Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 25 October 2012[1]

Case C-32/11

Allianz Hungária Biztosító Zrt.
Generali-Providencia Biztosító Zrt.
Gépjármű Márkakereskedők Országos Szövetsége
Magyar Peugeot Márkakereskedők Biztosítási Alkusz Kft.
Paragon-Alkusz Zrt., legal successor to Magyar Opelkereskedők Bróker Kft.
v
Gazdasági Versenyhivatal

(Reference for a preliminary ruling from the Magyar Köztársaság Legfelsőbb Bírósága (Hungary))

(Competition — Bilateral agreements concluded between insurance companies and certain car dealers pursuant to which the hourly repair charge which the insurance companies pay to the dealers depends on the percentage of insurance policies with the insurer concerned which the dealers sell in their capacity as brokers — Jurisdiction of the Court — Restriction of competition by object)

I – Introduction

1. In the present case, the Magyar Köztársaság Legfelsőbb Bírósága (Hungarian Supreme Court) has referred to the Court of Justice a question on the interpretation of Article 101(1) TFEU in the context of proceedings concerning the lawfulness of a decision of the national competition authority, sanctioning as restrictive of competition and incompatible with Hungarian law several agreements variously entered into by a number of insurance companies, car sales and repair dealers and an association of such dealers.

2. There are two aspects to the case. Firstly, in my opinion, the circumstances of the case call for an examination of the admissibility of the question referred for a preliminary ruling. Although the question concerns a rule of European Union ('EU') law, it is not disputed that the present case is governed by the Hungarian national rules on competition. In that connection, I shall propose that the Court declare that, in the clear absence of a 'direct and unconditional reference' by the national legislation to EU law, within the meaning of the case-law of the Court, the conditions required for a reference for a preliminary ruling of this kind to be held admissible are not satisfied.

3. Irrespective of that, I shall analyse, in the alternative, the substantive aspect of the case which relates, as I have indicated above, to a possible case of restrictions of competition by object in the particularly complex context of a number of vertical agreements which may, however, have been influenced by a horizontal agreement.

1 — Original language: Spanish.

II – Legal framework

A – *European Union law*

4. Article 3 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[2] governs the relationship between Articles 81 EC and 82 EC (Articles 101 TFEU and 102 TFEU) and national competition provisions.

5. In accordance with Article 3(1), '[w]here the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article [101(1) TFEU] which may affect trade between Member States within the meaning of that provision, they shall also apply Article [101(1) TFEU] to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article [102 TFEU], they shall also apply Article [102 TFEU]'.

6. Article 3(2) provides that '[t]he application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article [101(1) TFEU], or which fulfil the conditions of Article [101(3) TFEU] or which are covered by a Regulation for the application of Article [101(3) TFEU]. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings'.

7. Finally, Article 3(3) provides as follows: 'Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles [101 and 102 TFEU].'

B – *The Hungarian legislation*

8. In 1996, the Hungarian legislature adopted a law on the prohibition of unfair market practices and the restriction of competition,[3] the preamble to which states that the law is adopted 'in view of the requirement to approximate European Community legislation and the traditions of Hungarian competition law'.

9. In accordance with Paragraph 1(2) of the Tpvt, its provisions apply to the practices which are governed by Articles 81 EC and 82 EC (Articles 101 TFEU and 102 TFEU) where the matter falls within the jurisdiction of the Hungarian Competition Authority or a Hungarian court.

10. Paragraph 11(1) in Chapter IV of the Tpvt, entitled 'Prohibition of agreements restricting competition', prohibits 'all agreements between undertakings and all decisions by associations of undertakings, bodies governed by public law, associations and other similar entities ... which have as their object, or which have or may have as their effect, the prevention, restriction or distortion of competition. Agreements concluded between undertakings which are not independent of each other cannot be covered by this definition'.

2 — OJ 2003 L 1, p. 25.

3 — Law No LVII of 1996 (Tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról szóló 1996. évi LVII. törvény; 'Tpvt').

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

11. Since the end of 2002, a number of car dealers which also operate as repair shops have entrusted the national association of authorised dealers (Gépjármű Márkakereskedők Országos Szövetsége; 'GÉMOSZ') with negotiating annually on their behalf with insurance undertakings a framework agreement relating to the hourly charge for repairs of damaged vehicles to be borne by those insurers.

12. The dealers concerned had a dual relationship with the insurers, in particular with Allianz Hungária Biztosító Zrt. ('Allianz') and with Generali-Providencia Biztosító Zrt. ('Generali'). On the one hand, the dealers operated as 'brokers' for the insurers, offering their customers motor insurance with those companies when vehicles were sold or repaired. On the other hand, the dealers repaired the vehicles insured by the insurers in the event of damage.

13. In both 2004 and 2005, GÉMOSZ and Allianz concluded a framework agreement on hourly repair charges. Next, Allianz concluded a number of individual agreements with various dealers, pursuant to which their repair shops' hourly charge would increase if the motor insurance policies taken out with Allianz came to a specified percentage of the total number of insurance policies sold by the dealer concerned. [4]

14. Generali, for its part, did not conclude any framework agreements with GÉMOSZ during the period concerned but it did conclude individual agreements with the dealers, applying in practice, in the latter's favour, a clause providing for the increase of the hourly charge similar to the one described above. [5]

15. In its decision of 21 December 2006, the Hungarian Competition Authority (Gazdasági Versenyhivatal) ruled that the following agreements were incompatible with Paragraph 11 of the Tpvt:

— First, three decisions adopted by GÉMOSZ between 2003 and 2005, setting 'recommended prices' for authorised dealers to apply to insurers for the repair of damaged vehicles;

— Second, the framework agreements concluded in 2004 and 2005 between GÉMOSZ and Allianz and the different individual agreements concluded in the same period between various dealers and Allianz and Generali respectively;

— Third, a number of agreements concluded between 2000 and 2005 between Allianz and Generali, of the one part, and several insurance brokers (Peugeot Márkakereskedők, Opelkereskedők and Porsche Biztosítási), of the other part; those agreements related to the commission which the latter were to receive based on the number of policies sold on behalf of the insurer concerned.

