

JUDGMENT OF THE COURT (Second Chamber)

1 October 2009\*

In Case C-505/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal Supremo (Spain), made by decision of 22 October 2007, received at the Court on 19 November 2007, in the proceedings brought by

**Compañía Española de Comercialización de Aceite SA,**

intervening parties:

**Asociación Española de la Industria y Comercio Exportador de Aceite de Oliva (Asoliva),**

**Asociación Nacional de Industriales Envasadores y Refinadores de Aceites Comestibles (Anierac),**

**Administración del Estado,**

\* Language of the case: Spanish.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J.-C. Bonichot, K. Schiemann, J. Makarczyk (Rapporteur) and C. Toader, Judges,

Advocate General: J. Kokott,  
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 17 December 2008,

after considering the observations submitted on behalf of:

- Compañía Española de Comercialización de Aceite SA, by R. Illescas Ortiz, abogado,
  
- Asociación Española de la Industria y Comercio Exportador de Aceite de Oliva (Asoliva), by M. Albarracín Pascual, procuradora, and M.C. Ortega Martínez, abogada,
  
- Asociación Nacional de Industriales Envasadores y Refinadores de Aceites Comestibles (Anierac), by F. Bermúdez de Castro Rosillo, procurador, and A. Ruiz-Giménez Aguilar, abogado,

— the Commission of the European Communities, by F. Jimeno Fernández and F. Castillo de la Torre, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 February 2009,

gives the following

### **Judgment**

- 1 This reference for a preliminary ruling concerns the interpretation of Article 12a of Council Regulation No 136/66/EEC of 22 September 1966 on the establishment of a common organisation of the market in oils and fats (OJ, English Special Edition 1965-1966, p. 221), as amended by Council Regulation (EC) No 1638/98 of 20 July 1998 (OJ 1998 L 210, p. 32) ('Regulation No 136/66'), and of Article 2 of Council Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition 1959-1962, p. 129).
  
- 2 The reference was made in the course of an action brought by Compañía Española de Comercialización de Aceite SA ('Cecasa') against the decision of the Tribunal de Defensa de la Competencia (Competition Court) of 5 March 2002, refusing it individual authorisation for the purposes of creating a joint venture for the marketing of olive oil.

## Legal context

### *Community legislation*

Legislation concerning the applicability of the competition rules to the agricultural sector

3 The first recital in the preamble to Regulation No 26 states:

‘... by virtue of Article [36] of the Treaty one of the matters to be decided under the common agricultural policy is whether the rules on competition laid down in the Treaty are to apply to production of and trade in agricultural products ...’.

4 Article 1 of Regulation No 26 provides:

‘From the entry into force of this Regulation, Articles [81] to [86] of the Treaty and provisions made in implementation thereof shall, subject to Article 2 below, apply to all agreements, decisions and practices referred to in Articles [81(1)] and [82] of the Treaty which relate to production of or trade in the products listed in Annex [I] to the Treaty.’

5 Olive oil is one of the agricultural products listed in Annex I to the EC Treaty.

6 Article 2(1) and (2) of Regulation No 26 states:

‘1. Article [81](1) of the Treaty shall not apply to such of the agreements, decisions and practices referred to in the preceding Article as form an integral part of a national market organisation or are necessary for attainment of the objectives set out in Article [33] of the Treaty. In particular, it shall not apply to agreements, decisions and practices of farmers, farmers’ associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article [33] of the Treaty are jeopardised.

2. After consulting the Member States and hearing the undertakings or associations of undertakings concerned and any other natural or legal person that it considers appropriate, the Commission shall have sole power, subject to review by the Court of Justice, to determine, by decision which shall be published, which agreements, decisions and practices fulfil the conditions specified in paragraph 1.’

Legislation concerning the oils and fats sector

7 Article 12a of Regulation No 136/66 provides:

‘In the event of serious disturbance of the market in certain regions of the Community, in order to regularise the market, a decision may be taken in accordance with the

procedure laid down in Article 38 to authorise bodies offering sufficient guarantees, and approved by the Member States, to conclude contracts for the storage of olive oil that they market. Among the bodies concerned, priority shall be given to producer groups and associations thereof recognised in accordance with [Council] Regulation (EC) No 952/97 [of 20 May 1997 on producer groups and associations thereof (OJ 1997 L 142, p. 30)].

