Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

18 November 2021 *

(Reference for a preliminary ruling – Competition – Agreements, decisions and concerted practices – Article 101(1) and (3) TFEU – Vertical agreements – Restriction 'by object' or 'by effect' – Exemption – Registration by the distributor of the potential transaction with the end user – Clause giving the distributor 'priority in progressing the sale process' for six months from the time of registration – Exception – Objection of the user – Jurisdiction of the Court – Purely internal situation – National legislation adopting the same approach as that provided for under EU law)

In Case C-306/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia), made by decision of 4 June 2020, received at the Court on 9 July 2020, in the proceedings

SIA 'Visma Enterprise'

v

Konkurences padome,

THE COURT (Seventh Chamber),

composed of A. Arabadjiev (Rapporteur), President of the First Chamber, acting as President of the Seventh Chamber, T. von Danwitz and A. Kumin, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– SIA 'Visma Enterprise', by Z. Norenberga,

– the Konkurences padome, by V. Hitrovs,

* Language of the case: Latvian.

– the Latvian Government, initially by K. Pommere, V. Soņeca and L. Juškeviča, and subsequently by K. Pommere, acting as Agents,

– the European Commission, initially by N. Khan, P. Berghe and I. Naglis, and subsequently by N. Khan and P. Berghe, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 The request for a preliminary ruling concerns the interpretation of Article 101(1) and (3) TFEU and of Article 2 and Article 4(b) of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) [TFEU] to categories of vertical agreements and concerted practices (OJ 2010 L 102, p. 1).

2 This request has been made in proceedings between SIA 'Visma Enterprise' (formerly SIA FMS Software and SIA FMS) and the Konkurences padome (Competition Council, Latvia) concerning the latter's decision by which it imposed a fine on Visma Enterprise for having committed an infringement of Latvian competition law.

Legal framework

European Union law

3 Article 2(1) of Regulation No 330/2010 provides:

'Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to vertical agreements.

…'

Latvian law

4 Under Article 11(1) of the Konkurences likums (Competition Law):

'Agreements between operators which have as their object or effect the prevention, restriction or distortion of competition within Latvian territory shall be prohibited and null and void *ab initio*, including agreements relating to:

(1) the direct or indirect fixing of prices or tariffs in any form whatsoever or provisions relating to their formation and the exchange of information relating to prices or terms of sale;

(2) limiting or controlling the volume of production or sales, markets, technical development or investment;

(3) market-sharing based on territory, customers, suppliers or other factors;

(4) provisions which make the conclusion, amendment or cancellation of a transaction with a third party subject to the acceptance by that third party of obligations which, according to commercial usage, have no connection with the transaction in question;

(5) participation or non-participation in tendering procedures or awards or measures associated with such actions (failure to act), unless the competitors have publicly announced their joint tender and it is not the purpose of such a tender to impede, restrict or distort competition;

(6) the application of dissimilar conditions to equivalent transactions with third parties, thereby establishing disadvantageous competitive conditions for those third parties;

(7) actions (or failures to act) which oblige another operator to leave a given market or impede the entry of a potential operator in a given market.'

5 Article 11(2) of that law recognises the validity of agreements allowing for improvements in the production or sale of goods or economic progress and which consequently benefit customers, and the prohibition laid down in Article 11(1) does not apply to them provided that such agreements do not impose on the operators concerned restrictions which are not necessary for attaining the aforementioned objectives and do not enable competition to be eliminated in a substantial part of the relevant market.

6 Article 11(4) of the law provides that the Ministru kabinets (Latvian Council of Ministers) is to determine the agreements between operators which do not have a significant detrimental effect on competition and the criteria according to which agreements concluded between operators are exempt from the prohibitions laid down in Article 11(1).

7 The Ministru kabineta noteikumi Nr.797 'Noteikumi par atsevišķu vertikālo vienošanos nepakļaušanu Konkurences likuma 11.panta pirmajā daļā noteiktajam vienošanās aizliegumam' (Decree No 797 of the Council of Ministers of 29 September 2008 concerning 'Regulations relating to the exemption of certain vertical agreements from the prohibition of the agreements referred to in Article 11(1) of the Competition Law' ('Decree No 797/2008'), adopted on the basis of Article 11(4) of the Competition Law, applies to certain types of vertical agreement and provides for exceptions in that regard.

8 Article 8(2)(1) of Decree No 797/2008 permits, in exceptional cases, the limiting of active sales (distributor conduct in actively seeking customers in an unlimited territory or in relation to an unlimited number of customers), but prohibits limiting passive sales (situations in which the distributor is approached by a customer that does not belong to the territory or customers allocated exclusively to the distributor).

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

9 By decision of 9 December 2013, concerning the application of Article 11(1) of the Competition Law to certain practices of FMS Software, SIA RGP, SIA Zemgales IT centrs, SIA PC Konsultants, SIA Guno M, SIA Softserviss, SIA I.R. Finanses, FMS, SIA FOX ('the contested decision'), the Competition Council ordered FMS Software and FMS jointly and severally to pay a fine of 45 000 lati (LVL) (approximately EUR 64 000).

