Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

20 April 2023*

(Reference for a preliminary ruling – Competition – Vertical restrictions of competition – Article 101(1) and (2) TFEU – Principle of effectiveness – Regulation (EC) No 1/2003 – Article 2 – Directive 2014/104/EU – Article 9(1) – Binding effect of the final decisions of the national competition authorities finding an infringement of the competition law rules – Temporal and material application – Actions for damages and for a declaration of nullity for infringements of the EU competition law provisions)

In Case C-25/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Mercantil No 2 de Madrid (Commercial Court No 2, Madrid, Spain), made by decision of 30 November 2020, received at the Court on 15 January 2021, in the proceedings

ZA,

AZ,

BX,

CV,

DU,

ET

v

Repsol Comercial de Productos Petolíferos SA,

THE COURT (First Chamber),

composed of A. Arabadjiev (Rapporteur), President of the Chamber, P.G. Xuereb, A. Kumin, N. Wahl and I. Ziemele, Judges,

Advocate General: G. Pitruzzella,

Registrar: M. Ferreira, Principal Administrator,

* Language of the case: Spanish.

having regard to the written procedure and further to the hearing on 19 May 2022,

after considering the observations submitted on behalf of:

– ZA, AZ, BX, CV, DU and ET, by A. Hernández Pardo, I. Sobrepera Millet and L. Ruiz Ezquerra, abogados,

– Repsol Comercial de Productos Petrolíferos SA, by M.P. Arévalo Nieto, Á. Requeijo Pascua and M. Villarrubia García, abogados,

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

– the European Commission, by F. Jimeno Fernández and C. Urraca Caviedes, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 101(2) TFEU and Article 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1).

2 The request has been made in proceedings between ZA, AZ, BX, CV, DU and ET (together, 'KN's heirs') and Repsol Comercial de Productos Petrolíferos SA ('Repsol') concerning actions brought by KN's heirs seeking a declaration of nullity of the contracts concluded between them and Repsol as well as compensation for the harm allegedly caused by those contracts.

Legal context

European Union law

Regulation No 1/2003

3 Article 2 of Regulation No 1/2003, headed 'Burden of proof', provides:

'In any national or Community proceedings for the application of Articles [101 and 102 TFEU], the burden of proving an infringement of Article [101](1) or of Article [102 TFEU] shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article [101(3) TFEU] shall bear the burden of proving that the conditions of that paragraph are fulfilled.'

Directive 2014/104/EU

4 Recital 34 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1) states:

'Ensuring the effective and consistent application of Articles 101 and 102 TFEU by the [European] Commission and the national competition authorities necessitates a common approach across the [European] Union on the effect of national competition authorities' final infringement decisions on subsequent actions for damages. Such decisions are adopted only after the Commission has been informed of the decision envisaged or, in the absence thereof, of any other document indicating the proposed course of action pursuant to Article 11(4) of Regulation (EC) No 1/2003, and if the Commission has not relieved the national competition authority of its competence by initiating proceedings pursuant to Article 11(6) of that Regulation. The Commission should ensure the consistent application of Union competition law by providing, bilaterally and within the framework of the European Competition Network, guidance to the national competition authorities. To enhance legal certainty, to avoid inconsistency in the application of Articles 101 and 102 TFEU, to increase the effectiveness and procedural efficiency of actions for damages and to foster the functioning of the internal market for undertakings and consumers, the finding of an infringement of Article 101 or 102 TFEU in a final decision by a national competition authority or a review court should not be relitigated in subsequent actions for damages. Therefore, such a finding should be deemed to be irrefutably established in actions for damages brought in the Member State of the national competition authority or review court relating to that infringement. The effect of the finding should, however, cover only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction. Where a decision has found that provisions of national competition law are infringed in cases where Union and national competition law are applied in the same case and in parallel, that infringement should also be deemed to be irrefutably established.'

5 Article 1 of that directive, entitled 'Subject matter and scope', provides:

'1. This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association. It sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning, by ensuring equivalent protection throughout the Union for anyone who has suffered such harm.

2. This Directive sets out rules coordinating the enforcement of the competition rules by competition authorities and the enforcement of those rules in damages actions before national courts.'

6 Article 9 of the said directive, entitled 'Effect of national decisions', provides:

'1. Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.

2. Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.

