



Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 3 December 2015¹

Case C-542/14

**‘VM Remonts’ SIA, formerly ‘DIV un Ko’ SIA,
‘Ausma grupa’ SIA**
v

Konkurences padome

(Request for a preliminary ruling pursuant to Article 267 TFEU from the

Augstākā Tiesa (Supreme Court, Latvia))

(Reference for a preliminary ruling — Competition — Article 101(1) TFEU — Attribution to an undertaking of the acts of an independent service provider — Undertaking having no knowledge of the acts of the independent service provider)

I – Introduction

1. This reference for a preliminary ruling, made on 27 November 2014 by the Augstākā Tiesa (Supreme Court), concerns the interpretation of Article 101(1) TFEU in connection with an alleged concerted practice on the part of undertakings participating in a call for tenders organised by the city of Jūrmala (Latvia).

II – Legal framework

A – EU Law

2. Article 101 TFEU (formerly Article 81 EC) provides:

‘1. The following shall be prohibited as 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, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;

¹ — Original language: French.

- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

...'

B – *Latvian Law*

3. Under Article 11(1) of the Law on competition (Konkurences Likums) of 4 October 2001 (Latvijas Vēstnesis, 2001, No 151)):

'Agreements between economic operators which have as their object or effect the hindering, limiting or distortion of competition within the territory of Latvia shall be prohibited and void *ab initio*, including agreements relating:

...

- (5) to the participation or non-participation in calls for tenders or bidding procedures or to arrangements concerning such actions (non-participation), unless the competitors have publicly announced their joint tender and it is not the purpose of such a tender to hinder, limit or distort competition;

...'

III – The main proceedings and the question referred for a preliminary ruling

4. The municipal council of the city of Jūrmala issued a call for tenders for the supply of foodstuffs to educational establishments. VM Remonts SIA, formerly DIV un Ko SIA ('DIV un Ko'), Ausma grupa SIA ('Ausma grupa') and Pārtikas kompānija SIA ('Pārtikas kompānija'), submitted tenders in response to that call.

5. Pārtikas kompānija sought legal assistance from 'Juridiskā sabiedrība "B&Š partneri"' SIA in connection with the preparation and presentation of its tender. For this purpose, 'Juridiskā sabiedrība "B&Š partneri"' SIA had recourse, in turn, to a sub-contractor, 'MMD lietas' SIA ('MMD lietas'). MMD lietas received a draft tender from Pārtikas kompānija which the latter had prepared independently, without collaborating with DIV un Ko or Ausma.

6. It is clear from the order for reference that Pārtikas kompānija had set its prices independently (see in particular paragraphs 3.3 and 3.5 of that order) and that the Administratīvā apgabaltiesa (Regional Administrative Court) — which alone had jurisdiction to determine questions of fact — found that there was no agreement or concerted practice between Pārtikas kompānija and the other undertakings concerned (see, in particular, paragraphs 3 and 3.5 of the order).

7. It is also apparent from the order for reference that, without informing Pārtikas kompānija, MMD lietas had accepted instructions to prepare the respective tenders of DIV un Ko and Ausma grupa. In this context, it appears that an employee of MMD lietas used the Pārtikas kompānija tender as a point of reference in drawing up the tenders of the other two tenderers. In particular, it appears that MMD lietas drew up those two tenders on the basis of the prices set out in the Pārtikas kompānija tender, such that the Ausma grupa tender was approximately 5% cheaper than the Pārtikas kompānija tender, and the DIV un Ko tender was 5% cheaper than the Ausma grupa tender.

8. By decision of 21 October 2011, the Konkurences padome (Competition Council) held that the three tendering companies had infringed Article 11(1), point (5), of the Latvian law on competition by preparing their tenders jointly with the aim of creating the impression that there was actual competition between them. The Competition Council held that this concerted practice had distorted competition and imposed a fine on the companies.

9. DIV un Ko, Ausma grupa and Pārtikas kompānija sought annulment of the Competition Council's decision before the administratīvā tiesa (administrative court), and subsequently before the Administratīvā apgabaltiesa (Regional Administrative Court). By judgment of 3 July 2013, the latter court annulled the contested decision insofar as it held that there had been an infringement by Pārtikas kompānija, but upheld it insofar as the other two companies were concerned.

