



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

21 July 2016*

(Reference for a preliminary ruling — Competition — Article 101(1) TFEU — Purely internal situation — Application of analogous national rules — Jurisdiction of the Court — Concerted practice — Liability of an undertaking for the acts of a service provider — Conditions)

In Case C-542/14:

REQUEST for a preliminary ruling under Article 267 TFEU from the Augstākā Tiesa (Supreme Court, Latvia), made by decision of 13 November 2014, received at the Court on 27 November 2014, in the proceedings

SIA ‘VM Remonts’, formerly SIA ‘DIV un KO’,

SIA ‘Ausma grupa’,

v

Konkurences padome,

and

Konkurences padome,

v

SIA ‘Pārtikas kompānija’,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Lycourgos, E. Juhász, C. Vajda and K. Jürimäe (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 21 October 2015,

after considering the observations submitted on behalf of:

— the Latvian Government, by I. Kalniņš and J. Treijs-Gigulis, acting as Agents,

* Language of the case: Latvian.

— the Italian Government, by G. Palmieri, acting as Agent, assisted by P. Gentili, avvocato dello Stato,
— the European Commission, by N. Khan, C. Giolito and I. Rubene, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 3 December 2015,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 101(1) TFEU.
- 2 The request has been made in proceedings brought (i) by SIA ‘VM Remonts’, formerly SIA ‘DIV un Ko’, and SIA ‘Ausma Group’ against the Konkurences padome (Competition Council, Latvia) and (ii) by the Konkurences padome against SIA ‘Pārtikas kompānija’, concerning the allegedly collusive behaviour of those undertakings when they participated in a tendering procedure organised by the town of Jūrmala (Latvia).

Legal context

Latvian law

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

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

...

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

...’

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

- 4 The municipal council of the city of Jūrmala issued a call for tenders for the supply of food products to educational establishments. DIV un Ko, Ausma grupa and Pārtikas kompānija submitted tenders in response to that call.
- 5 Pārtikas kompānija instructed SIA ‘Juridiskā sabiedrība “B&Š partneri”’ to provide it with legal assistance in the preparation and submission of its tender. The latter company had recourse, in turn, to a subcontractor SIA ‘MMD lietas’, which received a draft tender from Pārtikas kompānija.
- 6 According to the order for reference, Pārtikas kompānija had prepared that draft independently, without colluding with DIV un Ko or Ausma grupa on prices.

- 7 The order for reference also indicates that, without informing Pārtikas kompānija, MMD lietas had, in parallel, undertaken to prepare the respective tenders for DIV un Ko and Ausma grupa. In that context, an employee of MMD lietas used the tender received from Pārtikas kompānija as a point of reference in preparing the tenders of the other two tenderers. In particular, that employee drew up those two tenders on the basis of the prices given in Pārtikas kompānija's tender, so that the Ausma grupa tender was approximately 5% lower than the Pārtikas kompānija tender and the DIV un Ko tender was approximately 5% lower than that of Ausma grupa.
- 8 By decision of 21 October 2011, the Competition Council held that the three tendering undertakings had infringed Article 11(1), point (5), of the Law on Competition, by preparing their tenders jointly with the aim of creating the impression that there was actual competition between them. The Competition Council held that the concerted practice in question had distorted competition and imposed a fine on the undertakings.
- 9 DIV un Ko, Ausma grupa and Pārtikas kompānija brought actions for annulment of that decision. By judgment of 3 July 2013, the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia) annulled the decision in so far as it made a finding of infringement against Pārtikas kompānija but upheld the decision with regard to the other two undertakings.
- 10 While, on the one hand, that court took the view that the arithmetic correlation between the prices proposed by the three tenderers showed there to have been a concerted practice, it also considered, on the other hand, nothing demonstrated that Pārtikas kompānija had been involved in that practice.
- 11 DIV un Ko and Ausma grupa brought an appeal on a point of law before the Augstākā Tiesa (Supreme Court, Latvia) against the judgment of the Administratīvā apgabaltiesa (Regional Administrative Court) in so far as it dismissed their actions. The Competition Council appealed on a point of law against the judgment in so far as it upheld the action brought by Pārtikas kompānija.
- 12 The referring court notes, first, that it is common ground between the parties to the main proceedings that the concerted practice at issue is not capable of affecting trade between Member States. It nevertheless points out that the Law on competition was drafted in the light of the need to align national competition law with that of the European Union and that the legal basis corresponding under EU law to that of the Law on competition is formed, in particular, of Articles 81 EC and 82 EC (now Articles 101 TFEU and 102 TFEU). As regards more particularly Article 11(1) of that law, the provision lays down a legal framework that is in substance identical to that provided for in Article 101(1) TFEU. In its view, Article 11(1) should not be applied any differently from Article 101(1) TFEU.
- 13 Given that the Administratīvā apgabaltiesa (Regional Administrative Court), which alone has jurisdiction to establish the facts, has not found that the senior managers of Pārtikas kompānija had authorised the actions taken by MMD lietas or were aware of those actions, the referring court is uncertain whether, in a situation such as that before it, an undertaking such as Pārtikas kompānija may be considered answerable for participation in a concerted practice within the meaning of Article 101(1) TFEU, on account of the actions of a service provider which, like MMD lietas, supplies it with services on an independent basis.
- 14 The Augstākā Tiesa (Supreme Court) refers in particular to the considerations in paragraph 97 of the judgment of 7 June 1983 in *Musique Diffusion française and Others v Commission* (100/80 to 103/80, EU:C:1983:158) and paragraph 25 of the judgment of 7 February 2013 in *Slovenská sporiteľňa* (C-68/12, EU:C:2013:71) — according to which the liability of an undertaking for an infringement of Article 101(1) TFEU does not require action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned, action by a person who is authorised to act on behalf of the undertaking sufficing — and enquires whether those considerations are relevant in a situation such as that in issue in the main proceedings.

