3) of the EC Treaty) which declares that the prohibition in Article 81(1) EC does not apply to agreements between undertakings falling into categories more closely defined, provided certain conditions are met.

40. Accordingly, before reaching an opinion on Regulation No 1984/83 it is necessary to answer the prior question as to whether commission and agency contracts [40] as concluded between Cepsa and the service stations it supplies fall within the scope of application of Article 81(1) EC.

2. Applicability of Article 81(1) EC to agents: agreements between undertakings

41. Article 81(1) EC applies not only to horizontal agreements between undertakings at the same stage of the production or distribution chain: the provision encompasses also vertical agreements between undertakings which operate at different levels of the economic process. [41]

42. Agency agreements constitute such a vertical relationship and therefore in principle can fall within Article 81(1) EC. However, this applies only if not only the principal but also the agent is to be regarded as an undertaking, that is that there is an agreement between two independent undertakings.

39 — Article 81(1) EC also applies to decisions by associations of undertakings and concerted practices. However, in the present case these two alternatives do not play any part, so that they will not be discussed in the remainder of this Opinion.

40 — For reasons of simplicity, in the following I use only the term 'agent'; the analysis is equally applicable to commission agents.

41 — Case 56/65 *Maschinenbau Ulm* [1966] ECR English Special Edition 235, at 248 f.; Case C-266/93 *Volkswagen and VAG Leasing* [1995] ECR I-3477, paragraph 17; Case C-306/96 *Javico International* v *Yves Saint Laurent Parfums* [1998] ECR I-1983, paragraph 11; see also Joined Cases 56/64 and 58/64 *Établissements Consten and Grundig-Verkauf* [1966] ECR English Special Edition 299, at 339, and Case 32/65 *Italy* v *Council and Commission* [1966] ECR English Special Edition 389, at 407: 'It is not possible to make a distinction where the Treaty does not make one'.

43. In the context of competition law, the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed, [42] and any activity consisting in offering goods and services on a given market is an economic activity. [43] In the case of agents, one must distinguish between two markets: on the one hand, the market on which the agent offers his agency services to potential principals, and on the other the market on which he offers his principal's goods or services to potential customers. [44]

(a) The position of agents in the market for agency services

44. As regards the agency services he offers, an agent is normally an independent economic operator and thus an undertaking for the purposes of Article 81(1) EC. Therefore, clauses in an agency agreement by which, for example, a principal transfers to his agent exclusive rights in relation to specified customers or territories (exclusive agency provisions) or, to the contrary, requires that the agent does not act on behalf of other principals (non-compete provisions) must be assessed by reference to Article 81 EC. [45] The case-law appears also to be orientated to this provision so far as it concerns cases in which an agent acts on behalf of more than one principal, [46] or acts partly for a principal and partly on his own account. [47]

45. If one applies this to the present case then exclusive purchasing clauses such as those in Cepsa's service-station contracts are to be regarded as agreements within the meaning of Article 81(1) EC. This is because service-station operators are thereby obliged to sell at their service-stations only petrol supplied by Cepsa. Thus, they cannot act on behalf of other oil companies, exactly as if bound by a non-compete provision. However, such clauses may be exempted from the prohibition in Article 81(1) EC by the relevant block exemption (Regulation No 1984/83 or Regulation No 2790/1999).

42 — This is settled case-law: see Case C-41/90 *Höfner and Elser* v *Macrotron* [1991] ECR I-1979, paragraph 21; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36; Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 107; *Enirisorse* (cited above, footnote 30), paragraph 28; and Case C-205/03 P *FENIN* [2006] ECR I-6295, paragraph 25.

43 — Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7; *Commission* v *Italy* (cited above, footnote 42), paragraph 36; *Cassa di Risparmio di Firenze* (cited above, footnote 42), paragraph 108; *Enirisorse* (cited above, footnote 30), paragraph 29; and *FENIN* (cited above, footnote 42), paragraph 25.

44 — This applies *mutatis mutandis* to the market on which the principal purchases a particular product.

45 — See the Commission notice of 24 May 2000, 'Guidelines on Vertical Restraints', OJ 2000 C 291, p. 1, paragraph 19.

46 — This is probably how one should understand paragraphs 20 and 21 of Case 311/85 *Vereniging van Vlaamse Reisbureaus* [1987] ECR 3801; see also *Binon* (cited above, footnote 37), paragraphs 20 and 21.