10. While, on the one hand, that court considered that the arithmetical relationship between the prices proposed by the three tenderers showed that there had been a concerted practice regarding participation in the call for tenders, it also held, on the other hand, that there was nothing to demonstrate that Pārtikas kompānija had been involved in that practice.

11. DIV un Ko and Ausma grupa brought an appeal on a point of law before the Augstākā Tiesa (Supreme Court) against the judgment of the Administratīvā Apgabaltiesa (Regional Administrative Court) in so far as it had dismissed their action. For its part, the Competition Council brought an appeal on a point of law against the judgment in so far as it had upheld the action brought by Pārtikas kompānija.

12. In connection with that appeal, the referring court is uncertain whether the participation of an undertaking in an infringement of competition law can lead to liability on the part of that undertaking, where it has not been shown that the senior management of the undertaking consented to the acts concerned or were aware of them.

13. The referring court observes that Article 11(1) of the Law on competition was drafted with regard to the need for harmonisation between national law and EU law in the field of competition law and, accordingly, that the interpretation of that provision should not differ from that of Article 101(1) TFEU.

14. Under the case-law of the Court, particularly its judgments in *Musique Diffusion française and Others v Commission* (100/80 to 103/80, EU:C:1983:158) and *Slovenská sporiteľňa* (C-68/12, EU:C:2013:71), an undertaking is liable under Article 101 TFEU for the acts of a person who, as an employee, acts on behalf of that undertaking, regardless of whether those with decision-making power within the undertaking have authorised that person to act in that way, or have been informed of such acts. Nonetheless, the referring court is uncertain whether that case-law applies in circumstances such as those of the case before it, given that the acts in question are not those of an employee of Pārtikas kompānija but of an independent service provider instructed by that company. Moreover, the service provider in question did not act exclusively for Pārtikas kompānija, but also acted on behalf of DIV un Ko and Ausma grupa.

15. In those circumstances, the Augstākā Tiesa (Supreme Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 101(1) TFEU be interpreted as meaning that, in order for it to be established that an undertaking has participated in an agreement restricting competition, it must be shown that an officer of the undertaking has personally engaged in conduct or been aware of, or consented to, conduct by persons providing an external service to the undertaking and at the same time acting on behalf of other parties to a possible prohibited practice?’

IV – Proceedings before the Court

16. Written observations were submitted by the Latvian and Italian Governments and by the European Commission. The Latvian Government and the Commission took part in the hearing on 21 October 2015.

V – Analysis

A – Admissibility

17. The Commission, which is alone in making observations on this point, argues that the request for a preliminary ruling is admissible. Although EU law is not applicable in the main proceedings, as the concerted practice at issue in the case is not capable of affecting trade between Member States, the Law on competition was adopted precisely to align Latvian law with EU law. The Commission adds that the circumstances of the main proceedings are more comparable to those of *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160) than to those of *Kleinwort Benson* (C-346/93, EU:C:1995:85).

18. In my opinion, the present reference is admissible.

19. The Court has jurisdiction to give preliminary rulings on questions concerning EU law in situations where the facts of a case before the referring court are outside the scope of that law, but where the provisions in question have been made applicable by national law, which has adopted, for purely internal situations, the same approach as that provided for under EU law. In such cases it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly, irrespective of the circumstances in which they are to apply.²

2 — See judgments in *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160, paragraph 20 and the case-law cited) and *FNV Kunsten Informatie en Media* (C-413/13, EU:C:2014:2411), in which, in circumstances similar to those of the present case, the Court ruled on the questions referred.

B – *Substance*

20. In this case, the referring court asks the Court to determine whether, in circumstances such as those of the main proceedings, participation in a concerted practice which is prohibited by Article 101 TFEU, consisting in a collusive bid made in the course of a tendering process ('bid rigging'³), can be attributed to an undertaking solely on the basis of proof of unlawful conduct on the part of an independent service provider retained by that company, and responsible for the preparation of the tender, when it has not been established that the senior management of the undertaking in question were aware of, or authorised, that conduct.