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

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

The question referred for a preliminary ruling

The jurisdiction of the Court

- 16 In its order for reference, the Augstākā Tiesa (Supreme Court) states that the concerted practice at issue in the main proceedings concerns a purely internal situation and has no impact on trade between Member States. Article 101(1) TFEU is thus not applicable to the dispute in the main proceedings. Consequently, it must be determined whether the Court of Justice has jurisdiction to answer the question referred by that court.
- 17 In that connection, the Court has on many occasions held that it had jurisdiction to give preliminary rulings on questions concerning provisions of EU law in situations in which the facts of the cases before the national courts fell outside the scope of that law, provided that those provisions had been rendered applicable by national law, which had adopted, for purely internal situations, the same approach as that provided for under EU law. In such cases, according to the settled case-law of the Court, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (see, inter alia, judgments of 14 March 2013 in *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 20; 4 December 2014 in *FNV Kunsten Informatie en Media*, C-413/13, EU:C:2014:2411, paragraph 18; and 26 November 2015 in *Maxima Latvija*, C-345/14, EU:C:2015:784, paragraph 12).
- 18 In the present case, it is apparent from the order for reference, first, that the Latvian legislature expressly intended to align national competition law with that of the European Union, the legislature having thus decided to treat internal situations and situations governed by EU law in the same way. Second, the Augstākā Tiesa (Supreme Court) states that Article 11(1) of the Law on competition provides for a legal framework that is in substance identical to that laid down in Article 101(1) TFEU and that Article 11(1) is interpreted in the same way as Article 101(1) TFEU.
- 19 In those circumstances, the Court has jurisdiction to answer the question referred.

Substance

- 20 By its question, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as meaning that an undertaking may be held liable for a concerted practice on account of the acts of an independent service provider supplying it with services.
- 21 In that regard, a preliminary point to note is that this question does not concern the rules relating to the assessment of evidence and the requisite standard of proof which, in the absence of EU rules on the matter, are covered, in principle, by the procedural autonomy of the Member States (see judgment of 21 January 2016 in *Eturas and Others*, C-74/14, EU:C:2016:42, paragraphs 29 to 37). Rather, it concerns the constituent elements of the infringement that must be present if an undertaking is to be found liable for a concerted practice.

