

JUDGMENT OF THE COURT (Grand Chamber)

3 May 2011

(Competition – Regulation (EC) No 1/2003 – Article 5 – Abuse of a dominant position – Powers of the competition authorities of the Member States to find that there has been no breach of Article 102 TFEU)

In Case C-375/09,

REFERENCE for a preliminary ruling under [Article 267 TFEU] from the Sąd Najwyższy (Poland), made by decision of 15 July 2009, received at the Court on 23 September 2009, in the proceedings

Prezes Urzędu Ochrony Konkurencji i Konsumentów

v

Tele2 Polska sp. z o.o., now Netia SA,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, D. Šváby, Presidents of Chambers, A. Rosas, E. Juhász (Rapporteur), J. Malenovský, E. Levits and A. Ó Caoimh, Judges,

Advocate General: J. Mazák,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 21 September 2010,

after considering the observations submitted on behalf of:

- the Polish Government, by M. Dowgielewicz, K. Zawisza and M. Laszuk, acting as Agents,
- the Czech Government, by M. Smolek, acting as Agent,
- the European Commission, by F. Castillo de la Torre and K. Mojzesowicz, acting as Agents,
- the EFTA Surveillance Authority, by X. Lewis and M. Schneider, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 December 2010,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 5 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] (OJ 2003 L 1, p. 1; ‘the Regulation’).
- 2 The reference has been made in proceedings between Prezes Urzędu Ochrony Konkurencji i Konsumentów (President of the Office of Competition and Consumer Protection; the ‘Prezes Urzędu Ochrony Konkurencji’) and Tele2 Polska sp. z o.o., now Netia SA, concerning a decision taken by the Prezes Urzędu Ochrony Konkurencji pursuant to [Article 102 TFEU].

Legal context

European Union legislation

- 3 The first sentence of recital 1 in the preamble to the Regulation states:

‘In order to establish a system which ensures that competition in the common market is not distorted, [Articles 101 and 102 TFEU] must be applied effectively and uniformly in the [Union].’
- 4 The first sentence of recital 8 in the preamble to the Regulation states:

‘In order to ensure the effective enforcement of the [Union] competition rules and the proper functioning of the cooperation mechanisms contained in this Regulation, it is necessary to oblige the competition authorities and courts of the Member States to also apply [Articles 101 and 102 TFEU] where they apply national competition law to agreements and practices which may affect trade between Member States.’
- 5 According to recital 14 in the preamble to the Regulation:

‘In exceptional cases where the public interest of the [Union] so requires, it may also be expedient for the Commission to adopt a decision of a declaratory nature finding that the prohibition in [Article 101 or 102 TFEU] does not apply, with a view to clarifying the law and ensuring its consistent application throughout the [Union], in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice.’
- 6 Article 3(1) of the Regulation provides:

‘Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of [Article 101(1) TFEU] which may affect trade between Member States within the meaning of that provision, they shall also apply [Article 101 TFEU] to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by [Article 102 TFEU], they shall also apply [Article 102 TFEU].’
- 7 Article 5 of the Regulation, entitled ‘Powers of the competition authorities of the Member States’, provides:

‘The competition authorities of the Member States shall have the power to apply [Articles 101 and 102 TFEU] in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

 - requiring that an infringement be brought to an end,

- ordering interim measures,
- accepting commitments,
- imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.²

8 According to Article 10 of the Regulation:

‘Where the [Union] public interest relating to the application of [Articles 101 and 102 TFEU] so requires, the Commission, acting on its own initiative, may by decision find that [Article 101 TFEU] is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of [Article 101(1) TFEU] are not fulfilled, or because the conditions of [Article 101(3) TFEU] are satisfied.

The Commission may likewise make such a finding with reference to [Article 102 TFEU].³

National law

9 Article 8 of the Law of 15 December 2000 on competition and consumer protection (ustawa o ochronie konkurencji i konsumentów, Dz. U. 2005, No 244, item 2080), in the version applicable to the facts in the main proceedings (‘the Law on competition and consumer protection’), provides:

‘1. The abuse of a dominant position in the relevant market by one or more undertakings shall be prohibited.

...

3. Acts which constitute an abuse of a dominant position shall be void in their entirety or in respect of the relevant part.⁴

10 Article 11 of the Law on competition and consumer protection provides:

‘(1) The [Prezes Urzędu Ochrony Konkurencji] shall give a decision stating that a practice does not restrict competition if he does not establish that a breach has been committed of the prohibitions laid down in Articles 5 or 8.

...’

