JUDGMENT OF THE COURT (Third Chamber)

11 September 2008 *

In Case C-279/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Audiencia Provincial de Madrid (Spain), made by decision of 16 June 2006, received at the Court on 27 June 2006, in the proceedings

CEPSA Estaciones de Servicio SA

v

LV Tobar e Hijos SL,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, U. Lõhmus (Rapporteur), J. Klučka, A. Ó Caoimh and P. Lindh, Judges,

* Language of the case: Spanish.

Advocate General: P. Mengozzi,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 7 June 2007,

after considering the observations submitted on behalf of:

— CEPSA Estaciones de Servicio SA, by A. Martínez Sánchez, J. Folguera Crespo and F. Lorente Hurtado, abogados,

— LV Tobar e Hijos SL, by A. Hernández Pardo, M. Gaitán Luján and S. Beltrán Ruiz, abogados,

— the Commission of the European Communities, by K. Mojzesowicz, E. Gippini Fournier and F. Castillo de la Torre, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 March 2008,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Article 81 EC and Articles 10 to 13 of Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article [81](3) of the Treaty to categories of exclusive purchasing agreements (OJ 1983 L 173, p. 5), as amended by Commission Regulation (EC) No 1582/97 of 30 July 1997 (OJ 1997 L 214, p. 27) ('Regulation No 1984/83').

2 The reference has been made in the course of proceedings between CEPSA Estaciones de Servicio SA ('CEPSA'), appellant in the main proceedings, and LV Tobar e Hijos SL ('Tobar'), respondent in the main proceedings, regarding the non-performance by Tobar of the exclusive purchasing agreement concluded between those two companies.

Community legislation

3 Regulation No 1984/83 excluded from the scope of Article 85(1) of the EC Treaty (now Article 81(1) EC) certain categories of exclusive purchasing agreements and concerted practices regarded as normally satisfying the conditions laid down in paragraph 3 of that article, on the ground that they led in general to an improvement in distribution.

4 Recitals 5, 6, 13, 15 and 17 in the preamble to that regulation were worded as follows:

'(5) … the exclusive purchasing agreements defined in this Regulation lead in general to an improvement in distribution; … they enable the supplier to plan the sales of his goods with greater precision and for a longer period and ensure that the reseller's requirements will be met on a regular basis for the duration of the agreement; … this allows the parties to limit the risk to them of variations in market conditions and to lower distribution costs;

(6) … such agreements also facilitate the promotion of the sales of a product and lead to intensive marketing because the supplier, in consideration for the exclusive purchasing obligation, is as a rule under an obligation to contribute to the improvement of the structure of the distribution network, the quality of the promotional effort or the sales success; … at the same time, they stimulate competition between the products of different manufacturers; … the appointment of several resellers, who are bound to purchase exclusively from the manufacturer and who take over sales promotion, customer services and carrying of stock, is often the most effective way, and sometimes the only way, for the manufacturer to penetrate a market and compete with other manufacturers already present; …;

…

(13) … [beer supply contracts and service-station contracts] are generally distinguished by the fact that, on the one hand, the supplier confers on the reseller special commercial or financial advantages by contributing to his financing, granting him or obtaining for him a loan on favourable terms, equipping him with a site or premises for conducting his business, providing him with equipment or fittings, or undertaking other investments for his benefit and that, on the other hand, the reseller enters into a long-term exclusive purchasing

obligation which in most cases is accompanied by a ban on dealing in competing products;

…

(15) … the commercial and financial advantages conferred by the supplier on the reseller make it significantly easier to establish, modernise, maintain and operate premises used for the sale and consumption of drinks and service stations; …;

…

(17) … the exclusive purchasing obligation for lubricants and related petroleum-based products can be accepted only on condition that the supplier provides for the reseller or finances the procurement of specific equipment for the carrying out of lubrication work; …'

5 The special provisions in respect of agreements concluded with service-station operators ('service-station agreements') were laid down in Articles 10 to 13 of Regulation No 1984/83.

