MONEREO MEYER MARINEL-LO
Abogados

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CRITICAL ISSUES IN INTERNATIONAL DISTRIBUTION
Termination Indemnity to Distributors, «Illicit Commissions», Revision of EC competition rules

Agency Agreements and Article 81 of the EC Treaty. New Developments After The Spanish Petrol Distribution Cases

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Belén Arribas Sánchez
Abogada
Monereo Meyer Marinel-lo Abogados

I. Judgements analysed:

- Judgment Of The Court Of Justice (Third Chamber), 14 December 2006, In Case C-217/05 (REFERENCE for a preliminary ruling under Article 234 EC, by the Tribunal Supremo (Spain), made by decision of 3 March 2005, in the proceedings Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA).
- Judgment of the Supreme Court (Spain) nº 988/2007, 3 October 2007.
- Judgment of the Supreme Court (Spain) nº 1066/2008, 20 November 2008.

II. Judgement of the Court of Justice (Third Chamber), 14 December 2006. Case C-217/05

A) Facts and main proceedings

- On 4 May 1995 the Confederación Española de Empresarios de Estaciones de Servicio (hereinafter, "**Confederation**") filed a complaint before the Spanish Ministry of the Economy against certain Spanish oil undertakings alleging that they engaged in practices which were restrictive to competition in the service-station sector. The Confederation complained that commission and commercial agency contracts in the terms normally entered into between Cepsa and the service-station undertakings it supplied in Spain, restricted competition.

- Although the contracts were not all exactly the same, according to the national court most of them had the following common features:

  (i) The service-station operator accepted 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.
  (ii) The operator was prohibited during the contract period, from authorising or participating in, directly or indirectly, sales or promotional transactions involving products in competition with the products covered by the exclusive purchasing agreement, which took place or which it was attempted to carry out within the boundaries (or in the surrounding area) of the service station to which the contract related.
  (iii) The operator assumed the risk associated with the products covered by the exclusive agreement as soon as those products were received from Cepsa and they 'flowed past the connecting flange of the storage vessels or tanks at the service station'.
  (iv) From that moment, the operator assumed the obligation to keep the products in the conditions necessary to ensure that they underwent no loss or deterioration and the operator was liable, where applicable, to Cepsa and to third parties for any loss, contamination or adulteration which might affect the products and for any damage arising as a result thereof.
  (v) The service-station operator was 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.
  (vi) The operator received from Cepsa the 'market commission' applicable to service stations at the relevant time. That commission, including the guarantee commission, was a specified sum per litre (according to whether the product concerned was petrol, diesel and red diesel, or heating oil) plus an annual fixed-rate commission. Commission was paid by Cepsa nine days after delivery to the service station.

- On 7 November 1997 the proceedings were partially stayed. The Confederation raised administrative proceedings against this stay of the proceedings before the *Tribunal de Defensa de la Competencia* (Competition Court). This administrative appeal was initially unsuccessful.

- Then, an action was filed before the *Audiencia Nacional* (National High Court), which was also unsuccessful.

- The Confederation brought an appeal in cassation against the *Audiencia Nacional*'s judgement before the *Tribunal Supremo* (Supreme Court), which raised the preliminary ruling before the Court of Justice.

B) Preliminary ruling

The Supreme Court raised the following issue to the Court of Justice, in order to obtain a 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.

C) Court's Grounds

(i) Concept of agreement between undertakings

- Article 81 (former 85) of the EC Treaty foresees only block exemptions for some types of agreements between undertakings. Therefore it must be set, what an agreement between undertakings is under this article.

  a. **AGREEMENT**: According to reiterated Jurisprudence of the Court of Justice, vertical agreements (between operators in different levels of the economic process) also fall under the definition of the agreements of the article 81 of the EC Treaty (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).

  b. **UNDERTAKING**: Within the EC Competition Law, the concept of 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). It shall also be considered an undertaking, if it is integrated by several persons, natural or legal, as long as it is an economic unit for the purpose of the subject-matter of the agreement (Case 170/83 *Hydrotherm* [1984] ECR 2999, paragraph 11).