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

11 The Prezes Urzędu Ochrony Konkurencji, acting as the national competition authority for the purposes of Article 3(1) of the Regulation, initiated a procedure against Telekomunikacja Polska SA, which was suspected of having infringed Article 8 of the Law on competition and consumer protection and [Article 102 TFEU]. At the end of that procedure, the Prezes Urzędu Ochrony Konkurencji found that the conduct of the undertaking in question, which had a dominant position on the market, did not constitute an abuse of that position and that, therefore, that conduct did not amount to an infringement of the national law and of Article 102 TFEU. Consequently, the Prezes Urzędu Ochrony Konkurencji took a decision under

national law stating that the undertaking in question had not implemented any restrictive practice, whilst, with regard to the infringement of Article 102 TFEU, he brought the procedure to an end on the ground that it was devoid of purpose.

- 12 Tele2 Polska sp. z o.o., now Netia SA, contested that decision.
- 13 The Sąd Okręgowy – Sąd Ochrony Konkurencji i Konsumentów (District Court – Court for Competition and Consumer Protection) annulled that decision and the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw) upheld the annulment of that decision, holding that the Prezes Urzędu Ochrony Konkurencji ought to have taken a decision stating that there was no restrictive practice under Article 102 TFEU, since he had taken such a decision regarding the prohibition of abuse of a dominant position provided for by national law.
- 14 The Prezes Urzędu Ochrony Konkurencji brought an appeal on a point of law before the Sąd Najwyższy (Supreme Court), claiming that the Regulation did not allow him to take a negative decision on the merits as regards the assessment of the compatibility of the practices of the undertaking concerned with Article 102 TFEU.
- 15 According to the Prezes Urzędu Ochrony Konkurencji, Article 5 of the Regulation governs the powers of the national competition authorities and limits their decision-making abilities. Article 5 does not confer on him any power to adopt a negative decision on the merits as regards the assessment of the compatibility of undertakings' practices with Article 102 TFEU. Thus, when it appeared, on conclusion of the procedure initiated against Telekomunikacja Polska SA, that that undertaking had not abused a dominant position within the meaning of Article 102 TFEU, the Prezes Urzędu Ochrony Konkurencji took a decision bringing that procedure to an end without ruling on the merits. Article 5 of the Regulation lists four types of substantive decisions, none of which provides that the national competition authority may find that there has been no infringement. In addition, Article 10 of the Regulation, which recognises the right of the Commission to adopt a decision of its own initiative finding that Article 102 TFEU is not applicable to certain conduct of an undertaking in the [Union] public interest, does not grant that right to the national competition authorities. In the opinion of the Prezes Urzędu Ochrony Konkurencji, the purpose of Article 10 of the Regulation is to prevent national competition authorities from being able to block any possibility for the Commission to establish infringements of Articles 101 TFEU or 102 TFEU by taking decisions stating that there has been no breach of those provisions, regard being had to the principle of *ne bis in idem*.
- 16 The Sąd Najwyższy takes the view, first, that procedural autonomy is limited in this case and does not make it possible for the Prezes Urzędu Ochrony Konkurencji to take a decision stating that a practice does not restrict competition, since such a decision does not feature among the types of decision listed in the second sentence of the first paragraph of Article 5 of the Regulation.
- 17 Second, the Sąd Najwyższy observes that a teleological and functional interpretation of the second paragraph of Article 5 of the Regulation, read in conjunction with the second sentence of the first paragraph of Article 5 of the Regulation and the other provisions thereof, might allow the national competition authority to take a decision such as that at issue. The wording of the second paragraph of Article 5 of the Regulation, which mentions that the national competition authorities may decide 'that there are no grounds for action on their part' where the conditions for prohibition are not met, suggests that such a possibility cannot be ruled out.
- 18 In view of the foregoing, the Sąd Najwyższy decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- (1) Is Article 5 of [the] Regulation ... to be interpreted as meaning that a national competition authority cannot take a decision stating that a practice does not restrict competition within the meaning of [Article 102 TFEU] in a case in which it has found, after conducting a procedure, that the undertaking did not breach the prohibition of abuse of a dominant position under that Treaty provision?
- (2) If the answer to the first question is in the affirmative: in a situation in which, under national competition law – if it should be established that the practice of an undertaking does not infringe the prohibition in [Article 102 TFEU] – a national competition authority may bring antitrust proceedings to an end only by taking a decision which states that the practice does not restrict competition, is the [second paragraph] of Article 5 of [the] Regulation ... to be interpreted as constituting a direct legal basis for that authority to decide that there are no grounds for action on its part?

