JUDGMENT OF THE COURT (Third Chamber)

29 June 2023 (*)

(Reference for a preliminary ruling – Competition – Agreements, decisions and concerted practices – Article 101 TFEU – Vertical agreements – Minimum resale prices fixed by a supplier to its distributors – Concept of 'restriction of competition by object' – Concept of 'agreement' – Proof of a concurrence of wills between the supplier and its distributors – Practice covering almost the entire territory of a Member State – Effect on trade between Member States – Regulation (EC) No 2790/1999 and Regulation (EU) No 330/2010 – Hardcore restriction)

In Case C-211/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal da Relação de Lisboa (Court of Appeal, Lisbon, Portugal), made by decision of 24 February 2022, received at the Court on 17 March 2022, in the proceedings

Super Bock Bebidas, SA,

AN,

BQ

v

Autoridade da Concorrência,

THE COURT (Third Chamber),

composed of K. Jürimäe (Rapporteur), President of Chamber, M. Safjan, N. Piçarra, N. Jääskinen and M. Gavalec, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Super Bock Bebidas SA, AN and BQ, by J. Caimoto Duarte, R. da Silva, F. Espregueira Mendes, R. Mesquita Guimarães, A. Navarro de Noronha, R. Sarabando Pereira, A. Veloso Pedrosa and J. Whyte, advogados,

– the Autoridade da Concorrência, by S. Assis Ferreira and A. Cruz Nogueira, advogadas,

– the Portuguese Government, by C. Alves and P. Barros da Costa, acting as Agents,

– the Greek Government, by K. Boskovits, acting as Agent,

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

– the Austrian Government, by A. Posch and G. Eberhard, acting as Agents,

– the European Commission, by S. Baches Opi, P. Berghe and P. Caro de Sousa, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 101(1) TFEU and of Article 4(a) of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) [TFEU] to categories of vertical agreements and concerted practices (OJ 2010 L 102, p. 1) and also of the Guidelines on Vertical Restraints (OJ 2010 C 130, p. 1).

2 The request has been made in proceedings between Super Bock Bebidas SA ('Super Bock'), AN and BQ, on the one hand, and the Autoridade da Concorrência (Competition Authority, Portugal) concerning the lawfulness of the latter's decision finding that Super Bock, AN and BQ had infringed competition rules and therefore imposing fines on them.

Legal context

European Union law

3 Regulation No 330/2010 succeeded, with effect from 1 June 2010, Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) [EC] to categories of vertical agreements and concerted practices (OJ 1999 L 336, p. 21). In accordance with Article 10 thereof, Regulation No 330/2010 expired on 31 May 2022.

4 Recitals 5 and 10 of Regulation No 330/2010, which are the same in substance as recitals 5 and 10 of Regulation No 2790/1999, were worded as follows:

'(5) The benefit of the block exemption established by this Regulation should be limited to vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) [TFEU].

…

(10) This Regulation should not exempt vertical agreements containing restrictions which are likely to restrict competition and harm consumers or which are not indispensable to the attainment of the efficiency-enhancing effects. In particular, vertical agreements containing certain types of severe restrictions of competition such as minimum and fixed resale-prices, as well as certain types of territorial protection, should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market share of the undertakings concerned.'

5 Article 1(1)(a) and (b) of Regulation No 330/2010 contained the following definitions:

'For the purposes of this Regulation, the following definitions shall apply:

(a) "vertical agreement" means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services;

(b) "vertical restraint" means a restriction of competition in a vertical agreement falling within the scope of Article 101(1) [TFEU]".

6 Substantially identical definitions were contained in Article 2(1) of Regulation No 2790/1999.

7 Article 2 of both Regulation No 2790/1999 and Regulation No 330/2010 laid down an exemption rule. Article 2(1) of Regulation No 330/2010, which corresponds, in substance, to Article 2(1) of Regulation No 2790/1999 provided:

‘Pursuant to Article 101(3) [TFEU] and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) [TFEU] shall not apply to vertical agreements.

This exemption shall apply to the extent that such agreements contain vertical restraints.’