The measures referred to in the first paragraph may be implemented inter alia when the average price recorded on the market during a representative period is less than 95% of the intervention price applicable during the 1997/98 marketing year.

The amount of the aid granted for the performance of contracts and the detailed rules for implementing this Article, in particular the quantities, qualities and duration of storage of the oils concerned, shall be established by the procedure laid down in Article 38 in such a way as to ensure a significant impact on the market. The aid may be granted by means of tenders.'

- 8 Article 38(1) of Regulation No 136/66 refers to a comitology procedure.
- 9 It is apparent from Article 1 of Regulation No 952/97 that that regulation introduced a system to encourage the formation of producer groups and associations of such groups in certain regions.

10 Article 1 of Regulation No 952/97 states as follows:

‘In order to remedy the structural deficiencies affecting the supply and marketing of agricultural products in certain regions, resulting from insufficient producer organisation, this Regulation hereby introduces a system to encourage the formation of producer groups and associations thereof for those regions.’

11 With effect from 3 July 1999 Regulation No 952/97 was repealed, without being replaced, by Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations (OJ 1999 L 160, p. 80).

12 According to recital 44 in the preamble to Regulation No 1257/1999, in view of existing aid to producer groups and their associations in several common organisations of the market, specific support to producer groups in the framework of rural development no longer appeared to be necessary.

13 Recital 11 in the preamble to Regulation No 1638/98 states that:

‘... the system of public buying-in constitutes a production incentive which is liable to destabilise the market; ... buying-in must therefore be discontinued and the references to the intervention price must be deleted or replaced.’

14 Recital 12 in the preamble to that regulation states:

‘... if the supply of olive oil is to be regulated when there is serious disturbance of the market, there is a need for a system of aid for private storage contracts, with priority for such contracts being given to producer groups and associations thereof recognised under [Regulation No 952/97].’

15 Article 1(1) of Commission Regulation (EC) No 2768/98 of 21 December 1998 on the aid scheme for the private storage of olive oil (OJ 1998 L 346, p. 14) provides:

‘The competent bodies in producer Member States shall conclude contracts for the private storage of virgin olive oil in bulk on the conditions laid down in this Regulation.’

16 Pursuant to Article 1(2) of that regulation, the Commission may carry out tenders for a limited period in order to determine the aid to be granted for the performance of contracts for private storage of olive oil.



*National legislation*

- <sup>17</sup> Article 1 of Law 16/1989 on the protection of competition (Ley 16/1989 de Defensa de la Competencia) of 17 July 1989 (BOE No 170, 18 July 1989, p. 22747; ‘the LDC’) states:

‘1. The following are prohibited: all agreements, decisions, collective recommendations or concerted or consciously synchronised practices, which have as their object or which result in or may result in the prevention, restriction or distortion of competition in all or part of the national market and, in particular, those which:

(a) directly or indirectly fix prices or other commercial or service conditions;

(b) limit or control production, distribution, technical development or investments;

(c) share markets or sources of supply;

...

2. The agreements, decisions and recommendations prohibited under paragraph 1 of this Article are automatically void and are not covered by the exemptions provided for in the present law. ...'

18 Under the heading 'Conditions for authorisation', Article 3 of the LDC provides:

'1. Agreements, decisions, recommendations and practices as referred to in Article 1, or categories thereof, which have the effect of improving the production or distribution of goods and services or promoting technical or economic progress, may be authorised provided that:

(a) they allow consumers or users an appropriate share of the benefit;

(b) they do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; and

(c) they do not afford participating undertakings the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

2. Similarly, the following may be authorised, to the extent that they are justified by general economic circumstances or by the public interest: agreements, decisions, recommendations and practices as referred to in Article 1, or categories thereof, which:

- (a) have as their object the protection or promotion of exports, provided that they do not distort competition within the internal market and are compatible with the obligations arising from international conventions ratified by Spain; or
- (b) have as their result the raising of the social and economic level of a depressed area or economic sector to a sufficiently great extent; or
- (c) by virtue of their de minimis nature, are not capable of materially affecting competition.’

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

<sup>19</sup> It is apparent from the case-file before the Court that Cecasa is a public limited company established under Spanish law, 68% of the capital of which is held by oil producers, oil pressers and cooperatives, whilst 32% of its capital is held by credit institutions and other bodies. The olive-growing members of that undertaking account for between 50% and 60% of olive oil production in Spain.