- 22 Next, it should be borne in mind that, under EU competition law, an undertaking must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (judgments of 12 July 1984 in *Hydrotherm Gerätebau*, 170/83, EU:C:1984:271, paragraph 11, and 10 September 2009 in *Akzo Nobel and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 55).
- 23 Nevertheless, it must be stated, first, that the judgments of 7 June 1983 in *Musique Diffusion française and Others v Commission* (100/80 to 103/80, EU:C:1983:158), and 7 February 2013 in *Slovenská sporiteľňa* (C-68/12, EU:C:2013:71) were given by the Court in cases in which undertakings were implicated on the basis of the acts of their employees. An employee performs his duties for and under the direction of the undertaking for which he works and, thus, is considered to be incorporated into the economic unit comprised by that undertaking (see, to that effect, judgment of 16 September 1999 in *Becu and Others*, C-22/98, EU:C:1999:419, paragraph 26).
- 24 For the purposes of a finding of infringement of EU competition law any anti-competitive conduct on the part of an employee is thus attributable to the undertaking to which he belongs and that undertaking is, as a matter of principle, held liable for that conduct.
- 25 However, where a service provider offers, in return for payment, services on a given market on an independent basis, that provider must be regarded, for the purpose of applying rules aimed at penalising anti-competitive conduct, as a separate undertaking from those to which it provides services and the acts of such a provider cannot automatically be attributed to one of those undertakings.
- 26 The relationship between an undertaking and its employees is thus not, in principle, comparable to the relationship between that undertaking and the service providers which supply services to it; accordingly the considerations in paragraph 97 of the judgment of 7 June 1983 in *Musique Diffusion française and Others v Commission* (100/80 to 103/80, EU:C:1983:158) and paragraph 25 of the judgment of 7 February 2013 in *Slovenská sporiteľňa* (C-68/12, EU:C:2013:71) cannot be applied to the latter situation.
- 27 Nonetheless, it is possible that, in certain circumstances, a service provider which presents itself as independent is in fact acting under the direction or control of an undertaking that is using its services. That would be the case, for example, in circumstances in which the service provider had only little or no autonomy or flexibility with regard to the way in which the activity concerned was carried out, its notional independence disguising an employment relationship (see, to that effect, judgment of 4 December 2014 in *FNV Kunsten Informatie en Media*, C-413/13, EU:C:2014:2411, paragraphs 35 and 36). Furthermore, such direction or control might be inferred from the existence of particular organisational, economic and legal links between the service provider in question and the user of the services, just as with the relationship between parent companies and their subsidiaries (see, to that effect, judgment of 24 June 2015 in *Fresh Del Monte Produce v Commission* and *Commission v Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, EU:C:2015:416, paragraphs 75 and 76 and the case-law cited). In such circumstances, the undertaking using the services could be held liable for the possible unlawful conduct of the service provider.
- 28 It must be stated, secondly, that, assuming the service provider concerned to be genuinely independent (a matter which falls to be determined by the national court), in circumstances such as those in the main proceedings the concerted practice involving that provider may be attributed to the undertaking using that provider's services only under certain conditions.
- 29 In that regard, it should be recalled that the Court has held that an undertaking may be held liable for agreements or concerted practices having an anti-competitive object when it intended to contribute by its own conduct to the common objectives pursued by all the participants and was aware of the actual

conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to accept the risk (see, to that effect, judgment of 8 July 1999 in *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 87).

- 30 Accordingly, the concerted practice at issue may be attributed to the undertaking using the services, inter alia, if the undertaking was aware of the anti-competitive objectives pursued by its competitors and the service provider and intended to contribute to them by its own conduct. Whilst it is true that such a condition is met when that undertaking intended, through the intermediary of its service provider, to disclose commercially sensitive information to its competitors, or when it expressly or tacitly consented to the provider sharing that commercially sensitive information with them (see, by analogy, judgments of 7 January 2004 in *Aalborg Portland and Others v Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraphs 82 to 84, and 21 January 2016 in *Eturas and Others*, C-74/14, EU:C:2016:42, paragraph 28), the condition is not met when that service provider has, without informing the undertaking using its services, used the undertaking's commercially sensitive information to complete those competitors' tenders.
- 31 The concerted practice at issue may also be attributed to the undertaking using those services if the latter could reasonably have foreseen that the service provider retained by it would share its commercial information with its competitors and if it was prepared to accept the risk which that entailed.
- 32 It is the task of the national court, in accordance with the rules of its domestic law concerning the assessment of evidence and the requisite standard of proof, to determine whether, in the circumstances of the case before it, one of those conditions is met.
- 33 Having regard to all the foregoing considerations, the answer to the question is that Article 101(1) TFEU must be interpreted as meaning that an undertaking may, in principle, be held liable for a concerted practice on account of the acts of an independent service provider supplying it with services only if one of the following conditions is met:
- the service provider was in fact acting under the direction or control of the undertaking concerned, or
 - that undertaking was aware of the anti-competitive objectives pursued by its competitors and the service provider and intended to contribute to them by its own conduct, or
 - that undertaking could reasonably have foreseen the anti-competitive acts of its competitors and the service provider and was prepared to accept the risk which they entailed.

Costs

- 34 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 101(1) TFEU must be interpreted as meaning that an undertaking may, in principle, be held liable for a concerted practice on account of the acts of an independent service provider supplying it with services only if one of the following conditions is met:

- the service provider was in fact acting under the direction or control of the undertaking concerned, or**

- **that undertaking was aware of the anti-competitive objectives pursued by its competitors and the service provider and intended to contribute to them by its own conduct, or**
- **that undertaking could reasonably have foreseen the anti-competitive acts of its competitors and the service provider and was prepared to accept the risk which they entailed.**

[Signatures]