8 Article 4 of both Regulation No 2790/1999 and Regulation No 330/2010 covered ‘hardcore restrictions’ which could not benefit from a block exemption. Article 4 of Regulation No 330/2010, which corresponded, in substance, to Article 4 of Regulation No 2790/1999, provided:

‘The exemption provided for in Article 2 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 to impose a maximum sale price or recommend 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;

…’

Portuguese law

9 Article 9(1)(a) of lei n.º 19/2012 – Aprova o novo regime jurídico da concorrência, revogando as leis n.ºs 18/2003, de 11 de junho, e 39/2006, de 25 de agosto, e procede à segunda alteração à lei n.º 2/99, de 13 de janeiro (Law No 19/2012 of 8 May 2012 establishing a new legal framework for competition, repealing Laws Nos 18/2003 of 11 June 2003 and 39/2006 of 25 August 2006 and amending for the second time Law No 2/99 of 13 January 1999), of 8 May 2012 (Diário da República, 1st Series, No 89/2012, of 8 May 2012; ‘the NRJC’), provides:

‘The following shall be prohibited: agreements between undertakings, concerted practices between undertakings and decisions of associations of undertakings which have the object or effect of preventing, distorting or wholly or in part restricting competition within the national market, and in particular those which consist of:

(a) directly or indirectly fixing purchase or selling prices or any other trading conditions …’

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

10 Super Bock is a company established in Portugal that manufactures and markets beers, bottled waters, soft drinks, iced teas, wines, sangrias and ciders. Its main activity is on the markets for beer and bottled water.

11 AN is a member of Super Bock’s board of directors. BQ is head of Super Bock’s commercial department with responsibility for sales in the ‘HoReCa’ sector, also called the ‘*on-trade*’ sector.

12 That sector, in which the conduct in issue in the main proceedings took place, corresponds to the purchase of beverages made in hotels, restaurants and cafés, namely for consumption away from home. For the purpose of distributing beverages through that sector in Portugal, Super Bock concluded exclusive distribution agreements with independent distributors. Those distributors sell beverages bought from Super Bock in almost the entirety of the Portuguese territory. Only some areas are supplied by direct sales made by Super Bock. That is the case for Lisbon, Porto, Madeira, Coimbra (Portugal) (until 2013) and, from 2014, for the Pico and Faial islands (Portugal).

13 According to the facts found by the referring court, for at least the period from 15 May 2006 until 23 January 2017, Super Bock regularly fixed and imposed, universally and without change, on all distributors, the terms of business which they were required to comply with when reselling products that it had sold to them. In particular, Super Bock fixed the minimum resale prices with the aim of ensuring a stable and consistent minimum price level throughout national market.

14 Specifically, every month (as a rule) the sales department of Super Bock approved a list of the minimum resale prices, which it transmitted to distributors. The network managers or marketing managers within Super Bock transmitted the resale prices to distributors either orally or in writing (by email). Those prices were, as a general rule, applied by the distributors. In turn, those distributors, in the context of a monitoring and tracking system established by Super Bock, were required to report to Super Bock relevant data on resale, for example in terms of quantities and prices. In the event of non-compliance with those prices, the distributors explain that, in accordance with the terms of business set by Super Bock, there were 'retaliatory' measures, such as the removal of financial incentives, comprised of trade discounts on the purchase of products and the reimbursement of discounts applied by distributors to resale, and the refusal to supply and replenish stocks. They thus risked losing the guarantee of positive distribution margins that had been granted to them under those marketing terms.

15 The Competition Authority considered that that practice of fixing, by direct and indirect means, prices and other terms applicable to the resale of products by a network of independent distributors in the HoReCa distribution sector for almost the entire Portuguese territory constituted an infringement of the competition rules, within the meaning of Article 9(1)(a) of the NRJC and of Article 101(1) TFEU. It therefore imposed fines on Super Bock, AN and BQ.

16 Seised of an action by the latter, the Tribunal da Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court, Portugal) confirmed the decision of the Competition Authority.

17 Super Bock, AN and BQ brought an appeal against that judgment before the Tribunal da Relação de Lisboa (Court of Appeal, Lisbon, Portugal), which is the referring court in this case.