1. Summary of the parties' arguments

21. The Latvian Government suggests that the answer to the referring court's question should be that Article 101(1) TFEU is to be interpreted in such a way that a finding that an undertaking has participated in an agreement which restricts competition does not require proof of personal conduct on the part of a senior manager of the undertaking, or that such a person was aware of the conduct of a service provider retained by the undertaking who was also working for other parties to the agreement, or that he consented to it.

22. The Latvian Government considers that, in cases such as the main proceedings, the legal status of the person carrying out the task assigned by the undertaking (whether salaried or independent, employee or agent) has no bearing on whether the undertaking is liable for an infringement of competition law.

23. In the view of that government, it is apparent from the definitions of agent and employee in Latvian law that both act in the interest of the undertaking using their services. It submits that the same applies in the case of an independent service provider which is retained by undertaking to provide a legal service. Such a provider obtains authority to act and to use information held by the undertaking. External service providers do not assume the risks of economic activities where they act on behalf of a third party and, in those circumstances, their acts are attributable to the undertaking which uses their services.

24. Furthermore, it is argued that an undertaking must exercise prudence in selecting an agent, just as it must in engaging an employee. If this obligation did not exist, it would suffice for undertakings to use the services of third parties in order to infringe competition law without risking penalties.

25. Moreover, the Latvian Government argues that it is necessary to consider whether the information provided to the service provider by the undertaking is capable of affecting competition. In this regard, information concerning a specific offer made by an undertaking in the context of a tendering procedure is, in the Latvian Government's view, capable of affecting competition, because it will contain details outside the public domain concerning, for example, the proposed price or the operation of the undertaking.

26. Taking account of the fact that, in the main proceedings, MMD lietas was in possession of (sensitive) information capable of affecting competition in the market in question, and was authorised to act, using that information, on behalf of Pārtikas kompānija, the Latvian Government submits that it can be concluded that that undertaking is liable for the acts carried out by the service provider on behalf of other participants to any prohibited arrangement.

3 — In general, there is bid rigging where at least two undertakings which are participating in a tender process reach an agreement that one or more of them will not submit a tender, will submit a tender, or will withdraw a tender.

27. In addition, the Latvian government argues that it is not necessary to demonstrate that the senior managers of the undertaking authorised the service provider to communicate the information at issue, or that they were aware that it had been communicated. The senior managers should be treated as necessarily being aware of the acts of independent service providers retained by their undertaking.

28. The Italian government suggests that the answer to the question referred should be that liability for an anti-competitive practice can be attributed to an undertaking which is involved in that practice by reason of the conduct of an independent service provider, which has communicated information received from that undertaking to competing undertakings, even if the senior managers of the first undertaking were unaware that the information had been communicated and had not authorised its communication, unless the undertaking concerned proves that it was not reasonably possible for it to foresee and prevent the unlawful conduct of the service provider.

29. In this regard, the Italian government considers that the case-law of the Court regarding the conduct of employees of an undertaking can be applied *mutatis mutandis* to a situation, such as that of the main proceedings, in which the conduct at issue is that of an independent service provider. It is thus unnecessary for the conduct constituting the practice to be that of senior managers or representatives of the undertaking; it suffices if it is that of a person required to act on behalf of the undertaking.

30. It is submitted, first, that permitting undertakings to argue that those who engaged in the unlawful conduct were not among the senior management of the undertaking, so as to avoid liability, would make it more difficult to punish unlawful arrangements.

31. Secondly, it is submitted that infringement of the rules contained in Article 101 TFEU does not require intention on the part of the undertaking, but can arise from negligence on its part. Accordingly, the simple fact that the senior managers of an undertaking such as Pārtikas kompānija did not explicitly authorise MMD lietas to communicate the draft tender to its competitors, or that they were unaware that it had been communicated, does not mean that that undertaking cannot have been a party to the arrangement arising from the conduct of the service provider. Pārtikas kompānija is said to have been negligent in entrusting the drafting of the tender to a service provider without prohibiting it from providing the same service to competing undertakings and from using the content of the draft tender for the benefit of those undertakings.

32. On that basis, it is submitted that Pārtikas kompānija accepted a risk which made liability fully attributable to it in respect of the anti-competitive arrangement which arose from the conduct of the service provider. It follows that Pārtikas can escape this liability only by proving specifically that it was not reasonably possible for it to foresee and prevent the unlawful conduct of the service provider.

