

OPINION OF ADVOCATE GENERAL
MENGOZZI

delivered on 4 September 2008¹

I — Introduction

between the oil company and the service station operators concerned.³

1. This is the third reference for a preliminary ruling to be brought before the Court in three years concerning service station agreements concluded between an oil company and one of its distributors operating on the Spanish market.²

2. The first two cases essentially concern the legal characterisation from the point of view of Community competition law of the contractual relationships entered into

3. By contrast, the questions referred in this case deal only with the issue of whether contracts such as those at issue in the main proceedings are eligible to benefit from the application of the respective block exemption schemes provided for successively by Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements⁴ and Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices.⁵ Essentially, the referring court is uncertain as to the interpretation of Article 12(2) of Regulation No 1984/83 and Article 5(a) of Regulation No 2790/1999, which authorise, subject to certain conditions, the conclusion of vertical exclusive purchasing agreements for a duration which exceeds that in principle required by those regulations for eligibility for the block exemption.

¹ — Original language: French.

² — The first of those cases was Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, the second, currently pending before the Court of Justice, was the subject of my Opinion of 13 March 2008 in Case C-279/06 *CEPSA*. Note that another case, registered as Case C-506/07 *Lubricarga*, is also pending before the Court of Justice.

³ — That is to say, the question was raised of whether those relationships were commercial agency agreements or, on the contrary, distribution agreements between two economically independent undertakings.

⁴ — OJ 1983 L 173, p. 5, and corrigendum OJ 1983 L 281, p. 24.

⁵ — OJ 1999 L 336, p. 21.

II — Legal framework

4. Regulation No 1984/93 excludes from the scope of Article 85(1) of the EEC Treaty (subsequently Article 85(1) of the EC Treaty, now Article 81(1) EC) certain categories of exclusive purchasing agreements and concerted practices which normally satisfy the conditions set out in paragraph 3 of that article on the ground that they lead, in general, to an improvement in product distribution.

5. According to Article 3(d) of that regulation, that exemption is not applicable where the agreement is concluded for an indefinite duration or for a period of more than five years.

6. Regulation No 1984/83 contains, in Articles 10 to 13, special provisions relating to service station agreements.

7. Under Article 10 of that regulation:

‘Pursuant to Article 85(3) of the Treaty and subject to Articles 11 to 13 of this Regulation, it is hereby declared that Article 85(1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby

one party, the reseller, agrees with the other, the supplier, in consideration for the according of special commercial or financial advantages, to purchase only from the supplier, an undertaking connected with the supplier or another undertaking entrusted by the supplier with the distribution of his goods, certain petroleum-based motor-vehicle fuels or certain petroleum-based motor-vehicle and other fuels specified in the agreement for resale in a service station designated in the agreement.’

8. Article 11 of that regulation provides:

‘Apart from the obligation referred to in Article 10, no restriction on competition shall be imposed on the reseller other than:

- (a) the obligation not to sell motor-vehicle fuel and other fuels which are supplied by other undertakings in the service station designated in the agreement;
- (b) the obligation not to use lubricants or related petroleum-based products which are supplied by other undertakings within

the service station designated in the agreement where the supplier or a connected undertaking has made available to the reseller, or financed, a lubrication bay or other motor-vehicle lubrication equipment;

Article 12(2) provides that, where the agreement relates to a service station which the supplier lets to the reseller, or allows the reseller to occupy on some other basis, in law or in fact, exclusive purchasing obligations or bans on dealing in competing products specified in Title III of that regulation can be imposed on the reseller for the whole period for which he in fact operates the premises.

- (c) the obligation to advertise goods supplied by other undertakings within or outside the service station designated in the agreement only in proportion to the share of these goods in the total turnover realised in the service station;

11. Article 13 of that regulation provides that Articles 2(1) and (3), 3(a) and (b), 4 and 5 are to apply *mutatis mutandis* to service station agreements.

- (d) the obligation to have equipment owned by the supplier or a connected undertaking or financed by the supplier or a connected undertaking serviced by the supplier or an undertaking designated by him.'

12. Recital 13 in the preamble to that regulation states:

9. Article 12(1) of Regulation No 1984/83 lists the contractual provisions and obligations which prevent the application of Article 10. One of the conditions laid down in Article 12(1)(c) is that the agreement cannot be concluded for an indefinite duration or for a period of more than 10 years.

'... these agreements are generally distinguished by the fact that, on the one hand, the supplier confers on the reseller special commercial or financial advantages by contributing to his financing, granting him or obtaining for him a loan on favourable terms, equipping him with a site or premises for conducting his business, providing him with equipment or fittings, or undertaking other investments for his benefit and that, on the

10. However, by way of exception to Article 12(1)(c) of Regulation No 1984/83,

other hand, the reseller enters into a long-term exclusive purchasing obligation which in most cases is accompanied by a ban on dealing in competing products’.

13. Regulation No 1984/83, the period of validity of which was extended until 31 December 1999 by Commission Regulation (EC) No 1582/97 of 30 July 1997,⁶ was repealed by Regulation No 2790/1999, which entered into force on 1 January 2000.

14. Article 4(a) of Regulation No 2790/1999 provides that the exemption from the prohibition laid down in Article 81(1) EC does not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object ‘the restriction of the buyer’s ability to determine its sale price, without prejudice to the possibility of the supplier’s imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties’.

15. Pursuant to Article 5(a) of Regulation No 2790/1999, the exemption provided for in Article 2 of the regulation does not apply to any direct or indirect non-compete obliga-

tion, the duration of which is indefinite or exceeds five years. A non-compete obligation which is tacitly renewable beyond a period of five years is to be deemed to have been concluded for an indefinite duration. That provision nevertheless specifies that that time limitation of five years does not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer.

16. According to Article 12 of Regulation No 2790/1999, the prohibition laid down in Article 81(1) EC does not apply during the period from 1 June 2000 to 31 December 2001 in respect of agreements already in force on 31 May 2000 which do not satisfy the conditions for exemption provided for in that regulation but which satisfy the conditions for exemption provided for, *inter alia*, in Regulation No 1984/83.