18 In the light of the arguments raised before it and the questions for a preliminary ruling proposed by the parties to the proceedings that were submitted to it, the referring court considers it necessary to obtain clarification as to the interpretation of Article 101 TFEU. In essence, it asks, first, whether the concept of 'restriction of competition by object' is capable of covering – and, if so, under what conditions – a vertical agreement fixing minimum resale prices. Secondly, its questions concern the concept of 'agreement' where minimum resale prices are imposed by the supplier on its distributors. Thirdly, it asks whether the concept of 'effect on trade between Member States' may include the consequences of a distribution agreement which affects, solely, almost the entirety of the territory of one Member State.

19 In those circumstances, the Tribunal da Relação de Lisboa (Court of Appeal, Lisbon) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the vertical fixing of minimum prices constitute in and of itself an infringement by object which does not require a prior analysis of whether that agreement is sufficiently harmful?

(2) In order to demonstrate that the "agreement" element of the infringement consisting in the (tacit) fixing of the minimum prices to be charged by distributors is present, is it necessary to show that the distributors actually charged the fixed prices in the case in question, in particular by direct evidence?

(3) Do the following factors constitute sufficient evidence of the commission of an infringement consisting in the (tacit) fixing of the minimum prices to be charged by distributors: (i) the sending of lists containing minimum prices and margins for distribution; (ii) asking distributors for information on the selling prices they charge; (iii) complaints from distributors (where they consider the resale prices imposed on them to be uncompetitive or find that competing distributors do not adhere to them); (iv) the existence of price-tracking mechanisms (as a minimum); and (v) the existence of retaliatory measures (even though it has not been demonstrated that these have actually been applied)?

(4) In the light of Article 101(1)(a) TFEU, Article 4(a) of Regulation No 330/2010, the European Commission's Guidelines on Vertical Restraints and the case-law of the European Union, can an agreement between a supplier and its distributors which (vertically) fixes minimum prices and other terms of business applicable to resale be presumed to be sufficiently harmful to competition, without prejudice to an analysis of any positive economic effects arising from such a practice, within the meaning of Article 101(3) TFEU?

(5) Is it compatible with Article 101(1)(a) TFEU and the case-law of the European Union for a judicial decision to find that the presence of the objective defining element of an “agreement” between a supplier and its distributors is proved on the basis of:

(a) the fixing and imposition, by the former on the latter, on a regular, universal and unchanging basis during the period of the practice, of the terms of business which the latter must fulfil when reselling the products they acquire from the supplier, in particular the prices they charge their customers, principally in terms of minimum prices or average minimum prices;

(b) the fact that the resale prices imposed are notified either verbally or in writing (via e-mail);

(c) the fact that distributors are unable to fix their resale prices independently;

(d) the customary and universal practice whereby the supplier’s employees ask distributors (by telephone or in person) to adhere to the prices indicated;

(e) the universal adherence by distributors to the resale prices fixed by the supplier (other than in the event of occasional disagreements) and the finding that the conduct of distributors on the market is generally in keeping with the terms laid down by the supplier;

(f) the fact that, in order not to breach the terms laid down, distributors themselves often ask the supplier to tell them what resale prices to charge;

(g) the finding that distributors frequently complain about the prices set by the supplier rather than simply charging other prices;

(h) the fixing by the supplier of (reduced) distribution margins and the assumption by distributors that those margins correspond to the level of remuneration payable for their business;

(i) the finding that, by imposing low margins, the supplier imposes a minimum resale price, as the distribution margins would otherwise be negative;

(j) the supplier’s policy of granting discounts to distributors on the basis of the resale prices actually charged by them – the minimum price previously fixed by the supplier being the level of the price of restocks at sell-out;

(k) the need for distributors — in the light in many cases of the negative distribution margin — to adhere to the resale price levels imposed by the supplier; the practice of lower resale prices is followed only in very specific circumstances and where the distributors ask the supplier for a further discount at sell-out;

(l) the fixing by the supplier of, and the adherence by distributors to, the maximum discounts which are to be applied to the distributors’ customers, which has the effect of imposing a minimum resale price, as the distribution margin would otherwise be negative;

(m) the direct contact between the supplier and the distributors’ customers and the fixing of the terms of business subsequently imposed on distributors;

(n) the supplier’s intervention, on the distributors’ initiative, inasmuch as it is the supplier that makes the decision to apply certain trade discounts or renegotiates the terms of business for resale;

(o) the fact that distributors ask the supplier to authorise them to conclude a particular transaction on certain terms in order to ensure their distribution margin?