33. The Commission suggests that the referring court's question should be answered as follows:

'Article 101(1) TFEU should be interpreted as meaning that a finding that an undertaking has been party to an agreement which restricts competition, on the basis of the conduct of an agent who is not an employee of the undertaking, requires proof:

- that the unlawful conduct is within the scope of the functions assigned to the agent by the undertaking, or
- that the undertaking was aware of the unlawful conduct of the agent and did not publicly distance itself from it.

However, where the unlawful conduct is within the scope of the activities assigned to the agent, it is not necessary to show that the agent was authorised to perform those activities in an unlawful manner, or that the management of the undertaking was aware of or consented to such conduct.'

34. The Commission submits in this regard, first, that the case-law of the Court distinguishes between the concepts of ‘employees’ and ‘agents’. In particular, in the judgment in *Suiker Unie and Others v Commission* (40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, EU:C:1975:174), the Court accepted that an agent may be a distinct undertaking from its principal for the purposes of applying Article 101 TFEU, except where the agent is ‘integrated’ into the principal’s undertaking. The Court has recognised two different criteria in this regard, first, whether or not the agent took an economic risk, and, secondly, whether or not the agent’s services were provided on an exclusive basis. The Commission submits that those criteria were applied, in particular, by the General Court of the European Union in the judgment in *Minoan Lines v Commission* (T-66/99, EU:T:2003:337), in which consideration was given to the issue of whether liability for an infringing act of an agent can be attributed to an undertaking.

35. Nonetheless, these two criteria are, in the Commission’s submission, neither exhaustive, nor cumulative. It follows from the judgment in *Energetický a průmyslový and EP Investment Advisors v Commission* (T-272/12, EU:T:2014:995) that it is also important to determine whether the unlawful conduct in question falls within the agent’s area of competence, the criterion of economic risk or exclusivity not always being decisive.

36. The Commission submits that this approach was followed by the Competition Appeal Tribunal (United Kingdom) in its judgment in *A H Willis & Sons Ltd v Office of Fair Trading (OFT)* [2011] CAT 13. The tribunal held, essentially, that the unlawful conduct of an agent cannot be attributed to the principal where it constitutes an act which is completely distinct from the functions assigned by the principal.

37. Secondly, as to the general principles of law which apply to the liability of principals for the activities of their agents, the Commission asserts, in particular, that in French law,⁴ a principal is liable for the actions of its agent provided that the infringement is committed within the scope — real or apparent — of its functions.⁵

38. According to the Commission, it follows from this case-law and these principles that the simple fact that MMD lietas was not an exclusive agent of Pärtikas kompānija does not suffice to exonerate that undertaking of its liability for the actions of MMD lietas. On the other hand, the conduct of MMD lietas cannot be attributed to Pärtikas kompānija if it was not within the scope of the functions assigned to MMD lietas, unless Pärtikas kompānija was aware of that conduct and did not publicly distance itself from it. As MMD lietas was only assigned the task of preparing Pärtikas kompānija’s tender documents in accordance with the instructions given by that undertaking (pure representation of the undertaking and lodging of the tender), the decision of an MMD lietas employee to use Pärtikas kompānija’s tender as a template for those of its competitors would appear to represent the execution of a completely distinct function which cannot be attributed to Pärtikas kompānija. Furthermore, it is also apparent from the documents before the Court that MMD lietas was not given any authorisation to negotiate with the other undertakings.

4 — The Commission refers to Article 1384 of the Civil Code.

5 — The Commission refers to a judgment of the French Court of Cassation of 19 May 1988, No 87-82654. It is said to follow from this judgment that a principal can escape liability for the acts of its agent if the agent has acted outside the scope of its functions, without authorisation and for purposes unrelated to its role.

