EXCLUSIVE PURCHASING (SERVICE STATIONS) THE NESTE CASE

Subject: Exclusive purchasing agreements
Market access

Industry: Service stations
(Limited application to other industries)

Parties: Neste Markkinointi Oy
Yötuuli Ky and Others

Source: Judgment of the Court of Justice of the European Communities, dated 7 December 2000, in case C-214/99 (*Neste Markkinointi Oy v Yötuuli Ky and Others*)

(Note. There are two main points of interest in this case. The first is the reappearance of a type of action in which a party to a contract seeks to have the contract voided on the grounds that it is contrary to the rules on competition. The classic case in which this happened was 161/84, Pronuptia v Schillgallis, in which a franchisee sought to avoid the payment of royalties to the franchisor on the grounds that the franchise agreement infringed Article 85(1). Not all cases in which voidance of a contract is sought on competition grounds are necessarily reprehensible. In the present case, the party claiming voidance considered that, while the contract period was for ten years, it was automatically renewable; that this meant in practice that it was for an unlimited duration; and that, inasmuch as it would largely foreclose the market, this would be contrary to the interests of a competitive system. However, it was the second and wider point which engaged the attention of the court: this was the question whether an individual agreement should be considered on its own or as part of a larger network of agreements in any assessment of the foreclosure of the market. Not all the agreements were of a similar duration: it therefore had to be determined whether, in assessing the significance of the effect of the agreements on competitive conditions, there should be a differentiation in the types of agreement according to their duration. The Court's ruling is a little convoluted; but it comes down in favour of differentiation. If a large number of agreements are of limited and relatively short – five years' – duration, they cannot have a significant effect on the foreclosure of market access: they must therefore be distinguished from agreements giving rise to the present proceedings.)

Reference by national court

1. By decision of 1 June 1999, received at the Court on 7 June 1999, the Tampere District Court referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 85(1) of the EC Treaty (now Article 81(1) EC).

2. That question was raised in proceedings between (i) Neste Markkinointi Oy ('Neste) and (ii) Yötuuli Ky ('Yötuuli) and its responsible partners concerning a service-station agreement.

The main proceedings

3. In 1986 the Finnish-law companies Yötuuli and Kesoil Oy entered into a cooperation and marketing agreement ('the contract), with effect from 7 October 1986, under which Yötuuli became a member of Kesoil Oy's distribution chain, buying and selling in its service stations exclusively petrol and other special products marketed by Kesoil Oy.

4. The contract was concluded for a 10 year period. It provided that after that period the member company could terminate the contract by giving one year's notice.

5. On 31 December 1995 Kesoil Oy was taken over by a company which, in turn, merged with two other companies to form the company Neste, which thus became the other party to the contract.

6. By registered letter of 23 June 1998, Yötuuli gave notice to Neste of its decision to cease purchasing motor fuels from it with effect from 1 July 1998.

7. Neste recovered possession of property belonging to it and then brought a claim against Yötuuli and its partners before the Tampere District Court for compensation for the damage which it claimed to have suffered as a result of the contract being terminated without the required one year's notice.

8. Before the national court, the defendants contended that the application should be dismissed on the ground that, since the contract contains an exclusive purchasing clause, it is contrary to Article 85(1) of the Treaty, so that it is automatically void by virtue of paragraph 2 of that article.

9. By contrast, Neste claims that the contract is not contrary to Article 85(1) of the Treaty.

10. The national court observes that the dispute raises a question as to the interpretation and application of Article 85(1) and (2) of the Treaty. It submits that the dispute also gives rise to a question as to the interpretation and application of Articles 10 and 12 of Commission Regulation EEC/83/1984 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements. The applicant claims before the national court that Article 85(1) of the Treaty does not apply to the contract by virtue of Article 10 of that regulation, on the ground that the contract was not concluded for an indefinite duration within the meaning of Article 12(1)(c) of the regulation, while the defendants contend that the contrary is the case, asserting that the contract, which was automatically renewed after 10 years, must be classified as a contract concluded for an indefinite duration.