6 Under Article 10 of that regulation:

'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.'

7 Article 11 of that regulation provided:

'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 undertakings 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 realised 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.'

8 Article 12 of Regulation No 1984/83 set out the clauses and contractual obligations which precluded the application of Article 10, including the fact that the agreement had been concluded for an indefinite duration or for a period of more than 10 years.

9 Article 13 of that regulation provided that Articles 2(1) and (3), 3(a) and (b), 4 and 5 were to apply *mutatis mutandis* to service-station agreements.

10 Regulation No 1984/83 expired on 31 December 1999. On 1 January 2000 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 (OJ 1999 L 336, p. 21) entered into force.

11 Article 3(1) of Regulation No 2790/1999 provides:

'Subject to paragraph 2 of this Article, the exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services.'

12 Article 4 of that regulation provides that the exemption from the prohibition laid down in Article 81(1) EC 'shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier's imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;

…'

13 Under Article 5(a) of that regulation, the exemption provided for in Article 2 thereof does not apply to any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years. A non-compete obligation which is tacitly renewable beyond a period of five years is to be deemed to have been concluded for an indefinite duration.

14 Pursuant to Article 12 of Regulation No 2790/1999, the exemption provided for in inter alia Regulation No 1984/83 was to continue to apply until 31 May 2000. The prohibition laid down in Article 81(1) EC did not apply, during the period from 1 June 2000 to 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 satisfied those provided for in Regulation No 1984/83.

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

15 On 7 February 1996, the parties to the main proceedings concluded a 'contract with a service station for use of brand name and image, technical and commercial assistance and supply on a commission-agent basis' ('the contract at issue in the main proceedings').

16 Pursuant to that contract, Tobar undertook to purchase exclusively from CEPSA motor-vehicle and other fuels, as well as lubricants and other related products ('petroleum products'), for resale in its service station in accordance with the retail prices, conditions and sales and business methods stipulated by that supplier. The contract was concluded for a period of 10 years, which could be extended for successive five-year periods by express agreement in writing on notice of at least six months. The exclusive purchasing obligation in respect of those products was accompanied by 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.

17 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 value added tax ('VAT'), the amount of the commission, including VAT.

18 As regards the clauses relating to the allocation of costs and risks, it is apparent from the order for reference that 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.

19 For its part, 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. However, Tobar was required to provide a 'guarantee on first demand' in favour of CEPSA to cover the value of the technical installations.

20 On 2 November 2001 CEPSA sent a letter to Tobar authorising it, henceforth, to lower the sale prices of the petroleum products but without reducing CEPSA's receipts.

21 In the course of 2003, after sending several letters to CEPSA, Tobar ceased obtaining supplies from CEPSA and concealed CEPSA's logo on the service-station installations.

22 During the course of 2004, Tobar brought an action against CEPSA for annulment of the contract at issue in the main proceedings, claiming that it was incompatible with Article 81 EC, 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.

23 CEPSA contested the merits of that action and counterclaimed, demanding performance of that contract or its rescission if its performance was impossible, whilst demanding compensation for the loss suffered.

24 On 29 July 2005, the Juzgado de Primera Instancia No 3 de Madrid (Court of First Instance No 3, Madrid) (Spain) annulled that contract on the ground that it was not compatible with Article 81(1) EC or with Regulations No 1984/83 and No 2790/1999. CEPSA appealed against that judgment to the referring court.

25 In those circumstances, the Audiencia Provincial de Madrid (Provincial Court, Madrid) (Spain) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) (a) Is Article 81(1) EC to be construed as meaning that an exclusive supply contract under a brand name concluded in 1996 by a distributor of petroleum products and the operator of a service station requiring the latter to sell exclusively the supplier's motor-vehicle and other fuels for a fixed period, and to undertake not to sell such products supplied by other distributors, falls within the ambit of that provision in so far as that obligation involves a no-competition agreement, even though that contract might, given its commercial significance, be regarded as an agency contract?