16. As the basis for its decision, the Competition Authority stated that, taken as a whole and individually, that bundle of agreements had as its object the restriction of competition in the insurance contracts market and the car repair services market. According to the Competition Authority, Article 101 TFEU was not applicable to those agreements because they had no impact on intra-Community trade and their unlawfulness was derived solely from the Hungarian competition rules.

4 — According to Allianz, its standard agreement included three different kinds of remuneration based on whether the dealer's sales of Allianz insurance policies represented, respectively, (i) less than 30%, (ii) between 30% and 50%, or (iii) 50% of the dealer's total insurance sales. The agreed increase in the hourly vehicle repair charge was (i) 10% to 11% for dealers whose sales of Allianz products came to less than 30% of their insurance sales, (ii) 12% to 13% for dealers whose sales of Allianz products came to between 30% and 50% of their insurance sales, and (iii) 14% to 15% for dealers whose sales of Allianz products came to 50% of their insurance sales. Despite that, according to the other insurer investigated, Generali, most of Allianz's contracts with dealers provided for an increase in the repair charge only where the Allianz products sold by the dealer in question represented 50% of its sales.

5 — According to Generali, the contracts it concluded with the dealers provided for an increase in remuneration where Generali products represented 30% of a dealer's insurance sales, a target which was 10% higher than Generali's market share of 20% during the period concerned.

17. Having found that the agreements were unlawful, the Competition Authority prohibited the continuation of the practices at issue and imposed fines in the following amounts: HUF 5 319 000 000 on Allianz, HUF 1 046 000 000 on Generali, HUF 360 000 000 on GÉMOSZ, HUF 13 600 000 on Peugeot Márkakereskedők and HUF 45 000 000 on Opelkereskedők.

18. An appeal was duly lodged against that decision and was partially upheld by the Fővárosi Bíróság (Budapest Municipal Court); however, the judgment at first instance was the subject of an appeal and the Fővárosi Ítélőtábla (Regional Court of Appeal, Budapest) restored the legality of the decision in its entirety.

19. An appeal on a point of law was duly lodged against the judgment of the appeal court with the Legfelsőbb Bírósága (Hungarian Supreme Court). The Supreme Court observed that the wording of Paragraph 11(1) of the Tptv is almost identical to that of Article 101(1) TFEU, and, citing to the clear interest in having a uniform interpretation of the provisions and concepts of EU law, it referred the following question for a preliminary ruling:

'Do bilateral agreements between an insurance company and individual car repairers, or between an insurance company and a car repairers' association, under which the hourly repair charge paid by the insurance company to the repairer for the repair of vehicles insured by the insurance company depends, among other things, on the number and percentage of insurance policies taken out with the insurance company through the repairer, acting as the insurance broker for the insurance company in question, qualify as agreements which have as their object the prevention, restriction or distortion of competition, and thus contravene Article 101(1) TFEU?'

IV – The admissibility of the question referred for a preliminary ruling

20. The referring court asks for a determination of whether Article 101(1) TFEU precludes a certain type of agreement between undertakings. However, the reference for a preliminary ruling states that that provision of the Treaty is not applicable in this case because the agreements at issue do not have an impact on trade between the Member States. Accordingly, the lawfulness of those agreements must be examined solely by reference to the national Hungarian rules on competition, specifically Paragraph 11(1) of the Tpvt. That view, which is the starting point for the decision of the Hungarian Competition Authority, has not been disputed by any of the parties.

21. Notwithstanding the purely internal nature of the case in the main proceedings, the Hungarian Supreme Court took the view that it was appropriate to refer a question on the interpretation of Article 101 TFEU, arguing that the classification of the agreements at issue under Hungarian domestic law (the Tpvt) is based on concepts which are identical in content to those in Article 101 TFEU.

22. Paragraph 11(1) of the Tpvt reproduces almost verbatim, without any significant differences, the prohibition on agreements which restrict competition contained in Article 101(1) TFEU (Article 81(1) EC). That is why the referring court is of the view that the classification of the agreements at issue as agreements intended to restrict competition entails an interpretation of the provisions of Article 101(1) TFEU and that the intervention of the Court of Justice is justified by the 'clear interest for the Community in having the provisions or concepts of Community law (which apply to the present appeal, including the concepts contained in Paragraph 11(1) of the [Tpvt]), interpreted in a uniform manner, in order to avoid the risk of any future interpretations that deviate therefrom, regardless of the circumstances to which they apply'.

23. The Commission has also expressed its support for the admissibility of the reference for a preliminary ruling. In particular, the Commission states that, although EU law has not been applied directly in the present case — unlike the cases which will be cited below — the specific relationship between the law on competition and EU law makes the interpretation requested by the Hungarian court necessary.