11. The national court makes clear, however, that the reference for a preliminary ruling is concerned only with the interpretation of Article 85(1) of the Treaty.

12. It refers to the judgments of the Court of Justice in Case 23/67, *Brasserie de Haecht v Wilkin*, and Case C-234/89, *Delimitis v Henniger Bräu*, which were given in respect of exclusive purchasing agreements for beer.

13. It infers, inter alia, from paragraphs 19 to 27 of the judgment in *Delimitis* that, in order for the prohibition laid down in Article 85(1) of the Treaty to apply, the contract, taking into account its economic and legal context, must make it more difficult to gain access to the market or to increase market share. For those purposes, account must be taken of the fact that the contract is part of a network of similar agreements having a cumulative effect on competition. However, the application of the prohibition also presupposes that the contract has a significant effect on the closing-off of the market brought about by the network. In that regard, the extent of the effect of an individual agreement depends on the position of the contracting parties in the relevant market and on the duration of the agreement.

14. The national court has found that a contract of the kind at issue before it, taken in conjunction with other contracts which are comparable by reason of their duration, does not appear to have any appreciable effect on the partitioning of the market in motor fuels. According to the national court, contracts of a fixed period concluded for several years restrict access to the market far more than those which may be terminated upon short notice at any time. It is not therefore arbitrary to distinguish between them by making only the first category of contracts, and not the second, subject to the prohibition, the basis for which is the cumulative effect of the network, where the second type represent only a very small proportion of the contracts of a single supplier which make a significant contribution to the cumulative effect.

15. Consequently, the national court considers that the defendants ought to have complied with the termination clause.

16. However, it considers that Community law is not without ambiguity in the area concerned and raises a question as to whether the solution to which an analysis of the judgment in Delimitis leads it is not contrary to the principle of legal certainty.

17. It points out that in its judgment in Case T-7/93, *Langnese-Iglo v Commission*, the Court of First Instance held in relation to exclusive purchasing agreements for ice-creams, that, in assessing the contribution of any disputed agreements to any cumulative effect found, the network of contracts of one and the same producer cannot be divided in order to limit the application of the prohibition to those contracts which have a significant effect, since the assessment must apply, for each producer, to all the individual contracts constituting the network.

18. It adds that, in its judgment in Case T-9/93, *Schöller Lebensmittel v Commission,* relating also to exclusive purchasing agreements for ice-creams, the Court of First Instance did not specifically address the applicant company's assertion that the Commission had not taken sufficient account of the fact that the agreements, whichcould be terminated at the end of each calender year following the expiry of the second year following their entry into force, were of relatively short duration.

Question for preliminary ruling

19. In those circumstances, the Tampere District Court decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:
"Is the prohibition referred to in Article 85(1) of the EC Treaty applicable to an exclusive purchasing agreement concluded by a supplier of goods, which could be terminated by the retailer at any time on one year's notice, if all the exclusive purchasing agreements concluded by that supplier have had a significant influence on the partitioning of the market, either on their own or together with the network of exclusive purchasing agreements concluded by all suppliers, but the agreements of similar duration to the exclusive purchasing agreement in question represent only a very small proportion of all the exclusive purchasing agreements of the same supplier, the majority of which are fixed-term agreements which have been concluded for a period of several years?"

20. Neste claims that, from the point of view of Article 85(1) of the Treaty, the agreement, which could be terminated at any time upon one year's notice, must be distinguished from its other agreements which were entered into for a period of several years. The duration of an agreement is of cardinal importance in any assessment of the freedom of action granted to the contracting party bound by an exclusive purchasing obligation, as paragraph 26 of the judgment in Delimitis confirms. In that regard, a one-year notice period gives each of the parties, on reasonable conditions, an opportunity to prepare for a change of brand and, in particular, enables the retailer to make the necessary alterations having decided to change its fuel supplier. Thus the contract does not constitute a commercial restriction for a party contracting with the supplier.