III — The main proceedings, the questions referred for a preliminary ruling and the procedure before the Court of Justice

17. The order for reference shows that, on 26 October 1989, Pedro IV Servicios SL (‘Pedro IV’) and Total España SA (‘Total’)

6 — OJ 1997 L 214, p. 27.

concluded a complex agreement consisting of four linked contracts.

18. Under the first contract, Pedro IV granted to Total a real property right known as a 'right to build' over a parcel of land belonging to Pedro IV. That contract authorised Total to construct a building on that land in return for payment of a fee. The amount of that fee was set at ESP 250 000 a month (equivalent to slightly more than EUR 1 500), payable for 20 years. At the end of that 20-year period, the service station built by Total would become the property of Pedro IV. Total undertook to build a service station for the sale of fuel within a period of two and a half years, so that the term of 20 years was to run from the date when the service station was brought into operation. The parties agreed that the right to build could not be transferred without the consent of the landowner.

19. The second contract was a lease of the proposed service station, a contract under which Total granted Pedro IV the right to occupy and operate the service station for a period of one year, extendable from month to month. However, the lessor was required to grant that extension for the duration of the exclusive supply agreement which it also agreed to conclude with the lessee company. In any event, the lease would come to an end when the lessor's right to build came to an end. The monthly rent payable by Pedro IV was ESP 600 000 (equivalent to EUR 3 600).

20. Under the third contract, Pedro IV undertook, once in possession of the service station, to operate it on the basis of an exclusive supply by Total and using the latter's image, colours, trade mark and logo. The exclusive purchasing contract was concluded for a duration of 20 years and supply was to be made by way of executed sale, so that title in the fuel passed to the distributor from the moment at which the supplier delivered it to the service station, the buyer undertaking to resell the fuel on his own behalf and at his own risk. In exchange, Total was to pay Pedro IV a monthly sum of ESP 350 000 (approximately EUR 2 100). In addition, Total was to inform the distributor of the recommended retail prices, while ensuring competitiveness against the prices offered in good faith by other competitors in the surrounding area. Total also undertook to fix the price of the fuel which it supplied to the reseller on the most advantageous terms agreed by it with other service stations which might be established in Barcelona (Spain), and the price was never to be higher than the average of the prices fixed by the other suppliers with a significant presence on the market operating in Barcelona.

21. Since the parties to the main proceedings also agreed that the amounts payable to each other under the three above contracts could be set off, the result was that neither of them paid anything, since those sums both amounted to ESP 600 000.

22. Finally, under the fourth contract, Total granted a mortgage loan of ESP 30 000 000 (approximately EUR 180 300) to Pedro IV, secured by a mortgage on the borrower's land, for a period of 20 years if the service station was built.

23. According to the referring court, after the conclusion of those four contracts, the service station was built on Pedro IV's land and that company was exclusively supplied by Total at least until the date of the order for reference.

24. In December 2004, Pedro IV brought an action principally for annulment of the legal relationship established by the four above-mentioned contracts before the Juzgado de lo Mercantil de Barcelona (Commercial Court, Barcelona). In support of its action, Pedro IV claimed, first, that those contracts contain provisions which are seriously restrictive of competition, namely an excessive duration, greater than the maximum allowed by Community law for an exclusive supply contract, and, second, that the third of those contracts indirectly fixes retail resale prices, which is prohibited under Article 85 of the Treaty, and is not eligible to benefit from either the block exemption rules in Regulation No 1984/83 or, subsequently, those in Regulation No 2790/1999.

25. Since that action was dismissed in its entirety at first instance, Pedro IV appealed to the referring court.

26. The Audiencia Provincial de Barcelona (Provincial Court, Barcelona), holding that the interpretation of the provisions of Regulations Nos 1984/83 and 2790/1999 was not free from doubt, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 12(2) of ... Regulation ... No 1984/83, which provides that "[w]here the agreement relates to a service station which the supplier lets to the reseller, or allows the reseller to occupy on some other basis, in law or in fact, exclusive purchasing obligations or bans on dealing in competing products specified in this Title may, notwithstanding paragraph 1(c), be imposed on the reseller for the whole period for which the reseller in fact operates the premises", be interpreted as referring to the situation in which the supplier/lessor initially owned the land and the installations, or on the contrary does the reference to the "letting" of the service station cover all those titles which by operation of law give the supplier a proprietary right in the service station alone, with the consequence that the supplier can lease it to the owner of the land without being required to comply with the time limitations which the rules impose in respect of exclusive purchasing agreements?

- (2) If ... Regulation ... No 2790/1999 ... is applicable to the present case, must the provision in Article 5 that the exemption [in Article 2 of the regulation] is not to apply if the duration of the exclusive purchasing agreement exceeds five years, although “the time limitation of five years shall not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer”, be interpreted, where it mentions leasing, as referring to a situation in which the supplier/lessor also initially owned the land and the installations, or on the contrary does the reference to the leasing of the service station cover all those titles which may by operation of law give the supplier a proprietary right in the service station alone, with the consequence that the supplier can lease it to the owner of the land without being required to comply with the time limitations which the rules impose in respect of exclusive purchasing agreements?

Regulation”, resale price fixing not being among the other restrictions on competition permitted in Article 11 of that regulation, be interpreted as including any form of restriction of the reseller’s freedom to fix the retail price, such as where the supplier fixes the distribution margin of the operator of the service station, by fixing the price of the fuel which he supplies to the reseller on the most advantageous terms agreed with other service stations that may be established in Barcelona, provided that the price will never be higher than the average price fixed by other suppliers with a significant presence on the market, then adding the minimum margin which is thought appropriate and thus arriving at the [retail price], which the supplier does not expressly impose but which he recommends be charged?