24. In a long line of judgments starting with *Dzodzi*,[6] the Court ruled that a reference for a preliminary ruling relating to a provision of EU law was admissible even though the provision concerned was not applicable to the case before it, 'in the specific case where the national law of a Member State refers to the content of that provision in order to determine rules applicable to a situation which is purely internal to that State'. As the basis for that approach, the judgment in *Dzodzi* stated that 'it is manifestly in the interest of the Community legal order that, in order to forestall future differences of interpretation, every Community provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied', although it will subsequently be for the national courts to apply the provision interpreted by the Court in the light of the factual and legal circumstances of the case before them and to determine the precise scope of the reference to EU law.[7]

25. In the past, a number of Advocates General have expressed clear reservations about that line of case-law.[8] Despite such criticisms, the case-law was subsequently confirmed by the Court.[9]

26. However, it should be borne in mind that conditions have been attached to the admissibility of this type of reference for a preliminary ruling. Thus, in *Kleinwort Benson*,[10] the Court introduced an important qualification, requiring that the reference to EU law by the national provision must be 'direct and unconditional', a condition which several Advocates General have highlighted in positive terms.[11] On the same lines, the order of the Court in *Club Náutico de Gran Canaria* applied that exception strictly in a case concerning the Canary Islands general indirect tax (Impuesto General Indirecto Canario; IGIC). That tax substantially reproduces the VAT provisions but it applies in the Canary Islands, outside the scope of EU law. Although the IGIC provision in connection with which the referring court was seeking an interpretation reproduced the provision contained in the Spanish Law on VAT, the Court observed that that legislation did not make a 'direct and unconditional' reference but was rather a mere reproduction, which resulted in the inadmissibility of the reference for a preliminary ruling.[12]

27. Judgments such as those in *Leur-Bloem* and *Kofisa Italia*[13] indirectly confirmed the validity of that case-law using *a contrario* reasoning, while, on the same lines, the judgment in *ETI*,[14] albeit without expressly relying on the *Kleinwort-Benson* precedent, stated in a similar case that the reference to EU law contained in the national provision concerned was not subject to any condition whatsoever.[15]

6 — Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763. A precedent may also be found in Case 166/84 *Thomasdünger* [1985] ECR 3001.

7 — *Dzodzi*, paragraphs 34 to 41.

8 — A good summary of that critical point of view is found in the Opinion of Advocate General Ruiz-Jarabo in Case C-1/99 *Kofisa Italia* [2001] ECR I-207, point 22 et seq. Many years ago, in his Opinion in *Thomasdünger*, delivered on 15 May 1[9]85, Advocate General Mancini also expressed his opposition to the admissibility of this type of reference for a preliminary ruling, which, in his opinion, ran counter to the provisions of the Treaty. A similar line was taken by Advocate General Darmon in his Opinion in *Dzodzi*, Advocate General Tizzano in his Opinion in *Adam*, and Advocate General Jacobs in his Opinions in Case C-28/95 *Leur-Bloem* [1997] ECR I-4161 and Case C-306/99 *BIAO* [2003] ECR I-1.

9 — See, inter alia, *Leur-Bloem*; Case C-7/97 *Bronner* [1998] ECR I-7791; *Kofisa Italia*; *Adam*; *BIAO*; and Case C-3/04 *Poseidon Chartering* [2006] ECR I-2505.

10 — Case C-346/93 [1995] ECR I-615.

11 — Opinions of Advocate General Ruiz-Jarabo in *Kofisa Italia*, of Advocate General Jacobs in *BIAO*, and of Advocate General Tizzano in *Adam*.

12 — Case C-186/07 [2001] ECR I-60.

13 — Cited above in points 27 and 29, respectively.

14 — Case C-280/06 [2007] ECR I-10893.

15 — Paragraph 25.

28. Much more recently, the judgment in *Cicala* [16] (which the parties did not have the opportunity to refer to in their pleadings) ruled inadmissible a reference for a preliminary ruling on the ground that the national provision lacked a 'direct and unconditional reference' to EU law. *Cicala* thus states that 'an interpretation, by the Court, of provisions of EU law in purely internal situations is justified because they are made applicable by national law in a direct and unconditional way'. [17] Finally, that requirement has recently been restated in *Nolan*, in which the Court declared that it did not have jurisdiction because the national law did not make an express, precise reference to EU law. [18]

29. As regards the interpretation to be given to the condition concerned, I believe, first, that the expression 'direct reference' means that it must be express and unambiguous. In short, it must be a genuine reference and a mere mention as a source of inspiration will not suffice. For its part, the word 'unconditional' implies, in my opinion, that the reference must be to the whole of the legislation concerned. To my mind, a single reference by the national legislature to a particular provision taken from the EU legislation cannot suffice, since the application of the Court's case-law in such a case and, ultimately, the reply to the question referred for a preliminary ruling, would run the risk of being dysfunctional.

30. If both conditions are satisfied, I believe that the reference for a preliminary ruling will not only be lawful but that it should also be positively welcomed. The logical consequence of the spontaneous wish of the national legislature to adopt EU law may, or even must, be that the national court will endeavour not to diverge from the EU judicature's interpretation of EU law. Moreover, in such cases recourse by the national court to a reference for a preliminary ruling should not, logically, be a random occurrence based on chance but rather should become a consistent, stable practice.

31. Lastly, on that point, it is not, to my mind, appropriate to question whether or not the national court will abide by the reply from the Court of Justice. As a clear consequence of the principle of sincere cooperation, a national court which has sought a preliminary ruling from the Court of Justice in that set of circumstances must heed the latter's reply. [19]

32. As in *Cicala*, it is therefore appropriate in this case to examine, first, whether the Hungarian law makes a 'direct and unconditional reference' to the provisions of EU competition law, for the purposes of determining whether the reference for a preliminary ruling is admissible.

33. As stated above, the parties to the present proceedings were not able to refer to the judgment in *Cicala* because it was given after they had lodged their pleadings. However, it is a precedent of particular relevance to the present case because there are a number of similarities between the two.

