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CASE CARD | 4 October 2021

CEEES (C-217/05)

Genuine agency

1. CASE SUMMARY

A. Summary of facts

CEEES filed a complaint with the Spanish Competition Protection Department against certain undertakings in the petroleum sector, including CEPSA. CEEES complained that the agreements concluded at the end of 1992 between CEPSA (an oil company) and service-station operators (supplied by CEPSA) had the effect of restricting competition. The agreements were nominally classified as commission or agency contracts (so that the service-station operators had the status of commercial agent). The agreements provided for fixed prices for the sale of fuel to final customers as well as non-compete clauses. It was apparent that 95% of service stations in the CEPSA network were bound by this type of contract.

The Spanish competition legislation contained an explicit reference to Regulation 1984/83 on exclusive purchasing agreements (that is currently no longer applicable) to exclude from the application of Spanish competition law agreements that complied with the provisions of that block exemption. Regulation 1984/83 contained specific provisions for service-station agreements but did not grant an exemption to practices such as those used by CEPSA.

The complaint of CEEES was dismissed by the Spanish Competition Protection Department. The service-station operators were considered to be commercial agents so that the prohibition of anti-competitive agreements was found not to be applicable. The appeals brought by CEEES were also dismissed, essentially on the same grounds. CEEES brought an appeal before the Spanish Supreme Court. One of the pleas in law relied on an alleged infringement of Article 101(1) TFEU and of Regulation 1984/83, to which Spanish legislation referred. The Spanish Supreme Court raised a question as to the applicability of Regulation 1984/83 to commercial agency agreements.

B. Legal analysis

The ECJ assessed the question of the national court whether exclusive fuel distribution agreements with the characteristics as described fell within the scope of Article 101(1) TFEU and Regulation 1984/83. Essentially, the court considered the decisive factor for determining whether the agreements were concluded between independent undertakings (in which case Article 101 TFEU fully applies) or were to be regarded as genuine

agency agreements. Furthermore, the ECJ set out the criteria to enable the national court to assess the actual allocation of the financial and commercial risks between the service-station operators and the fuel supplier.

B.1 - Article 101(1) TFEU – applicability

The ECJ first stated that agreements between traders at different levels in the economic process (i.e. vertical agreements) may constitute agreements within the meaning of Article 101 TFEU. (§37) However, vertical agreements such as the agreements between CEPSA and service-station operators are covered by Article 101 TFEU only where the operator is regarded as an independent economic operator and there is, consequently, an agreement between two undertakings. (§38)

As to the definition of an 'undertaking', the ECJ called upon settled case law and observed that the decisive test for the purposes of applying the competition rules is not the formal separation between two parties but the unity of their conduct. (§41) In certain circumstances, the relationship between a principal and his agent may be characterized by such economic unity. (§42) However, agents 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. (§43)

The ECJ continued that 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 the implied or express clauses of that agreement 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 categorization of the contractual relationship in national law. (§46)

The ECJ set out the criteria to enable the national court to assess the actual allocation of the financial and commercial risks between the service?station operators and the fuel supplier in the light of the factual circumstances of the case. The national court should take account, first, of the risks linked to the sale of goods and, second, of the risks linked to investments specific to the market (i.e. those required to enable the service-station operator to negotiate or conclude contracts with third parties). (§51)

- Risks linked to the sale of the goods (§51-58) (also labelled as *product-specific risks* by Advocate General Kokott): the service-station operator is presumed to bear these risks

a. when he takes possession of the goods, at the time he receives them from the supplier;
b. when he assumes directly or indirectly the costs linked to the distribution of the goods, particularly the transport costs;
c. when he maintains stocks at his own expense;

d. 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

e. 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.

- Risks linked to investments specific to the market (§51 and §59) (also labelled as *transaction-specific investment risks* by Advocate General Kokott): it is necessary to establish whether the 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.

The ECJ pointed out that the fact that the intermediary bears only a negligible share of the risks does not render Article 101 TFEU applicable. (§61 and §65) Advocate General Kokott clarified that 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. (§64 of the Opinion, referring to §15 and 17 of the Vertical Guidelines of 2000)

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

B.2 - Regulation 1984/83

If, following the examination of the risks assumed by the service-station operators, the national court were to conclude that there was no agreement between undertakings within the meaning of Article 101 TFEU as regards the sale of goods to third parties, the obligation imposed on the service-station operators to sell fuel at a specific price would fall outside Article 101 TFEU. Conversely, if there was an agreement between two (independent) undertakings due to the risks assumed by the service-station operator, this would not be the case. In such event, the imposition of the retail price would constitute a restriction of competition within the meaning of Article 101 TFEU, but would not be covered by the exemption in Regulation 1984/83. (§63-64)

2. QUOTES

"*It is therefore appropriate to examine, first of all, whether the agreements at issue in the main proceedings constitute such agreements between undertakings and, second, whether the block exemption introduced by*

Regulation No 1984/83 is applicable to them.

In that connection, it must be recalled that, according to settled case-law, agreements between traders at different levels in the economic process, namely 'vertical agreements', may constitute agreements within the meaning of Article [101(1) TFEU] and be prohibited by that provision (see, to that effect, Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 299, 338, and Case C?266/93 Volkswagen and VAG Leasing [1995] ECR I?3477, paragraph 17).