47 — See Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Coöperatieve Vereniging 'Suiker Unie' and Others* [1975] ECR 1663, in particular paragraphs 544 to 547, and *Volkswagen and VAG Leasing* (cited above, footnote 41), paragraph 19.

(b) The position of an agent in the market for his principal's products

46. By contrast, even if he is in law a separate entity, an agent is not necessarily to be regarded as an undertaking for the purposes of Article 81 EC as regards the transactions he negotiates on behalf of his principal, that is as regards the sale by the agent of the principal's goods or services on the relevant product market. Accordingly, agreements between an agent and his principal which contain provisions relating to the sale of such goods and services, for example restrictions on retail prices, are not necessarily to be assessed by reference to Article 81 EC and the block exemptions conferred by Community law. It is only to the extent that the agent acts as an independent economic entity on the market for the principal's goods and services without constituting an economic unit with the latter that Article 81 EC and the block exemptions are at all applicable.

(i) Allocation of risk between agent and principal (distinction between genuine and non-genuine agents)

47. The essential feature of the status of 'undertaking' is that a person is an independent economic operator who bears the risks associated with his activities. Thus, whether an agent assumes the risks of the transactions he obtains or whether these risks are borne instead by the principal is decisive. [48]

48. If an agent does not bear any of the risks involved in the transactions he obtains for his principal then he may be regarded as a *genuine agent*. Provisions such as fixed prices for sales to final consumers imposed by the principal on his agent for contracts he obtains are merely the corollary of the agent's general obligation to act in the interests of his principal and to comply with the latter's reasonable instructions. [49] In that situation the agent is not an independent economic operator (undertaking) on the market for the products concerned, notwithstanding that he is a separate legal entity, but on that market is in the same position as an employee [50] or assistant of the principal, or a subsidiary company. [51] To that extent the agent oper-

48 — To this effect, see *Suiker Unie* (cited above, footnote 47), paragraphs 538 to 542, in particular paragraph 541, and *Volkswagen and VAG Leasing* (cited above, footnote 41), paragraph 19. See also the Commission's Guidelines for Vertical Restraints (cited above, footnote 45), paragraph 13, and its Notice on exclusive dealing contracts with commercial agents (OJ 1962, No 139, paragraph 2921, Section I).

49 — See Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (OJ 1986 L 382, p. 17; 'Directive 86/653'), in particular Article 3, and the Commission's Notice on exclusive dealing contracts with commercial agents (cited above, footnote 48), section II.

50 — See for example Case C-22/98 *Becu and Others* [1999] ECR I-5665, paragraph 26.

51 — Case C-73/95 P *Viho* v *Commission* [1996] ECR I-5457, paragraphs 15 to 17.

ates as an auxiliary organ and forms an integral part of the principal's undertaking as such. [52] As regards selling the principal's products the two together constitute an economic unit and act in combination on the market. [53]

49. By contrast, if the agent bears at least some of the financial risks arising out of the transactions he negotiates, then the situation is one of *non-genuine agency*, in which case the agent's position is closer to an intermediary (independent broker) acting on his own account. In that case the agent is to be regarded as an undertaking on the market for his principal's goods and services, and his agreements with his principal as to how he is to obtain business are to be measured against Article 81 EC. [54]

50. As an aside it may be observed that at the oral hearing, the Commission submitted — contrary to its written observations — that an agent should always be regarded as an undertaking for the purposes of Article 81 EC. I am not persuaded by this submission. Specifically, this approach would have the consequence that — contrary to the usual definition [55] — sales agents who did not carry on any independent economic activity, and did not bear any risks, on the relevant product market, but simply carried out their principals' instructions, for example as regards the retail price for the latter's goods and services, would have to be regarded as undertakings. [56]

51. Finally, this purely theoretical problem has little practical relevance for the answer to the question referred to the Court. In result the Commission is also of the view that whether the restrictions agreed with the principal, for example as regards retail prices, can be prohibited by Article 81 EC depends on the allocation of risk between agent and principal in relation to the