3. This Article is without prejudice to the rights and obligations of national courts under Article 267 TFEU.'

7 Article 21 of the same directive, entitled 'Transposition', is worded, in paragraph 1 thereof, as follows:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 27 December 2016. They shall forthwith communicate to the Commission the text thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. Member States shall determine how such reference is to be made.'

8 Article 22 of that directive, entitled 'Temporal application', states:

'1. Member States shall ensure that the national measures adopted pursuant to Article 21 in order to comply with substantive provisions of this Directive do not apply retroactively.

2. Member States shall ensure that any national measures adopted pursuant to Article 21, other than those referred to in paragraph 1, do not apply to actions for damages of which a national court was seized prior to 26 December 2014.'

Spanish law

9 Article 75(1) of Ley 15/2007 de Defensa de la Competencia (Law 15/2007 on the protection of competition) of 3 July 2007 (*BOE* No 159 of 4 July 2007, p. 28848), as amended by Real Decreto-ley 9/2017, por el que se transponen Directivas de la Unión Europea en los ámbitos financiero, mercantil y sanitario, y sobre el desplazamiento de trabajadores (Royal Decree-Law 9/2017 transposing European Union directives in the fields of finance, business and health, and on the posting of workers) of 26 May 2017 (*BOE* No 126 of 27 May 2017, p. 42820), provides:

'An infringement of competition law found by a final decision of a Spanish competition authority or by a Spanish review court is deemed to be irrefutably established for the purposes of an action for damages brought before a Spanish court.'

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

10 KN's heirs are the owners of a service station built by KN. During the period from 1987 to 2009, KN or KN's heirs, on the one hand, and Repsol, on the other, concluded several exclusive contracts for the supply of fuel.

11 It is apparent from the order for reference that the first two contracts concluded on 1 July 1987 and 1 February 1996 were 'resale contracts', ownership of the fuel supplied by Repsol being transferred to KN or to KN's heirs as soon as it was transferred into the tank of the service station concerned. Those contracts provided that the remuneration of the service station operator consisted of a commission which that operator could charge on the fuel retail price recommended by Repsol.

12 On 27 April 1999, the Asociación de Propietarios de Estaciones de Servicio y Unidades de Suministro de Andalucía (Association of Service Station and Supply Unit Proprietors of Andalusia, Spain) lodged a complaint with the competent authorities against several refining companies, Repsol among them, alleging breach of national and Community competition law.

13 By decision of 11 July 2001 ('the 2001 decision'), the Tribunal de Defensa de la Competencia (Competition Court, Spain) found that, by having fixed, in the context of its contractual relations with certain Spanish service stations, fuel retail prices, Repsol had infringed the competition law rules. That court ordered Repsol to bring that infringement to an end.

14 That decision, the validity of which was challenged by Repsol, was confirmed by a judgment of the Audiencia Nacional (National High Court, Spain) of 11 July 2007. That judgment was appealed by Repsol to the Tribunal Supremo (Supreme Court, Spain), which, by its judgment of 17 November 2010, dismissed that appeal. As a result, the 2001 decision became final.

15 On 22 February 2001, 22 February 2006 and 17 July 2009, KN's heirs concluded three further contracts with Repsol. Those contracts, which were also resale contracts, contained an exclusive supply obligation in favour of that company.

16 Following an investigation by the Comisión Nacional de la Competencia (National Competition Commission, Spain), that authority, on 30 July 2009, adopted a decision ('the 2009 decision') by which it penalised certain refining companies, including Repsol, for having indirectly fixed the fuel retail prices charged by the service stations concerned. The said authority found that Repsol had infringed Article 81(1) EC (now Article 101(1) TFEU) and Article 1 of Ley 16/1989 de Defensa de la Competencia (Law 16/1989 on competition) of 17 July 1989 (*BOE* No 170 of 18 July 1989, p. 22747).

17 The 2009 decision, against which an action for annulment had been brought, was upheld by the judgments of the Tribunal Supremo (Supreme Court) of 22 May and 2 June 2015 and became final.

18 In the context of a supervisory procedure, the National Competition Commission delivered three decisions in which it found that Repsol had continued to disregard the competition law rules until 2019.

