New Supreme Court doctrine on the nullity of fuel supply arrangements on grounds of competition law infringements

Analysis of the Supreme Court judgments of 6 and 7 November 2024 establishing a new doctrine on the fixing of retail fuel prices at service stations and on the binding effect of national competition authorities' decisions on national judges and courts.

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The new doctrine on the nullity of fuel supply arrangements on grounds of competition law infringements is set out in judgments 1469 of 6 November 2024 (*Husco/Repsol*) and 1474 of 7 November 2024 (*Sama/Cepsa*), mainly in relation to three issues: the resale price-fixing by the supplier, the binding force of competition authorities' decisions for civil judges and courts and the need for effective proof of harm caused subject of the claim.

1. Factual background

Firstly, we have to say that both cases are alike: on the one hand, the disputes concern the supply and sale of fuel by a service station (acting as a retail distributor) and an oil company (acting as a fuel supplier) under a filling station lease agreement (incorporating exclusive fuel-supply and tenancy arrangements) and, on the other hand, the legal proceedings followed a similar path:

a) The legal proceedings are initiated by claims filed by the filling station lessees against the oil companies that own and lease said filling stations, seeking a declaration of nullity of the contractual relationship and of the exclusive supply clause on the grounds of infringement

of competition law, in particular the fact that the supplier is responsible for fixing the resale price. An award of damages is also sought for the harm resulting from said price-fixing. The Madrid companies courts do not uphold the lessees' claims in judgments of 12 November 2018, in the case of *Sama/Cepsa*, and 8 April 2022, in the case of *Husco/Repsol*.

b) Both claimants appeal with mixed success: Sama's appeal is rejected by the Madrid Provincial Court on the grounds that it is not a (genuine) agent, but a distributor, and that there was no fixing of a resale price by Cepsa, since it only fixed a maximum retail price, the distributor being able, as was proven, to apply discounts (Judgment of 29 September 2020), while Husco's appeal is allowed in part, as the judgment declares the filling station lease agreement automatically void for the same reasons as above, but, instead of awarding the damages sought by the appellant, it orders Repsol to pay damages to the distributor as determined in the enforcement of the judgment in accordance with the parameters set out therein (Judgment of 13 November 2023).

c) These last two judgments are appealed to the Supreme Court. In the case of *Sama/Cepsa*, the Supreme Court allows the appeal against the judgment of the Madrid Provincial Court, which it varies as follows: "allow in part the statutory appeal against the judgment of the Madrid Companies Court as regards the finding that Cepsa engaged in an anti-competitive practice of indirect price-fixing and to exonerate the defendant from the remaining claims contained in the claim" (judgment of 7 November 2024); and, in the *Husco/Repsol* case, the Supreme Court allows the appeal brought by Repsol against the judgment of the Madrid Provincial Court and partially sets it aside in the sense of upholding the declaration of nullity, but leaving without effect the order to pay damages (Judgment of 6 November 2024).

With regard to these facts, it should be noted that on 30 July 2009 the Spanish Competition Authority (*Comisión Nacional de la Competencia*, 'CNC') issued a decision finding that the companies Repsol, Cepsa and BP Oil España had infringed Article 1(1) of the Competition Act and Article 81(1) of the Treaty establishing the European Community (now Art. 101(1) of the Treaty on the Functioning of the European Union – 'TFEU') by having indirectly fixed the retail price to be applied by independent dealers (distributors) operating under their own banner, thereby restricting competition between the service stations in their network and between these and the rest of the service stations; it also declared agreements establishing price-determination clauses to be automatically void. The companies found liable in judicial review proceedings appealed, but the *Audiencia Nacional* rejected the appeals and affirmed the CNC decision. Lastly, the Supreme Court rejected the ensuing cassation appeal by judgment of 22 May 2015, so that the aforementioned CNC decision became final and conclusive.

2. Doctrine established in the judgments

2.1. With regard to the *nullity on grounds of infringement of competition rules on retail price fixing,* the Supreme Court rejects the appeals and changes its

previous doctrine that, following the guideline set by the Court of Justice in its Judgment of 11 September 2008, C-279/06 (*Cepsa*), had established that retail price clauses could benefit from the block exemption provided for in Commission Regulation (EEC) No 1984/83 and subsequent regulations replacing the same if the supplier merely imposed a maximum selling price or recommended a selling price and the reseller had the real possibility of determining the final retail price[1].

Several subsequent judgments[2] culminated this case-law development by adopting the doctrine established by the European Court of Justice Judgment of 2 April 2009, *Pedro IV* (C-260/07), which gave the national court before which the dispute had been brought the power to " to ascertain, account being taken of all the contractual obligations in their commercial and legal context, and if the conduct of the parties to the main proceedings, whether the retail price recommended by the supplier constitutes, in reality, a fixed or minimum sale price" (para. 79). In order to do so, it had to "examine whether it is genuinely possible for the reseller to reduce that recommended sale price. It must, inter alia, ascertain whether such a retail price is, in reality, fixed by indirect or concealed means, such as the fixing of the reseller's margin or the maximum reduction he can make from the recommended sale price, threats, intimidation, warnings, penalties or incentives" (para. 80). Likewise, Supreme Court judgments 713/2014 of 17 December and 764/2014 of 13 January 2015 expressly referred to Judgment no. 789/2012 of 4 January 2013, according to which, "if the contract allows for discounts on the retail price, the burden of proof of real impossibility lies with the litigant seeking a declaration of nullity, normally by means of expert evidence, so that as a general rule the findings of the court of first instance on this point must be respected". This doctrine was confirmed in judgments 699/2015 of 17 December and 54/2019 of 24 January.