2. Assessment

a) General observations and case-law

39. It should be noted at the outset that, according to the case-law of the Court, the concept of ‘concerted practices’ within the meaning of Article 101(1) TFEU relates to any form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.⁶ A concerted practice may arise from direct or indirect contact between competing undertakings, the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.⁷

40. It follows from that case-law that a concerted practice cannot be attributed to an undertaking unless it is established that the undertaking deliberately participated in that practice. In this regard, while the Court’s case-law does not require it to be demonstrated that the undertaking was aware that it was infringing Article 101 TFEU, there must be a finding that it could not have been unaware that its conduct had the effect of restricting competition.⁸

41. By reason, in particular, of the heavy penalties associated with infringements of competition law, liability can only, in principle, be personal, whether the infringement was intentional or negligent.

42. The request for a preliminary ruling puts before the Court the question, in relation to competition law, of the circumstances in which the acts of third parties can be attributed to undertakings.

43. In this regard, a distinction can be drawn according to whether the practice which is prohibited by competition law is engaged in by:

- an employee of the undertaking;
- one of its subsidiaries; or
- a third party (whether a physical or legal person) which is not part of the company’s organisation.

44. Where it is the undertaking itself which engages, through its representatives or employees in the exercise of their duties within the undertaking, in conduct contrary to competition law, it is directly liable, whether the infringement was intentional or negligent. In that case, in order for competition law to apply to the undertaking ‘it is not necessary for there to have been action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned; action by a person who is authorised to act on behalf of the undertaking suffices’.⁹

45. The Court has observed that ‘participation in agreements that are prohibited by the FEU Treaty is more often than not clandestine and is not governed by any formal rules. It is rarely the case that an undertaking’s representative attends a meeting with a mandate to commit an infringement’. Accordingly, ‘Article 101(1) TFEU must be interpreted as meaning that, in order to find that an

6 — Judgment in *Imperial Chemical Industries v Commission*, 48/69, EU:C:1972:70, paragraph 64.

7 — Judgment in *Suiker Unie and Others v Commission* (40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, EU:C:1975:174, paragraph 174).

8 — Judgments in *Miller International Schallplatten v Commission* (19/77, EU:C:1978:19, paragraph 18); *Musique Diffusion française and Others v Commission* (100/80 to 103/80, EU:C:1983:158, paragraph 112), and *IAZ International Belgium and Others v Commission* (96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82, EU:C:1983:310, paragraph 45).

9 — Judgment in *Musique Diffusion française and Others v Commission* (100/80 to 103/80, EU:C:1983:158, paragraph 97).

agreement is restrictive of competition, it is not necessary to demonstrate personal conduct on the part of a representative authorised under the undertaking's constitution or the personal assent, in the form of a mandate, of that representative to the conduct of an employee of the undertaking who has participated in an anti-competitive meeting'.¹⁰

46. The Court has also accepted that parent companies are liable for acts of their subsidiaries which are contrary to competition law when the parent and the subsidiary form an economic unit: 'when such an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement'.¹¹

47. It is also settled case-law that 'the conduct of a subsidiary may be attributed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company ... having regard in particular to the economic, organisational and legal links between those two legal entities'.¹²

48. There remains the situation in which the act which is contrary to competition law is that of a person (whether natural or legal) which is neither a subsidiary of, nor integrated into, the undertaking in question, but in which, as in the present case, that third party acts as an independent service provider. To what extent can the undertaking receiving the services of such a provider be held liable for its acts?

49. Two types of case may arise:

- the third party acted in the name of the undertaking and carried out the act contrary to competition law in the performance of the tasks assigned to him by the undertaking. In such a case, it is clear that the undertaking using the services of the third party is liable: it knew or must perforce have known that the third party was to carry out, or had carried out, an act contrary to competition law; it consented to this, and the act in question may even have been among the tasks assigned to the third party;
- the third party acted under a contract with the undertaking concerned but took steps on its own initiative (including acts contrary to competition law) which were not provided for in the tasks assigned to it, and it is not established that the senior managers of the undertaking knew that the service provider had carried out an act contrary to competition law, nor, *a fortiori*, that they consented to it.

50. What are the criteria on the basis of which liability for an unlawful act carried out by the third party can be attributed to the undertaking using its services?

10 — Judgment in *Slovenská sporiteľňa* (C-68/12, EU:C:2013:71, paragraphs 26 and 28 respectively). See also paragraphs 25 and 27 of that judgment.

11 — Judgment in *Akzo Nobel and Others v Commission* (C-97/08 P, EU:C:2009:536, paragraph 56 and the case-law cited).