21. Therefore, for the purposes of Article 85(1) of the Treaty, contracts which are made by one supplier in respect of one product but which contain different terms must be evaluated in different ways.

22. Neste also claims that, even if considered on a cumulative basis, the contracts which it entered into, such as the contract at issue in the main proceedings, had only a quite minimal effect on conditions of competition in the relevant market in motor fuels, since, all in all, those contracts totalled 27 in July 1998. They did not therefore fall within the prohibition in Article 85(1) of the Treaty.

23. The French Government submits that there is little, if any, justification for subdividing one operator's network by reference to the duration of a category of

contracts, for the purpose of treating those contracts differently. Such a distinction is complex and, in certain cases, difficult to apply.

24. The Commission submits that when a supplier sets up a network of similar contracts, the effect of that network on competition must be assessed as a whole. If, taken as a whole, those contracts restrict competition significantly, they are all, according to the Commission, contrary to Article 85(1) of the Treaty. Segregating exclusive purchasing contracts or groups of such contracts according to whether or not they are 'insignificant is inevitably arbitrary. The Court of First Instance made a specific ruling to that effect, in paragraphs 129 and 95 of, respectively, *Langnese-Iglo* and *Schöller*.

Court's views

25. It should be recalled that, even if exclusive purchasing agreements do not have as their object the restriction of competition within the meaning of Article 85(1), it is nevertheless necessary to ascertain whether they have the effect of preventing, restricting or distorting competition. The effects of an exclusive purchasing agreement have to be assessed in the economic and legal context in which the agreement occurs and where it may combine with other agreements to have a cumulative effect on competition. It is therefore necessary to analyse the effects of such an agreement, taken together with other agreements of the same type, on the opportunities of national competitors or those from other Member States to gain access to the relevant market or to increase their market share (*Delimitis*, paragraphs 13 to 15).

26. In that connection, it is necessary to examine the nature and extent of all similar contracts which tie a large number of points of sale to various suppliers and to take into account, among the other factors pertaining to the economic and legal context of the agreement, factors relating to opportunities for access to the relevant market. In that regard, it is necessary to examine whether there are real concrete possibilities for a new competitor to enter the network of contracts. It is also necessary to take account of the conditions under which competitive forces operate on the relevant market (*Delimitis*, paragraphs 21 and 22).

27. If an examination of all similar contracts reveals that it is difficult to gain access to the relevant market, it is necessary to assess the extent to which the contracts entered into by the supplier concerned contribute to the cumulative effect produced by the totality of the agreements. Under the Community rules on competition, responsibility for such an effect of closing off the market must be attributed to the suppliers who make an appreciable contribution thereto. Contracts entered into by suppliers whose contribution to the cumulative effect is insignificant do not therefore fall under the prohibition laid down in Article 85(1). In order to assess the extent of the contribution of the contracts concluded by a supplier to the cumulative sealing-off effect, the market position of the contracting parties must be taken into consideration. That contribution also depends on the duration of the agreements. If the duration is manifestly excessive in relation to the average duration of contracts generally concluded on the relevant market, the

individual contract falls under the prohibition laid down in Article 85(1) (*Delimitis*, paragraphs 24 to 26).

28. In its judgment making the reference, the national court found that the contract was part of a network of exclusive purchasing agreements which closed off the larger part of the market in motor fuels.

29. Furthermore, it appears from the information which was provided to the national court and which has not been contested:
- as at 1 July 1998, the number of service stations tied to Neste by a contract of the kind at issue was 27 out of a total of the 573 service stations comprising Neste's network, that is to say, less than 5% of that total or 1.5% of the 1 799 service stations in Finland;
- the 27 service stations mentioned above account for 8% of the Neste network's petrol sales and 10.48% of its diesel sales, namely 2.48% of petrol sales and 1.07% of diesel sales made in the whole of Finland;
- a large number of the agreements entered into by Neste with other retailers were amended in order to come within the scope of Regulation No 1984/83 or were already exempt by virtue of Article 12(2) of the regulation.