10 In that decision, the Competition Council found that FMS Software, which holds the copyright for the Horizon and Horizon Start accounting software, had concluded an agreement with several distributors relating to the distribution of that software, which gave an advantage in the sale process to certain distributors, which had the effect of restricting the scope of competition between those distributors. FMS had taken over one of the economic activities of FMS Software in connection with which there had been a finding of infringement of the competition law rules.

11 After examining the cooperation agreements concluded between FMS Software and its distributors for the distribution of the Horizon and Horizon Start accounting software, as well as a copy of the standard cooperation agreement between that company and those distributors for the year 2011, the Competition Council found that Clause 4.1 of that agreement provided that, at the beginning of the sale process with an end user, the distributor is required to register the potential transaction in a database created by FMS Software by sending a standard electronic form stating certain information about that user. Under that clause, the distributor that was the first to register the potential transaction with an end user has priority in progressing the sale process, unless that user objects. That clause also provided that that priority was to continue for six months as from the time of registration of the potential transaction ('the agreement at issue').

12 The Competition Council considered that the creation of a database relating to the potential customers of the distributors of FMS Software is not prohibited, but the advantage resulting from the 'priority in progressing the sale process' conferred on the distributor that has registered the potential customer denotes a certain degree of control over the relationship between distributors, so that only the distributor that was the first to inform FMS Software may, during a specific period, progress the sales transaction with that customer, provided that the customer does not object. The agreement at issue seeks to restrict competition between distributors in connection with the marketing of the Horizon and Horizon Start accounting software. Since the registration concerns potential customers to which the product in question has not yet been sold, it is impossible for distributors to compete with each other to offer accounting software on more favourable terms. This limits the benefit that customers obtain from there being competition between distributors, with the result that the grant of the advantage provided for by the agreement at issue, which is tantamount to market-sharing according to customer group, is aimed at restricting competition between the distributors of accounting software. The aim of that agreement is to restrict competition, so that it is not necessary to examine whether it has a restrictive effect on competition, or to make out proof of its application or actual implementation.

13 The Competition Council also took the view that the agreement at issue is not exempt from the prohibition provided for in Article 11(1) of the Competition Law by virtue of Article 8(2)(1) of Decree No 797/2008, since it limits the customer groups to which the distributors may sell the Horizon and Horizon Start accounting software.

14 According to the Competition Council, the infringement thus established lasted more than five years and was brought to an end at the initiative of FMS Software. The Competition Council also considered that it was neither appropriate nor necessary to hold the other parties to the agreement at issue, i.e. the distributors of FMS Software, liable for the infringement, because they had not actively participated in concluding the agreement and had negligible bargaining power in relation to FMS Software.

15 Visma Enterprise lodged an appeal with the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia) seeking annulment of the contested decision, claiming, inter alia, that it contains substantive errors concerning the assessment of the agreement at issue, the interpretation of its

object and the interpretation of the criteria for assessing whether certain vertical agreements are exempt from the prohibition of agreements as provided for in Article 11(1) of the Competition Law.

16 In Visma Enterprise's submission, the agreement at issue does not eliminate competition between distributors, since it does not prevent them from submitting their offers to a customer that is already registered. There is no element external to that agreement liable to denote a common objective on the part of the parties of sharing the market according to customer group. The distributors are not informed of the reservation of customers.

17 Visma Enterprise also claimed that, in order to establish the existence of an agreement, the Competition Council should have identified two or more parties involved in the infringement. The fact that it ruled out liability for Visma Enterprise's distributors for the infringement found confirms that there was no infringement. Moreover, the fact that the distributors were not active at the time of conclusion of the agreement at issue and that their market power in relation to FMS Software was negligible does not justify ruling out their liability for an infringement of the prohibition laid down in Article 11(1) of the Competition Law. Moreover, it is for the Competition Council to assess, first, whether or not the conditions for cooperation between FMS Software and its distributors were exempt and, only if they were, then whether or not Article 11(1) of the Competition Law was applicable.

18 The Competition Council maintained that the agreement at issue is aimed at sharing customers amongst distributors for six months as from the time of registration and at eliminating competition between them. It tends, by its object, to restrict competition since, in particular, Visma Enterprise has not put forward any grounds justifying the need to limit a distributor's right to offer its services to a customer reserved by another distributor.

19 By judgment of 8 May 2015, the Administratīvā apgabaltiesa (Regional Administrative Court) partially upheld Visma Enterprise's appeal and annulled that part of the contested decision ordering joint and several liability for the fine. That court ordered the Competition Council to adopt a new administrative measure aimed at imposing a fine on FMS Software and to exclude from calculation of the fine FMS's net turnover for the last financial year preceding the adoption of the contested decision. The appeal was dismissed as to the remainder.

20 Visma Enterprise and the Competition Council both lodged an appeal on a point of law against that judgment.

21 By judgment of 16 June 2017, the Senāta Administratīvo lietu departaments (Supreme Court, Department of Administrative Cases, Latvia) set aside the judgment of the Administratīvā apgabaltiesa (Regional Administrative Court) of 8 May 2015 and referred the case back to that court for reconsideration.