34. Firstly, the *Cicala* judgment points out in paragraphs 25 and 26 that, in that case, the national provision in question 'refers ... in a general manner to "principles derived from the Community legal order"' and not specifically to the provisions of EU law referred to by the questions posed or to other provisions relating to the same field, from which it follows that 'it cannot be considered that the provisions referred to by the questions posed have been, as such, made applicable in a direct way by Italian law'. In the case of the Hungarian law at issue here, the reference is even more general, since it is limited to a reference in the preamble to an abstract 'requirement to approximate European Community legislation and the traditions of Hungarian competition law'. Moreover, that is not surprising since the legislature concerned was the legislature of a Member State which was still a long way from achieving the status of a Member State of the European Union.

16 — Case C-482/10 *Cicala* [2011] ECR I-14139.

17 — *Cicala*, paragraph 19.

18 — Case C-583/10 [2012] ECR, paragraph 47.

19 — In relation to that principle, see Joined Cases C-200/07 and C-201/07 *Marra and Clemente* [2008] I-7929, paragraph 41 and the case-law cited.

35. Secondly, it should be noted that in both cases the referring courts sought an interpretation of provisions of primary law which were, in addition, extremely general — almost basic — in nature: in one case, the second paragraph of Article 296 TFEU and Article 41(2)(c) of the Charter of Fundamental Rights of the European Union, concerning the obligation to state reasons for legal acts, and, in the other case, the concept of restriction of competition by object in Article 101 TFEU.

36. In those circumstances, it is not possible to state that the Hungarian Law on competition makes a 'direct and unconditional reference' to Article 101 TFEU. First, the preamble to the Law simply refers in general terms to the 'European Community' legislation on competition, without mentioning any particular provision in an express and unequivocal manner; moreover, that legislation is cited as another source of inspiration in addition to the traditions of national law. Second, like the Italian Law in *Cicala*, the Hungarian Law does not indicate at all whether that reference has the consequence of setting aside the national rules. [20] Lastly, the question submitted is wholly lacking in specificity because it concerns the very concept of a restrictive practice under primary law.

37. It follows from the foregoing that it must in principle be concluded that, in the present case, there is no clear interest for the European Union in maintaining a uniform interpretation of the provision forming the subject-matter of the reference for a preliminary ruling, which would follow from a direct and unconditional reception of EU law.

38. None the less, [21] it is still necessary to respond to the Commission's argument that it is appropriate to treat in an exceptional manner cases in which national legislation involves a reception of EU law concerning restrictive practices.

39. Relying on Article 3 of Regulation No 1/2003 and citing case-law in support, the Commission suggests that that clear interest exists in a general way in the sphere of competition law. To my mind, although there are arguments for accepting that such an interest for the European Union may be somewhat stronger in the sphere of competition law, that cannot replace the requirement for a direct and unconditional reception, for the reasons which I shall set out below.

40. Admittedly, there has been particularly strong confirmation that the *Dzodzi* case-law applies in the sphere of competition law. In *Bronner*, *Poseidon Chartering*, *ETI* (all cited above) and *Confederación Española de Empresarios de Estaciones de Servicio*, [22] the Court ruled that references for a preliminary ruling were admissible in cases in which the main proceedings were, in principle, outside the scope of EU law and in fact concerned a national rule on competition.

41. In those cases, the jurisdiction of the Court was upheld using the additional argument that it is necessary to forestall differences in the interpretation of the same EU legal provision depending on whether it is applicable only indirectly (through a reference made by national law) or directly (because it falls within the scope of both national law and Article 101 TFEU). [23]

42. In accordance with Article 3(1) of Regulation No 1/2003, national competition provisions (like Paragraph 11(1) of the Tpvt) apply together with Articles 101 TFEU and 102 TFEU when the agreements, decisions or practices concerned 'may affect trade between Member States' within the meaning of the Treaty.

20 — *Cicala*, paragraph 28.

21 — And regardless of the fact that, at the hearing, the Commission accepted that the present case does not concern a direct and unconditional reference.

22 — Case C-217/05 [2006] ECR I-11987.

23 — *Bronner*, paragraphs 19 and 20; *Poseidon Chartering*, paragraph 16; *Confederación Española de Empresarios de Estaciones de Servicio*, paragraph 20; and *ETI*, paragraph 26. On the same lines, see the Opinions of Advocate General Kokott in *Confederación Española de Empresarios de Estaciones de Servicio* and *ETI*.

43. Conversely, therefore, those national provisions must be deemed to apply independently from EU law when that potential effect on intra-Community trade is not identified. The EU legislature has been very clear on this point: Article 3(1) and (2) of Regulation No 1/2003 make an express statement to that effect while the Commission Notice on the concept of the effect of competition provisions on trade provides that this condition 'also determines the scope of application of Article 3 of Regulation No 1/2003 on the implementation of the rules ... laid down in Articles [101 and 102 TFEU]'. [24]

44. Accordingly, when there is a possible effect on trade between Member States, national law must be applied together with EU law (Article 3(1) of Regulation No 1/2003) and the latter will operate as a 'barrier' (Article 3(2) of Regulation No 1/2003), but, apart from those cases, the national rules on competition apply (and, therefore, must be interpreted) in a manner which is, in principle, independent of EU law.

45. Further, in the light of the Treaty and Regulation No 1/2003, Member States have their own role in the area of competition which extends not only to mere administrative and implementing powers but also includes legislative powers. When Member States take action in the domain which has been reserved to them, those powers are in no way limited by the primacy of EU law, since Articles 101 TFEU and 102 TFEU are not applicable to them and there is no harmonising EU legislation in this area.