(b) If the contract does fall within the ambit of Article 81(1), is it possible to claim the benefit of exemption from the prohibition if it satisfies the requirements of Regulation No 1984/83, especially those relating to duration?

(c) If that should be the case, does the fact that Articles 10 and 12 of that regulation permit the duration of the no-competition agreement to exceed five years as consideration for the granting of commercial or financial

advantages by the supplier to the service-station operator, require those commercial or financial advantages to be substantial or is it enough that they are not insignificant? Can those provisions be interpreted as meaning that such commercial or financial advantages have been conferred in exclusive supply contracts under a brand name in which the supplier of petroleum products bears the costs of installing and maintaining its brand image in the service station, or transfers fuel-tanks and -pumps which the service-station operator may not use without the authorisation in writing of the sole supplier for products not supplied by the latter and which it must hand back when it ceases to use them as authorised, and the value of which is covered by the guarantee on first demand that the service-station operator has provided in favour of the supplier?

(d) If that exemption should not be applicable, does the automatic nullity provided for by Article 81(2) EC affect the contract in its entirety?

(2) (a) Is Article 81(1) EC to be interpreted as meaning that an exclusive supply contract under a brand name, such as that in the present case, in so far as it provides that the service-station operator must sell motor-vehicle and other fuels supplied by the exclusive supplier at the retail price fixed by the supplier, is in theory caught by the prohibition of restriction of competition because it fixes sale prices, taking account of its economic significance and in particular of the risks assumed by the service-station operator and its contribution to the costs connected with the supply of goods under the contract or of the sales promotion of those goods, given the following relevant points:

(i) The service-station operator undertakes to sell exclusively the supplier's lubricants, vehicle products and motor-vehicle and other fuels, in accordance with the retail prices, conditions and sales and business methods stipulated by the supplier for a period of 10 years, which may be extended for successive periods each of five years by express agreement in writing on notice of at least six months.

(ii) The service-station operator assumes the risk associated with the motor-vehicle and other fuels as soon as they are received from the supplier in the storage tanks, including the risk of discrepancies in volume. From the moment of receipt 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, 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.

(iii) 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, on presentation on the date of the first supply of a bank guarantee for the total price of the supply, equivalent to 15 days. If it should fail to pay, apart from the possibility that the supplier might enforce the guarantee presented by the service-station operator, the latter would be required to pay for supplies before they were delivered to the service station. Payment is made by the service-station operator to the supplier by deducting from the retail price fixed by the distributor, including VAT, the amount of "commission" due to the service-station operator, plus the corresponding VAT. The fuel supplied is sold on average in a period of much less than the nine days provided for payment by the applicant (respondent in these proceedings) to the defendant (appellant in these proceedings). The distributor debits or credits the service station monthly, depending on the upward or downward variation in the prices fixed for the fuel delivered. The cost of transport is borne by the supplier.

(iv) The operator of the service station guarantees and is responsible for those customers who have signed up for the use of the credit

card created and managed by the group of companies to which the supplier belongs, charges the sales made by means of the card one month after they are made, finances a small part of the cost of customers' use of the fuel distributor's loyalty card and assumes the risk of non-payment by those customers who have been allowed direct credit.

(v) The supplier of the petroleum products bears the costs of installing and maintaining its brand image in the service station, and also transfers the fuel-tanks and pumps which the operator of the service station may not use, without the supplier's authorisation in writing, to sell products not supplied by that supplier, and which are valued precisely at the amount of the bank guarantee that the service-station operator has presented in favour of the supplier?

(b) If so, on a proper construction of Regulation [No 1984/83], and in particular of Articles 10 to 13 thereof, do those provisions catch within their scope a contract of that kind with the result that the prohibition laid down in Article 81(1) EC is not applicable if the contract satisfies the requirements for exemption contained in those articles of the regulation?