In contrast to that doctrine, the Supreme Court, taking as its starting point the fact - established by the judgments under appeal - of the existence of a CNC decision that had found that the undertakings subject to proceedings had clearly infringed competition rules prohibiting the vertical fixing of resale prices by applying a system of indirect price-fixing, since the mechanisms put in place for price formation prevented, in practice, service stations from departing from the maximum recommended price, confirms the conclusion that the conduct in question was prohibited conduct that could not be covered by the individual or block exemptions of the vertical restraints regulations and supports the nullity of the agreements.

[1] Judgments 863/2009 of 15 January 2010, 214/2012 of 16 April, 447/2012 of 10 July, 91/2012 of 20 July, 601/2012 of 24 October, and 713/2014 of 17 December.

[2] Judgments 713/2014 of 17 December, 764/2014 of 13 January 2015 (Plenary), 699/2015 of 17 December, 450/2018 of 17 July, and 618/2020 of 17 November.

2.2. Regarding the *binding effect on civil courts of the findings in competition authorities' decisions*, the Supreme Court changes its previous doctrine (judgments 511/2018 of 20 September and 191/2019 of 27 March) and fully embraces the content of the Judgment of the Court of Justice of the European Union of 20 April 2023 (C-25/21), stating the following:

> Article 101 TFEU, as implemented by Article 2 of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU and, read in combination with the principle of effectiveness, must be interpreted as meaning that the infringement of competition law found in a decision of a national competition authority, against which an action for annulment had been brought before the competent national courts but which became final after having been confirmed by those courts, must be deemed to be established, in the context of both an action for a declaration of nullity under Article 101(2) TFEU and an action for damages for an infringement of Article 101 TFEU, by the claimant until proof to the contrary is adduced, thereby shifting the burden of proof defined by that Article 2 to the defendant, provided that the temporal and territorial scope of the alleged infringement that is the subject of those actions coincides with that of the infringement found in that decision. In addition, where the author, nature, legal classification, duration and territorial scope of the infringement found in that type of decision and of the infringement that is the subject matter of the action in question coincide only partially, the findings in such a decision are not necessarily irrelevant, but constitute an indication of the existence of the facts to which those findings relate.

2.3. *Damages*

As a general rule, infringements of competition law entail an award of damages to the aggrieved parties. This was established in Article 6 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 (now Articles 101 and 102 TFEU): "Ordinary courts safeguard the personal rights deriving from Union law when ruling on disputes between private parties, for example, by awarding damages to those affected by the commission of infringements". Such damages had already been accepted by the Court of Justice when it recognised that it was up to the national civil court to declare anti-competitive agreements or contracts void and to order the consequences thereof (CJEU judgment of 28 February 1991 (*Delimitis*), 18 September 1992 (*Automec*), 20 September 2001 (*Courage*) and 13 July 2006 (*Manfredi*)).

According to EU case law, the harm eligible for damages can be both material damage and loss of earnings, including statutory interest (CJEU Judgment of 13

July 2006, *Manfredi*). The most common material damage arises from loss of sales, loss of customers or loss of turnover, and loss of earnings from the loss of a contractual opportunity frustrated by the unlawful conduct.

In this case, the harm caused is not, as claimed, that caused by the failure to supply fuel at more competitive prices comparable with those applied to other service stations, but that the oil companies indirectly fixed the retail price applicable by the independent distributors (service stations) operating under their own banner, thereby restricting competition between the service stations in their network and between these and the rest of the service stations. Therefore, in so far as the damages sought and the basis for such as set out in the claim (the average annual difference between the transfer price applied by the oil supplier and that which results in comparable terms from the free supply to service stations) do not tally with the harm caused by the anti-competitive practice, both the appeal and the damages sought in the case of the appellant Sama must be rejected and Repsol's appeal must be partially allowed, leaving without effect the order to pay damages.

3. Conclusions

The following legal doctrine can be extracted from the analysis of the judgments that are the subject of this paper:

— First: the direct or indirect fixing by the supplier (oil company) of the retail price to be applied by the distributor (service station) is a practice prohibited by Articles 1(1) of the Competition Act and 101(1) of the Treaty on the Functioning of the European Union, which cannot benefit from the individual exemption of Articles 1(3) of the said act and 101(3) of the said treaty, nor from the block exemption of the EU regulations governing vertical restrictions of competition.

— Second, the findings in decisions of competition authorities that have become final and conclusive upon affirmation by the relevant courts have a binding effect on the civil courts both in actions for a declaration of nullity and in actions for damages for competition law infringements.

— Third, in order to be entitled to damages for an infringement of competition law, the harm claimed must be a direct consequence of the infringement and its value must be sufficiently proven.