46. Therefore, Article 3 of Regulation No 1/2003 does not by itself serve as a basis for the jurisdiction of the Court in cases such as the present one, where the main proceedings must be disposed of exclusively by the application of national provisions. [25] A contrary conclusion would render entirely ineffective the defining condition for an effect on trade between Member States and would constitute undue interference in the area of sovereignty which was intended to be reserved exclusively to the Member States.

47. Admittedly, in recent years there has been a gradual 'Europeanisation' of national laws on competition which, especially in the new Member States, have frequently taken EU law as a model. [26] However, that does not mean that such Europeanisation must be effected by means of case-law. Although it might be appropriate and even desirable for the Member States to tend towards convergence with EU law when it comes to competition legislation applicable to purely domestic cases (with no effect on trade between Member States) and for national authorities to rely on the case-law of the Court on Articles 101 TFEU and 102 TFEU when applying and interpreting that national law, such harmonisation should not be imposed by means of preliminary-ruling proceedings.

48. Therefore, in conclusion, a reference for a preliminary ruling should be ruled admissible only where there is a genuine 'direct and unconditional' reference to EU law, as required by the *Kleinwort-Benson* and *Cicala* judgments, without there being any need to derogate from that condition in cases where the reference by the national legislature concerns a provision of competition law. Since those conditions are not satisfied, I believe that the Court should rule that the present reference for a preliminary ruling is inadmissible on the ground that the Court lacks jurisdiction to dispose of it.

24 — **Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty** (OJ 2004 C 101 p. 81), paragraph 8. See also the **Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 EC and 82 EC** (OJ 2004 C 101 p. 54), paragraph 6.

25 — It would be a different matter if it were demonstrated that the agreements at issue were capable of affecting intra-Community trade but, as already indicated, that point has not been disputed in this case.

26 — In that regard, see CSERES, K.J., 'The impact of regulation 1/2003 in the new Member States', *The Competition Law Review*, Volume 6, Issue 2 (July 2010).

V – Analysis of the reference for a preliminary ruling

49. Should the Court consider it appropriate to find the reference for a preliminary ruling admissible, I shall now, without prejudice to the foregoing, go on to analyse the substance of the proceedings.

A – *Preliminary considerations*

50. In the present case, the referring court asks the Court of Justice whether it is possible to classify a number of agreements between several undertakings and an association of undertakings as restrictive of competition by reason of their object, within the meaning of Article 101(1) TFEU. The analysis of that question must begin with a number of preliminary considerations concerning the specific factual and legal features of the case, some points about the nature of the agreements at issue, and, lastly, an explanation of the concept of restrictions by object.

1. The specific features of the case

51. The case before the Court turns on the lawfulness of a complex bundle of agreements, the main parties to which are two insurance companies, Allianz and Generali, a number of car dealers and the association which groups those dealers together (GÉMOSZ), with the specific feature that, in their relationship with the insurers, the dealers act in a dual capacity. When a car insurance policy is taken out by their customers, the dealers act as intermediaries for the insurers or as insurance brokers, and when vehicles are repaired after an accident, the dealers act in their capacity as repair shops which receive payment from the insurance companies concerned on the basis of, among other factors, the insurance policies previously concluded on behalf of those companies.

52. Allianz and Generali agree annually with the vehicle repair shops the conditions governing repairs and the charges to be applied by the repair shops to the vehicles insured by the insurance companies. Under those agreements, the repair shops may proceed to repair insured vehicles without first having to consult the insurers.

53. Each year from the end of 2002, many authorised dealers which also operate as repair shops asked GÉMOSZ to negotiate framework agreements concerning repair charges on their behalf with the insurers.

54. In 2004 and 2005, the insurer Allianz concluded framework agreements relating to the charges with GÉMOSZ. Subsequently, Allianz concluded individual agreements with the dealer-repair shops based on those framework agreements. In accordance with those individual agreements, a dealer-repair shop would receive higher remuneration than that agreed within GÉMOSZ, provided that it attained or maintained a specified percentage of Allianz insurance policies out of the total number of car insurance policies it sold.

55. Generali did not conclude any framework agreements with GÉMOSZ during the reference period but it did conclude individual agreements with the dealers. It appears that those agreements did not contain any clauses concerning increases in charges of the kind included in the Allianz agreements, although the Hungarian Competition Authority found that, in practice, Generali applied similar commercial incentives.

56. In addition, between 2000 and 2005, both Allianz and Generali concluded individual agreements with insurance brokers with a view to encouraging sales of the insurers' products in return for increased remuneration.

57. The main complexity of the present case therefore derives from the fact that it involves interconnected activities which are potentially restrictive of competition and which belong to two very different markets: the insurance market and the car repair services market. Thus, the reply to the question referred for a preliminary ruling calls for some differentiation between the two markets concerned.

2. The agreements at issue

58. In addition to that complex network of agreements, it should be pointed out that the question referred for a preliminary ruling by the Hungarian Supreme Court refers solely to 'bilateral agreements between an insurance company and individual car repairers' and to agreements 'between an insurance company and a car repairers' association'.

59. Therefore, the present reference for a preliminary ruling is concerned solely with those agreements, that is, agreements concluded by the insurers, Allianz and Generali, with various dealer-repair shops, on the one hand, and agreements concluded between Allianz and the dealers' association (GEMOSZ), on the other.

60. However, the Hungarian Government and the Commission submit that the agreements in question must be examined in conjunction with a number of decisions of GEMOSZ and with the agreements concluded by the insurance companies with the dealers' insurance brokers. Regardless of the wording of the question and for reasons which I shall set out below, it seems to me that that overall analysis is hard to avoid.

3. The concept of restrictions by object

61. By its question, the Hungarian Supreme Court asks whether the agreements in question may be classified as restrictive of competition by reason of their object, within the meaning of Article 101(1) TFEU.

