

# EFFECTS OF A COMMITMENT DECISION ADOPTED BY THE COMMISSION ON DOMESTIC JUDICIAL PROCEEDINGS

Nevin Alija

On November 23<sup>rd</sup>, 2017, the Court of Justice decided in Case C-547/16 Gasorba vs. Repsol that a commitment decision adopted by the Commission in relation to certain agreements cannot preclude the national authorities from examining the conformity of such agreements with competition rules and from declaring them to be invalid under Article 101(2) TFEU.

## Facts of the Case

The Tribunal Supremo (Supreme Court, Spain) referred the question to the Court of Justice for preliminary ruling while examining whether long-term exclusive purchasing agreements for fuel entered into between the oil and gas company Repsol and the Spanish tenants of its petrol station infringes Article 101 TFEU.

Under the lease agreement, the lessee was required, throughout the term of the lease, to supply its clients with fuel solely from Repsol. Additionally, Repsol would periodically communicate the maximum retail selling prices of fuel and concede the tenant to grant discounts, paid out of its commission, without impacting Repsol's receipts.

This contractual relationship was the subject of an investigation by the European Commission which at the end of its preliminary assessment found that the long-term exclusive supply agreements gave raise to doubts whether they were compatible with Article 101 TFEU. The main concern for the Commission was that the arrangements could result in foreclosure in the Spanish retail fuel market, which was already highly concentrated.

As a response to the preliminary assessment, Repsol offered a series of commitments and on 12 April 2006, the Commission announced that it had accepted binding commitments<sup>1</sup> under Article 9 of Regulation 1/2003 from Repsol and closed the case.

The tenants, Gasorba and Ms Rico Gil and Mr Ferrández González decided to bring an action against Repsol for the annulment of the lease agreement as it was incompatible with Article 101(2) of the TFEU and also asked for the appropriate compensation. However, the Juzgado Mercantil No 4 and, on appeal, the Audiencia Provincial de Madrid dismissed the case on the grounds that *the commitment decision would not preclude a national court from declaring an agreement to which that decision applies invalid for infringement of Article 101 TFEU.*<sup>2</sup>

The questions that the Supreme Court referred to the Court of Justice are the following:

1. *Under Article 16 of Regulation 1/2003, does Commission Decision of 12 April 2006 relating to a proceeding pursuant to Article 101 of the TFEU (Case*

---

<sup>1</sup> Commission Decision 2006/446/EC of 12 April 2006 relating to a proceeding pursuant to Article [101 TFEU] (Case COMP/B-1/38.348 — Repsol CPP) (OJ 2006 L 176, p. 104)

*COMP/B-1/38.348 - Repsol CPP) (Commitment Decision) preclude a national court from declaring that the agreements to which that decision applies are invalid on account of the duration of the exclusive supply period, even though they may be declared invalid for other reasons such as, for example, the imposition of a minimum retail price by the supplier on the buyer (or reseller)?*

2. *If so, are long-term contracts to which the Commitment Decision applies to be regarded as benefiting from an individual exemption, under Article 101(3) of the TFEU, as a consequence of that decision?’*

## **The Judgment**

The Court started answering the first question by reminding the need for a uniform application of EU competition law which is especially ensured by Article 16(1) of the Regulation. While in accordance with this article, national courts have the competences to apply Article 101 TFEU they cannot decide opposite to the decision taken by the Commission in proceedings for the same matter.

However, the Court duly points out that the Commission may carry “*a mere preliminary assessment*”, without further taking a decision of whether there has been or still is an infringement. Furthermore by the reading of recitals 13 and 22 of the Regulation, the Court is of the view that without a doubt “*commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to decide on the case, and do not affect the power of the courts and the competition authorities of the Member States to apply Articles 101 and 102 TFEU*”.

Finally, having taken into consideration also the observations of Advocate General Kokott, the Court concludes that as the commitment decision contains no binding findings on whether the relevant agreement is lawful or not, the national courts are entitled to apply Article 101 TFEU and to decide whether an infringement has taken place. Lastly the Court expressed that by so deciding it does not give a greenlight for national courts to disregard commitment decisions. During the proceedings they are under the obligation, pursuing to the uniform application of EU competition law and the principle of sincere cooperation, to take these decisions if not as *prima facie* evidence, at the very least as indicative of the nature of the agreements and contractual relations.