19 In those circumstances, pursuant to Article 101(2) TFEU, KN's heirs, in the wake of the decisions of 2001 and 2009, brought before the Juzgado de lo Mercantil No 2 de Madrid (Commercial Court No 2, Madrid, Spain) – the referring court – first, an action for a declaration of nullity of the contracts concluded with Repsol, on the ground that, in breach of Article 101(1) TFEU, that company had fixed the retail price of the fuels at issue and, second, an action for damages for the harm allegedly caused by those contracts. In order to demonstrate the existence of the infringement concerned, KN's heirs rely, in those actions, on the 2001 and 2009 decisions.

20 The referring court recalls, first, that, under Article 2 of Regulation No 1/2003, the burden of proof of an infringement of Article 101 TFEU is to rest on the party alleging the infringement.

21 Second, it observes that, in principle, in accordance with Article 9(1) of Directive 2014/104, in an action for damages brought following a decision of a national competition authority which has become final, the applicant concerned may be able to discharge its burden of proof concerning the existence of an infringement by demonstrating that that decision relates specifically to the contractual relationship at issue.

22 According to national case-law, however, in an action for a declaration of nullity under Article 101(2) TFEU, such as that brought by KN's heirs, no binding effect is conferred on a final decision of a national competition authority unless it is shown that the infringement found in that decision and the alleged infringement against which that action has been brought are the same and that it is the applicant and not another person who is the victim of that infringement.

23 Thus, it is necessary to carry out an individual analysis of the contractual relationship that is the subject of the dispute and to show that it is precisely the applicant, a service station operator, and not another person, who is the victim of the price-fixing practice.

24 The referring court states that, according to national case-law, where, in particular, the infringement found by a final decision of a national competition authority and that against which an action for a declaration of nullity has been brought under Article 101(2) TFEU do not coincide, such a decision does not even constitute an indication of the existence of an infringement of the competition rules.

25 Consequently, in the present case, in order to obtain a decision declaring the contracts at issue in the main proceedings void, KN's heirs would have to resubmit to that court the evidence provided in the administrative file examined by the national competition authorities.

26 In that context, the referring court is of the view that to deny any binding effect to the final decisions of the national competition authority would have the effect of maintaining in force contracts which infringe Article 101 TFEU.

27 According to that court, if KN's heirs succeed in demonstrating that those contracts correspond temporally and territorially to the practices penalised by the national competition authorities in their final decisions and to the type of contracts examined by those authorities, they should be regarded as having discharged the burden of proof incumbent on them under Article 2 of Regulation No 1/2003 and, therefore, as having successfully proved the existence of the infringement of Article 101 TFEU that is the subject of their actions.

28 In those circumstances, the Juzgado de lo Mercantil nº 2 de Madrid (Commercial Court No 2, Madrid) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) If the applicant establishes that its exclusive supply contract under a brand name (on a commission basis or an executed sale basis with a discounted reference resale price) with Repsol falls within the territorial and temporal scope examined by the national competition authority, must the contractual relationship be found to be covered by the decision of the Tribunal de Defensa de la Competencia (Competition Court …) of 11 July 2001 (case 490/00 REPSOL) and/or by the decision of the [National Competition Commission] of 30 July 2009

(case 652/07 REPSOL/CEPSA/BP), the conditions laid down in Article 2 of Regulation (EC) No 1/2003 regarding the burden of proof of the infringement being deemed to be satisfied pursuant to those decisions?

(2) If the previous question is answered in the affirmative, and it is established in the specific case that the contractual relationship is covered by the decision of the Competition Court of 11 July 2001 (case 490/00 REPSOL) and/or the decision of the National Competition Commission of 30 July 2009 (case 652/07 REPSOL/CEPSA/BP), must the necessary consequence be a declaration that the agreement is automatically void in accordance with Article 101(2) TFEU?'

Consideration of the questions referred

The first question

Preliminary observations

29 The referring court makes reference to Directive 2014/104, and to Article 9(1) thereof in particular. That provision could be relevant to the outcome of the dispute in the main proceedings, however, only if that dispute fell within its material and temporal scope.

30 In that regard, in terms of the material scope of Article 9 of Directive 2014/104, it should be noted, as is apparent from the title of that directive and from Article 1 thereof, entitled 'Subject matter and scope', that the said directive lays down certain rules governing actions for damages brought at national level for infringements of the competition law provisions of the Member States and of the European Union.

31 The result of this is that the material scope of Directive 2014/104, including that of Article 9 thereof, is limited solely to actions for damages brought for infringements of the competition rules and, therefore, does not extend to other types of action concerning infringements of the competition law provisions, such as, for example, actions for a declaration of nullity brought under Article 101(2) TFEU.