- (3) Must the prohibition of the indirect fixing of purchase or selling prices laid down in Article [85](1)(a) [of the Treaty] and the statement in recital 8 in the preamble to ... Regulation ... No 1984/83 that “further restrictive obligations and in particular those which limit the reseller’s choice of customers or his freedom to determine his prices and conditions of sale cannot be exempted under this
- (4) Must the prohibition of the indirect fixing of purchase or selling prices laid down in Article [85](1)(a) [of the Treaty], and the inclusion in Article 4(a) of ... Regulation ... No 2790/1999 ... of resale price maintenance as a particularly serious restriction on competition, be interpreted as including any form of restriction of the reseller’s freedom to fix the retail price, such as where the supplier fixes the distribution margin of the operator of the service station, by fixing the price of the fuel which he supplies to the reseller on the most advantageous terms agreed with other service stations that may be established in Barcelona, provided that the price will never be higher than the average price

fixed by other suppliers with a significant presence on the market, then adding the minimum margin which is thought appropriate and thus arriving at the [retail price], which the supplier does not expressly impose but which it recommends be charged?’

clearly inferred from Community and Spanish case-law and, third, the lack of relevance of the questions asked to the outcome of the dispute in the main proceedings.

27. In accordance with Article 23 of the Statute of the Court of Justice, Pedro IV, Total, the Spanish Government and the Commission of the European Communities have submitted written observations. They also submitted oral arguments at the hearing which took place on 26 June 2008.

29. In addition, the Spanish Government takes the view that, having regard to the fact that Regulations Nos 1984/83 and 2790/1999 cannot both be applied at the same time, two of the questions referred, namely, as specified at the hearing, those relating to the interpretation of Regulation No 1984/83, must be declared inadmissible having regard to their hypothetical nature.

30. The objections raised against the admissibility of the order for reference cannot, in my view, be sustained.

IV — Analysis

A — *Admissibility*

28. Total raises three objections of inadmissibility with regard to the questions referred, relating to, first, omissions in the statement of the factual and legal context made by the referring court, second, the fact that the answers to the questions referred can be

31. First of all, Total’s claim that the Community and national case-law would provide a clear answer to the questions referred should be rejected as of no effect. Even if such a claim is correct, in so far as it relates to the Court’s case-law — which is the only relevant case-law here — that in itself would not lead the Court to declare the questions referred inadmissible, but at the most, if appropriate, would allow it to give its decision by reasoned order, pursuant to the procedure under

Article 104(3) of its Rules of Procedure. In any event, neither the judgment in *Confederación Española de Empresarios de Estaciones de Servicio* nor the *CEPSA* case concerns the interpretation of Article 12(2) of Regulation No 1984/83 and/or that of Article 5(a) of Regulation No 2790/1999.⁷

32. Next, regarding the other two grounds put forward by Total, it must be observed that, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 177 of the Treaty (now Article 234 EC), it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling to enable it to deliver judgment and the relevance of the questions which it submits to the Court.⁸

33. Where questions submitted by national courts concern the interpretation of a provision of Community law, the Court of Justice is thus bound, in principle, to give a ruling unless it is obvious that the request for a preliminary ruling is really designed to induce the Court to give a ruling by means of a fictitious dispute, or to deliver advisory opinions on general or hypothetical questions, or that the interpretation of Community law requested bears no relation to the actual facts of the main action or its purpose,

or that the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.⁹

34. It must also be observed in that regard that, according to settled case-law, the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court should define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based.¹⁰ While the requirement to give reasons imposed on the national courts varies according to many factors, it is particularly relevant in certain areas, such as competition, which are characterised by complex factual and legal situations.¹¹

35. Furthermore, the information provided in the order for reference must also give the governments of the Member States and the other interested parties the opportunity to submit observations pursuant to Article 23 of the Statute of the Court of Justice, an

⁷ — See specifically, in this connection, my Opinion in *CEPSA*, footnote 32.

⁸ — See *Confederación Española de Empresarios de Estaciones de Servicio*, paragraph 16 and the case-law cited.

⁹ — *Ibidem*, paragraph 17 and the case-law cited.

¹⁰ — *Ibidem*, paragraph 26.

¹¹ — See to that effect, inter alia, Case C-109/99 *ABBOI* [2000] ECR I-7247, paragraph 42 and the case-law cited. The care which the national courts must exercise in formulating their orders for reference is even more important since the need for cooperation between national courts and the Court of Justice has increased since the entry into force of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

opportunity which the Court must ensure is safeguarded, bearing in mind that, by virtue of that provision, only the orders for reference are notified to the interested parties.¹²

36. It is admittedly true in this case, as Total states in support of its objection, that the summary of the legal and factual context of the order for reference contains omissions and that that order does not give any information on some aspects of the dispute in the main proceedings, such as the legal character of the right to build on land granted by Pedro IV or the proportion of the market for the distribution of motor-vehicle and other fuels in Spain held by Total.

37. However, the order for reference clarifies the contractual relationship between the parties to the main proceedings with sufficient precision to allow the Court to give a useful answer to the interpretation of the provisions of Community law sought. In addition, it is apparent from Total's written observations submitted in case the Court should find the questions raised by the referring court admissible, and from those of the other interested parties, that the information contained in the order for reference enabled them to express their view on those questions effectively.

38. As regards the objection relating to the lack of relevance of the questions asked to the outcome of the dispute in the main proceedings, I will concede to Total that, in so far as the national court has merely referred questions to the Court of Justice on the interpretation of the provisions of Regulations Nos 1984/83 and 2790/1999, without having considered, prior to doing so, the applicability of Article 85(1) of the Treaty to the bundle of contracts concluded between Pedro IV and Total, the Court's answers to those questions will not necessarily place the referring court in a position in which it can give a final decision on the case in the main proceedings.

39. However, in addition to the fact that, as noted in the case-law cited in point 32 above, it is for the national court to determine the relevance of the questions it refers to the Court, I am not of the opinion that the admissibility of a question referred for a preliminary ruling can be conditional on the answer given by the Court allowing, in every possible situation, the national court to resolve the case before it. If that were true, the admissibility of the questions referred would quite simply depend on the Court's answer as regards their substance.