12 — *Ibid.* (paragraph 58 and the case-law cited).

51. In the judgment in *Minoan Lines v Commission* (T-66/99, EU:T:2003:337),¹³ the General Court rightly sought to ascertain whether the undertaking and the agent ‘form, or fall within, one and the same undertaking or economic entity adopting the same course of conduct on the market’ (paragraph 124). If that is the case, the third party who is working for the benefit of the principal may in principle be treated as an ‘auxiliary organ forming an integral part of the latter’s undertaking, who must carry out his principal’s instructions and thus, like a commercial employee, forms an economic unit with this undertaking’ (paragraph 125).

52. The General Court went on to adopt two factors as the criteria for determining whether there was a single economic unit: ‘first, whether the intermediary takes on any economic risk and, secondly, whether the services provided by the intermediary are exclusive’ (paragraph 126), the absence of risk-sharing and the fact of exclusivity as regards services pointing towards the existence of a single economic entity.

53. As the Latvian Government and the Commission observed at the hearing, these two factors cannot be exhaustive and in themselves decisive for the purpose of establishing whether unlawful conduct on the part of an agent can be attributed to the principal.

54. In its judgment in *voestalpine AG and voestalpine Wire Rod Austria GmbH v Commission* (T-418/10, EU:T:2015:516), in circumstances where there was no evidence that the undertaking could have had any information concerning the anti-competitive conduct of its agent, the General Court, after carrying out a factual examination of the conduct and functions of the agent, held that ‘nevertheless, in circumstances such as those of the present case, where the agent acts in the name and for the benefit of the principal without assuming the economic risk of the activities assigned to him, the anti-competitive conduct of that agent in the course of those activities can be attributed to the principal, in the same way that the misconduct of an employee can be attributed to the employer, even where it is not proved that the principal knew of the anti-competitive conduct of the agent’ (paragraph 175), concluding in paragraph 178 of that judgment ‘that, in the present case, the Commission is entitled, first, to conclude that agent and principal form a single economic unit in relation to the activities assigned to M. G. by Austria Draht, and, secondly, to consider that, on that basis, the misconduct engaged in by M. G. on behalf of Austria Draht, in the performance of the activities assigned to it, can be attributed to the principal, without the need to demonstrate that the principal was aware of that misconduct’.

55. However, in the same judgment, the General Court also held that the agent’s participation in certain anti-competitive meetings could not be attributed to the principal, since the issues discussed at those meetings clearly did not relate to the representative function assigned to the agent by the principal (see, to this effect, paragraph 384 of the judgment). The General Court considered that liability for the anti-competitive acts of the agent carried out outside the Italian market could not be attributed to voestalpine Austria Draht, the mandate being limited to Italian territory. Having regard to those matters, the General Court reduced the fine imposed jointly and severally on the two companies from EUR 22 000 000 to EUR 7 500 000.

56. It should be added that in that case (and also in *Minoan Lines v Commission*, T-66/99, EU:T:2003:337), the agent had clearly acted in the name of the undertaking and had powers relating to the commercial policy of the principal, such that *setting prices was an aspect of the mandate* given to the agent, which involved negotiating with the other undertakings.

13 — An appeal was brought against this judgment, one of the grounds of appeal relating to the very issue of whether the acts of the agents could be attributed to the principal, but the Court dismissed the appeal on the basis that it was purely factual and thus manifestly inadmissible (order in *Minoan Lines v Commission*, C-121/04 P, EU:C:2005:695, paragraphs 19 and 20). Concerning the judgment in *Minoan Lines v Commission* (T-66/99, EU:T:2003:337), see Blaise, J.-B., and Idot, L., *Chronique de droit communautaire de la concurrence — Mise en œuvre des articles 81 et 82 CE*, *Revue trimestrielle de droit européen*, 2005, pp. 131 to 223, paragraph 81, and Idot, L., *Transports maritimes — Commentaires aux arrêts du Tribunal du 11 décembre 2003*, *Europe*, 2004, No 2, pp. 18 and 19.