32 It follows that the action for a declaration of nullity brought by KN's heirs under Article 101(2) TFEU does not fall within the material scope of Directive 2014/104.

33 So far as concerns the temporal applicability of Article 9(1) of that directive to the action for damages brought by KN's heirs, it must be recalled that, in order to determine the temporal applicability of the provisions of Directive 2014/104, it is necessary to establish, in the first place, whether or not the provision concerned constitutes a substantive provision (judgment of 22 June 2022, *Volvo and DAF Trucks*, C-267/20, EU:C:2022:494, paragraph 38).

34 In the event that Article 9(1) of Directive 2014/104 were to be classified as a 'substantive provision' and given that, in the case at hand, it is common ground that that directive was transposed into Spanish law five months after the expiry of the time limit for transposition provided for in Article 21 thereof, Royal Decree-Law 9/2017 transposing that directive having entered into force on 27 May 2017, it would be necessary to ascertain, in the second place, whether the situation at issue in the main proceedings, in so far as it cannot be described as new, arose before the expiry of

the time limit for transposition of the same directive – 27 December 2016 – or whether it continued to produce effects after the expiry of that time limit (see, to that effect, judgment of 22 June 2022, *Volvo and DAF Trucks*, C-267/20, EU:C:2022:494, paragraphs 42 and 48).

35 By contrast, if that provision is classified as a 'procedural provision', it will be taken to apply to the legal situation concerned from the date on which it entered into force (see, to that effect, judgment of 3 June 2021, *Jumbocarry Trading*, C-39/20, EU:C:2021:435, paragraph 28).

36 As regards, in the first place, whether or not Article 9(1) of Directive 2014/104 is substantive in nature, it should be recalled that, under that provision, Member States are to ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.

37 It is apparent from the wording of that provision that it confers, in essence, binding effect on final decisions of a national competition authority or, as the case may be, on decisions of a review court finding infringements of competition law for the purposes of actions for damages brought before a court of the same Member State as that in which that authority exercises its jurisdiction.

38 In particular, Article 9(1) of Directive 2014/104 establishes an irrefutable presumption as to the existence of an infringement of competition law.

39 Since, as is apparent from the case-law of the Court, the existence of an infringement of competition law, the existence of harm caused by that infringement, the causal link between that harm and the said infringement, and the identity of the perpetrator of that same infringement are among the necessary elements which the injured party must have in order to bring an action for damages (see, to that effect, judgment of 22 June 2022, *Volvo and DAF Trucks*, C-267/20, EU:C:2022:494, paragraph 60), Article 9(1) of Directive 2014/104 must be considered to pertain to the existence of one of the constituent elements of civil liability for infringements of the competition law rules and must therefore, as the Advocate General observed, in essence, in point 64 of his Opinion, be classified as a substantive rule.

40 Article 9(1) of Directive 2014/104 must therefore be held to be substantive in nature, within the meaning of Article 22(1) of that directive.

41 As is apparent from paragraph 34 of the present judgment, in order to determine the temporal applicability of Article 9(1) of Directive 2014/104, it is appropriate, in the second place, to ascertain whether the situation at issue in the main proceedings arose before the expiry of the time limit for transposition of that directive or whether it continued to produce effects after the expiry of that time limit.

42 To that end, it is necessary to take account of the nature and operational arrangements of Article 9(1) of Directive 2014/104 (see, to that effect, judgment of 22 June 2022, *Volvo and DAF Trucks*, C-267/20, EU:C:2022:494, paragraphs 49 and 100).

43 As is apparent from paragraph 38 of the present judgment, that provision establishes a presumption that an infringement of competition law found in a final decision of a national competition authority or in a decision of a review court must be deemed to be irrefutably

established for the purposes of an action for damages for infringement of competition law, brought following such decisions, before a court of the same Member State as that in which that authority and that review court exercise their jurisdiction.

44 Since the fact identified by the EU legislature as enabling the infringement concerned to be deemed to be irrefutably established for the purposes of the action for damages concerned is the date on which the decision concerned became final, it is necessary to ascertain whether that date precedes the date of expiry of the time limit for transposing Directive 2014/104, that directive not having been transposed into Spanish law within that time limit.