(6) Is an agreement on the fixing of minimum resale prices which exhibits the characteristics described above and covers almost the entire national territory capable of affecting trade between Member States?’

Consideration of the questions referred

Preliminary observations

20 Without raising the issue of the inadmissibility of the request for a preliminary ruling and without formally putting the admissibility of certain questions at issue, Super Bock and the European Commission have expressed their doubts as to, respectively, the intelligibility of the fifth question and the need for the second question for the purposes of the main proceedings.

21 It must be borne in mind that the preliminary reference procedure, which is an instrument of cooperation between the Court and the national courts, is based on a dialogue between those two courts. It is for a national court to assess whether an interpretation of EU law is necessary to enable it to resolve the dispute before it, having regard to the procedural mechanism laid down in Article 267 TFEU, and it is also for that court to decide the manner in which those questions are to be worded. Although that court is at liberty to request the parties to the dispute before it to suggest wording suitable for the questions to be referred, it is for it alone, however, ultimately to decide both their form and content (see, to that effect, judgment of 21 July 2011, *Kelly*, C−104/10, EU:C:2011:506, paragraphs 63 to 65).

22 Questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for this Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 23 January 2018, *F. Hoffmann-La Roche and Others*, C−179/16, EU:C:2018:25, paragraph 45 and the case-law cited).

23 In that latter regard, it must be noted that, according to settled case-law, which is now reflected in Article 94(a) and (b) of the Rules of Procedure of the Court of Justice, the need to provide an interpretation of EU law which will be of use to the national court makes it necessary for the national court to define the factual and legal context of the questions it is asking or, at the very least, to explain the factual hypotheses on which those questions are based. Those requirements are of particular importance in the area of competition, where the factual and legal situations are often complex (see, to that effect, the judgments of 26 January 1993, *Telemarsicabruzzo and Others*, C−320/90 to C−322/90, EU:C:1993:26, paragraphs 6 and 7, and of 19 January 2023, *Unilever Italia Mkt. Operations*, C−680/20, EU:C:2023:33, paragraph 18 and the case-law cited).

24 Furthermore, it is essential, as stated in Article 94(c) of the Rules of Procedure, that the request for a preliminary ruling itself contain a statement of the reasons which prompted the referring court or tribunal to enquire about the interpretation or validity of certain provisions of EU law, and the connection between those provisions and the national legislation applicable to the main proceedings.

25 In the present case, in the spirit of cooperation intrinsic to the dialogue between the two courts and in order to enable the Court to deliver a decision which is as helpful as possible, it would have been desirable for the referring court to have set out more succinctly and clearly its own understanding of the dispute before it and the questions of law giving rise to its request for a preliminary ruling, rather than reproducing, in an excessively long form, numerous extracts from the file which had been submitted to it. Similarly, while the referring court has certainly set out the reasons that led it to make a preliminary reference to the Court, it would have assisted effective cooperation if it had also reformulated the questions suggested to it by the parties to the main proceedings in order to avoid the unnecessary overlap of those questions. It would also have been helpful to set out the legal and factual premisses on which the questions were based in order to allow the Court to reply in a more specific and targeted manner.

26 In those circumstances, although the preliminary reference is admissible as it meets the conditions of Article 94 of the Rules of Procedure, the Court is in a position to be able to provide the referring court

with minimal and general indications only so as to provide guidance as to the application of Article 101 TFEU in the circumstances of the dispute in main proceedings.

The first and fourth questions: the concept of 'a restriction of competition by object', within the meaning of Article 101(1) TFEU

27 By its first and fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as meaning that the finding that a vertical agreement fixing minimum resale prices constitutes a 'restriction of competition by object' may be made without first examining whether that agreement raises a sufficient level of harm to competition or whether it may be presumed that such an agreement, of itself, presents such a degree of harm.