22 The parties to the main proceedings submitted further pleadings.

23 Visma Enterprise claimed, inter alia, that the priority granted to the distributor that was the first to submit its request consists of support provided by Visma Enterprise in preparing the offer and the technical solutions. That agreement contains no promise on the part of Visma Enterprise that registration ensures that the other distributors will not make an offer to a given customer or that Visma Enterprise will not consult other distributors concerning a particular customer. Similarly, the agreement does not establish a mechanism of coercion or any penalties. Visma Enterprise

does not in any way prevent the other distributors from carrying out sales transactions with customers to which one of Visma Enterprise's distributors has already provided services. Distributors are treated on a 'first-come, first-served' basis, which ensures equal treatment. Moreover, cooperation with a particular distributor does not preclude the customer from acquiring an accounting software licence for a subsequent period from another distributor. Neither Visma Enterprise nor the distributors prevent the customer from changing distributor. The customer may also conclude a contract with a distributor that was not the first to have registered it, which rules out the possibility of market-sharing.

24 The agreement at issue encourages distributors to be active in distributing accounting software, by actively conducting their sales transactions in competition with each other. It is necessary owing to the specific features of the sector and of the product at issue and to the particular feature that the distribution system involves the simultaneous action of several distributors performing an equivalent function on the market. The registration system is designed to ensure that the customer receives a high-quality effective product and service and also to monitor the work of distributors, since they are, on their own, unable to understand the specific features of the services provided to customers.

25 Hence, by ensuring that Visma Enterprise is informed in good time and enabling it to fill in the gaps in the distributor's knowledge, registration serves to prevent harm to the product's reputation or a misleading impression of the software and its functionalities being conveyed to the customer. The provision of high-quality service by a competent distributor enables less use of Visma Enterprise's resources.

26 The objective of the agreement at issue is therefore to encourage activity by distributors seeking to do business with Visma Enterprise, so that, in view of anticipated income, the sector of activity and the interests of potential clients, it is able to plan its income, identify potential customers, make investment decisions on product development and grant customers a manufacturer's discount at the request of the distributor. That agreement therefore pursues a legitimate aim in enabling organisation of the cooperation with the distributor, assessing the suitability of the product for the purchaser's needs, establishing fair rules for cooperation with the distributors and making efficient use of resources.

27 The Competition Council contended that Visma Enterprise is operating a coordinated sharing of customers between distributors. There is no rational and economically justified explanation for launching the initiation of the registration process before the potential customer has even confirmed that it wishes to begin to use the software developed by Visma Enterprise. The appraisal and identification of potential customers and the investment needed to develop the product cannot take place until after the end user has agreed to begin to use the software being marketed.

28 Visma Enterprise does not monitor distributors' activities and expertise in the resale of the software. It checks the distributors' knowledge before beginning to cooperate with them and regularly organises seminars for distributors to further their knowledge and develop their skills. The wording 'unless the end user objects' in the agreement at issue is irrelevant for the purpose of assessing the standard of proof of a restrictive effect on competition. Assessing a customer's likely behaviour is tantamount to examining whether the clause at issue has actually been implemented. It is, however, not necessary to consider whether that clause has been implemented, unless the intention is to make the presence of a restriction on competition contingent on the expression of a third party's will.

29 The Competition Council also maintained that the implementation of the agreement at issue does not establish either an exclusive distribution system or a selective distribution system. There is therefore no need to assess whether there are any restrictions on passive sales.

30 By judgment of 13 September 2018, the Administratīvā apgabaltiesa (Regional Administrative Court) dismissed the appeal, holding that the contested decision was lawful and well founded. After examining the significance of the insertion in the agreement at issue of the wording 'unless the end user objects', that court dismissed it as of no import, on the ground that it was formal in nature and the end user was unaware of the agreement to share customers. According to that court, the finding of an agreement cannot be contingent on customer conduct, except in the case of horizontal agreements, where an agreement can be found to exist only if the customers buy products for the collusive price concerned.

31 Visma Enterprise lodged an appeal on a point of law against that judgment.

32 By judgment of 26 November 2019, the Senāta Administratīvo lietu departaments (Supreme Court, Department of Administrative Cases) set aside the judgment of the Administratīvā apgabaltiesa (Regional Administrative Court) of 13 September 2018.

33 The Senāta Administratīvo lietu departaments (Supreme Court, Department of Administrative Cases) held that the Administratīvā apgabaltiesa (Regional Administrative Court) incorrectly assessed the legal and economic context of the agreement at issue. The nature, scope and limits of that agreement are found in the detailed rules for its implementation, envisaged by the parties to the agreement, which also includes the manner in which any customer objections will be perceived and affect the seller's room for manoeuvre. Furthermore, whether or not the customer is aware of the existence of the proviso allowing it to object to the priority of the distributor that was the first to register it or of the content of the agreement at issue is of little importance.

34 What does matter is to know how distributors should conduct themselves in sales procedures in the event of such objections being received. That point may be clarified in the light of both the wording and implementation of that agreement. The need to assess that proviso as reflecting the content of the agreement at issue cannot be treated as evidence of its actual implementation as a prerequisite for a finding of an infringement. The terms of the agreement must be assessed in the light both of its wording and of the evidence, adduced by the parties to the proceedings, liable to shed light on the true nature of the agreement.

35 The referring court observes that, in the main proceedings, it is common ground between the parties that the agreement at issue is not liable to affect trade between Member States. Consequently, this dispute must be resolved through the application of Latvian law, that is to say, the Competition Law and Decree No 797/2008.