45 In this case, it is apparent from the file before the Court, first, that the 2001 decision became final following the judgment of 17 November 2010 of the Tribunal Supremo (Supreme Court). Second, the 2009 decision became final following the judgments of the Tribunal Supremo (Supreme Court) of 22 May and 2 June 2015. Those decisions thus became final before the date of expiry of the time limit for transposition of Directive 2014/104. It follows that the situations at issue in the main proceedings are established.

46 Consequently, in the light of Article 22(1) of Directive 2014/104, it must be held that Article 9(1) of that directive cannot be applicable *ratione temporis* to actions for damages brought following decisions of national competition authorities which became final before the date of expiry of the time limit for transposition of the said directive.

47 In those circumstances, it is necessary, in this case, to examine the national legislation, as interpreted by the competent national courts, in particular in the light of Article 101 TFEU, as implemented by Article 2 of Regulation No 1/2003.

Substance

48 By its first question, the referring court asks, in essence, whether Article 101 TFEU, as implemented by Article 2 of Regulation No 1/2003 and read in combination with the principle of effectiveness, must be interpreted as meaning that the infringement of competition law found in a decision of a national competition authority, against which an action for annulment had been brought before the competent national courts but which became final after having been confirmed by those courts, must be deemed to be established, in the context of both an action for a declaration of nullity under Article 101(2) TFEU and an action for damages for an infringement of Article 101 TFEU, by the applicant until proof to the contrary is adduced, thereby shifting the burden of proof defined by that Article 2 to the defendant, provided that the temporal and territorial scope of the alleged infringement that is the subject of those actions coincides with that of the infringement found in that decision.

49 According to settled case-law, just as it imposes burdens on individuals, EU law is also intended to give rise to rights which become part of their legal heritage. Those rights arise not only where they are expressly granted by the Treaties but also by virtue of obligations which they impose in a clearly defined manner both on individuals and on the Member States and the EU institutions (judgment of 11 November 2021, *Stichting Cartel Compensation and Equilib Netherlands*, C-819/19, EU:C:2021:904, paragraph 47 and the case-law cited).

50 It should be recalled that Article 101(1) and Article 102 TFEU produce direct legal effects in relations between individuals and directly create rights for individuals which national courts must protect (judgment of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraph 24).

51 The full effectiveness of those provisions and, in particular, the practical effect of the prohibitions laid down therein would be put at risk if it were not open to any individual to claim damages for loss caused to him or her by a contract or by conduct liable to restrict or distort competition (see, to that effect, judgments of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraph 25, and of 28 March 2019, *Cogeco Communications*, C-637/17, EU:C:2019:263, paragraph 39).

52 Actions for damages for infringement of EU competition rules brought before the national courts ensure the full effectiveness of Article 101 TFEU, in particular the practical effect of the prohibition laid down in paragraph 1 thereof, and thus strengthen the working of the EU competition rules, since they discourage agreements or practices, frequently covert, which are liable to restrict or distort competition (see, to that effect, judgment of 11 November 2021, *Stichting Cartel Compensation and Equilib Netherlands*, C-819/19, EU:C:2021:904, paragraph 50 and the case-law cited).

53 As the Advocate General observed, in essence, in point 82 of his Opinion, the same is true of actions for a declaration of nullity brought under Article 101(2) TFEU.

54 Accordingly, any individual can rely on a breach of Article 101(1) TFEU before a national court and therefore rely on the invalidity of an agreement or decision prohibited under that provision, as laid down in Article 101(2) TFEU; that individual may also claim compensation for the harm suffered where there is a causal relationship between that harm and that agreement or decision (see, to that effect, judgment of 11 November 2021, *Stichting Cartel Compensation and Equilib Netherlands*, C-819/19, EU:C:2021:904, paragraph 49 and the case-law cited).

55 In accordance with settled case-law, the national courts whose task it is to apply the provisions of EU law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals It is those courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of EU law (judgment of 11 November 2021, *Stichting Cartel Compensation and Equilib Netherlands*, C-819/19, EU:C:2021:904, paragraph 52 and the case-law cited).

56 In that context, it should be recalled that, in accordance with Article 2 of Regulation No 1/2003, in any proceedings for the application of Articles 101 and 102 TFEU, whether they be national or EU proceedings, the burden of proving an infringement of Article 101(1) or of Article 102 TFEU is to rest on the party or the authority alleging the infringement.