40. By contrast, at the stage of examining admissibility, it must be considered whether, *regardless of the answer which the Court may give to a question referred for a preliminary ruling*, that answer would be *manifestly* without impact on the outcome of the main proceedings since, in that case, the interpretation of Community law sought would not be

12 — *ABBOI*, paragraph 43, and *Confederación Española de Empresarios de Estaciones de Servicio*, paragraph 27.

objectively required for the decision to be taken by the national court.¹³ That is definitely not the case as regards the answers to the questions in the order for reference.

42. I therefore suggest that the Court should declare the order for reference admissible.

B — *Substance*

41. Lastly, the Spanish Government's objection that the two questions on the interpretation of Regulation No 1984/83 are hypothetical must also be rejected. Although the block exemption scheme established by that regulation was repealed by Regulation No 2790/1999, the fact remains that Regulation No 1984/83 was fully applicable until 31 May 2000 and, as a transitional measure, continued to apply until 31 December 2001 for agreements already operational on 31 May 2000 which satisfied, *inter alia*, the conditions for exemption in that regulation without however satisfying those in Regulation No 2790/1999.¹⁴ Since the contracts at issue in the case in the main proceedings were concluded in 1989, that is, under Regulation No 1984/83, for a duration of 20 years — which, pursuant to the contracts, only began to run from the time when the service station was brought into operation, which appears to have been during 1991 — it follows that the questions relating to the interpretation of Regulation No 1984/83 cannot be considered to be hypothetical; the interpretation requested remains in fact fully relevant with regard to the period of the contracts at issue in the main proceedings which preceded the entry into force and application of the block exemption scheme provided for by Regulation No 2790/1999.

1. Preliminary remarks

43. As I have pointed out above in my introduction, this case does not concern the legal characterisation from the point of view of the Community rules on competition of the contractual relationship between Pedro IV and Total. The referring court has not expressed any doubts regarding the fact that that relationship must be considered as binding two economically independent undertakings and, consequently, as falling within the concept of an 'agreement between undertakings' within the meaning of Article 85(1) of the Treaty.

44. On the other hand, as I also observed in point 38 above, the referring court does not seem to have considered whether, in the situation in the case in the main proceedings, all the conditions for the application of

¹³ — See Case C-206/99 *SONAE* [2001] ECR I-4679, paragraphs 45 and 46.

¹⁴ — See Articles 12 and 13 of Regulation No 2790/1999.

Article 85(1) of the Treaty were satisfied before enquiring of the Court about the interpretation of the provisions of Regulations Nos 1984/83 and 2790/1999, which exempt, under certain conditions, some categories of vertical agreements from the prohibition set out in that article.

45. Although that approach may seem rather surprising from a logical point of view, it is nevertheless understandable from a practical point of view and, to a certain extent, on grounds of procedural economy, since if the exemption regulations apply to a given agreement it becomes unnecessary to ascertain whether the agreement is forbidden under Article 85(1) of the Treaty.¹⁵ On the other hand, the anticipated procedural gain is lost where the conditions for the block exemption are not satisfied. If that is the case, then obviously an examination of the conditions for the application of Article 85(1) of the Treaty will have to be carried out by the national court.

46. Since it is not being asked to give a preliminary ruling on the interpretation of

Article 85(1) of the Treaty in the light of the bundle of contracts at issue in the main proceedings, the Court could, in my view, either restrict itself to observing that it is for the referring court to assess whether that type of agreement falls within the prohibition laid down in that provision, or repeat certain general criteria, identified in the case-law, as regards the assessment of the anti-competitive character of exclusive purchasing agreements, which the referring court should take into account in its consideration of the contracts at issue in the main proceedings.¹⁶ I do not think, however, that, in the absence of a request for a preliminary ruling on that issue, the Court need specify to the referring court all the relevant economic and legal factors allowing it to ascertain whether there has been conduct prohibited under Article 85(1) of the Treaty.¹⁷

16 — Thus it might be pointed out that, for the purposes of assessing whether an exclusive purchasing agreement has as its object or effect the appreciable restriction of competition within the internal market and may affect trade between Member States, regard must be had to the economic and legal context in which that agreement takes place and in which it may combine with other agreements to have a cumulative effect on competition. That is why it is necessary to analyse the effects of such an agreement, taken together with other agreements of the same type, on the opportunities of national competitors or those from other Member States to gain access to the relevant market or to increase their market share (see, *inter alia*, Case C-234/89 *Delimitis* [1991] ECR I-935, paragraphs 13 to 15, and Case C-214/99 *Neste* [2000] ECR I-11121, paragraph 25; see, also, the judgment of the EFTA Court in Case E-7/01 *Hegelstad* [2002] *EFTA Court Report* 310, paragraph 31).

17 — Although the guidance there is not exhaustive, the referring court might usefully refer to the findings in *Neste* (paragraphs 26 to 34), which concerned exclusive fuel purchasing agreements. As regards Total's market share on the Spanish market, while Total states that it never exceeded 3% during the past period of the contracts at issue in the main proceedings, Pedro IV and the Commission point out that Total now owns approximately 48% of the authorised capital of CEPSA, which is one of the main suppliers of motor-vehicle fuel in Spain, a fact which means that it is not impossible that the two undertakings may be regarded as a single economic unit for the purpose of assessing the position of Total on the market. Neither Pedro IV nor the Commission specify, however, the amount of capital owned by Total during the past period of the contracts at issue in the main proceedings. In any event, as the Commission pointed out at the hearing, the relevant market is not definitely of national dimension, but might rather be local in scale, covering only the conurbation of Barcelona.

15 — As an example, such an approach was adopted by the national court in Case C-230/96 *Cabour* [1998] ECR I-2055. It should be noted that that national court did however refer to the Court a question concerning the interpretation of Article 85(1) of the Treaty in case the motor-vehicle distribution agreement at issue was ineligible to benefit from the provisions of the relevant block exemption regulation in that case.