(c) In that case, is Article 11 of that regulation to be construed as meaning that, if the contract at issue imposes more than one restriction on competition, and, moreover, if it stipulates no competition by providing for exclusive supply by one supplying undertaking, sale prices are fixed by the supplier? Does the authorisation given by the [supplier] to the service-station [operator] to lower its sale price without affecting [that supplier's] receipts, which took place in November 2001, make it possible to regard the contract as valid?'

The questions referred

Preliminary observations

26 By its reference for a preliminary ruling, the referring court submits two questions to the Court, each one of those questions being subdivided into several parts, which envisage different hypotheses according to how the contract at issue in the main proceedings is categorised. The first question is submitted in the event that that contract is to be categorised as an agency contract, whilst the second question is based on the premiss that that contract is concluded between two autonomous undertakings.

27 The referring court essentially asks whether the prohibition laid down in Article 81(1) EC and, possibly, the block exemption established by Regulation No 1984/83 are applicable in the light of the facts of the case in the main proceedings. However, by its Questions 1(a) and 2(a), that court does not seek to obtain from the Court of Justice an interpretation of the concept of agreements between undertakings within the meaning of Article 81(1) EC in order to be able to assess, subsequently, whether the contract at issue in the main proceedings falls within the scope of that provision, but requests the Court to carry out that assessment itself.

28 It must be recalled that under Article 234 EC, which is based on a clear separation of functions between national courts and tribunals and the Court of Justice, the latter is empowered to rule on the interpretation or validity of Community provisions only on the basis of the facts which the national court or tribunal puts before it, and that it is, however, for the national court or tribunal to apply the rules of Community law to a specific case. Consequently, the Court has no jurisdiction to give a ruling on the facts in the main proceedings or to apply the rules of Community law which it has interpreted to national measures or situations, since those questions are matters for the exclusive jurisdiction of the national court or tribunal (see, inter alia, Case C-318/98 *Fornasar and Others* [2000] ECR I-4785, paragraph 32, and Case C-421/01 *Traunfellner* [2003] ECR I-11941, paragraph 21).

29 It is apparent from the order for reference that the request for interpretation submitted to the Court is based on the claims of the parties to the main proceedings, the merits of which have not yet been established by the national court. Similarly, in their written and oral submissions made to the Court, the parties to the main proceedings expressed significant disagreement as to the facts of the dispute before the referring court.

30 In this respect, it must also be recalled that, within the framework of proceedings under Article 234 EC, the Court cannot resolve a dispute concerning the facts. Such a dispute, like any other assessment of the facts involved, is within the province of the national court (see Case 36/79 *Denkavit Futtermittel* [1979] ECR 3439, paragraph 12, and Joined Cases C-211/03, C-299/03 and C-316/03 to C-318/03 *HLH Warenvertrieb and Orthica* [2005] ECR I-5141, paragraph 96).

31 However, it is for the Court to provide the referring court with an answer which will be of use to it and enable it to determine the case before it (see, inter alia, Case C-98/06 *Freeport* [2007] ECR I-8319, paragraph 31).

32 Since the categorisation of the contract at issue in the main proceedings in the light of the rules on competition is essential for the purpose of deciding the case before the referring court, it is for the Court to recall, first, the criteria relevant for such a categorisation (Questions 1(a) and 2(a)). Second, it is necessary to analyse whether the block exemption is capable of applying to that contract, in the light of the contract's clauses relating to the duration of its performance (Questions 1(b) and (c) and Question 2(b)) and the fixing of the retail price (Question 2(c)). Third, the question arises as to possible nullity of the contract pursuant to Article 81(2) EC (Question 1(d)).

The existence of an agreement between undertakings within the meaning of Article 81(1) EC

33 By its Questions 1(a) and 2(a), the referring court asks whether Article 81(1) EC must be interpreted as applying to an exclusive supply contract for petroleum products having the characteristics of that at issue in the main proceedings, first, in the event that that contract is regarded as having been concluded between two independent undertakings, by reason of the fact that the retail price of those products is fixed by the supplier, and, second, 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.