57 Although Article 2 of Regulation No 1/2003 expressly governs the burden of proof, including in situations in which actions for a declaration of nullity under Article 101(2) TFEU and/or actions for damages for infringement of competition law are brought following a final decision of a national competition authority – such as those at issue in the main proceedings – the fact remains that Regulation No 1/2003 does not contain any provisions relating to the effects of those decisions in the context of those two types of action.

58 In the absence of EU rules governing the matter that are applicable *ratione materiae* or *ratione temporis*, it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to seek a declaration of nullity of agreements or decisions under Article 101(2) TFEU and of the right to compensation for the harm resulting from an infringement of Article 101 TFEU, including those on the binding effects of final decisions of national competition authorities in the context of such types of action, provided that the principles of equivalence and effectiveness are observed (see, to that effect, judgment of 28 March 2019, *Cogeco Communications*, C-637/17, EU:C:2019:263, paragraph 42).

59 Accordingly, the rules applicable to actions for safeguarding rights which individuals derive from the direct effect of EU law must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) (judgment of 28 March 2019, *Cogeco Communications*, C-637/17, EU:C:2019:263, paragraph 43).

60 In particular, the detailed rules referred to in paragraph 58 of the present judgment must not jeopardise the effective application of Articles 101 TFEU and 102 TFEU and must be adapted to the specificities of competition law cases, which require, in principle, a complex factual and economic analysis (see, to that effect, judgment of 28 March 2019, *Cogeco Communications*, C-637/17, EU:C:2019:263, paragraph 44, 46 and 47).

61 As the Advocate General observed in points 91 and 92 of his Opinion, the enforcement of claims for damages due to breaches of Article 101 TFEU would be rendered excessively difficult if the final decisions of a competition authority were to be accorded no effect whatsoever in civil actions for damages or in actions seeking to establish the invalidity of agreements or decisions prohibited under that article.

62 Thus, in order to guarantee the effective application of Articles 101 and 102 TFEU, inter alia, in the context of actions for a declaration of nullity brought under Article 101(2) TFEU and actions for damages for infringement of the competition rules brought following a decision of a national competition authority against which an action for annulment had been brought before the competent national courts but which became final after having been confirmed by those courts and which can no longer be appealed by ordinary means, it should be considered that, in particular, in proceedings relating to such actions which are instituted before a court of the same Member State as that in which that authority exercises its jurisdiction, the finding of an infringement of competition law by that authority establishes the existence of that infringement until proof to the contrary is adduced, which it is for the defendant to do, provided that its nature and its material, personal, temporal and territorial scope correspond to those of the infringement found in that decision.

63 In those circumstances, it must be considered that, for the purposes of such proceedings, the existence of an infringement of EU competition law found in such a decision must be deemed to be established by the applicant until proof to the contrary is adduced, thereby shifting the burden of proof defined by Article 2 of Regulation No 1/2003 to the defendant, provided that the nature and the material, personal, temporal and territorial scope of the alleged infringements that are the subject matter of the actions brought by the applicant correspond to those of the infringement found in the said decision.

64 In addition, where the author, nature, legal classification, duration and territorial scope of the infringement found in that type of decision and of the infringement that is the subject matter of the action in question coincide only partially, the findings in such a decision are not necessarily irrelevant, but constitute an indication of the existence of the facts to which those findings relate, as the Advocate General observed, in essence, in point 97 of his Opinion.

65 In the case at hand, it is for the referring court to ascertain whether KN's heirs have shown that their situation falls within the scope of the 2001 and 2009 decisions and, in particular, that the nature and the material, personal, temporal and territorial scope of the alleged infringements that are the subject of their action for a declaration of nullity and of their action for damages brought following those final decisions correspond to the nature and scope of the infringements found in those decisions.

66 If that is not the case and if the infringements found in the said decisions overlap only to a limited extent with the infringements alleged in the context of the actions brought by KN's heirs, those same decisions may be relied on as indications of the existence of the facts to which the findings in those decisions relate.

67 In the light of the foregoing considerations, the answer to the first question is that Article 101 TFEU, as implemented by Article 2 of Regulation No 1/2003 and read in combination with the principle of effectiveness, must be interpreted as meaning that the infringement of competition law found in a decision of a national competition authority, against which an action for annulment had been brought before the competent national courts but which became final after having been confirmed by those courts, must be deemed to be established, in the context of both an action for a declaration of nullity under Article 101(2) TFEU and an action for damages for an infringement of Article 101 TFEU, by the applicant until proof to the contrary is adduced, thereby shifting the burden of proof defined by that Article 2 to the defendant, provided that the nature of the alleged infringement that is the subject of those actions and its material, personal, temporal and territorial scope coincide with those of the infringement found in the said decision.