47. Having made those observations, the four questions referred for a preliminary ruling must now be considered. I take the view that, having regard to their wording and content, the first question should be considered jointly with the second, and the third question with the fourth.

2. The first and second questions

48. Essentially, by its first and second questions, the referring court is asking whether an exclusive purchasing obligation covering motor-vehicle fuels and other fuels, such as that between Pedro IV and Total, can, in view of its duration, benefit from the application of the block exemption provided for in Regulation No 1984/83 and, subsequently and if appropriate, from that provided for in Regulation No 2790/1999.

(a) The interpretation of Regulation No 1984/83

49. Regulation No 1984/83 provides, *inter alia*, for the application of Article 85(3) of the Treaty to exclusive purchasing agreements entered into for the purpose of the resale of

petroleum products in service stations. Those rules, which differ from the general provisions applicable to exclusive purchase agreements, are contained in Articles 10 to 13 of Regulation No 1984/83. Article 10 of that regulation exempts from the prohibition laid down in Article 85(1) of the Treaty the exclusive purchasing obligation imposed on the reseller by the supplier of the petroleum-based motor-vehicle and other fuels, 'in consideration for the according of special commercial or financial advantages'. Article 11 of Regulation No 1984/83 sets out the other restrictions on competition which may be imposed on the reseller, apart from that provided for in Article 10, which include 'the obligation not to sell motor-vehicle fuel and other fuels which are supplied by other undertakings in the service station designated in the agreement'. Article 12(1)(c) of Regulation No 1984/83 states that Article 10 of that regulation does not apply if the agreement is concluded for an indefinite duration or for a period of more than 10 years.

50. However, Article 12(2) of Regulation No 1984/83 specifies that, '[w]here the agreement relates to a service station which the supplier lets to the reseller, or allows the reseller to occupy on some other basis, in law or in fact, exclusive purchasing obligations or bans on dealing in competing products specified in this Title may, notwithstanding paragraph 1(c), be imposed on the reseller for the whole period for which the reseller in fact operates the premises'.

51. As I have already had the opportunity to submit in my Opinion in *CEPSA*,¹⁸ the period of 10 years referred to in Article 12(1)(c) of Regulation No 1984/83 is justified where the financial and commercial advantages granted by the supplier are so significant that without them it is highly unlikely that the operator of the service station could have gained access to the market in services as an intermediary entrusted with the marketing of fuel.

52. The fact that Article 12(2) of Regulation No 1984/83 allows, as an exception, the extension *beyond 10 years* of the duration of the exclusive purchasing provision seems justifiable only if the supplier grants the service station operator financial and commercial advantages at least as significant as those which it would have granted to enable the agreement to benefit from a block exemption for a period of 10 years, as referred to in Article 12(1)(c) of that regulation.

53. In this connection, Article 12(2) of Regulation No 1984/83 only refers to one advantage granted by the supplier, namely that of leasing the service station to the operator or, similarly, allowing the operator to occupy the service station on some other basis, in law or in fact.

54. It is indisputable, in my opinion, that such an advantage is particularly, if not extremely, significant, since it in fact consists in supplying the operator with a 'turnkey' service station for his commercial activities. In other words, the supplier puts the distributor in charge of a fully equipped service station, which the supplier owns, without the distributor having to make any investment in this respect.

55. There is no doubt, on a reading of Article 12(2) of Regulation No 1984/83, that the grant of such an advantage is a requirement for the application of that provision.

56. It is also undeniable that a supplier might grant additional financial and commercial advantages to the operator of a service station in order to claim the benefit of Article 12(2) of Regulation No 1984/83. In this respect, it must be noted that, in the case in the main proceedings, Total granted Pedro IV a large mortgage at a rate of interest which, according to the unchallenged statement of Total at the hearing in response to a specific question on that point from the Court, was lower than the market rate at that time. That fact and the other conditions relating to that loan must nevertheless be verified by the referring court.

18 — See points 64 to 71 and point 101(2) of the Opinion.

57. By contrast, more doubt surrounds the issue whether, as Pedro IV and the Commission claim, entitlement to the exception provided for in Article 12(2) of Regulation No 1984/83 must be subject to the twofold condition that the supplier owns both the service station and the land on which it is built.

58. In support of that line of argument, the Commission relies, first, on recital 13 in the preamble to Regulation No 1984/83, from which it seems to be inferring the spirit of that regulation, and, second, on Article 5(a) of Regulation No 2790/1999, which now expressly made the potentially unlimited duration of the exclusive rights provided for in that provision subject to the requirement that the distributor must carry on his activity from premises and land owned by the supplier.

59. These arguments are not convincing.

60. As regards the first argument set out by the Commission, it should be recalled that recital 13 in the preamble to Regulation No 1984/83, which contains a non-exhaustive list of various types of economic and financial advantages granted by the supplier to the distributor, states that those advantages include equipping the reseller with a 'site or

premises for conducting his business'.¹⁹ Admittedly, having regard to its wording as an alternative, that recital clearly does not preclude a supplier from granting a reseller a site and premises for conducting his business, in order, if appropriate, to rely on the application of Article 12(2) of Regulation No 1984/83. However, it does not follow from that passage from the grounds of the regulation that entitlement to the application of that provision is subject to the twofold condition that the supplier must grant a lease of both the site *and* the premises from which the distributor operates the service station.

61. Although it is certainly not for the Court to give a wide interpretation to the exceptions in a block exemption regulation,²⁰ neither must it, in my opinion, limit the scope of those provisions notwithstanding the clarity of their wording, as a fortiori confirmed by the recitals in the preamble to the regulation.

62. Also for that reason, I cannot endorse the interpretation upheld by the Commission in its written observations, according to which, in order to benefit from the application of Article 12(2) of Regulation No 1984/83, the supplier must grant 'absolute advantages' to the service station operator. If that is the case,

¹⁹ — My emphasis.