62. In accordance with that article, '[t]he following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market'.

63. Article 101(1) TFEU therefore provides for two types of prohibited restrictions of competition: restrictions by object and restrictions by effect. As has been stated in the case-law, the use of the conjunction 'or' indicates that the second classification is subsidiary to the first. Initially, it is necessary 'to consider the precise purpose of the agreement, in the economic context in which it is to be applied', but where an analysis of the clauses of that agreement does not reveal a sufficient degree of harm to competition, the effects of the agreement should then be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent. The distinction between 'infringements by object' and 'infringements by effect' therefore arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition. [27]

27 — Case C-209/07 *Beef Industry Development Society and Barry Brothers* [2008] ECR I-8637, paragraphs 15 and 17.

64. The classification of an agreement or practice as restrictive of competition by object acts as a kind of 'presumption', since, if that agreement or practice is found to be restrictive, it will not be necessary to establish what effects it has on competition. Moreover, the prohibition may be adopted as a preventive measure without waiting until any effects which are detrimental to competition have actually occurred. [28]

65. As the Commission states in its Guidelines on the application of Article [101(3) TFEU], '[t]hese are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article [101(1) TFEU] to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules'. [29] To my mind, it follows from the foregoing that this category must be interpreted strictly and must be limited to cases in which a particularly serious inherent capacity for negative effects can be identified.

66. According to settled case-law, in order to assess whether an agreement has an anti-competitive object, regard must be had inter alia to the content of its provisions, its objectives and the economic and legal context of which it forms a part. Although the parties' intention is not a necessary factor in determining whether an agreement is restrictive, there is nothing to prevent the Commission or the Community judicature from taking that factor into account. [30]

67. In accordance with that case-law, I shall examine in the present case the content of the agreements mentioned by the referring court and the objectives which they seek to attain; the agreements concerned are the contracts between the insurers, of the one part, and individual dealer-repair shops or the association which groups them together (GEMOSZ), of the other part. Second, I shall examine the economic and legal context of which those agreements form a part, a context which, in my opinion, must include the agreements and decisions to which the Hungarian Government and the Commission refer, that is, the decisions of GEMOSZ and the agreements with the insurance brokers.

B – *The content and objectives of the agreements at issue*

68. First of all, as far as their content and objectives are concerned, it is my view that the agreements at issue in the reference for a preliminary ruling, pursuant to which the greater the percentage of insurance policies with the insurer concerned which the dealer sells, the higher the remuneration offered to the dealer by the insurer for the repair of vehicles, do not warrant the classification of restrictions by object.

28 — In that connection, it is settled case-law that, for the purposes of applying Article 101(1) TFEU, 'there is no need to take account of the actual effects of an agreement once it appears that its aim is to restrict, prevent or distort competition'. See, in that connection, Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, paragraph 496, and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 491.

29 — Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty (OJ 2004 C 101, p. 97), paragraph 21.

30 — See, inter alia, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and others* v *Commission* [1983] ECR 3369, paragraphs 23 to 25, and Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline and Others* [2009] ECR I-9291, paragraph 58.

69. It should be noted at the outset that these are vertical agreements, to which, as a general rule and subject to exceptions, Article 101(1) TFEU does not apply. [31] Therefore, unlike horizontal agreements, [32] where it is clearly easier to identify an object or effect restrictive of competition, vertical agreements are considerably more complex.

70. However, the Hungarian Government and the Commission dispute the classification of those agreements as vertical. In their view, there is no legal relationship between the insurers and the dealer-repair shops pursuant to which one party provides a service to the other. Since the repair shops are not customers of the insurance companies and the hourly repair charges cannot be regarded as consideration for the sale of insurance, it is not possible in the present case to talk about a genuine 'vertical relationship'. They submit, in short, that these are not vertical agreements because there is no legal relationship whereby one of the parties provides a service to the other.

71. However, Allianz maintains that its agreements with the dealers are clearly vertical because, in return for remuneration, the dealers provide it with a repair service for insured vehicles or a brokerage service for insurance sales.

72. To my mind, the position of Allianz is more compatible with the broad definition of vertical agreements laid down in Regulation No 330/2010. Article 1(1)(a) of that regulation defines a vertical agreement as 'an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services'.

73. My understanding is therefore, first, that, for the purposes of the agreements, the insurers and the dealer-repair shops operate at different levels of the distribution chain and, second, that the parties stipulate in the agreements at issue the conditions under which the dealers provide certain services to the insurers which the latter pay for at the agreed price. In that connection, it is common ground, for example, that the dealers market the insurers' insurance products in return for remuneration and, in fact, the reference for a preliminary ruling turns on whether the form of remuneration chosen (the hourly repair charge) is compatible with Article 101(1) TFEU. Accordingly, the agreements to which the question refers are, to my mind, vertical agreements.

74. As regards vertical agreements, the Court of Justice has hitherto classified only the following as restrictions of competition by object: the imposition of minimum resale prices, [33] the prohibition of parallel trade between Member States through the establishment of absolute territorial protection, [34] and, more recently, clauses prohibiting distributors from using the internet to sell certain products, unless that prohibition is justified objectively as in the context of a selective distribution network. [35]

75. However, as I shall explain below, it is my view that the agreements at issue in the present case do not in themselves have the capacity to restrict competition which those clauses had.

31 — See, in that regard, Article 2 of **Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices** (OJ 2010 L 102, p. 1). Article 3 of that regulation provides for a number of market share thresholds for the application of the exemption, while Article 5 sets out a number of vertical restrictions which do not fall within the scope of that exemption.

32 — Between rival undertakings: For example, if there were an agreement relating to repair charges between Allianz and Generali, it would clearly be a horizontal agreement.