The second question

68 By its second question, the referring court asks, in essence, whether Article 101 TFEU must be interpreted as meaning that, provided that an applicant succeeds in establishing the existence of an infringement of that article that is the subject of its action for a declaration of nullity brought under Article 101(2) TFEU and of its action for damages brought for the purpose of compensation for the harm suffered as a result of that infringement, the agreements concerned by those actions that infringe Article 101 TFEU are automatically void in their entirety.

69 In that regard, it should be borne in mind that, under Article 101(2) TFEU, any agreements or decisions prohibited pursuant to that article are automatically void.

70 That principle of automatic nullity can be relied on by anyone, and the courts are bound by it once the conditions for the application of Article 101(1) are met and so long as the agreement concerned does not justify the grant of an exemption under Article 101(3) TFEU. Since the nullity referred to in Article 101(2) TFEU is absolute, an agreement which is null and void by virtue of that provision has no effect as between the contracting parties and cannot be set up against third parties. Moreover, it is capable of having a bearing on all the effects, either past or future, of the agreement or decision concerned (judgment of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraph 22).

71 The automatic nullity decreed by Article 101(2) TFEU applies only to those contractual provisions which are incompatible with Article 101(1) TFEU. The consequences of such nullity for all other parts of the agreement are not a matter for EU law. Those consequences are to be determined by the national court according to the law of its Member State (see, to that effect, judgment of 14 December 1983, *Société de vente de cements et bétons de l'Est*, 319/82, EU:C:1983:374, paragraph 12).

72 It is for the national court to determine, in accordance with the relevant national law, the extent and consequences, for the contractual relations as a whole, of the nullity of certain contractual provisions by virtue of Article 101(2) TFEU (judgment of 18 December 1986, *VAG France*, 10/86, EU:C:1986:502, paragraph 15).

73 Thus, it is only those aspects of the agreement which are prohibited by Article 101(1) TFEU that are affected by the automatic nullity decreed by Article 101(2) TFEU. The agreement as a whole is void only if those parts of the agreement are not severable from the agreement itself (see, to that effect, judgment of 28 February 1991, *Delimitis*, C-234/89, EU:C:1991:91, paragraph 40).

74 In the light of the foregoing considerations, the answer to the second question is that Article 101 TFEU must be interpreted as meaning that, provided that an applicant succeeds in establishing the existence of an infringement of that article that is the subject of its action for a declaration of nullity brought under Article 101(2) TFEU and of its action for damages in respect of that infringement, the national court must draw all the consequences from it and infer, inter alia, pursuant to Article 101(2) TFEU, the automatic nullity of all those contractual provisions which are incompatible with Article 101(1) TFEU, the agreement concerned as a whole being void only if those parts of the agreement are not severable from the agreement itself.

Costs

75 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 (First Chamber) hereby rules:

1. **Article 101 TFEU, as implemented by Article 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] and read in combination with the principle of effectiveness, must be interpreted as meaning that the infringement of competition law found in a decision of a national competition authority, against which an action for annulment had been brought before the competent national courts but which became final after having been confirmed by those courts, must be deemed to be established, in the context of both an action for a declaration of nullity under Article 101(2) TFEU and an action for damages for an infringement of Article 101 TFEU, by the applicant until proof to the contrary is adduced, thereby shifting the burden of proof defined by that Article 2 to the defendant, provided that the nature of the alleged infringement that is the subject of those actions and its material, personal, temporal and territorial scope coincide with those of the infringement found in the said decision.**

2. Article 101 TFEU must be interpreted as meaning that, in so far as an applicant succeeds in establishing the existence of an infringement of Article 101 TFEU which is the subject of its action for annulment brought under Article 101(2) TFEU, as well as its action for damages in respect of that infringement, the national court must draw all the consequences and infer from this, in particular, pursuant to Article 101(2) TFEU, that all the contractual provisions incompatible with Article 101(1) TFEU are automatically void, as the agreement concerned is void in its entirety only if those elements do not appear to be severable from the agreement itself.

[Signatures]