34 In this respect, it must be recalled that a similar question was already submitted to the Court in Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987 ('*CEEES*'). In that case, just as in the case which has given rise to the present reference for a preliminary ruling, the contractual relationship between service-station operators and their supplier, namely CEPSA, was at issue. According to the actual wording of the order for reference, the contract at issue in the main proceedings is identical to those which were the subject of the referred question examined by the Court in *CEEES*.

35 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 85 of the Treaty only where the operator is regarded as an independent economic operator and there is, consequently, an agreement between two undertakings.

36 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).

37 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.

38 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).

39 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).

40 It must, however, be pointed out that the fact that the operator bears only a negligible share of the risks does not render Article 81 EC 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.

41 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 81 EC. 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 81(1) EC is therefore applicable to those clauses.

42 If an examination of the risks leads to the conclusion that there is an agreement between undertakings within the meaning of Article 81 EC, 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 81(1)(a) EC 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).

43 Moreover, as regards in particular exclusive purchasing agreements, the case-law of the Court of Justice should be recalled, according to which, even if those agreements do not have as their object the restriction of competition within the meaning of Article 81 EC, it is nevertheless necessary to ascertain whether they have the effect of preventing, restricting or distorting competition. The effects of an exclusive purchasing agreement have to be assessed in the economic and legal context in which the agreement occurs and where it may combine with other agreements to have a cumulative effect on competition. It is therefore necessary to analyse the effects of such an agreement, taken together with other agreements of the same type, on the opportunities of national competitors or those from other Member States to gain access to the relevant market or to increase their market share (see Case C-234/89 *Delimitis* [1991] ECR I-935, paragraphs 13 to 15, and Case C-214/99 *Neste* [2000] ECR I-11121, paragraph 25).

44 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 81(1) 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 at issue in the main proceedings has the effect of preventing, restricting or distorting competition within the meaning of Article 81 EC.

The maximum duration of the agreement provided for in Regulation No 1984/83

45 By its Question 1(b) and (c), and by its Question 2(b), the referring court essentially asks whether an exclusive supply agreement, such as that at issue in the main proceedings, is capable, in the event that if falls within the scope of Article 81 EC, of benefiting from a block exemption such as provided for in Regulation No 1984/83, subject to its compliance with the conditions laid down by that regulation and, in particular, the maximum duration of the agreement and the granting of commercial and financial advantages.

46 That court raises the question, in particular, first, whether, in order to comply with the maximum duration condition, Article 10 of Regulation No 1984/83 must be interpreted as meaning that it requires, for the application of the exemption to service-station agreements, that the advantages granted to the service-station operator by the supplier are substantial or whether it is enough that they are not insignificant and, second, whether the advantages granted by the contract at issue in the main proceedings are sufficient in this respect.

47 It should be recalled, as a preliminary point, that Regulation No 1984/83 provided for the application of Article 85(3) of the Treaty to certain categories of exclusive purchasing agreements concluded between two undertakings for the resale of products capable of being caught by Article 85(1) of the Treaty.

48 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 81 EC. 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.

49 Article 12(1)(c) of Regulation No 1984/83 provided that, by derogation from the maximum duration of five years, which is generally applicable to exclusive purchasing agreements of short and medium duration in all sectors of the economy, the maximum duration applicable to service-station agreements was ten years. As regards the special conditions applicable to those agreements, Article 10 of that regulation provided that the reseller was to agree with the supplier to purchase only from the supplier, such an exclusive purchasing obligation being concluded 'in consideration for the according of special commercial or financial advantages'.

50 It should be noted that the Spanish version of that article 10 did not specify the nature of those commercial or financial advantages, unlike all the other language versions, which used the term 'specific' or 'special' to describe those advantages. However, according to settled case-law, the different language versions of a provision of Community law must be uniformly interpreted and, in the case of divergence between those versions, the relevant provision must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see Case C-1/02 *Borgmann* [2004] ECR I-3219, paragraph 25; Case C-227/01 *Commission* v *Spain*

[2004] ECR I-8253, paragraph 45, and judgment of 16 March 2006 in Case C-332/04 *Commission* v *Spain*, paragraph 52).