57. The situation is different in the present case, in which it is apparent from the documents before the Court that Pārtikas kompānija had set the tender price itself (see point 6 of this Opinion) and that MMD lietas was merely an agent instructed to carry out the technical drafting of the documents. It would appear therefore that in deciding to use the Pārtikas kompānija tender as a template for producing the tenders of the other undertakings, MMD lietas was performing a function which was completely distinct from that assigned to it, and which cannot in my view be attributed to Pārtikas kompānija.

58. I repeat that there is no evidence on the case-file in this matter to demonstrate that Pārtikas kompānija knew and/or approved of the acts of the agent, unlike the situation in *Minoan Lines v Commission* (T-66/99, EU:T:2003:337, in particular paragraphs 139 to 147).

b) The matter at issue in the main proceedings

59. What then should be the decision in the present case, where there is nothing to show that Pārtikas kompānija knew of MMD lietas's conduct, and where the agent MMD lietas acted as an independent trader, did not share the economic risk with Pārtikas kompānija, was not contractually bound by any exclusivity agreement with that undertaking (although it seems to me that the minimal professional ethics of its field would automatically require such exclusivity in relation to the tender in question) and took steps on its own initiative which clearly went beyond the function assigned to it by Pārtikas?

60. It seems to me that two extreme positions must be rejected: first, that liability for the actions of third parties should automatically be attributed to the company, regardless of the extent of its involvement — this would run counter to fundamental principles governing the imposition of penalties such as those provided for by competition law (in particular the principle that penalties must be specific to the offender and the principle of legal certainty); and secondly, that the authority which is competent in the field of competition law must provide convincing proof that the company receiving the services of the third party knew of unlawful acts carried out by that third party, or consented to such acts — this would seriously undermine the effectiveness of competition law.

61. As the Court has held, 'since the prohibition on participating in anti-competitive practices and agreements and the penalties which infringers may incur are well known, it is normal that the activities which those practices and agreements involve take place in a clandestine fashion, for meetings to be held in secret, frequently in a non-member country, and for the associated documentation to be reduced to a minimum'.¹⁴ It would thus be too easy for an undertaking to 'hide behind' a third party so as to avoid penalties under competition law.

62. Furthermore, the importance of preserving free competition justifies a requirement, imposed on undertakings which assign tasks such as those at issue to third parties, to take every precaution to prevent those third parties committing infringements of competition law, in particular by avoiding any lack of care or prudence in defining or supervising those tasks.

63. In accordance with the above, the approach which I propose in relation to cases such as the present is to establish a rebuttable presumption of liability on the part of a company for acts contrary to competition law which are carried out by a third party whose services are used by the company and which cannot be regarded as an auxiliary organ forming an integral part of the company. Such a presumption would maintain a balance between, on the one hand, the objective of effectively punishing conduct which is contrary to the rules of competition law (in particular Article 101 TFEU) and preventing its recurrence, bearing in mind that compliance with those rules requires continuous

¹⁴ — Judgment in *Knauf Gips v Commission* (C-407/08 P, EU:C:2010:389, paragraph 49).

positive conduct on the part of the undertakings, and, on the other hand, the requirements of the fundamental rights relating to penalties. The presumption would apply even where the acts of the third party are distinct from the functions assigned to it, and even where it is not proved that the company using its services was aware of its acts, or consented to them.¹⁵

64. That presumption should apply in relation to an undertaking upon proof by the authority responsible for compliance with competition rules that an act contrary to competition law has been carried out by a person who is working for that undertaking but is not part, directly or indirectly, of its organisation.

65. So as to maintain the balance I referred to in point 63 above, the undertaking will be able to rebut the presumption of liability by presenting such material as may substantiate the proposition that it was unaware of the unlawful conduct of the third-party service provider, and by proving that it took all necessary precautions to prevent such a deviation from competition law, at three stages in the chronology.¹⁶

66. The first is the point in time when the third party is taken on or retained. This relates in particular to choosing the service provider, defining the tasks and monitoring their performance, the terms relating to (or preventing) the use of sub-contractors, the obligations imposed in order to ensure compliance with the law, particularly competition law, as well as the penalties provided for in the event of non-compliance with the contract, and the authorisation required for acts which are not contemplated by the contract.