28 At the outset, it should be recalled that, in the context of the procedure under Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, the role of the latter is limited to interpreting the provisions of EU law referred to it, in this case Article 101(1) TFEU. Therefore, it is not for the Court of Justice, but for the referring court to determine in the end whether, taking account of all of the information relevant to the situation in the main proceedings and the economic and legal context of which it forms a part, the agreement at issue has as its object the restriction of competition (judgment in 18 November 2021, *Visma Enterprise*, C−306/20, EU:C:2021:935, paragraph 51 and the case-law cited).

29 However, the Court, when giving a preliminary ruling, may, on the basis of the information available to it, provide clarification designed to give the national court guidance in its interpretation in order to enable it to decide the case before it (judgment in 18 November 2021, *Visma Enterprise*, C−306/20, EU:C:2021:935, paragraph 52 and the case-law cited).

30 It must first of all be recalled that, under Article 101(1) TFEU, the following are incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

31 In order to be caught by the prohibition laid down by that provision, an agreement must have as its 'object or effect' the prevention, restriction or distortion of competition within the internal market. According to the settled case-law of the Court since the judgment of 30 June 1966, *LTM* (56/65, EU:C:1966:38), the alternative nature of that requirement, as shown by the conjunction 'or', means that it is first necessary to consider the object of the agreement (see, to that effect, the judgments of 26 November 2015, *Maxima Latvija*, C−345/14, EU:C:2015:784, paragraph 16 and the case-law cited, and of 18 November 2021, *Visma Enterprise*, C−306/20, EU:C:2021:935, paragraphs 54 and 55 and the case-law cited). Thus, where the anticompetitive object of an agreement is established, it is not necessary to examine its effects on competition (judgment of 20 January 2016, *Toshiba Corporation* v *Commission*, C−373/14 P, EU:C:2016:26, paragraph 25 and the case-law cited).

32 The concept of 'restriction of competition by object' must be interpreted restrictively. Accordingly, that concept applies only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (see, to that effect, the judgments of 26 November 2015, *Maxima Latvija*, C−345/14, EU:C:2015:784, paragraph 18 and the case-law cited, and of 18 November 2021, *Visma Enterprise*, C−306/20, EU:C:2021:935, paragraphs 60 and the case-law cited).

33 However, the fact that an agreement is a vertical agreement does not exclude the possibility that it comprises a 'restriction of competition by object'. While vertical agreements are, by their nature, often less damaging to competition than horizontal agreements, they can also, in some cases, have a particularly significant restrictive potential (see, to that effect, the judgments of 14 March 2013, *Allianz Hungária Biztosító and Others*, C−32/11, EU:C:2013:160, paragraph 43, and of 18 November 2021, *Visma Enterprise*, C−306/20, EU:C:2021:935, paragraph 61).

34 The essential legal criterion for ascertaining whether an agreement, whether it is horizontal or vertical, involves a 'restriction of competition by object' is a finding that that agreement in itself presents a

sufficient degree of harm to competition (see, to that effect, the judgments of 11 September 2014, *CB* v *Commission*, C−67/13 P, EU:C:2014:2204, paragraph 57, and of 18 November 2021, *Visma Enterprise*, C−306/20, EU:C:2021:935, paragraph 59 and the case-law cited).

35 In order to determine whether that criterion is met, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the actual conditions of the functioning and structure of the market or markets in question (judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C−32/11, EU:C:2013:160, paragraph 36 and the case-law cited).

36 In addition, where the parties to the agreement rely on its procompetitive effects, those effects must, as elements of the context of that agreement, be taken into account. Provided that they are demonstrated, relevant, intrinsic to the agreement concerned and sufficiently significant, those effects may give rise to reasonable doubt as to whether the agreement concerned caused a sufficient degree of harm to competition (see, to that effect, the judgment of 30 January 2020, *Generics (UK) and Others*, C−307/18, EU:C:2020:52, paragraphs 103, 105 and 107).

37 It follows from that case-law that, in order to determine whether a vertical agreement fixing minimum resale prices involves the ‘restriction of competition by object’, within the meaning of Article 101(1) TFEU, it is for the referring court to ascertain whether that agreement presents a sufficient degree of harm for competition in the light of the criteria recalled in paragraphs 35 and 36 of this judgment.