51 As regards the scheme and purpose of the Community rules at issue, it was apparent from recital 13 in the preamble to Regulation No 1984/83 that service-station agreements are generally distinguished by the fact that the supplier confers on the reseller special commercial or financial advantages by contributing to his financing, granting him or obtaining for him a loan on favourable terms, equipping him with a site or premises for conducting his business, providing him with equipment or fittings, or undertaking other investments for his benefit.

52 Moreover, recital 15 in the preamble to that regulation stated that the commercial and financial advantages conferred by the supplier on the reseller make it significantly easier to establish, modernise, maintain and operate premises used for service stations. Recital 17 in the preamble stated, by way of example, that an exclusive purchasing obligation for lubricants and related petroleum-based products can be accepted only on condition that the supplier provides for the reseller or finances the procurement of specific equipment for the carrying out of lubrication work.

53 The purpose of the exemption from the prohibition laid down in Article 81(1) EC is also apparent from the third indent of Article 81(3) EC, according to which the provisions of that paragraph 1 are inapplicable to any agreement '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'. Recitals 5 and 6 in the preamble to Regulation No 1984/83 stated, furthermore, as regards in particular exclusive purchasing agreements, that such agreements lower distribution costs, limit the risk of variations in market conditions, facilitate the promotion of the sales of a product, improve the structure of the distribution network and the quality of the sales service and are the most effective way, and sometimes the only way, to penetrate a market.

54 It follows that the concept of 'special commercial or financial advantages', referred to in Article 10 of Regulation No 1984/83, must be interpreted as meaning that those advantages are indeed specific to the contractual relationship, but that they must also be substantial in order to justify an exclusivity of supply of 10 years. Those advantages must be such as to lead to an improvement in distribution, to facilitate the establishment or modernisation of the service station and to lower the distribution costs.

55 As regards the question whether the commercial or financial advantages, such as those granted to Tobar in the case in the main proceedings, are capable of justifying the duration of the exclusivity of supply of 10 years, it is necessary to recall the case-law referred to in paragraph 30 of this judgment, according to which any assessment of the facts is within the province of the national court. It is therefore for the referring court to appraise the significance of the investments made by CEPSA, taking account of the guidance set out in paragraphs 51 to 54 of this judgment.

56 It must, however, be pointed out that it is apparent from the order for reference that the scope *ratione temporis* of Regulation No 1984/83 does not entirely cover the period of performance of the contract at issue in the main proceedings, since that contract was concluded on 7 February 1996 for a duration of 10 years and it was only in the course of 2003 that Tobar ceased to perform its contractual obligations. Regulation No 1984/83 expired on 31 December 1999, but the exemption provided for in that regulation continued to apply until 31 May 2000 pursuant to Regulation No 2790/1999, which provided, furthermore, for a transitional period until 31 December 2001, during which the prohibition laid down in Article 81(1) EC did not apply in respect of agreements in force on 31 May 2000 which did not satisfy the conditions for exemption provided for in that regulation but which did satisfy those provided for in Regulation No 1984/83. Accordingly, in order to give a useful answer to the referring court, it is necessary also to examine the applicable conditions for exemption pursuant to Regulation No 2790/1999.

57 Regulation No 2790/1999, which is applicable to categories of vertical agreements and concerted practices, does not contain any special provisions relating to service-station agreements. In accordance with Article 3(1), the exemption provided for in that regulation is to apply on condition that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods

or services. Unlike Regulation No 1984/83, Regulation No 2790/1999 provides, in Article 5(a), that the exemption provided for in Article 2 is not to apply to any of the direct or indirect non-compete obligations, 'the duration of which is indefinite or exceeds five years' and that 'a non-compete obligation which is tacitly renewable beyond a period of five years is to be deemed to have been concluded for an indefinite duration'.