²⁰ — See *inter alia*, in this connection, *Cabour*, paragraph 30.

then it is impossible to understand why Article 12(2) of Regulation No 1984/83 merely refers to a lease of the site from which the service station operator carries on his activities and specifically does not make the application of that provision conditional on the grant of absolute economic and financial advantages, without the operator having to make any investment.

cance of the advantages granted by the supplier and the investments from which the operator is relieved, as on the finding that limiting the duration of the exclusive supply obligation to 10 years in the situation where the supplier leases the service station to the operator will have no effect (or, at most, a purely marginal effect) on interbrand competition, since, on the expiry of such a period, it is highly improbable that the supplier, which still owns the service station, will transfer it to one of its competitors.

63. In fact, the ratio of Article 12(2) of Regulation No 1984/83 (and, in part, that of Article 5(a) of Regulation No 2790/1999) seems more pragmatic, as explained by the Commission in its reply to the written question from the Court. Where a reseller conducts his activities from premises belonging to a supplier, it is hard to imagine that the duration of the exclusive purchasing agreement would be restricted to a shorter period than that of the lease, it being impossible, in any case, to make the premises available to another supplier to allow him to gain access to the relevant market or to extend his base on that market. Thus, as the Commission pointed out, restricting the period of the exclusive supply obligation of a point of sale (to a period shorter than the duration of the lease) is *of no real value* where that point of sale belongs in its entirety to the supplier.

64. The ratio of Article 12(2) of Regulation No 1984/83 is therefore based not so much on an absolute correlation between the signifi-

65. It is, admittedly, possible to apply analogous reasoning regarding the site or sites on which the service station leased to the operator is located. However, such a line of reasoning would amount to inserting an additional condition for the application of Article 12(2) of Regulation No 1984/83 which is not expressly provided for in the wording of that regulation and which cannot be identified impliedly from it. In that regard, I take the view that to require the supplier, for him to benefit from the application of Article 12(2) of that regulation, also to own the site on which he has constructed the service station and which he leases to the operator, without support in the wording of Regulation No 1984/83 and without a detailed examination by the Commission and the Advisory Committee on Restrictive Practices and Dominant Positions, is a condition which is liable to restrict interbrand competition by strengthening the position of incumbent operators or those already present on the market who, by virtue of being in that position, have been able to acquire land over the years. Such an effect is even more plausible in a situation where, as all the parties which

lodged observations accepted, the relevant market has been dominated for several years by three operators, following the dismantling of the former national monopoly.

66. I therefore feel that to interpret Article 12(2) of Regulation No 1984/83 as including a condition relating to the ownership of the site on which the service station is built goes beyond the normal interpretation of such a measure which it is the Court's task to give, and at the same time oversteps the role delegated to the Court by encroaching on the legislative powers of the Commission and of the Advisory Committee on Restrictive Practices and Dominant Positions.

67. That argument should not, in my view, be affected by the Commission's second argument, relating to the adoption of Regulation No 2790/1999 and, specifically, Article 5(a) thereof, which makes, from the date on which that regulation becomes applicable, the block exemption of exclusive purchasing obligations which exceed five years subject to, *inter alia*, a twofold condition that the supplier owns both the site and the premises from which the operator's activity is conducted.

68. The approach suggested by the Commission would lead to granting retroactive effect to Article 5(a) of Regulation No 2790/1999, notwithstanding the wording of Article 12(2) of Regulation No 1984/83 and the grounds of

that latter regulation, an effect which would be contrary, at the very least, to the immediate application of Regulation No 2790/1999 and which would result in that regulation encroaching, at least in part, on the autonomous scope of Regulation No 1984/83.

69. On the other hand, as the Spanish Government has submitted, it is true that individuals must not improperly or fraudulently take advantage of provisions of Community law.²¹ The application of Community legislation cannot thus be extended to cover abusive practices on the part of economic operators, that is to say, transactions carried out not in the context of normal commercial operations, but solely for the purpose of circumventing the rules of Community law.²²

70. In accordance with the case-law, it is for the referring court, on the basis of objective evidence, to take into account abuse on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provision of Community law on which they seek to rely.²³

21 — See, in particular, Case C-367/96 *Kefalas and Others* [1998] ECR I-2843, paragraph 20; Case C-373/97 *Diamantis* [2000] ECR I-1705, paragraph 33; Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 68; and Case C-456/04 *Agip Petroli* [2006] ECR I-3395, paragraph 19.

22 — See, in particular, *Halifax and Others*, paragraph 69, and *Agip Petroli*, paragraph 20.

23 — See, in particular, *Diamantis*, paragraph 34, and *Agip Petroli*, paragraph 21.

71. However, some general guidance may be given to the referring court in the context of the judicial cooperation which characterises the preliminary ruling procedure.

72. First, I am of the opinion that, in a situation such as that in the main proceedings, the mere recourse to two overlapping contracts by which, first, the operator, who owns the site, grants a right to build on that site to the supplier under which the supplier becomes the owner of structures and buildings erected on the site during a contractually agreed period²⁴ and, second, that supplier, after having undertaken to build the service station he will own, grants exclusive use of that service station to the owner of the site for a duration equal to that of the lease of the service station, cannot be admitted as objective evidence of an intention to benefit abusively from the application of Article 12(2) of Regulation No 1984/83. Since entitlement to the application of Article 12(2) of Regulation No 1984/83 is not subject to the requirement that the supplier owns the land (or that the operator does not), the mere conclusion of those overlapping contracts between the service station supplier and operator, which does not, moreover, seem to be illegal in national law, cannot be regarded in itself as demonstrating the intention to take advantage abusively of the provisions of that article.

73. Second, however, I take the view that abuse might be shown if the examination to be carried out by the referring court were to find that the financial and economic advantages which the supplier undertook by contract to provide were not in fact agreed or if the price paid by the parties does not correspond to the market value of the relevant assets. In this connection, I feel that the fact that, on the expiry of the exclusive supply agreement and the lease of the service station, the supplier agrees to reassign the ownership of the service station to the operator, also allowing the operator, in due course and where appropriate, to change supplier, must be taken into consideration.