<sup>20</sup> On 5 April 2001, Cecasa applied to the national competition authorities for an individual authorisation for the purposes of Article 3 of the LDC with a view to incorporating an olive oil marketing company. Its principal aim was to prevent the price

of olive oil from falling below a certain level — set at approximately 95% of the former intervention price — by buying oil from that price upwards and putting the oil back on the market once prices had begun to rise again.

21 On the view that Cecasa's application for individual authorisation was directed at establishing an agreement between competitors to fix olive oil prices during periods of production surplus, the Tribunal de Defensa de la Competencia (Competition Court) (Spain) rejected that application by decision of 5 March 2002.

22 That decision was, essentially, upheld by judgment of the Chamber for Contentious Proceedings of the Audiencia Nacional (National High Court) (Spain) of 22 July 2005, against which Cecasa lodged an appeal on a point of law before the referring court.

23 In those circumstances, the Tribunal Supremo (Supreme Court) (Spain) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

- '1. Does the reference to "bodies" authorised to conclude contracts for the storage of olive oil in Article 12a of ... Regulation ... No 136/66 ... cover a company whose shareholders predominantly comprise producers, oil pressers and olive growers' cooperatives, as well as financial institutions? Can a company with these characteristics be considered equivalent to producer groups and associations thereof recognised under Regulation ... 952/97?
  
2. In the event that the company falls within the description of "bodies" capable of carrying out storage activities, can the "approval by the Member State" which such bodies require by virtue of Article 12a of Regulation No 136/66 be obtained as part

of an application for an individual exemption (“authorisation”) made to the national competition authorities?

3. Does Article 12a of Regulation No 136/66 constitute an absolute requirement that the Commission authorise the private storage of olive oil in each case or, on the contrary, is it compatible with the existence of a mechanism agreed between producers for the privately-financed acquisition and storage of such olive oil, which would be activated exclusively on the same terms and conditions which activate Community-financed private storage, with the aim of supplementing and rationalising such Community-financed storage without going beyond it?
  
4. Can the reasoning given by the Court ... in Case C-137/00 *Milk Marque and National Farmers' Union* [2003] ECR I-7975 relating to the application by domestic authorities of national competition rules to producers' agreements which are capable, in principle, of being covered by Article 2 of ... Regulation No 26 ... be extended to agreements which, by their nature and by nature of the sector in question, could affect the Community market in olive oil as a whole?
  
5. In the event that the national competition authorities are competent to apply national laws to the aforementioned agreements which are capable of affecting the common organisation of the market in oils and fats, can those authorities refuse absolutely to allow a company such as the appellant to make use of the storage mechanisms for olive oil, even in situations of “serious disturbance” as contemplated by Article 12a of Regulation No 136/66?

## The questions referred for a preliminary ruling

### *Admissibility of the reference for a preliminary ruling*

- 24 In the second part of the first question referred, the referring court mentions Regulation No 952/97, which was no longer in force at the time that the decision contested in the main proceedings was taken.
- 25 In that regard, it should be recalled that, according to settled case-law, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (see Case C-213/07 *Michaniki* [2008] ECR I-9999, paragraph 33 and the case-law cited).
- 26 The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community 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 (see *Michaniki*, paragraph 34 and the case-law cited).
- 27 However, as the Advocate General pointed out in point 33 of her Opinion, Regulation No 952/97 did not lose its practical significance on being repealed.
- 28 In the present case, as they are specifically identified in Article 12a of Regulation No 136/66, producer groups and their associations play a particular role in the context

of that provision. The Community legislature granted priority to those groups and to their associations in the context of contracts concluded for storage of olive oil.

- 29 In those circumstances, the second part of the first question referred must be held to be admissible.

*The first question*

- 30 By its first question, the referring court asks whether a public limited company, the capital of which is held predominantly by olive oil producers, oil pressers and olive growers' cooperatives, and the remainder of the capital of which is held by financial entities, comes within the concept of 'body', within the meaning of Article 12a of Regulation No 136/66, authorised to conclude contracts for the storage of olive oil.
- 31 In that regard, it should be borne in mind that — as is clear from recital 11 in the preamble to Regulation No 1638/98 — in view of the risk of the market being destabilised by the buying-in scheme, the Council of the European Union decided to discontinue the buying-in scheme in the context of the reform of the market in olive oil following the adoption of that regulation.
- 32 It is apparent from recital 12 in the preamble to Regulation No 1638/98 that, in order to achieve the objective of regulating the supply of olive oil when there is serious disturbance of the market, a system of aid for private storage contracts was established. The characteristics of that system are set out in Article 12a of Regulation No 136/66.