30. By the question it has submitted, the national court is essentially seeking to ascertain whether, in the actual conditions characterising the Finnish market for motor-fuels distribution, supply contracts for those fuels terminable upon one year's notice at any time may be regarded as making only an insignificant contribution to the cumulative effect of closing off that market and therefore as not being caught by the prohibition laid down in Article 85(1), even though they form part of an entire set of agreements entered into by the same supplier which, overall, make a significant contribution to that closing-off.

31. Neste and the French Government rightly point out that an exclusive purchasing agreement for motor fuels differs in one significant respect from an exclusive purchasing agreement for other products such as beer or ice-cream, in so far as only one brand of motor fuels is, as a matter of fact, sold in a particular service station.

32. It follows from this finding that, as regards the type of contract in point in the main proceedings, the fundamental factor for the supplier is less the exclusivity clause itself than the duration of the supply obligation assumed by the retailer and that duration is the decisive factor in the market-sealing effect.

33. In that connection, it must be recognised that, as the national court has suggested, fixed term contracts concluded for a number of years are more likely to restrict access to the market than those which may be terminated upon short notice at any time.

34. As far as service-station agreements are concerned, the obligations entered into by the supplier are, in general, onerous in terms of investment, entailing adapting the sales point to the image of the brand sold. Therefore, a change of supplier most often entails, from a technical standpoint, a certain period of time.

35. In view of those particular factors, a notice period of one year is one which can give reasonable protection to the economic and legal interests of each of the parties to the contract and limit the restrictive effect of the contract on competition on the market in motor-fuels distribution.

36. In those circumstances, when, as in the case before the national court, the contracts which may be terminated upon one year's notice at any time represent only a very small proportion of all the exclusive purchasing agreements entered into by a particular supplier, they must be regarded as making no significant contribution to the cumulative effect, for the purposes of the judgment in *Delimitis*, and therefore as not being caught by the prohibition laid down by Article 85(1) of the Treaty.

37. The fact of subdividing, exceptionally, a supplier's network is not arbitrary nor does it undermine the principle of legal certainty. Subdividing the network in that way results from a factual assessment of the position held by the operator concerned on the relevant market, the aim of the assessment being, on the basis of an objective criterion of particular relevance in that it takes into account the market's distinctive features, to limit the number of cases in which a supplier's contracts are declared void to those which, together, contribute significantly to the cumulative effect of sealing off the market.

38. Contrary to the submissions made by the Commission in its observations, that approach does not conflict with the judgment in *Delimitis*. Although that judgment, in the context of the case then under consideration, set out in paragraphs 25 and 26 the criteria for assessing the extent to which a supplier's 'contracts, without being more specific, contribute to the cumulative sealing-off effect, it did not exclude a selective assessment according to the various categories of contracts that a particular supplier might have entered into.

39. The answer to the question raised must therefore be that the prohibition laid down by Article 85(1) of the Treaty does not apply to an exclusive purchasing agreement entered into by a motor-fuels supplier which the retailer may terminate upon one year's notice at any time where all that supplier's exclusive purchasing agreements, whether considered separately or as a whole, taken together with the network of similar agreements made by the totality of suppliers, have an appreciable effect on the closing-off of the market but where the agreements of the same kind as the agreement at issue in the main proceedings by reason of their duration represent only a very small proportion of the totality of one supplier's exclusive purchasing agreements, of which the majority are fixed term contracts entered into for more than one year.

[Paragraph 40 of the judgment concerns costs. Those incurred by the French Government and by the Commission are not recoverable. 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. The Court's formal ruling is expressed in the same terms as paragraph 39.]