74. In the light of the foregoing, I am of the opinion that Article 12(2) of Regulation No 1984/83 must be interpreted as not requiring, as one of its conditions of application, that the supplier owns the land on which he has at his own cost built the service station which he lets to the reseller, even in a situation where the supplier is the owner of the service station by virtue of a right to build granted by the reseller over his land. It is for the national court to ascertain, however, on the basis of objective evidence, whether the transactions at issue in the main proceedings were carried out in the course of normal commercial operations or solely, abusively, for the purpose of evading the maximum duration of 10 years applicable in principle to exclusive purchase agreements in the context of service station agreements, laid down in Article 12(1)(c) of Regulation No 1984/83.

²⁴ — The right to build on land, as a right *in rem*, is also encountered in the legal order of other Member States, such as the Kingdom of Belgium, the Italian Republic and the Grand Duchy of Luxembourg.

(b) The interpretation of Regulation No 2790/1999

75. As I have explained above, when it adopted Regulation No 2790/1999, the Commission inserted in Article 5(a) of that regulation, *inter alia*, the additional condition that the supplier must own the land on which the service station is situated and operated by the buyer if the parties are to be able to agree on non-compete obligations for a period of more than five years, provided however that that period does not exceed the period of occupation of the premises and land by the buyer. The Commission's reply to the written question asked by the Court indicates that the insertion of that additional condition was the result of observations submitted by interested parties on the draft regulation concerning the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, proposed by the Commission on 24 September 1999,²⁵ and appears to have been intended to counteract certain conduct regarded as abusive, even though no such grounds appear from the wording of the regulation.²⁶

76. There can therefore be no doubt that, under the block exemption scheme set out in Regulation No 2790/1999, the supplier, in

order to be covered by the conditions for the application of Article 5(a) of that regulation, must own not only the service station but also the land on which the service station has been built.

77. It follows from Article 12 of Regulation No 2790/1999 that the exemptions provided for in that regulation in principle became applicable from 1 June 2000. However, Regulation No 2790/1999 allowed a transitional period, set until 31 December 2001, for agreements which satisfied in particular the conditions for exemption set out in Regulation No 1984/83 without satisfying those of Regulation No 2790/1999.

78. Accordingly, the parties to those agreements, in order to be able to benefit from an exclusive purchase obligation lasting for more than five years, such as provided for in Article 5(a) of Regulation No 2790/1999, had to comply, from 1 January 2002 at the latest, *inter alia* with the condition that the supplier owned the land on which the service station had been built.

79. In the case in the main proceedings, the referring court does not state that the contracts concluded on 26 October 1989 for a period of 20 years from the construction of

²⁵ — OJ 1999 C 270, p. 7.

²⁶ — In point 59 of the Commission notice — Guidelines on Vertical Restraints of 13 October 2000 (OJ 2000 C 291, p. 1), it specifies that the reason for the exception whereby the non-compete obligation may be of the same duration as the period of occupancy of the point of sale by the buyer 'is that it is normally unreasonable to expect a supplier to allow competing products to be sold from premises and land owned by the supplier without his permission. Artificial ownership constructions intended to avoid the five-year limit cannot benefit from this exception'.

the service station were amended for the purpose of complying with the conditions in Article 5(a) of Regulation No 2790/1999.

accordance with the requirements of Article 5(a) of that regulation, the outstanding duration of the agreements being, in any event, more than five years.

80. Furthermore, notwithstanding what Total seems to be asserting, it seems unlikely, although that would require a review of the national law which must be carried out by the national court, that the right to build granted by Pedro IV confers on Total not only ownership of the structures and buildings on the land covered by such a right but also the actual ownership of the land.²⁷

82. On the other hand, if the referring court were to find, following its examination of all the facts of the case in the main proceedings, that the parties in that case intended abusively to take advantage of the provisions of Article 12(2) of Regulation No 1984/83, those parties would not be able to rely on either of the two block exemption schemes.

81. If, therefore, the referring court were to consider, in the light of all the factual and legal evidence in the case in the main proceedings, that the agreements concluded in that case benefited from the block exemption scheme laid down in Regulation No 1984/83, in particular from Article 12(2) of that regulation, those agreements could remain covered by that exemption until 31 December 2001, under the transitional regime provided for by Regulation No 2790/1999, but ceased to benefit from it from 1 January 2002, in

83. If the referring court concludes that the agreements at issue in the main proceedings are ineligible to benefit from the block exemptions for the *entire* duration of the period for which they were concluded, it must then, in accordance with what I have previously stated, examine whether those agreements satisfy all the conditions for the application of Article 85(1) of the Treaty.

27 — The concept of ownership in Article 5(a) of Regulation No 2790/1999 cannot, I think, be regarded as a concept of Community law which is independent of the law of the Member States. Given that, pursuant to Article 222 of the Treaty (now Article 295 EC), the Treaty in no way prejudices the rules in the Member States governing the system of property ownership, a Community regulation cannot be considered to use a concept of ownership different from those which exist in the Member States. See also, to that effect, point 7 of the Opinion of Advocate General Capotorti in Case 44/79 *Hauer* [1979] ECR 3727, according to which the Community legal order does not introduce any new concept of property ownership or system of rules appertaining thereto.

84. In the light of the foregoing arguments, I am of the opinion that Article 5(a) of Regulation No 2790/1999 must be interpreted as requiring, *inter alia*, that, in order for non-compete obligations in vertical agreements to be concluded for a period of more than five years, the supplier of the contractual goods or services must own the premises and land from which the buyer carries on his activity. That

requirement is applicable from 1 June 2000 or, if the agreements in force on 31 May 2000 satisfied the conditions for exemption in Regulation No 1984/83, in particular those laid down in Article 12(2) of that regulation, from 1 January 2002. It is for the national court to ascertain which of those two hypotheses is true in the case in the main proceedings.