However, vertical agreements such as the agreements between CEPSA and service-station operators are covered by Article [101 TFEU] only where the operator is regarded as an independent economic operator and there is, consequently, an agreement between two undertakings." (§36-38)

"*It is settled case-law that, in Community competition law, the definition of an 'undertaking' covers any entity engaged in an economic activity, regardless of the legal status of that entity and the way in which it is financed (Case C?41/90 Höfner and Elser [1991] ECR I?1979, paragraph 21, and Case C?205/03 P FENIN v Commission [2006] ECR I?0000, paragraph 25).*

The Court has also stated that, in the same context, the term 'undertaking' must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal (Case 170/83 Hydrotherm [1984] ECR 2999, paragraph 11).

The Court has furthermore made clear that for the purposes of applying the rules on competition the formal separation between two parties resulting from their separate legal personality is not conclusive, the decisive test being the unity of their conduct on the market (see, to that effect, Case 48/69 ICI v Commission [1972] ECR 619, paragraph 140).

In certain circumstances, the relationship between a principal and his agent may be characterised by such economic unity (see, to that effect, Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 Suiker Unie and Others v Commission [1975] ECR 1663, paragraph 480).

In that connection, it is clear, however, from the case-law that agents 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 (see, to that effect, Volkswagen and VAG Leasing, paragraph 19)." (§39-43)

"*It follows that 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. As the Commission rightly submitted in its observations, the question of risk must be analysed on a case-by-case basis, taking account of the real economic situation rather than the legal*

classification of the contractual relationship in national law." (§46)

"*First, as regards the risks linked to the sale of the goods, it is likely that the service-station operator assumes those risks when he takes possession of the goods at the time he receives them from the supplier, that is to say, prior to selling them on to a third party.*

Likewise, the service-station operator who assumes, directly or indirectly, the costs linked to the distribution of those goods, particularly the transport costs, should be regarded as thereby assuming part of the risk linked to the sale of the goods.

The fact that the service-station operator maintains stocks at his own expense could also be an indication that the risks linked to the sale of the goods are transferred to him.

Furthermore, the national court should determine who 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. If the service-station operator were responsible for such damage, irrespective of whether or not he had complied with the obligation to keep the goods in the conditions necessary to ensure that they undergo no loss or deterioration, the risk would have to be regarded as having been transferred to him.

It is also necessary to assess the allocation of the financial risk linked to the goods, in particular as regards payment for the fuel should the service-station operator not find a purchaser, or where payment is deferred as a result of payment by credit card, on the basis of the rules or practices relating to the payment system for fuel.

In that connection, it is apparent from the order for reference that the service-station operator is required to pay CEPSA the amount corresponding to the sale price of the fuel nine days after the date of delivery and that, by the same date, the service-station operator receives commission from CEPSA, in an amount corresponding to the quantity of fuel delivered.

In those circumstances, it is for the national court to ascertain whether the payment to the supplier of the amount corresponding to the sale price of the fuel depends on the quantity actually sold by that date and, as regards the turnover period for the goods in the service-station, whether the fuel delivered by the supplier is always sold within a period of nine days. If the answer is in the affirmative it would have to be concluded that the commercial risk is born by the supplier.

As regards the risks linked to investments specific to the market, if the service-station operator makes investments specifically linked to the sale of the goods, such as premises or equipment such as a fuel tank, or commits himself to investing in advertising campaigns, such risks are transferred to the operator." (§52-59)

"*However, as the Commission rightly submits, the fact that the intermediary bears only a negligible share of the risks does not render Article [101 TFEU] applicable.*

[…]

In the light of the foregoing considerations, the answer to the question referred for a preliminary ruling must be that Article [101 TFEU] applies to an agreement for the exclusive distribution of motor-vehicle and other fuels, such as that at issue in the main proceedings, concluded between a supplier and a service-station operator where that operator assumes, to a non-negligible extent, one or more financial and commercial risks linked to the sale to third parties." (§61 and 65)

"*Nevertheless, it must be pointed out that, in such a case, only the obligations imposed on the intermediary in the context of the sale of the goods to third parties on behalf of the principal fall outside the scope of that article. As the Commission submitted, an agency contract may contain clauses concerning the relationship between the agent and the principal to which that article applies, such as exclusivity and non-competition clauses. In that connection it must be considered that, in the context of such relationships, agents are, in principle, independent economic operators and such clauses are capable of infringing the competition rules in so far as they entail locking up the market concerned.*" (§62)

"*Article [101 TFEU] applies to an agreement for the exclusive distribution of motor-vehicle and other fuels, such as that at issue in the main proceedings, concluded between a supplier and a service-station operator where that operator assumes, to a non-negligible extent, one or more financial and commercial risks linked to the sale to third parties.*" (§1 of the operative part)

"*Articles 10 to 13 of Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article [101(3) TFEU] to categories of exclusive purchasing agreements must be interpreted as not covering such an agreement in so far as it requires the service-station operator to charge the final retail price stipulated by the supplier.*" (§2 of the operative part)

3. RELEVANT LEGISLATION

- Article 101 TFEU
- Regulation 1984/83

4. RELEVANT LITERATURE

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

5. PRACTICAL SIGNIFICANCE

The case clarifies:

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

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