38 When it makes that assessment, the referring court must also take into account the fact, which it has itself pointed to, that a vertical agreement fixing minimum resale prices may fall within the category of ‘hardcore restrictions’ for the purposes of Article 4(a) of Regulations Nos 2790/1999 and 330/2010, as an element of the legal context.

39 However, if it does so, that does not exempt the referring court from carrying out the assessment referred to in paragraph 37 of this judgment.

40 The sole purpose of Article 4(a) of Regulation No 2790/1999 read in the light of recital 10 thereof, and Article 4(a) of Regulation No 330/2010, read in the light of recital 10 thereof, is to exclude certain vertical restrictions from the scope of a block exemption. That exemption, set out in Article 2 of each of those regulations, read in the light of their respective recital 5, benefits vertical agreements deemed not to be harmful to competition.

41 By contrast, those provisions of Regulations Nos 2790/1999 and 330/2010 do not contain an indication as to whether those restrictions must be categorised as a restriction ‘by object’ or ‘by effect’. Furthermore, as the Commission observed in its written observations before the Court, the concepts of ‘hardcore restrictions’ and of ‘restriction by object’ are not conceptually interchangeable and do not necessary overlap. It is therefore necessary to examine restrictions falling outside that exemption, on a case by case basis, with regard to Article 101(1) TFEU.

42 It follows that the referring court cannot dispense with carrying out the assessment referred to in paragraph 37 of this judgment on the ground that a vertical agreement fixing minimum resale prices constitutes on any hypothesis or is deemed to constitute such a restriction by object.

43 In the light of all of the foregoing considerations, the answer to the first and fourth questions is that Article 101(1) TFEU must be interpreted as meaning that the finding that a vertical agreement fixing minimum resale prices entails a ‘restriction of competition by object’ may only be made after having determined that that agreement presents a sufficient degree of harm to competition, taking into account the nature of its terms, the objectives that it seeks to attain and all of the factors that characterise the economic and legal context of which it forms part.

The third and fifth questions: the concept of ‘agreement’, within the meaning of Article 101 TFEU

44 By its third and fifth questions, which it is appropriate to examine together in the second place, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as meaning that there

is an ‘agreement’ within the meaning of that article where a supplier imposes on its distributors minimum resale prices of the products that it markets.

45 The referring court seeks clarification as to the concept of ‘agreement’, within the meaning of that provision, in order to be able to determine whether there is, in the circumstances of the main proceedings, such an agreement between Super Bock and its distributors. Since its question is based on numerous hypotheses of fact set out in the third and fifth questions referred, which in part are inconsistent and some of which are contested by Super Bock, it must be recalled that it is not for the Court to rule on the facts of the dispute in the main proceedings in accordance with the division of tasks between the national courts and the Court recalled in paragraph 28 of this judgment.

46 However, it may be observed, on the reading of the findings of fact made by the referring court, that those questions arise in a context in which Super Bock regularly transmits to its distributors lists of minimum resale prices and distribution margins. It is clear from those findings that the resale prices thus indicated are, in practice, observed by the distributors who sometimes request that indication and do not hesitate to complain to Super Bock about the prices transmitted instead of other prices being applied. Finally, according to that findings, the indication of the minimum resale prices is accompanied by mechanisms for monitoring prices and failure to apply those prices can give rise to retaliatory measures and lead to the application of negative distribution margins.

47 Having made that preliminary observation, it should be recalled that, according to the settled case-law of the Court, in order for there to be an ‘agreement' within the meaning of Article 101(1) TFEU, it suffices for undertakings to have expressed their joint intention to conduct themselves on the market in a specific way (judgment of 18 November 2021, *Visma Enterprise*, C−306/20, EU:C:2021:935, paragraph 94 and the case-law cited).

48 An agreement cannot therefore be based on a statement of a purely unilateral policy of one party to a contract for distribution (see, to that effect, judgment of 6 January 2004, *BAI and Commission* v *Bayer*, C−2/01 P and C−3/01 P, EU:C:2004:2, paragraphs 101 and 102).