36 However, inter alia in the judgment of 14 March 2013, *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160), the Court has already held that it has jurisdiction to give preliminary rulings on provisions of EU law in situations where the facts were outside the direct scope of EU law but where 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 situations, the European Union has a manifest interest in seeing 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.

37 Moreover, it is apparent from the case-law of the Senāta Administratīvo lietu departaments (Supreme Court, Department of Administrative Cases) that, with regard to the likely effects of the agreements on competition, Article 101(1) TFEU and Article 11(1) of the Competition Law establish the same legal framework. That means that the application of Article 11(1) of the Competition Law should not be different from that of Article 101(1) TFEU. It is essential to avoid acceptance in Latvia of different assessment criteria from those provided for by EU law for determining the existence of prohibited vertical agreements. The legal certainty obtained with foreseeable institutional and judicial practice is consistent with the general legal principles of both the Republic of Latvia and the European Union.

38 Moreover, fundamentally different approaches to the definition of infringements of competition law may give rise to differences between the Member States which might hinder the functioning of the internal market.

39 In the main proceedings, it is important to determine whether, in the case of an agreement which provides that the distributor that was the first to register the transaction is granted, for six months from the date of registration, priority in progressing the sale process with the end user concerned, unless that user objects, the nature of the agreement alone is sufficient to conclude that it is an agreement with the object of preventing, restricting or distorting competition on the market.

40 In those circumstances, the Administratīvā apgabaltiesa (Regional Administrative Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) On a correct interpretation of the [TFEU], may the agreement to which this case relates, between a producer and a number of distributors (under which the distributor [that] was the first to register a potential transaction with the producer enjoys priority in progressing the sale process with the end user concerned for six months from that registration, unless the end user objects) be regarded as an agreement between undertakings which has as its object the prevention, restriction or distortion of competition within the meaning of Article 101(1) [TFEU]?

(2) Does the agreement to which this case relates, between a producer and a number of distributors, interpreted in accordance with the [TFEU], contain indications from which it can be found not to be exempt from the general prohibition on collusion?

(3) May the agreement to which this case relates, between a producer and a number of distributors, interpreted in accordance with the [TFEU], be found to constitute an exception? Does the exception permitting the conclusion of vertical agreements which restrict active sales into the exclusive territory or to an exclusive customer group that the supplier has reserved exclusively for itself or has allocated exclusively to another buyer, where such a restriction does not limit sales by the customers of the buyer and where the market share of the supplier [Visma Enterprise] does not exceed 30%, apply only to exclusive distribution systems?

(4) May the agreement to which this case relates, between a producer and a number of distributors, interpreted in accordance with the [TFEU], constitute a prohibited agreement on the basis solely of the unlawful conduct of a single economic operator? Is it possible to find evidence in the circumstances of this case, interpreted in accordance with the [TFEU], that a single economic operator participated in a prohibited agreement?

(5) In the circumstances of this case, interpreted in accordance with the [TFEU], is it possible to find evidence that competition was reduced (distorted) within the distribution system, that there was an advantage benefiting [Visma Enterprise] or that competition was adversely affected?

(6) In the circumstances of this case, interpreted in accordance with the [TFEU], if the market share of the distribution network does not exceed 30% ([Visma Enterprise] is a producer, and its market share therefore also includes the sales volumes of its distributors), is it possible to find evidence of negative effects on competition in the distribution system and elsewhere, and is that agreement subject to the prohibition on collusion?

(7) In accordance with Article 101(3) [TFEU] and Article 2 [of Regulation No 330/2010, read in conjunction with Article 4(b)]:

– does the exemption apply to a distribution system under which (i) the distributor (trader) itself chooses the potential customer with which it is going to work; (ii) the supplier has not previously determined, on the basis of clearly known and verifiable objective criteria, a specific group of customers to which each distributor will provide its services; (iii) the supplier, at the request of the distributor (trader), reserves potential customers for that distributor; (iv) the other distributors are not aware that the potential customer has been reserved or are not previously informed of that fact; under which (v) the sole criterion on the basis of which a potential customer is reserved and on which the resulting exclusive distribution system favouring a specific distributor is established is not a decision by the supplier but a request by that distributor; or under which (vi) the reservation remains in force for six months from registration of the potential transaction (after which the distribution ceases to be exclusive)?

– should it be found that passive sales are not restricted where the agreement between the supplier and the distributor includes a term providing that the buyer (end user) may object to the reservation in question but that that buyer has not been informed of the term in question? Can the behaviour of the buyer (end user) influence (justify) the terms of the agreement between the supplier and the distributor?'

The jurisdiction of the Court

41 The referring court notes that the agreement at issue concerns a purely internal situation and has no effect on trade between the Member States. Consequently, according to that court, the case must be resolved through the application of Latvian law. The court adds however that, according to the case-law of the Latvian Supreme Court, Article 101(1) TFEU and Article 11(1) of the Competition Law establish the same legal framework as regards the likely effects of the agreements on competition and the application of those two provisions should not differ. According to the referring court, it is essential to avoid acceptance in Latvia of different assessment criteria from those provided for by EU competition law for determining the existence of prohibited vertical agreements.