33 As follows from Article 12a of Regulation No 136/66, read in conjunction with recital 12 in the preamble to Regulation No 1638/98, bodies offering sufficient guarantees and approved by the Member States may be authorised to conclude private storage contracts. Among those bodies are the producer groups and associations within the meaning of Regulation No 952/97, to whom priority is given.

34 It should be noted that, subject to meeting the requirements laid down in Article 12a of Regulation No 136/66, both private and public undertakings may, irrespective of their composition or their means of financing, be authorised to conclude contracts under that provision.

35 Accordingly, the answer to the first question is that a public limited company, the capital of which is held predominantly by olive oil producers, oil pressers and olive growers' cooperatives, and the remainder of the capital of which is held by financial entities, is capable of coming within the concept of a body, within the meaning of Article 12a of Regulation No 136/66, which may be authorised to conclude a contract for the private storage of olive oil under that provision, subject to it meeting the conditions laid down therein.

*The second question*

36 By its second question, the referring court raises, in essence, the question of the conditions for the grant, by a Member State, of the authorisation provided for in Article 12a of Regulation No 136/66.

37 At the outset, it should be pointed out that that provision contains no details as to the nature of the national procedure leading to the grant of authorisation to a body wishing



to engage in the private storage of olive oil. Nor does it specify the type of national authority empowered to issue such authorisation.

38 Although the Member States thus enjoy a measure of discretion in the organisation of the authorisation procedure for private storage of olive oil for the purposes of Article 12a of Regulation No 136/66, they do so subject to full compliance with the objectives and obligations laid down in that regulation.

39 Therefore, the body given statutory authority by the Member State to issue the authorisation must be able to carry out all the appropriate verifications in order to satisfy itself that the body which has submitted an application for authorisation is capable of privately storing oil in compliance with the provisions of agricultural law, and offers, in that regard, sufficient guarantees.

40 Furthermore, if Article 12a of Regulation No 136/66 is to retain its effectiveness, the authority empowered to approve bodies to conclude contracts under that provision must be clearly identifiable.

41 Consequently, the answer to the second question is that the ‘approval by the Member State’, which bodies within the meaning of Article 12a of Regulation No 136/66 must have, can be obtained in the context of an application for an individual exemption (‘authorisation’) submitted to the national competition authorities, provided that those authorities have the means necessary to verify the suitability of the body which has submitted the application to carry out the private storage of olive oil in compliance with the legal requirements.

*The third question*

- 42 By its third question, the referring court asks, in essence, whether Article 12a of Regulation No 136/66 precludes the existence of a mechanism for the purchase and storage of olive oil, which is agreed and financed privately, and which has not undergone the authorisation procedure to which that provision refers.
- 43 In that regard, as has been pointed out in paragraphs 31 and 32 of this judgment, in the context of the reform of the market in olive oil, following the adoption of Regulation No 1638/98, Article 12a of Regulation No 136/66 established a system of Community aid for the conclusion of contracts for private storage of olive oil.
- 44 In the light of the wording of that provision, it should be borne in mind that the mechanism established by Article 12a of Regulation No 136/66 applies only to private storage benefiting from Community aid.
- 45 By contrast, where the operators are not seeking to obtain Community support, the private storage of olive oil does not fall within the scope of Regulation No 136/66.
- 46 Therefore, Article 12a of Regulation No 136/66 cannot preclude the establishment of a mechanism for private storage which is financed privately.
- 47 The establishment of a mechanism which is independent of Community aid must not, however, lead to a situation where the storage of olive oil is independent of the provisions of Community law and the national law governing the market in olive oil, or the competition rules.

48 Accordingly, the answer to the third question is that Article 12a of Regulation No 136/66 does not preclude a mechanism for the purchase and storage of olive oil which is agreed and financed privately and which has not undergone the authorisation procedure to which that provision refers.

*The fourth and fifth questions*

49 By its fourth and fifth questions, the referring court asks about the extent of the powers of national competition authorities in the event that an agreement between undertakings acting on the national market in olive oil has repercussions at Community level.

