

Agency Agreements

Under EU law, commercial agency agreements benefit from a special regime with regards to the application of competition law rules. Although they may contain clauses that can produce anticompetitive effects, such as minimum price fixing, these type of agreements are generally allowed in so far as their overall positive effects trump their negative ones. However, not all type of clauses are allowed, and some clauses are considered illegal regardless of which guises they are presented under.

This was the gist of the recent ruling of the European Court of Justice after a preliminary reference was made to it by a Spanish Court in the context of a contractual dispute which arose between CEPSA, a supplier of fuel and related products, and Tobar, a petrol station. The relationship of these two companies arose from a contract they entered into for the resale of fuel and related products. This contract imposed a non-compete obligation on Tobar for 10 years, renewable for periods of 5 years. CEPSA also set the resale price charged by Tobar for a period of time. Half-way through the agreement, Tobar ceased purchasing from CEPSA and in the context of subsequent litigation, Tobar argued before a Spanish court that the contract was contrary to EU competition law.

In the determination of the merits at issue, the first assessment that had to be made by the Court was whether the companies were independent economic operators on the markets they operated in, namely the market for the provision of agency services as regards CEPSA, and the market for the sale of the contract goods or services as regards Tobar.

If it resulted that they were independent economic operators, the clauses of the agency agreement had to be scrutinized under the normal competition law rules. If not, and there existed between the companies a strict relationship of principal and agent, with the latter bearing only negligible commercial or financial risks relating to the sale of goods, the special regime applicable to agency relationships would apply.

In the present case, Tobar bore the risk of loss of fuel from the moment of delivery and it had to pay CEPSA for the fuel within nine days of delivery, irrespective of whether the fuel had been sold to customers. Tobar also bore the costs of displaying the CEPSA brand in its petrol station and the costs of the fuel tanks, pumps and other equipment.

After setting out these legal principles, the decision on whether CEPSA and Tobar has a genuine agent relationship was left to be determined by the national Spanish court. Nonetheless, the Advocate-General, who gives his recommendations to the Court, had determined that the legal relationship between CEPSA and Tobar was not a genuine agency relationship given the financial risks that Tobar bore.

Although in practice it may be very difficult to determine what level of risks a supplier should bear in order to be considered a genuine agent, the conditions of the test will be very stringent.