42 According to settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which the dispute has been brought which must bear the responsibility for the subsequent judicial decision, to determine, in the light of the special features of the case, both the need for a

preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, obliged to give a ruling (judgments of 18 October 1990, *Dzodzi*, C-297/88 and C-197/89, EU:C:1990:360, paragraphs 34 and 35, and of 10 December 2020, *J & S Service*, C-620/19, EU:C:2020:1011, paragraph 31 and the case-law cited).

43 However, it is also settled case-law that it is for the Court to examine the conditions in which the case has been referred to it by the national court, in order to assess whether it has jurisdiction (judgment of 10 December 2020, *J & S Service*, C-620/19, EU:C:2020:1011, paragraph 32 and the case-law cited).

44 In that regard, it should be borne in mind that 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 (judgment of 21 July 2016, *VM Remonts and Others*, C-542/14, EU:C:2016:578, paragraph 17 and the case-law cited).

45 That jurisdiction is justified by the manifest interest of the European Union that, in order to forestall future differences of interpretation, provisions taken from EU law should be interpreted uniformly (see, to that effect, judgments of 18 October 1990, *Dzodzi*, C-297/88 and C-197/89, EU:C:1990:360, paragraph 37, and of 10 December 2020, *J & S Service*, C-620/19, EU:C:2020:1011, paragraph 34 and the case-law cited).

46 In the present case, it is, in essence, apparent from the order for reference that Article 11(1) of the Competition Law lays down a legal framework identical to that laid down in Article 101(1) TFEU and that Article 11(1) of the Competition Law is to be given the same interpretation as Article 101(1) TFEU.

47 Moreover, that fact has already led the Court to hold that it had jurisdiction to give preliminary rulings concerning the interpretation of Article 101(1) TFEU in purely internal situations which had no impact on trade between Member States, to which Article 11(1) of the Competition Law applied (see, to that effect, judgments of 26 November 2015, *Maxima Latvija*, C-345/14, EU:C:2015:784, paragraphs 11 to 14, and of 21 July 2016, *VM Remonts and Others*, C-542/14, EU:C:2016:578, paragraphs 16 to 19).

48 In those circumstances, it must be concluded that the Court has jurisdiction to provide answers to the questions referred in so far as they relate to the interpretation of Article 101(1) TFEU and Article 101(3) TFEU, the essential content of which is reproduced in Article 11(2) of the Competition Law.

49 On the other hand, under the case-law referred to in paragraph 44 of this judgment, the Court's jurisdiction to provide answers to the questions referred in so far as they relate to the interpretation of Regulation No 330/2010 is not established. It is apparent from Article 2(1) of that regulation that the purpose of that regulation is to lay down the conditions in which Article 101(1) TFEU is declared inapplicable to vertical agreements pursuant to Article 101(3) TFEU. However, it is not clear from the order for reference that the Latvian legislation has made

the approach used in Regulation No 330/2010 applicable to situations such as the one at issue in the main proceedings, which does not fall within the scope of Article 101 TFEU and, accordingly, within the scope of that regulation.

The questions referred for a preliminary ruling

The first, fifth and sixth questions

50 By its first, fifth and sixth questions, which should be examined together, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as meaning that an agreement concluded between a supplier and a distributor under which the distributor that was the first to register the potential transaction with the end user enjoys, for six months from the time of registration of that transaction, 'priority in progressing the sale process' unless that user objects, may be classified as an agreement which has as its 'object or effect' the prevention, restriction or distortion of competition within the meaning of that provision.

51 It should be borne in mind in that regard that, in the context of the procedure referred to in Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, the role of the latter is limited to interpreting the provisions of EU law referred to it, in this case Article 101(1) TFEU. Therefore, it is not for the Court of Justice, but for the referring court to determine in the end whether, taking account of all of the information relevant to the situation in the main proceedings and the economic and legal context of which it forms a part, the agreement at issue has as its object the restriction of competition (see, to that effect, judgments of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 29, and of 2 April 2020, *Budapest Bank and Others*, C-228/18, EU:C:2020:265, paragraph 59).

52 However, the Court, when giving a preliminary ruling, may, on the basis of the information available to it, provide clarification designed to give the national court guidance in its interpretation in order to enable it to decide the case before it (see, to that effect, judgment of 2 April 2020, *Budapest Bank and Others*, C-228/18, EU:C:2020:265, paragraph 48 and the case-law cited).

53 Under Article 101(1) TFEU, the following are 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.

54 In order to be caught by that prohibition, an agreement must have the 'object or effect' of appreciably preventing, restricting or distorting competition within the internal market (see, to that effect, judgments of 13 December 2012, *Expedia*, C-226/11, EU:C:2012:795, paragraphs 16, 17 and 20 and the case-law cited, and of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 31).

55 According to settled case-law of the Court since the judgment of 30 June 1966, *LTM* (56/65, EU:C:1966:38), the alternative nature of that requirement, as shown by the conjunction 'or', leads, first of all, to the need to consider the precise object of the agreement (see, to that effect, judgment of 2 April 2020, *Budapest Bank and Others*, C-228/18, EU:C:2020:265, paragraph 33 and the case-law cited).

56 It follows that that provision, as interpreted by the Court, makes a clear distinction between the concept of 'restriction by object' and the concept of 'restriction by effect', evidence with regard to each of those concepts being subject to different rules (judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 63).