33 — Case 243/83 *Binon* [1985] ECR 2015.

34 — *Consten and Grundig* v *Commission*, and Case 19/77 *Miller* [1978] ECR 131.

35 — Case C-439/09 *Pierre Fabre Dermo-Cosmétique* [2011] ECR I-9419.

76. The Hungarian Government and the Commission submit that the fact that, under the agreements at issue, the amount of the hourly repair charge payable by the insurers is dependent on the sale by the dealer-repair shops of a specified percentage of those insurers' products, instead of the sale of an absolute quantity, is aimed at perpetuating the distribution of the insurers' market shares in existence at the time when the agreements were concluded, an objective which is in itself anti-competitive. According to the Hungarian Government and the Commission, the agreements have the effect of linking activities which are in principle separate, that is, the repair of cars and the sale of insurance, thereby affecting the normal operation of the market and confirming the anti-competitive objective of the agreements at issue.

77. First of all, it should be recalled that competition law does not expressly prohibit clauses of this kind with objectives in the form of a percentage and nor does it penalise any vertical agreement intended to increase an undertaking's own sales at the expense of those of its competitors. The clearest test of that is the allowance, within certain time-limits, of so-called 'single-branding' or non-compete obligations, which not only encourage that lack of competition but also prohibit the marketing of competitors' goods. [36]

78. Article 5(1)(a) of Regulation No 330/2010, for example, excludes the application of the exemption under Article 101(3) TFEU only in the case of non-compete obligations 'the duration of which is indefinite or exceeds five years' (and therefore makes them subject to Article 101(1) TFEU), meaning that the exemption may be applied to obligations with a shorter duration. For their part, the Commission Guidelines on Vertical Restraints state that '[s]ingle branding obligations shorter than one year entered into by non-dominant companies are generally not considered to give rise to appreciable anti-competitive effects or net negative effects'. [37]

79. Obviously, the fact that Regulation No 330/2010 provides that the exemption is not applicable to a particular kind of vertical agreement does not mean that such agreements should automatically be included in the category of restrictions by object. However, it is also true that the 'black list' in Regulation No 330/2010 and the restrictions identified as 'hardcore' by the Commission overlap to a large extent with the agreements and practices classified in the case-law as restrictions by object. Accordingly, although it is not a decisive criterion, it is clear that those lists can be used as an indication, in particular, of what is not a restriction by object.

80. Moreover, the case-law has analysed specific vertical agreements containing non-compete obligations of that kind, reaching the conclusion that they do not constitute restrictions of competition by object although it is necessary to analyse whether they have the effect of prohibiting, restricting or distorting competition. [38]

81. To my mind, in the light of their content and objectives, the capacity of the agreements at issue to restrict competition is not as high as that of the vertical agreements which the case-law has held in the past to be restrictions by object. Furthermore, their capacity to restrict competition also appears to be lower than that of vertical agreements which, in accordance with the case-law, do not constitute restrictions by object, although they might be capable of producing anti-competitive effects. [39]

36 — In accordance with Article 1(1)(d) of Regulation No 330/2010, 'non-compete obligation' means 'any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80% of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value or, where such is standard industry practice, the volume of its purchases in the preceding calendar year'.

37 — OJ 2010 C 130, p. 1, paragraph 133.

38 — See, to that effect, Case C-234/89 *Delimitis* [1991] ECR I-935, paragraphs 13 to 15; Case C-214/99 *Neste* [2000] ECR I-11121, paragraph 25; Case C-279/06 *CEPSA* [2008] ECR I-6681, paragraph 43; and Case C-260/07 *Pedro IV Servicios* [2009] ECR I-2437, paragraph 83.

39 — See the cases cited in the previous footnote.

C – *The economic and legal context of the agreements at issue*

82. As I stated above, in order to determine whether a particular agreement constitutes a restriction of competition by object, it is also necessary to examine the economic and legal context of which that agreement forms a part, as the case-law indicates. [40]

83. In that connection, the Commission Notice on the application of Article [101(3) TFEU] states that '[i]t may also be necessary to consider the context in which [the agreement] is (to be) applied and the actual conduct and behaviour of the parties on the market. In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object. The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect'. [41]

84. In the present case, the agreements at issue were applied in a very specific context which presents a number of initially problematic aspects.

85. First, the decisions of GÉMOSZ appear, by any reckoning, to constitute a horizontal agreement between authorised dealers on the charges for, and conditions relating to, motor vehicle repair services. Second, on the basis of what was stated at the hearing, the insurers which entered into the agreements at issue — Allianz and Generali — together held a share of more than 70% of the relevant market. Accordingly, by concluding agreements with the dealers and/or GÉMOSZ on repair prices, based on charges previously agreed within the association, the insurers with the most market power consolidated and rendered effective the horizontal agreement between the dealers. Finally, the agreements between the insurers and the brokers increased the possible anti-competitive effects resulting from the agreements between the insurers and the dealers.

86. In my opinion, strictly from the point of view of the *car insurance market*, all those factors might not be sufficient to classify the vertical agreements to which the national court refers as agreements which are restrictive of competition by reason of their object.

87. Admittedly, in their agreements with GÉMOSZ, Allianz and Generali were seeking to increase their market shares, thereby bringing about the effect of excluding competitors. However, as stated above, that objective does not convert the agreements at issue into restrictions by object.

88. In order to establish a restriction by object in the insurance market, it would be necessary, in my view, to establish that there was an anti-competitive horizontal agreement between Allianz and Generali or, at least, a concerted practice aimed at excluding competitors from the market; such a practice would indeed be restrictive of competition by object. Moreover, that appears to be the position which the Commission outlines in its observations, in which it asserts that the insurers in the present case could be involved in a concerted practice, regard being had, in particular, to the identical terms and conditions of the contracts concluded, respectively, by Allianz with GÉMOSZ and with the dealers on an individual basis, and by Generali with the dealers on an individual basis.