The questions referred for a preliminary ruling

The first question

- 19 By its first question, the national court asks, in essence, whether Article 5 of the Regulation must be interpreted as precluding a national competition authority, in the case where, in order to apply Article 102 TFEU, it examines whether the conditions for applying that article are satisfied and where, following that examination, it forms the view that there has been no abuse, from being able to take a decision stating that there has been no breach of that article.
- 20 It should be noted from the outset that, under Article 3(1) of the Regulation, where the national competition authorities apply national competition law to any abuse by an undertaking having a dominant position on the market which may affect trade between Member States, they must also apply Article 102 TFEU.
- 21 The first paragraph of Article 5 of the Regulation specifies the powers of the competition authorities of the Member States to apply Articles 101 TFEU and 102 TFEU in individual cases. According to the first paragraph of Article 5 of the Regulation, those authorities, adjudicating on the substance, may, acting on their own initiative or on a complaint, take the following decisions: require that an infringement be brought to an end; order interim measures; accept commitments; and impose fines, periodic penalty payments or any other penalty provided for in their national law.
- 22 According to the second paragraph of Article 5 of the Regulation, where on the basis of the information in their possession the conditions for prohibition are not met, the national competition authorities may decide that there are no grounds for action on their part.
- 23 The wording of the latter provision indicates clearly that, in such a situation, the power of the national competition authority is limited to the adoption of a decision stating that there are no grounds for action.
- 24 That limitation on the power of the national competition authorities is corroborated by the determination of the Commission's decision-making power where there has been no breach of Articles 101 TFEU and 102 TFEU. According to Article 10 of the Regulation, the Commission may by decision find that [Articles 101 and 102 TFEU] are not applicable.
- 25 Recital 14 in the preamble to the Regulation states that the Commission may adopt such a decision of a declaratory nature 'in exceptional cases'. The purpose of such action, according to that recital, is 'to [clarify] the law and ensur[e] its consistent application throughout the

[Union], in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice?

- 26 Furthermore, the Court has held that, in order to ensure the coherent application of the competition rules in the Member States, a cooperation mechanism between the Commission and the national competition authorities was set up by the Regulation, as part of the general principle of sincere cooperation (see, to that effect, Case C-429/07 X [2009] ECR I-4833, paragraphs 20 and 21).
- 27 Empowerment of national competition authorities to take decisions stating that there has been no breach of Article 102 TFEU would call into question the system of cooperation established by the Regulation and would undermine the power of the Commission.
- 28 Such a 'negative' decision on the merits would risk undermining the uniform application of Articles 101 TFEU and 102 TFEU, which is one of the objectives of the Regulation highlighted by recital 1 in its preamble, since such a decision might prevent the Commission from finding subsequently that the practice in question amounts to a breach of those provisions of European Union law.
- 29 It is thus apparent from the wording, the scheme of the Regulation and the objective which it pursues that the Commission alone is empowered to make a finding that there has been no breach of Article 102 TFEU, even if that article is applied in a procedure undertaken by a national competition authority.
- 30 Consequently, the answer to the first question is that Article 5 of the Regulation must be interpreted as precluding a national competition authority, in the case where, in order to apply Article 102 TFEU, it examines whether the conditions for applying that article are satisfied and where, following that examination, it forms the view that there has been no abuse, from being able to take a decision stating that there has been no breach of that article.

The second question

- 31 By its second question, the national court asks, in essence, whether the second paragraph of Article 5 of the Regulation is directly applicable and whether, on that basis, a national competition authority which forms the view that the conditions for prohibiting a practice under Article 102 TFEU are not satisfied may bring to an end the procedure initiated against an undertaking by taking a decision which states that there are no grounds for action on its part, even though national law provides in such circumstances only for the possibility of taking a negative decision on the merits.
- 32 It follows from the answer to the first question that a national competition authority cannot take a decision stating that there has been no breach of Article 102 TFEU. According to the second paragraph of Article 5 of the Regulation, such an authority may, however, decide, in cases where, on the basis of the information in its possession, the conditions for prohibiting a practice under Article 102 TFEU are not met, that there are no grounds for action on its part.
- 33 It should be borne in mind in this respect that it is only where European Union law does not lay down a specific rule that a national competition authority may apply its national rules.
- 34 In the present case, since, by virtue of Article 288 TFEU, Article 5 of the Regulation is directly applicable in all Member States, Article 5 precludes the application of a rule of national law which would require a procedure relating to the application of Article 102 TFEU to be brought to an end by a decision stating that there has been no breach of that article.

35 Consequently, the answer to the second question is that the second paragraph of Article 5 of the Regulation is directly applicable and precludes the application of a rule of national law which would require a procedure relating to the application of Article 102 TFEU to be brought to an end by a decision stating that there has been no breach of that article.

Costs

36 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 (Grand Chamber) hereby rules:

1. **Article 5 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] must be interpreted as precluding a national competition authority, in the case where, in order to apply Article 102 TFEU, it examines whether the conditions for applying that article are satisfied and where, following that examination, it forms the view that there has been no abuse, from being able to take a decision stating that there has been no breach of that article.**
2. **The second paragraph of Article 5 of Regulation No 1/2003 is directly applicable and precludes the application of a rule of national law which would require a procedure relating to the application of Article 102 TFEU to be brought to an end by a decision stating that there has been no breach of that article.**