- Since in certain circumstances, the relationship between a principal and his agent is characterised by an economic unity and, overall, a unity of conduct within the market, the court also stated that the decisive test is not separate legal personality between two enterprises, but the unity of conduct (see, to that effect, Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 140 and 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).

(ii) Risk

- The starting point of the Court of Justice is "who assumes the financial and commercial risks of the agreement". An intermediary –even with a separate legal entity- may not determine its conduct

independently, due to the complete dependence to its principal and, therefore, not bear any commercial or financial risk in the transactions under the agreement.

- In such a case, those intermediaries would be regarded as auxiliary organs forming an integral part of the principal's undertaking, so that a clause restricting competition would not be covered by the prohibition of the article 81.1 of the EC Treaty.

- Otherwise, if under the agreement the intermediaries have functions which, from an economic point of view, are approximately the same as those carried out by an independent economic operator, an agreement between those undertakings would be deemed an agreement between undertakings, according to article 81 of the EC Treaty.

- In case, the agreement between the principal an the agent, as stated in the previous point, foresees clauses which may restraint the competition, that may be an agreement between undertakings for the purposes of Article 81 of the EC Treaty and should pass the test (see, to that effect, *Suiker Unie*, paragraphs 541 and 542).

- The Court states that in order to consider that situation, the intermediary should assume, **to a non-negligible extent**, one or more financial and commercial risks linked to the sale to third parties.

- The Advocate General, in her conclusions, refers to genuine agency agreements (excluded for the prohibition of the 81.1 of the EC Treaty) and non genuine agency agreements (which may be under the prohibition).

- However, each agreement must be considered individually, since the concrete situation of each case may lead to other conclusions, as the concrete clauses are only signs. The Court states that the analysis of the concrete risk distribution must be made according to the factual circumstances of the case in the main proceedings, and it must be considered by the national Courts.

- The Court gives some clues about the risk distribution analysis. Concretely, the Court of Justice, states that the national Judge should specially pay attention to the risks linked to the sale of the goods and to the risks linked to investments specific to the market.

    a. **SALE OF THE GOODS**: The Judge should take account of the property of the goods, if it is transferred to the intermediary in the purchase moment, namely, before selling it to the final customer. Also, it is a good sign to take account of who carries with the costs of distribution, conservation.

    b. **INVESTMENT**: The national Judge should also consider the payment terms granted to the intermediaries in case the product is not sold in those terms, according to the regime of payment of the fuel.

D) Conclusions of the Court

- The eventual applicability of the article 81.1 shall be considered only when facing an agreement between undertakings that are economically independent in the terms said above. If the conclusion is that there is no independence for the intermediaries, agreements restricting competition would not fall under the prohibition of the article 81.1.

- In order to determinate the applicability of the article 81.1 of the EC Treaty, the national Judge should take account for the economic and financial risk distribution between the principal and its intermediaries, based on criteria such as the property of the goods, the payment of the costs arisen from their distribution and conservation and the liability for damages on the products or due to the products to third parties and the eventual investments for the sale of those products.

- Therefore, the Court concludes that Article 85 of the Treaty applies to agreements 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.

III. Case Law in Spain, arising from the Court's preliminary ruling

The Spanish Supreme Court in its further Judgements, receiving the preliminary rulings of the Court of Justice, had the chance to apply them.

Indeed, the Supreme Court has stated (f.i. Judgements of 3 October 2007 and 20 November 2008) that irrespective of the legal consideration of the contract and in order to discern if its concrete clauses fall into the prohibition of article 81.1 of the EC Treaty the Judge must consider the economic purposes of the agreement and concretely the risks assumed by each party in the contract.

Therefore, according to the Judgement of 20 November 2008, the Judge must consider the real economic content of the contract and investigate if it is a fraudulent intent to be covered by the agency Law instead of a prohibitive/mandatory regulation (i.e. the mandatory application of the article 81.1 of the EC Treaty. In such a case, that mandatory stipulation –which was intended to be avoided- should be applied, according to article 6.4 of the Civil Code.