57 Indeed, it is apparent from the Court's case-law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition to be regarded as being 'restrictions by object', so that there is no need to examine their effects. That case-law arises from the fact that certain forms of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of competition (judgment of 2 April 2020, *Budapest Bank and Others*, C-228/18, EU:C:2020:265, paragraph 35 and the case-law cited).

58 Accordingly, as regards agreements characterised as 'restrictions by object', there is no need to investigate their effects nor a fortiori to demonstrate their effect on competition in order to classify them as 'restrictions of competition' within the meaning of Article 101(1) TFEU, in so far as experience shows that such agreements lead to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers (see, to that effect, judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 64 and the case-law cited). In order for the agreement to be regarded as having an anticompetitive object, it is therefore sufficient that it be capable in an individual case of resulting in the prevention, restriction or distortion of competition within the internal market (see, to that effect, judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 38).

59 The essential legal criterion for ascertaining whether an agreement involves a restriction of competition 'by object' is therefore the finding that such an agreement reveals in itself a sufficient degree of harm to competition for it to be considered that it is not necessary to assess its effects (judgment of 2 April 2020, *Budapest Bank and Others*, C-228/18, EU:C:2020:265, paragraph 37 and the case-law cited).

60 Moreover, the concept of 'restriction of competition by object' must be interpreted restrictively. That concept can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition for it to be found that there is no need to examine their effects (see, to that effect, judgment of 2 April 2020, *Budapest Bank and Others*, C-228/18, EU:C:2020:265, paragraph 54 and the case-law cited).

61 That being so, the fact that an agreement is a vertical agreement does not exclude the possibility that it comprises a restriction of competition 'by object'. While vertical agreements are, by their very nature, often less damaging to competition than horizontal agreements, they can, nevertheless, in some cases, also have a particularly significant restrictive potential (see, to that effect, judgments of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 43, and of 26 November 2015, *Maxima Latvija*, C-345/14, EU:C:2015:784, paragraph 21).

62 In order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition to be considered a restriction of competition 'by object' within the meaning of Article 101(1) TFEU, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of

the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (judgment of 2 April 2020, *Budapest Bank and Others*, C-228/18, EU:C:2020:265, paragraph 51 and the case-law cited).

63 The fact that a measure is regarded as pursuing a legitimate objective does not preclude that measure from being regarded, in the light of the existence of another objective which is pursued by the measure and which, for its part, must be regarded as illegitimate, account being taken in addition of the content of that measure's provisions and of the content of which it forms a part, as having an object restrictive of competition (see, to that effect, judgment of 2 April 2020, *Budapest Bank and Others*, C-228/18, EU:C:2020:265, paragraph 52 and the case-law cited).

64 As regards, first of all, the content of the agreement at issue, it is apparent from the order for reference that Clause 4.1 of the standard cooperation agreement concluded between Visma Enterprise and its distributors provides that the distributor that was the first to register the potential transaction with the end user enjoys, for six months from the time of registration of the potential transaction, 'priority in progressing the sale process' unless that user objects.

65 It should be noted, in that regard, that it is not clear from the wording of that clause, as reproduced in the order for reference, what that priority comprises. The Competition Council considered, in the contested decision, that only the distributor that was the first to register the potential customer may progress the sales operation with that customer, a point disputed by Visma Enterprise.

66 As the European Commission observed in its written observations submitted to the Court, that clause does not appear, on its own, expressly to prohibit Visma Enterprise's distributors from actively approaching a potential customer or responding to requests from that customer. It is therefore for the referring court to determine the precise content of the agreement at issue.

67 Next, it is important to note that the parties to the dispute in the main proceedings also disagree as to the object of that agreement. Visma Enterprise has claimed that it is aimed at organising cooperation with distributors, assessing the product's suitability in relation to the purchaser's needs, establishing fair terms for cooperation with the distributors and making efficient use of resources.

68 In accordance with the case-law referred to in paragraph 51 of this judgment, it is for the referring court to assess the objectives pursued by the agreement at issue.

69 In that regard, it should be recalled that, although the parties' intention is not a necessary factor in determining whether an agreement between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Courts of the European Union from taking that factor into account (judgment of 2 April 2020, *Budapest Bank and Others*, C-228/18, EU:C:2020:265, paragraph 53 and the case-law cited).

70 Lastly, it is for the referring court to examine the economic and legal context of which the agreement at issue forms a part.

71 If that agreement cannot be classified as a 'restriction by object', the referring court will have to examine its effects and, in order to classify it as a 'restriction of competition' within the meaning of Article 101(1) TFEU, find that factors are present which show that competition has in fact been

prevented, restricted or distorted to an appreciable extent (see, to that effect, judgment of 2 April 2020, *Budapest Bank and Others*, C-228/18, EU:C:2020:265, paragraph 38 and the case-law cited).

72 To that effect, it is necessary to take into consideration the actual context in which the agreement occurs, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question (judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 116 and the case-law cited).

73 In accordance with settled case-law, the restrictive effects on competition may be both real and potential, but they must, in any event, be sufficiently appreciable (judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 117 and the case-law cited).