52 — The Judgment in *Volkswagen and VAG Leasing* (cited above, footnote 41) should *not* be understood as meaning that whether the agent is assimilated into his principal's undertaking and whether the principal bears the risks of the transactions are *two different, independent criteria*. Admittedly, paragraph 19 of the Judgment states that, 'Representatives can lose their character as independent traders only if they do not bear any of the risks resulting from the contracts negotiated on behalf of the principal *and* they operate as auxiliary organs forming an integral part of the principal's undertaking' (emphasis added). However, in the market for the sale of the principal's goods, the agent's assimilation into the principal's undertaking and the principal's bearing of the transactional risks are two sides of the same coin. Accordingly, the case-law in which whether an agent is integrated has been given particular importance concerned less the market for the principal's products and more the different market for the agent's services as such (see above, points 44 and 45).

53 — To this effect see *Suiker Unie* (cited above, footnote 47), paragraphs 539, 541 and 542, and the Judgment of the Court in Case T-325/01 *DaimlerChrysler* [2005] ECR II-3319, paragraphs 85, 86 and 88. See also the Commission's Guidelines on Vertical Restraints (cited above, footnote 45), paragraph 13, and its Notice on exclusive dealing contracts with commercial agents (cited above, footnote 48).

54 — *Suiker Unie* (cited above, footnote 47), paragraphs 541 and 542, *Volkswagen and VAG Leasing* (cited above, footnote 41), paragraph 19, and *DaimlerChrysler* (cited above, footnote 53), paragraph 87.

55 — See above, point 43.

56 — This is also unclear in the Commission's Guidelines on Vertical Restraints (cited above, footnote 45), paragraph 15, where a proper agent on the one hand is described as an independent undertaking but on the other is regarded as not exercising any independent economic activity.

contracts obtained. Whether this risk allocation is itself held to be the basis for determining whether the agent is an undertaking or whether, as the Commission seems to suggest, it is not relevant until determining whether the agreement between principal and agent is anti-competitive, is immaterial. In both scenarios the allocation of risk assists in determining whether or not the prohibition in Article 81 EC as well as the possible exceptions in the block exemptions are applicable.

(ii) The criteria for determining the actual allocation of risk between agent and principal

52. Whether the agent bears the financial risk of the activities he undertakes for his principal or whether this risk is borne by the principal himself is to be answered having regard to all the circumstances of the individual case, and is for the national court. [57] None the less, the Court must give it guidance as to the interpretation of Community law in order to assist it to decide the main proceedings correctly. [58]

53. In that context, a formalistic approach which has regard to the designation of the intermediary as an agent, a commission agent, an independent dealer or a dealer is less decisive than an economic analysis of his role in the actual business relationship. Accordingly, the Court cannot provide the national court with an exhaustive list of criteria and can only identify factors which in a case such as the present permit conclusions to be drawn as to how risk is allocated between the parties. [59]

54. In this connection two fundamental types of risk are important: first, the *product-specific risk* relating to the principal's goods, and second the *transaction-specific investment risk* relating to the sale of those products.

55. The *product-specific risk* comprises responsibility for the transport and storage costs of the goods, liability for any damage caused by the goods, and the risk that no buyer is found for the goods (sales risk).

56. The starting point for assessing this product-specific risk should be the owner-

57 — On this point, see the case-law cited above, footnote 37.

58 — On this point, see the case-law cited above, footnote 38.

59 — To this effect see the Commission's Guidelines on Vertical Restraints (cited above, footnote 45), paragraphs 16 and 17.

ship of the goods to be sold. [60] If the goods remain the property of the principal until they are acquired by the third party, as Cepsa asserts, this indicates that the risk too remains with the principal. By contrast, if ownership of the goods passes at an earlier time to the agent, this suggests that he also bears the risk bound up with the goods. In the present case all that is known is that the service-station operators assume the risk in the petrol as soon as it is pumped into their tanks. This allows the conclusion that the service-station operators are in a position similar to that of owner and suggests that they assume the product-specific risk prior to the sale of the petrol to the final consumer.

57. In addition to ownership of the goods, the question as to who bears the cost of their transport can also provide an indication as to the product-specific risk. [61] To the extent that the agent bears the costs of transport, he also bears the risk bound up in the goods. The order making the reference does not give any information on this point. However, Cepsa claims that all the transport costs are borne by it and none by the owners of the service-stations it supplies. It is for the national court to examine this claim. In doing so it must ensure in particular that in practice the transport costs are not *indirectly* shifted to service-station operators by means of the payment due to Cepsa for the petrol. It is only if such an examination shows that Cepsa's claim as regards transport costs is correct that it can be concluded that in this respect the product-specific risk is with it and not with the service-station operators.