58 If the referring court were to arrive at the conclusion that the duration of the exclusive supply agreement satisfies the condition on maximum duration laid down in Article 12(1)(c) of Regulation No 1984/83, it would still remain for that court to ascertain whether that agreement also satisfied the maximum duration allowed under Regulation No 2790/1999, namely five years.

59 In this respect, it is important to determine whether the exclusivity agreement satisfied the conditions for exemption provided for in Regulation No 2790/1999 from 1 June 2000 onwards, the date on which that regulation became applicable. If it were necessary to reply in the negative, a transitional period until 31 December 2001 would be applicable to that agreement only if it satisfied the conditions for exemption provided for in Regulation No 1984/83.

60 It follows from the provisions of Regulation No 2790/1999 that the exemption provided for in that regulation is applicable from 1 June 2000 to agreements the duration of which does not exceed five years. However, Article 12(2) of Regulation No 2790/1999 provides for a transitional period until 31 December 2001 in respect of agreements in force on 31 May 2000 which do not satisfy the conditions for exemption provided for in that regulation but which do satisfy the conditions for exemption provided for in Regulation No 1984/83. It is for the referring court to ascertain, in the present case, according to whether the contract at issue in the main proceedings did or did not satisfy the conditions for exemption of Regulation No 1984/83, from which date the exclusivity clause must be examined under Regulation No 2790/1999.

61 Further, it is for that court to assess whether the clause of the contract at issue in the main proceedings providing for the extension of the contact for successive five-year

periods by express agreement in writing on notice of at least six months cannot, under Article 5(a) of Regulation No 2790/1999, be regarded as providing that that contract was concluded for an indefinite duration, which would mean that it would be excluded from the benefit of the block exemption.

62 On the basis of the foregoing considerations, the answer to Questions 1(b) and (c) and 2(b) must be that an exclusive supply contract, such as that at issue in the main proceedings, is capable of benefiting from a block exemption provided for in Regulation No 1984/83 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.

The fixing of the retail price

63 By its Question 2(c), the referring court essentially asks whether Articles 10 to 13 of Regulation No 1984/83 must be interpreted as precluding the application of the block exemption to an exclusive supply contract by reason of the fact that that contract provides for the fixing of the retail price by the supplier. If so, it wishes to know whether the authorisation to lower that sale price without affecting the supplier's receipts renders the exemption applicable again.

64 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.

65 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).

66 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.

67 In such a situation, in the light of the division of jurisdiction between the national courts and the Court of Justice, it is for the referring court to assess the manner in which the retail price was fixed in the case in the main proceedings, as well as to determine whether it is possible, in national law, to amend unilaterally the clause governing the fixing of that price.

68 If the referring court should conclude that such a unilateral amendment is possible under national law, it would then be necessary to examine the conditions for exemption in force on the date on which CEPSA gave its authorisation.

69 In November 2001, Regulation No 2790/1999 was applicable to agreements which did not qualify for the transitional period provided for in Article 12(2) of Regulation No 2790/1999 by reason of the fact that they did not satisfy the conditions for exemption laid down in Regulation No 1984/83. According to Article 4(a) of Regulation No 2790/1999, the exemption provided for in Article 2 thereof was not to apply to vertical agreements which have as their object the 'restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier's imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties'.

70 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.

71 Since the Court is not in a position to assess the discretion that Tobar had to determine the retail price of the petroleum products, following the authorisation granted to that company by CEPSA's letter of 2 November 2001, it is for the referring court to examine whether that authorisation made it genuinely possible for the reseller to lower that sale price, taking account of the actual effect of all the clauses of the contract at issue in the main proceedings in their economic and legal context. In particular, it is necessary to ascertain whether such a retail price is not, in reality, fixed by indirect or concealed means, such as the fixing of the margin of the service-station operator, threats, intimidation, warnings, penalties or incentives.