74 In order to assess the effects of an agreement with regard to Article 101 TFEU, competition should be assessed within the actual context in which it would occur in the absence of the agreement at issue (see, to that effect, judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 118 and the case-law cited).

75 To that end, it is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and the importance of the parties on the market for the products concerned, and the isolated nature of that agreement or, alternatively, its position in a series of agreements. In that regard, although not necessarily decisive, the existence of similar contracts is a circumstance which, together with others, is capable of constituting an economic and legal context within which the agreement must be judged (see, to that effect, judgment of 11 December 1980, *L'Oréal*, 31/80, EU:C:1980:289, paragraph 19).

76 The purpose of the counterfactual scenario is to establish the realistic possibilities with respect to the economic operators' conduct in the absence of the agreement at issue and to determine how the market will probably operate and be structured if that agreement is not concluded (see, to that effect, judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 120).

77 It is for the national court to decide, on the basis of all the relevant information, whether the agreement at issue in fact satisfies the requirements necessary for it to fall under the prohibition laid down in Article 101(1) TFEU (judgment of 11 December 1980, *L'Oréal*, 31/80, EU:C:1980:289, paragraph 20).

78 Moreover, as the Commission has argued, in essence, vertical agreements are, in principle, likely to be less harmful to competition than horizontal agreements. Thus, a restriction of intra-brand competition is, in principle, problematic only if inter-brand competition on the market in question is reduced (see, by analogy, judgment of 25 October 1977, *Metro SB-Großmärkte* v *Commission*, 26/76, EU:C:1977:167, paragraph 22).

79 It is apparent from the foregoing considerations that it is for the national court to determine, inter alia, the characteristics of the market at issue and the position of the parties on it.

80 In that regard, it is clear from the wording of the questions referred for a preliminary ruling that Visma Enterprise's market share does not exceed 30%. That fact, together with other factors, must be taken into account in order to determine the structure of the market at issue, including Visma Enterprise's position on it, which may be part of the economic context in which the agreement at issue must be assessed.

81 Next, the referring court must examine the effects on competition of the 'reservation' of the potential customer by a distributor in the light, inter alia, of the fact – which appears, from the wording of the questions referred, to be established – that distributors are not informed in advance of the 'reservation' of the potential customer and the final customer is not informed of the possibility of objecting to that reservation, and also in the light of the duration of the reservation.

82 In the light of all the foregoing considerations, the answer to the first, fifth and sixth questions is that Article 101(1) TFEU must be interpreted as meaning that an agreement concluded between a supplier and a distributor under which the distributor that was the first to register the potential transaction with the end user enjoys, for six months from the time of registration of that transaction, 'priority in progressing the sale process' unless that user objects, cannot be classified as an 'agreement which has as its object' the prevention, restriction or distortion of competition within the meaning of that provision, unless that agreement, in view of its provisions, objectives and context, may be regarded as revealing such a sufficient degree of harm to competition as to be so classified. If such an agreement does not constitute a restriction of competition 'by object' within the meaning of Article 101(1) TFEU, the national court must examine whether, in the light of all the relevant circumstances of the case in the main proceedings, namely, inter alia, the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, and the actual conditions of the functioning and structure of the market in question, that agreement may be regarded as restricting competition to a sufficiently appreciable degree due to its actual or potential effects.

The second, third and seventh questions

83 By its second, third and seventh questions, which should be examined together, the referring court asks, in essence, whether Article 101(3) TFEU must be interpreted as meaning that an agreement concluded between a supplier and a distributor under which the distributor that was the first to register the potential transaction with the end user enjoys, for six months from the time of registration of the transaction, 'priority in progressing the sale process' unless that user objects may, if it does constitute an agreement which has as its 'object or effect' the prevention, restriction or distortion of competition within the meaning of Article 101(1) TFEU, qualify for exemption under Article 101(3) TFEU.

84 In that regard, it should be pointed out that any agreement which proves to be contrary to the provisions of Article 101(1) TFEU may be exempted under Article 101(3) thereof only if it satisfies the cumulative conditions in that provision, including the condition that it contribute to improving the production or distribution of goods or to promoting technical or economic progress (see, to that effect, judgment of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 230 and the case-law cited).

85 It is also settled case-law that the improvement, within the meaning of the first condition laid down in Article 101(3) TFEU, cannot be identified with all the advantages which the parties obtain from the agreement at issue in their production or distribution activities. The

improvement must in particular display appreciable objective advantages of such a character as to compensate for the disadvantages which that agreement entails for competition (judgment of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 234 and the case-law cited).

86 The examination of an agreement for the purposes of determining whether it contributes to the improvement of the production or distribution of goods or to the promotion of technical or economic progress, and whether that agreement generates appreciable objective advantages, must be undertaken in the light of the factual arguments and evidence provided by the undertakings (judgment of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 235 and the case-law cited).

87 Such an examination may require the nature and specific features of the sector concerned by the agreement at issue to be taken into account if its nature and those specific features are decisive for the outcome of the analysis. Furthermore, under Article 101(3) TFEU, it is the beneficial nature of the effect on all consumers in the relevant markets that must be taken into consideration (judgment of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 236 and the case-law cited).

88 It is apparent from the information provided by the referring court that Visma Enterprise maintained that the agreement at issue has the effect, inter alia, of improving the distribution of its product, providing a higher-quality product and achieving cost savings.