3. The third and fourth questions

85. By its third and fourth questions, the national court seeks to ascertain, essentially, whether contractual provisions relating to the retail price of motor-vehicle and other fuels covered by an exclusive purchasing agreement such as those at issue in the main proceedings are prohibited by Article 85(1)(a) of the Treaty and ineligible to benefit from the application of the block exemption scheme provided for in Regulation No 1984/83 and, subsequently, of that provided for in Regulation No 2790/1999, on the ground that such provisions are liable to restrict, in any way, the reseller's freedom to fix the retail price of the goods at issue.

86. It must be pointed out that Article 85(1)(a) of the Treaty prohibits, *inter alia*, agreements between undertakings which may affect trade between Member States and which 'directly or indirectly fix ... selling prices'.

87. The Court has previously held that the restrictions on competition which are eligible for the block exemption provided for by Regulation No 1984/83 do not include the obligation, imposed on a service station operator, to sell fuel at the retail price fixed by the supplier.²⁸

88. As far as Regulation No 2790/1999 is concerned, Article 4(a) provides that the block exemption is not to apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object the restriction of the buyer's ability to determine his sale price, without prejudice to the possibility of the supplier's imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.

89. It follows that, as all the parties which submitted written observations to the Court maintained, regardless of whether it is under Regulation No 1984/83 or Regulation No 2790/1999, the imposition by the supplier of a fixed or minimum retail price, that is, one below which the distributor may not set its

²⁸ — *Confederación Española de Empresarios de Estaciones de Servicio*, paragraph 64.

prices, cannot benefit from the respective provisions of those regulations.

90. By contrast, the issue between the parties to the main proceedings is whether, having regard in particular to the relevant contractual provisions at issue in the main proceedings, Total is imposing on the operator, either directly or indirectly, a fixed retail price.

91. Such an assessment is obviously for the referring court to make. However, some observations can be made in the light of the case-file and with a view to giving a useful answer to the questions referred.

92. In this connection, it is apparent from the order for reference that, under the exclusive supply agreement, Total undertook to inform the distributor of the *recommended* retail prices and to ensure their competitiveness against the prices offered in good faith by other competitors in the surrounding area. As the Spanish Government and the Commission have correctly submitted, the operator of the service station therefore does not seem to be bound to apply a fixed or minimum price imposed by the supplier, but, on the contrary, remains free either to charge prices higher than those recommended or to award discounts to its customers, reducing its own profit margins, so as to encourage interbrand competition between distributors.

93. That assessment does not seem to be called into question by Total's second price commitment, to which attention was drawn in the order for reference, under which the supplier undertakes to fix the price of the fuel it supplies to the service station operator on the most advantageous terms agreed by it with other operators which may be established in Barcelona, and the price is never to be higher than the average of the prices fixed by the other suppliers with a significant presence on the market who operate in Barcelona. That provision concerns only the price of the transactions agreed between the two operators who are parties to the contract, not the retail price.

94. In its written observations and at the hearing, Pedro IV nevertheless argued that, notwithstanding the wording of the provisions of the exclusive supply contract, Total is indirectly fixing the retail price, a practice which *de facto* changes the recommended price to a fixed or minimum retail price.

95. Admittedly, the use of indirect means of fixing the retail price by the supplier would in fact preclude the benefit of the block exemptions provided for by Regulations Nos 1984/83 and 2790/1999,²⁹ but the fact remains that the accuracy of Pedro IV's claim must be verified by the national court, which did not refer to that issue in the order for reference.

29 — See, in this connection, Article 4(a) of Regulation No 2790/1999, point 47 of the Guidelines on Vertical Restraints of 13 October 2000, and point 91 of my Opinion in *CEPSA*.

96. In the light of the foregoing, I suggest that the Court's answer to the third and fourth questions should be that, whether under Regulation No 1984/83 or under Regulation No 2790/1999, the imposition, directly or indirectly, by the supplier of a fixed or minimum retail price, that is, one below which the distributor may not set his prices, may not benefit from the application of the

respective block exemption provisions in those regulations. It is for the national court, in the light both of the contractual provisions by which the parties to the main proceedings are bound and of the facts of those proceedings, to verify whether the supplier is indirectly imposing on the distributor a fixed or minimum retail price.

V — Conclusion

97. For the reasons set out above, I am of the opinion that the Court should give the following answers to the questions referred by the Audiencia Provincial de Barcelona:

- (1) Article 12(2) of Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements must be interpreted as not requiring, as one of its conditions of application, that the supplier owns the land on which he has at his own cost built the service station which he lets to the reseller, even in a situation where the supplier is the owner of the service station by virtue of a right to build granted by the reseller over his land. It is for the national court to ascertain, however, on the basis of objective evidence, whether the transactions at issue in the main proceedings were carried out in the course of normal commercial operations or solely, abusively, for the purpose of evading the maximum duration of 10 years applicable in principle to exclusive purchase agreements in the context of service station agreements, laid down in Article 12(1)(c) of Regulation No 1984/83.

- (2) Article 5(a) of Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices must be interpreted as requiring, *inter alia*, that, in order for non-compete obligations in vertical agreements to be concluded for a period of more than five years, the supplier of the contractual goods or services must own the premises and land from which the buyer carries on his activity. That requirement is applicable from 1 June 2000 or, if the agreements in force on 31 May 2000 satisfied the conditions for exemption in Regulation No 1984/83, in particular those laid down in Article 12(2) of that regulation, from 1 January 2002. It is for the national court to ascertain which of those two hypotheses is true in the case in the main proceedings.
- (3) Whether under Regulation No 1984/83 or under Regulation No 2790/1999, the imposition, directly or indirectly, by the supplier of a fixed or minimum retail price, that is, one below which the distributor may not set his prices, may not benefit from the application of the respective block exemption provisions in those regulations. It is for the national court, in the light both of the contractual provisions by which the parties to the main proceedings are bound and of the facts of those proceedings, to verify whether the supplier is indirectly imposing on the distributor a fixed or minimum retail price.