67. The second stage is the whole period of performance of the tasks assigned to the third party, during which the undertaking must ensure that the third party adheres strictly to the tasks as defined in the contract.

68. The third stage is the point in time when the third party infringes competition law, even if this is done without the undertaking's knowledge. The undertaking cannot simply opt to ignore the infringement, but must publicly distance itself from the prohibited act, prevent it from recurring, and/or report it to the administrative authorities. As the Court has held, 'passive modes of participation in the infringement, such as the presence of an undertaking in meetings at which anti-competitive agreements were concluded, without that undertaking clearly opposing them, are indicative of collusion capable of rendering the undertaking liable under Article 81(1) EC, since a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, encourages the continuation of the infringement and compromises its discovery' (judgment in *AC-Treuhand v Commission*, C-194/14 P, EU:C:2015:717, paragraph 31).

69. At the hearing, the question was raised of whether it was of any significance, in rebutting the presumption, for the undertaking to demonstrate that it could not benefit in any way from the acts contrary to competition law carried out by the agent. Both the Latvian Government and the Commission answered this question in the negative.

70. I do not share that view, subject to two conditions which were indirectly at the centre of argument at the hearing. It is true that whether or not an undertaking has an interest in a concerted practice cannot have any relevance in establishing an infringement of competition law. Nonetheless, the issue under discussion is not whether an infringement has been established but whether a factor is present

15 — Presumptions are known to EU law. Both the Court of Justice and the General Court have used presumptions in determining whether a parent company is jointly and severally liable for acts of its subsidiaries (judgment in *Akzo Nobel and Others v Commission*, C-97/08 P, EU:C:2009:536), or for acts of its salaried staff and employees (judgment in *Musique Diffusion française and Others v Commission*, 100/80 to 103/80, EU:C:1983:158, paragraph 97).

16 — As to the rebuttal of the presumption that a parent company is liable for the conduct of its subsidiary, see the judgment in *ENI v Commission* (C-508/11 P, paragraphs 46 et seq., and 68 and 69).

which enables the presumption of liability to be rebutted. Where the undertaking demonstrates that the acts of the agent had only negative consequences for it, this may bolster other factors relied on as rebutting the presumption of liability. The converse is obviously true in the opposite situation where the undertaking had an interest in the outcome of the agreement or concerted practice.

71. It was stated at the hearing that the fact that Pārtikas kompānija was not awarded the contract does not prove that it did not participate in some way in the concerted practice, in that it might have come to an understanding with the other undertakings to divide the market on a temporal basis (bid rigging). I agree with this observation but it does not relate to the situation I have in mind, namely where the undertaking shows, besides the fact that it was not awarded the contract, that it did not participate in any way in the negotiation of any other matters which might have led to it benefiting from an infringement of competition law. Clearly this is only one of a number of factors which the undertaking may put forward in seeking to rebut the presumption.

72. In summary, the undertaking will be able to rebut the presumption if it establishes that the third party acted outside the scope of the assigned tasks, that it took the necessary precautions at the time of the third party's appointment and in monitoring the tasks assigned to the third party, and that once it became aware of the unlawful conduct, it publicly distanced itself from that conduct or reported it to the administrative authorities.

73. It will naturally be for the national court to assess the facts before it in this case, in the light of the matters set out above, so as to determine whether or not Pārtikas kompānija is liable.

VI – Conclusion

74. In the light of all the foregoing considerations, I suggest that the Court should answer the question referred for a preliminary ruling by the Augstākā Tiesa (Supreme Court) as follows:

Article 101(1) TFEU must be interpreted as meaning that, in order for it to be established that an undertaking has participated in an agreement restricting competition, it need not be shown that an officer of the undertaking has personally engaged in conduct or been aware of, or consented to, conduct by persons providing an external service to the undertaking and at the same time acting on behalf of other parties to a possible prohibited practice.

It is for the national court to determine, in the dispute before it, whether — as regards (i) whether the third party acted outside the scope of the tasks assigned to it, (ii) the precautions taken by the undertaking at the time of the third party's appointment and in monitoring the performance of the tasks in question, and (iii) the undertaking's own conduct once it became aware of the unlawful conduct — the undertaking has been able to present evidence which is sufficiently convincing to rebut the presumption of liability.