89 In those circumstances, it is for that court to assess whether that agreement helps to improve the production or distribution of the products at issue in the main proceedings and whether it satisfies the other conditions laid down in Article 101(3) TFEU.

90 In the light of the foregoing considerations, the answer to the second, third and seventh questions is that Article 101(3) TFEU must be interpreted as meaning that an agreement concluded between a supplier and a distributor under which the distributor that was the first to register the potential transaction with the end user enjoys, for six months from the time of registration of that transaction, 'priority in progressing the sale process' unless that user objects, may, if it does constitute an agreement which has as its 'object or effect' the prevention, restriction or distortion of competition within the meaning of Article 101(1) TFEU, qualify for exemption under Article 101(3) thereof only if it satisfies the cumulative conditions laid down therein.

The fourth question

91 It is apparent from the order for reference that the Administratīvā apgabaltiesa (Regional Administrative Court) asked the fourth question in connection with the complaint which Visma Enterprise had directed at that part of the contested decision in which the Competition Council considered that it was neither appropriate nor necessary to hold the distributors of FMS Software liable for the infringement established. By that complaint, Visma Enterprise had argued, in essence, that since Article 11(1) of the Competition Law, which reproduces the substance of Article 101(1) TFEU, applies to agreements between undertakings, the Competition Council could not sanction only one party to the agreement at issue, unless it is acknowledged that there was no infringement of those provisions.

92 Accordingly, the fourth question must be understood as meaning that, by it, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as meaning that the existence of an agreement infringing that provision is precluded where the authority responsible for implementing the provision has made a differentiated assessment concerning the attribution of liability for the infringement.

93 In that regard, as observed in paragraph 53 of this judgment, under Article 101(1) TFEU, the 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.

94 According to settled case-law of the Court, in order for there to be an 'agreement' within the meaning of Article 101(1) TFEU, undertakings should have expressed their joint intention to conduct themselves on the market in a specific way (judgment of 14 January 2021, *Kilpailu- ja kuluttajavirasto*, C-450/19, EU:C:2021:10, paragraph 21 and the case-law cited).

95 The finding of an infringement of Article 101 TFEU must accordingly be based on an assessment made in the light of the conditions laid down in that provision.

96 It follows that the question of the existence of an agreement prohibited under Article 101(1) TFEU is, in principle, different from that of the attribution of liability for the infringement and the imposition of a fine on a party to that agreement, even though certain factual elements may be relevant in the assessment of both of those issues.

97 The first question relates to the conditions of application of Article 101(1) TFEU, whilst the second question concerns the consequences of an infringement of that provision, the latter question, in principle, becoming relevant only where there has been a prior finding of an infringement of that provision.

98 Therefore, provided that the existence of an agreement infringing Article 101(1) TFEU is established in accordance with the criteria laid down in that provision, the assessment by the authority responsible for implementing that provision concerning the attribution of liability for the infringement to the parties to that agreement cannot, in principle, affect the finding of that infringement.

99 The question relating to the conditions of application of Article 101(1) TFEU is, moreover, different from the question whether an authority responsible for implementing that provision may attribute liability for an infringement of that provision only to one party to an agreement constituting that infringement, which has not been raised in the main proceedings.

100 In those circumstances, the answer to the fourth question is that Article 101(1) TFEU must be interpreted as meaning that the existence of an agreement prohibited by that provision may not be precluded solely on the ground that the authority responsible for implementing that provision has made a differentiated assessment concerning the attribution of liability for the infringement to the parties to that agreement.

Costs

101 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 (Seventh Chamber) hereby rules:

1. **Article 101(1) TFEU must be interpreted as meaning that an agreement concluded between a supplier and a distributor under which the distributor that was the first to register the potential transaction with the end user enjoys, for six months from the time of registration of that transaction, 'priority in progressing the sale process' unless that user objects, cannot be classified as an 'agreement which has as its object' the prevention, restriction or distortion of competition within the meaning of that provision, unless that agreement, in view of its provisions, objectives and context, may be regarded as revealing such a sufficient degree of harm to competition as to be so classified.**

   If such an agreement does not constitute a restriction of competition 'by object' within the meaning of Article 101(1) TFEU, the national court must examine whether, in the light of all the relevant circumstances of the case in the main proceedings, namely, inter alia, the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, and the actual conditions of the functioning and structure of the market in question, that agreement may be regarded as restricting competition to a sufficiently appreciable degree due to its actual or potential effects.

2. **Article 101(3) TFEU must be interpreted as meaning that an agreement concluded between a supplier and a distributor under which the distributor that was the first to register the potential transaction with the end user enjoys, for six months from the time of registration of that transaction, 'priority in progressing the sale process' unless that user objects, may, if it does constitute an agreement which has as its 'object or effect' the prevention, restriction or distortion of competition within the meaning of Article 101(1) TFEU, qualify for exemption under Article 101(3) thereof only if it satisfies the cumulative conditions laid down therein.**

3. **Article 101(1) TFEU must be interpreted as meaning that the existence of an agreement prohibited by that provision may not be precluded solely on the ground that the authority responsible for implementing that provision has made a differentiated assessment concerning the attribution of liability for the infringement to the parties to that agreement.**

[Signatures]