58. In addition there must be investigated who bears the costs of storing the goods and who is liable for any damage that is caused to the goods or is caused to third parties by the goods. [62] The national court states only that the service-station operators are obliged to store the petrol properly and are liable to Cepsa and to third parties for any loss, contamination or adulteration which may affect the products and for any damage arising as a result thereof. However, it is not clear who bears the costs of storing the petrol and whether the service-station operator is liable for damage regardless of his own fault or, as Cepsa claims, only for his own fault. [63] If the cost of storing the petrol is borne by the service-station operator and

60 — To this effects see also the Commission's Guidelines on Vertical Restraints (cited above, footnote 45), paragraph 16.

61 — See also the Commission's Guidelines on Vertical Restraints (cited above, footnote 45), paragraph 16, first indent.

62 — See also the Commission's Guidelines on Vertical Restraints (cited above, footnote 45), paragraph 16, third and sixth indents; as regards storage of goods see its Notice on exclusive dealing contracts with commercial agents (cited above, footnote 48), section I.

63 — In any event, Cepsa's claim — which the Confederation disputes — that to date there has been no case of liability arising is irrelevant. What is decisive as regards the relationship between Cepsa and the service-station operators it supplies is who bears the risk of liability for any losses which may arise, not whether that risk has ever materialised before.

he is liable for damage regardless of whether he is at fault, this suggests that he bears the product-specific risk.

59. Finally, it depends also on who assumes the sales risk for the principal's goods, that is the risk that no buyer is found for the goods. [64] In that regard the national court states only that the service-station operators are obliged to pay Cepsa for the petrol nine days after delivery, and that they receive the commission due to them from Cepsa at the same time. A provision of this type, which is not directly linked to the amount of petrol actually sold during a specified period, suggests that the service-station operators bear at least some of the sales risk and are treated as independent dealers.

60. The sales risk would be allocated differently if the turnover time for the petrol delivered by Cepsa never exceeded nine days, [65] that is if the fuel was never stored at the service stations for longer than nine days and at the time of the accounting with Cepsa had already all been sold. In that event, in making payments to Cepsa, service-station operators would simply be passing on the income the agent actually received from the transactions concluded for his principal, without bearing any sales risk. Before the Court the Confederation and Cepsa described and analysed the facts of the main proceedings differently in this regard.

61. Likewise, the sales risk would remain with Cepsa if it were *realistically* possible for a service-station operator not to include in the payment to Cepsa any part of the petrol supplied [66] which had not yet been sold to third parties at the time of the accounting with Cepsa, [67] so that it would be necessary to pay only for petrol which had actually been sold to final consumers within the nine-day period. However, on that point the Confederation stated to the Court that the accounting system Cepsa used did not allow for such deductions from the payment due nine days after the delivery of the petrol, and for tax reasons this would be difficult to apply in any event. It is for the national court to examine this claim.

64 — See also the Commission's Guidelines on Vertical Restraints (cited above, footnote 45), paragraph 16, third and seventh indents.

65 — Simply having regard to the average time it took to sell the petrol supplied in all service stations supplied by Cepsa would not be sufficient in this context, given that the turnover time can vary significantly depending on the location and size of the service station and how many customers it has.

66 — That is, so much of the petrol delivered by Cepsa which the service station has not been able to sell in the nine days between the delivery by Cepsa and the accounting with Cepsa.

67 — In this connection it is neither necessary nor indeed realistic to require that the unsold petrol is physically returned to Cepsa and taken away by it. Simply postponing the payment to Cepsa for the petrol which has not been sold until such time as it is actually sold to a final consumer would have the effect of keeping the sales risk with Cepsa.

62. In addition to the product-specific risk which has just been considered, the risks arising out of transactions negotiated by the agent include *transaction-specific investment risks*. These are in particular investment in infrastructure (in the case of service stations, an example is the construction of fuel tanks) and advertising in connection with the sale of the principal's goods. [68] To the extent that these costs are borne by the agent, he participates in a risk connected to the transactions negotiated for the principal. There is no information at all on this point in the order making the reference. It is for the national court to make the necessary findings in this regard.