89. However, in that connection, it should be pointed out that, in accordance with the settled case-law of the Court, 'a concerted practice within the meaning of Article [101(1) TFEU] is a form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition. The Court also stated, in its judgment of 16 December 1975 ... *Suiker Unie* v *Commission* ... that the criteria of coordination and co-operation necessary for the existence of a

40 — See, for example, *IAZ and others* v *Commission*, paragraphs 23 to 25.

41 — Notice cited above, paragraph 22.

concerted practice in no way require the working out of an actual "plan" but must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each trader must determine independently the policy which he intends to adopt on the common market and the conditions which he intends to offer to his customers'. Although it is correct to say that 'this requirement of independence does not deprive traders of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contract between such traders, the object or effect of which is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market'. [42]

90. Accordingly, for a concerted practice to exist, there must be, first, a finding of a concurrence of wills whereby a number of competitors decide to replace the risks of competition with coordination and some kind of direct or indirect contact between them. [43] Furthermore, a concerted practice 'implies, besides undertakings concerting with each other, subsequent conduct on the market, and a relationship of cause and effect between the two'. [44]

91. In the light of that case-law, the Commission submits that the fact that the insurers accepted the standard terms offered by the dealers, and the fact that the contractual conditions are similar or even identical, makes it clear that these are horizontal agreements, or at least concerted practices, implemented separately by both the insurers and the dealers.

92. However, in that regard, it should be observed that parallel conduct is not in itself enough to prove the existence of a concerted practice if there is another plausible explanation for that conduct. The Court has stated unequivocally that, '[i]n determining the probative value of those different factors, it must be noted that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. It is necessary to bear in mind that, although Article 85 of the Treaty prohibits any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors'. [45]

93. It is for the national court to determine whether there is evidence of such coordination or concerted practice. Only if that evidence exists will there be a clear case of a restriction by object in the insurance market, since coordination by competitors for the purpose of dividing the market between themselves is one of the restrictions of competition which warrants that classification pursuant to the case-law referred to above.

94. If, however, it is found only that the intention of each insurer was to increase its sales, on the one hand, and to conclude with the dealers contracts including similar clauses, on the other — a similarity created by the fact that the dealers had previously agreed between themselves the hourly rate which they were seeking to charge — then, to my mind, it is not possible to establish the existence of a concerted practice.

95. It would, however, be less difficult to establish that the same network of agreements constitutes a restriction of competition by object in the *vehicle repair services market*.

42 — Case 172/80 *Züchner* [1981] ECR 2021, paragraphs 12 to 14.

43 — In that regard, reference is also made to Case 48/69 *ICI* v *Commission* [1972] ECR 619, at paragraph 64: 'Article 85 draws a distinction between the concept of "concerted practices" and that of "agreements between undertakings"; the object is to bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition'.

44 — Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 161.

45 — Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* [1993] ECR I-1307, paragraph 71.

96. It appears to be established that the increased charges agreed horizontally by the dealers were passed on in the contracts with the insurers, which not only accepted the rates agreed by the dealers within GÉMOSZ but also improved those rates in return for certain conditions.

97. At first sight, therefore, the effectiveness of the horizontal agreement on repair charges was dependent on the insurers' accepting its terms and conditions, which they apparently did. The vertical agreements between the dealer-repair shops (or GÉMOSZ) and the insurers served to ratify an inherently anti-competitive horizontal agreement. For that reason, the whole arrangement (and not just the horizontal agreement) is unlawful and the conduct of the insurers must be censured in addition to that of the dealer-repair shops.

98. In any event, it is for the national court to ascertain the terms and conditions of the agreement or decision of GÉMOSZ. In particular, it is necessary to determine whether it binds a sufficiently high number of dealer-repair shops for it to be possible to talk about a genuine anti-competitive horizontal agreement.

99. If those matters are established, that would all lead to a finding that a restriction of competition exists on the car repair services market, which the agreements between the insurers and GÉMOSZ and between the insurers and each of the dealers have contributed to consolidating. As the Commission has observed, the Court previously sanctioned a set of agreements between parties present on two different markets in *Coop de France bétail et viande* v *Commission*.[46]

VI – Conclusion

100. Accordingly, I suggest that the Court reply as follows to the question referred for a preliminary ruling by the Magyar Köztársaság Legfelsőbb Bírósága, Hungary:

(1) The Court of Justice of the European Union does not have jurisdiction to answer the question referred for a preliminary ruling.

(2) In the alternative: bilateral agreements between an insurance company and individual car repairers, or between an insurance company and a car repairers' association, under which the hourly repair charge paid by the insurance company to the repairer for the repair of vehicles insured by the insurance company depends, among other things, on the number and percentage of insurance policies taken out with the insurance company through the repairer, acting as the insurance broker for the insurance company in question:

(a)
do not constitute a restriction of competition by object within the meaning of Article 101(1) TFEU as far as the insurance market is concerned, unless there is a concerted practice on the part of the insurers which is aimed at excluding competitors from the market; it is for the national court to determine whether that is the case;

(b)
may constitute a restriction of competition by object within the meaning of Article 101(1) TFEU as far as the vehicle repair market is concerned, regard being had to the circumstances in which the agreements were applied, in particular whether there is a horizontal agreement on charges between the dealers. It is for the national court to establish whether such an agreement exists and what its scope is.

46 — Joined Cases C-101/07 P and C-110/07 P [2008] ECR I-10193.