49 However, an act or conduct which is apparently unilateral will constitute an agreement, within the meaning of Article 101(1) TFEU, where it is the expression of the concurrence of wills of at least two parties, the form in which that concurrence is expressed not being by itself decisive (see, to that effect, judgment of 13 July 2006, *Commission* v *Volkswagen*, C−74/04 P, EU:C:2006:460, paragraph 37).

50 That concurrence of the parties’ wills may be shown from the terms of the distribution contract at issue, where it contains an express invitation to comply with minimum resale prices or authorises, at the very least, the supplier to impose those prices, as well as from the conduct of the parties and, in particular, from any explicit or tacit acquiescence on the part of the distributors to an invitation to comply with minimum resale prices (see, to that effect, judgments of 6 January 2004, *BAI and Commission* v *Bayer*, C−2/01 P and C−3/01 P, EU:C:2004:2, paragraphs 100 and 102, and of 13 July 2006, *Commission* v *Volkswagen*, C−74/04 P, EU:C:2006:460, paragraphs 39, 40 and 46).

51 It is for the referring court to assess the facts of the dispute in the main proceedings in the light of that case-law.

52 In that context, the fact that a supplier regularly transmits to distributors lists indicating the minimum prices that it has determined and the distribution margins, as well as the fact that it asks them to comply with those prices, which it monitors, on pain of retaliatory measures and at the risk, in the event of non-compliance with those measures, of the application of negative distribution margins, are elements from which it may be concluded that that supplier seeks to impose minimum resale prices on its distributors. While, in themselves, those facts appear to reflect an apparently unilateral conduct by that supplier, it would be otherwise if the distributors complied with those prices. In that respect, the facts that the minimum resale prices are, in practice, followed by the distributors, or that their indication is sought by the latter, who, whilst complaining to the supplier about the indicated prices, do not however apply other prices on their own initiative, could be of such a nature as to reflect the acquiescence on the part of those distributors to minimum resale prices being fixed by the supplier.

53 In the light of all of the foregoing considerations, the answer to the third and fifth questions is that Article 101(1) TFEU must be interpreted as meaning that there is an 'agreement', within the meaning of that article, where a supplier imposes on its distributors minimum resale prices of the products that it markets, if the imposition of those prices by the supplier and compliance with them by the distributors reflects the expression of the concurrence of wills of those parties. That concurrence of wills may be shown from the terms of the distribution contract at issue, where it contains an express invitation to comply with minimum resale prices or authorises, at the very least, the supplier to impose those prices, as well as from the conduct of the parties and, in particular, from any explicit or tacit acquiescence on the part of the distributors to an invitation to comply with minimum resale prices.

The second question: proof of an 'agreement' within the meaning of Article 101 TFEU

54 By its second question, the referring court asks, in essence, whether Article 101 TFEU must be interpreted as meaning that the existence of an 'agreement', within the meaning of that article, between a supplier and its distributors may be established only on the basis of direct evidence.

55 According to the Court's case-law, in the absence of EU rules on the principles governing the assessment of evidence and the requisite standard of proof in national proceedings for the application of Article 101 TFEU, it is for the national legal order of each Member State to establish those rules, in accordance with the principle of procedural autonomy, provided, however, that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness) (see, to that effect, judgment of 21 January 2016, *Eturas and Others*, C−74/14, EU:C:2016:42, paragraphs 30 to 32 and the case-law cited).

56 It is clear from that case-law that the principle of effectiveness requires that an infringement of EU competition law may be proven not only by direct evidence, but also through indicia, provided that they are objective and consistent. In most cases the existence of a concerted practice or an agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (judgment of 21 January 2016, *Eturas and Others*, C−74/14, EU:C:2016:42, paragraphs 36 and 37 and the case-law cited).

57 It follows that the existence of an agreement, within the meaning of Article 101(1) TFEU, on minimum resale prices may be established not only by means of direct evidence but also on the basis of consistent coincidences and indicia, where it may be inferred that a supplier invited its distributors to apply to follow those prices and that the latter, in practice, complied with the prices indicated by the supplier.

58 In the light of all the foregoing considerations, the answer to the second question is that Article 101 TFEU, read together with the principle of effectiveness, must be interpreted as meaning that the existence of an 'agreement', within the meaning of that article, between a supplier and its distributors, may be established not only by means of direct evidence, but also on the basis of objective and consistent indicia from which the existence of such an agreement may be inferred.