72 If the referring court were to conclude that Tobar was, in reality, required to charge the fixed or minimum sale price imposed by CEPSA, that contract could not qualify for the block exemption established by Regulation No 2790/1999. However, where an agreement does not satisfy all the conditions provided for by an exempting regulation, it will be caught by the prohibition provided for in Article 81(1) EC only if its object or effect is to restrict appreciably competition within the common market and it is capable of affecting trade between Member States (see, to that effect, *Cabour*, cited above, paragraph 48). In that latter case, and in the absence of individual

exemption pursuant to Article 81(3) EC, the price agreement would be automatically void under Article 81(2) EC.

73 By contrast, if the unilateral amendment of the contract at issue in the main proceedings meant that the clause relating to the retail price of the petroleum products was to be brought into line with the competition rules, that contract would then qualify for the block exemption, subject to its satisfying all the conditions laid down in Regulation No 2790/1999. However, as the Advocate General rightly points out at point 94 of his Opinion, such an amendment cannot result in the retroactive validity of that contract from the point of view of the block exemption under Regulation No 1984/83.

74 It follows from settled case-law that, once the conditions for the application of Article 81(1) EC are met and so long as the agreement concerned does not justify the grant of an exemption under Article 81(3) EC, the nullity referred to in Article 81(2) EC can be relied on by anyone. Since that nullity is absolute, it is capable of having a bearing on all the effects, either past or future, of the agreement concerned (Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 57 and the case-law cited).

75 The question whether the nullity of the clause relating to the fixing of the retail price of the petroleum products means that the contract at issue in the main proceedings becomes automatically void in its entirety is the subject of Question 1(d), which is answered in paragraphs 78 to 80 of this judgment. However, should the referring court find that that contract was automatically void in its entirety, the question whether it may become valid following the amendment of the clause relating to the sale price is, as the Commission of the European Communities rightly submits, a matter to be decided under national contract law.

76 It follows that the answer to Question 2(c) must be that Articles 10 to 13 of Regulation No 1984/83 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 81(1) EC.

The consequences of possible nullity of the agreement under Article 81(2) EC

77 By its Question 1(d), the referring court asks whether the automatic nullity provided for by Article 81(2) EC affects the contract at issue in the main proceedings in its entirety or only those clauses which are incompatible with Article 81(1) EC.

78 In this regard, it must be borne in mind that, according to the settled case-law of the Court, the automatic nullity of an agreement within the meaning of Article 81(2) EC only applies to those parts of the agreement affected by the prohibition laid down in Article 81(1) EC or to the agreement as a whole if it appears that those parts are not severable from the agreement itself (see, in particular, Case 56/65 *LTM* [1966] ECR 235, at 250, and *Delimitis*, cited above, paragraph 40).

79 If those parts are severable from the agreement, the consequences, for all other parts of the agreement or for other obligations flowing from it, of the nullity are not a matter for Community law. It is therefore for the referring court to determine, in accordance with the national law applicable, the extent and consequences, for the contractual relation as a whole, of the nullity of certain contractual clauses under Article 81(2) EC (see, inter alia, Case 10/86 *VAG France* [1986] ECR 4071, paragraphs 14 and 15; *Cabour*, cited above, paragraph 51, and Joined Cases C-376/05 and C-377/05 *Brünsteiner and Autohaus Hilgert* [2006] ECR I-11383, paragraph 48).

80 The answer to Question 1(d) must therefore be that the automatic nullity provided for in Article 81(2) EC affects a contract in its entirety only if the clauses which are incompatible with Article 81(1) EC 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.

Costs

81 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 (Third Chamber) hereby rules:

1. **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 81(1) 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 81 EC.**

2. **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 [81](3) 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.**

3. **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 81(1) EC.**

4. **The automatic nullity provided for in Article 81(2) EC affects a contract in its entirety only if the clauses which are incompatible with Article 81(1) EC 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.**

[Signatures]