50 In that regard, it must be pointed out that Community competition law and national competition law apply in parallel, since they consider restrictive practices from different points of view. Whereas Articles 81 EC and 82 EC regard them in the light of the obstacles which they may engender for trade between Member States, national law proceeds on the basis of the considerations peculiar to it and considers restrictive practices only in that context (see *Milk Marque and National Farmers' Union*, paragraph 61 and the case-law cited).

51 In the light of that parallel application of provisions of national and Community competition law, the fact that an agreement concluded between undertakings acting in the sector governed by the common organisation of the market is such as to affect trade between Member States cannot lead to Community law being applied in isolation.

52 As the Court has already held, given that the scope of the Community competition rules is not the same as the scope of national competition rules, the mere fact that in Article 36 EC and Regulation No 26 the Community legislature has endeavoured to

reconcile the objectives of the common agricultural policy with Community competition policy does not necessarily mean that any application of national competition law conflicts with Article 36 EC and Regulation No 26 (*Milk Marque and National Farmers' Union*, paragraph 66).

53 As regards, in particular, the interpretation of Article 2(2) of Regulation No 26, as the Advocate General stated in point 87 of her Opinion, the exclusivity of the Commission's competence — under which it is empowered to decide to which agreements, decisions and practices the exception provided for in Article 2(1) of that regulation applies — does not prevent the application of national competition law either.

54 Article 2(2) of Regulation No 26 seeks only to establish the competent authority to apply Community competition law.

55 It must, however, be borne in mind that where the national competition authorities act in the area governed by the common organisation of the market for the sector in question, they are under an obligation to refrain from adopting any measure which might undermine or create exceptions to that common organisation (*Milk Marque and National Farmers' Union*, paragraph 94).

56 Moreover, as regards cases coming within the scope *ratione materiae* not only of Article 81(1) EC, but also of national competition law, the national authorities cannot take decisions which conflict with those of the Commission, or create the risk of such a conflict (see, to that effect, Case C-344/98 *Masterfoods and HB* [2000] ECR I-11369, paragraphs 51 and 52).

57 Accordingly, it must be held that, subject to compliance with the conditions which are referred to in paragraphs 55 and 56 of this judgment, the national competition authorities are empowered to control — and, therefore, to prohibit — a mechanism for the storage of olive oil which is agreed and financed outside the scope of Article 12a of Regulation No 136/66, and which is likely to affect the Community market.

58 In the light of all of the foregoing, the answer to the fourth and fifth questions is that, to the extent that the national competition authorities refrain from taking any measure which might undermine or create exceptions to the common organisation of the market in olive oil and from taking decisions which conflict with those of the Commission or create the risk of such conflict, they can apply national competition law to an agreement which is likely to affect the market in olive oil at Community level.

## Costs

59 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Second Chamber) hereby rules:

- 1. A public limited company, the capital of which is held predominantly by olive oil producers, oil pressers and olive growers' cooperatives, and the remainder of the capital of which is held by financial entities, is capable of coming within the concept of a body, within the meaning of Article 12a of Council Regulation**

**No 136/66/EEC of 22 September 1966 on the establishment of a common organisation of the market in oils and fats, as amended by Council Regulation (EC) No 1638/98 of 20 July 1998, which may be authorised to conclude a contract for the private storage of olive oil under that provision, subject to it meeting the conditions laid down therein.**

- 2. The ‘approval by the Member State’, which bodies within the meaning of Article 12a of Regulation No 136/66 — as amended by Regulation No 1638/98 — must have, can be obtained in the context of application for an individual exemption (‘authorisation’) submitted to the national competition authorities, provided that those authorities have the means necessary to verify the suitability of the body which has submitted the application to carry out the private storage of olive oil in compliance with the legal requirements.**
- 3. Article 12a of Regulation No 136/66, as amended by Regulation No 1638/98, does not preclude a mechanism for the purchase and storage of olive oil which is agreed and financed privately, and which has not undergone the authorisation procedure to which that provision refers.**
- 4. To the extent that the national competition authorities refrain from taking any measure which might undermine or create exceptions to the common organisation of the market in olive oil and from taking decisions which conflict with those of the Commission of the European Communities or create the risk of such conflict, they can apply national competition law to an agreement which is likely to affect the market in olive oil at Community level.**

[Signatures]