The sixth question: the concept of 'effect on trade between Member States', within the meaning of Article 101(1) TFEU

59 By its sixth question, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as meaning that the fact that a vertical agreement fixing minimum resale prices covers almost the entirety, but not all, of the territory of a Member State prevents that agreement from being able to affect trade between Member States.

60 According to consistent case-law, in order for the condition that an agreement within the meaning of Article 101(1) TFEU must be capable of affecting trade between Member States to be fulfilled, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law and of fact, that the agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that it might hinder the attainment of a single market between Member States. Moreover, that effect must not be insignificant (judgments of 11 July 2013, *Ziegler* v *Commission*, C−439/11 P, EU:C:2013:513, paragraph 92 and the

case-law cited, and 16 July 2015, *ING Pensii*, C−172/14, EU:C:2015:484, paragraph 48 and the case-law cited).

61 An effect on trade between Member States is normally the result of a combination of several factors which, taken separately, are not necessarily decisive. In order to assess whether an arrangement has an appreciable effect on trade between Member States, it is necessary to examine it in its economic and legal context (judgment of 11 July 2013, *Ziegler* v *Commission*, C−439/11 P, EU:C:2013:513, paragraph 93 and the case-law cited).

62 In that respect, the fact that an agreement relates only to the marketing of products in a single Member State is not sufficient to exclude the possibility that trade between Member States might be affected. Thus, the Court has held that a practice extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the TFEU is designed to bring about (see, to that effect, the judgments of 26 November 1975, *Groupement des fabricants de papiers peints de Belgique and Others* v *Commission*, 73/74, EU:C:1975:160, paragraphs 25 and 26, and of 16 July 2015, *ING Pensii*, C−172/14, EU:C:2015:484, paragraph 49 and the case-law).

63 Similarly, the Court has held that an arrangement that covers only part of the territory of a Member State may, in some circumstances, be capable of affecting trade between Member States (see, to that effect, judgment of 3 December 1987, *Aubert*, 136/86, EU:C:1987:524, paragraph 18).

64 It is for the referring court to determine whether, having regard to the economic and legal context of the agreement in question in the main proceedings, that agreement is capable of significantly affecting trade between Member States.

65 In the light of all of the foregoing considerations, the answer to the sixth question is that Article 101(1) TFEU must be interpreted as meaning that the fact that a vertical agreement fixing minimum resale prices covers almost the entirety, but not all, of the territory of a Member State does not prevent that agreement from being capable of affecting trade between Member States.

Costs

66 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. **Article 101(1) TFEU**

   must be interpreted as meaning that the finding that a vertical agreement fixing minimum resale prices entails a 'restriction of competition by object' may only be made after having determined that that agreement presents a sufficient degree of harm to competition, taking into account the nature of its terms, the objectives that it seeks to attain and all of the factors that characterise the economic and legal context of which it forms part.

2. **Article 101(1) TFEU**

   must be interpreted as meaning that there is an 'agreement', within the meaning of that article, where a supplier imposes on its distributors minimum resale prices of the products that it markets, if the imposition of those prices by the supplier and compliance with them by the distributors reflects the expression of the concurrence of wills of those parties. That concurrence of wills may be shown from the terms of the distribution contract at issue, where it contains an express invitation to comply with minimum resale prices or authorises, at the very least, the supplier to impose those prices, as well as from the conduct of the

parties and, in particular, from any explicit or tacit acquiescence on the part of the distributors to an invitation to comply with minimum resale prices.

3. Article 101 TFEU, read together with the principle of effectiveness,

must be interpreted as meaning that the existence of an 'agreement', within the meaning of that article, between a supplier and its distributors, may be established not only by means of direct evidence, but also on the basis of objective and consistent indicia from which the existence of such an agreement may be inferred.

4. Article 101(1) TFEU

must be interpreted as meaning that the fact that a vertical agreement fixing minimum resale prices covers almost the entirety, but not all, of the territory of a Member State does not prevent that agreement from being capable of affecting trade between Member States.

[Signatures]

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* Language of the case: Portuguese.