63. In summary, in the present case there cannot be excluded the possibility that the criteria identified in relation to the product-specific risk and the transaction-specific investment risk give a mixed picture. In that connection it is to be recalled that those criteria provide merely a basis for allocating risk between agent and principal. As mentioned, the issue depends on an analysis of all the circumstances of the individual case as a whole.

64. Even if the agent bears only part of the costs and obligations specified, his position becomes closer to that of an independent dealer, such that he can no longer be regarded as forming an economic unit with his principal but must be considered to be an independent undertaking on the market for the latter's products; by contrast, if the agent bears none of the risks bound up with the transactions he negotiates, he may be regarded as a proper agent who is merely an auxiliary to his principal. [69] The latter finding is appropriate also where the agent bears the specified risks only to an insignificant extent. [70] This is because in economic terms it makes no difference whether an agent *does not* bear, or *bears only to an insignificant extent*, the risks arising out of the transactions he negotiates.

65. Apart from that, the requisite evaluation does not depend on the *commission risk*. In the classic agency relationship, the agent's remuneration depends wholly or partly on his performance, and in particular on the number and/or value of the transactions he negotiates. [71] Thus, the agent normally bears

68 — See also the Commission's Guidelines on Vertical Restraints (cited above, footnote 45), paragraph 16, second and fifth indents. The importance of the investment made within the framework of service-station contracts in order to bring the service station into line with the image of the make sold is emphasised for example in Case C-214/99 *Neste Markkinointi* v *Yötuuli* [2000] ECR I-11121, paragraph 34.

69 — *Volkswagen and VAG Leasing* (cited above, footnote 41), paragraph 19, and *DaimlerChrysler* (cited above, footnote 53), paragraph 87; see also the Commission's Guidelines on Vertical Restraints (cited above, footnote 45), paragraphs 15 and 17.

70 — To this effect see also the Commission's Guidelines on Vertical Restraints (cited above, footnote 45), paragraphs 15 and 17.

71 — Article 6(2) of Directive 86/653. See also the Commission's Guidelines on Vertical Restraints (cited above, footnote 45), paragraph 15 *in fine* and paragraph 16, seventh indent.

the commission risk whether he is a genuine or non-genuine agent.

(iii) Consequences of the allocation of risk as regards the assessment for competition law purposes of price-fixing provisions in service-station agreements

66. To the extent that the analysis of the risk allocation leads to the conclusion that the service-station operators supplied by Cepsa act as its proper agents and therefore constitute an economic unit with it, there is no agreement between independent undertakings and the disputed provisions in the service-station contracts are accordingly not within the scope of Article 81 EC at all and thus do not fall within the scope of the block exemptions in Regulation No 1984/83 or Regulation No 2790/1999. It follows that the binding retail prices and other requirements laid down in those contracts cannot be assessed by reference to those provisions. [72]

67. By contrast, if the risk they bear means that the service-station operators are to be regarded as improper agents or independent dealers and therefore as independent economic operators then the service-station contracts are to be assessed by reference to Article 81 EC, including the provisions of the relevant block exemptions.

68. As regards the latter scenario, the following observations should be made for the sake of completeness.

69. First, it is to be observed that Article 81 EC and therefore the block exemptions apply only to agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition. According to settled case-law, [73] one must have regard not only to the individual agency contract but also to the whole economic and legal context in which the contract exists. In particular, one must take into account that an individual contract, when taken together with other contracts of the same type, may have a cumulative effect on competition. Accordingly, there must be considered how such a contract, taken together with a 'bundle' of other contracts of the same type, affects the opportunities of national competitors or those from other

72 — See also the Commission's Guidelines on Vertical Restraints (cited above, footnote 45), paragraph 15 *in fine* and paragraph 18, in particular the third indent.

73 — Case 23/67 *Brasserie de Haecht* v *Consorts Wilkin-Janssen* [1967] ECR English Special Edition 407, pages 415 and 416; *Suiker Unie* (cited above, footnote 47), paragraph 549; Case C-234/89 *Delimitis* v *Henninger Bräu* [1991] ECR I-935, in particular paragraphs 13 to 15, 19 and 20; Case C-230/96 *Cabour and Nord Distribution Automobile* v *Arnor 'SOCO'* [1998] ECR I-2055, paragraph 50; and *Neste* (cited above, footnote 68), paragraphs 25 to 27.

Member States to gain access to the relevant market or to increase their market share.

70. So far as national law simply refers to Community law in relation to purely internal situations, it is also irrelevant whether the disputed service-station agreements may affect trade between Member States. [74] In such a case too what is to be assessed is not necessarily the effect of service-station contracts on the Common Market but on the market which is relevant according to national (Spanish) competition law.

71. Finally, as regards the block exemptions under Article 81(3) EC, it is to be observed that with effect from 1 January 2000 Regulation No 2790/1999 replaced Regulation No 1984/83. In respect of agreements already in force on 31 May 2000 which did not satisfy the conditions for exemption provided for in Regulation No 2790/1999 but which did satisfy those provided for in Regulation No 1984/83, a transitional period to 31 December 2001 was granted.

72. What meaning is to be given to the reference in Article 1(1)(B) of Royal Decree No 157/1992 to Regulation No 1984/83 for the period from 1 June 2000 is a question of national law which is solely for the national court to decide. [75]

73. In any event, neither the old block exemption under Regulation No 1984/83 nor the new block exemption under Regulation No 2790/1999 exempts service-station contracts which fix retail prices for service-station operators from the prohibition in Article 81(1) EC. [76] Nor can such an exemption be read into these Regulations by interpreting them broadly. [77] In addition, Article 3 of the new block exemption under Regulation No 2790/1999 disapplies it where market share exceeds 30%.

74 — Any potential effect on trade between Member States plays a role only where Community law is applicable directly (and not indirectly by virtue being referred to by national law); as regards the obligation to apply Community law and national law in parallel where necessary, see Article 3(1) of Regulation No 1/2003; as regards the issue of the effect on trade between Member States see also Case C-475/99 *Amublanz Glöckner* [2001] ECR I-8089, paragraphs 47 ff., and in particular paragraph 48, and Case 161/84 *Pronuptia de Paris* v *Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 353, paragraph 26, and also the Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ 2004 C 101, p. 81.

75 — See *Dzodzi* (cited above, footnote 17), paragraphs 41 and 42, and *Leur-Bloem* (cited above, footnote 17), paragraph 33.

76 — As regards Regulation No 2790/1999 this follows from the express provision in Article 4(1)(a). The same applies within the scope of application of Regulation No 1984/83 when Articles 10 to 13, which relate specifically to service-station contracts, are considered as a whole, given that these for example permit exclusive purchasing agreements (see in particular Articles 10 and 11(a)) but do not provide for price-fixing (see the introductory words in Article 11: 'Apart from the obligation referred to in Article 10, no restriction on competition shall be imposed on the reseller other than ...').

77 — To that effect see Case C-70/93 *Bayerische Motorenwerke* v *ALD Auto-Leasing D* [1995] ECR I-3439, paragraph 28, and *Cabour* (cited above, footnote 73), paragraph 30.

VI — Conclusion

74. On the basis of the foregoing considerations I would suggest to the Court that it answer the question posed by the Tribunal Supremo as follows:

(1) Exclusive purchasing agreements between an oil company and the operators of service stations which it supplies, binding the latter to sell exclusively that oil company's motor-vehicle and other fuels, are to be assessed by reference to Article 81 EC, regardless of whether the contractual relationship between the oil undertaking and the service-station operator is structured as a commission or agency contract.

Since 1 June 2000 such agreements may be lawful in terms of Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices.

Before then, such agreements could be exempted from the prohibition in Article 85(1) of the EC Treaty (now Article 81(1) EC) by Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements.

(2) Agreements between an oil company and the operators of service-stations which it supplies, subjecting the latter to obligations in relation to retail prices, conditions, and sales and business methods for the oil company's motor-vehicle and other fuels, are to be assessed against Article 81 EC if the service-station operator in question either sells the motor-vehicle and other fuels to third parties on his own account or if in any event — as a commission agent or as an agent — he has to bear the risks bound up with sales to third parties to a not insignificant degree.

Subject to the same conditions such agreements may be assessed by reference to Regulation (EC) No 2790/1999 from 1 June 2000 onwards and before that date by reference to Regulation (EEC) No 1984/83.