

Herbert Smith Freehills Competition Law Moot 2025**Problem Question**

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**RURITANIA IS A FICTIONAL MEMBER STATE OF THE EUROPEAN UNION
REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION UNDER
ARTICLE 267 TFEU FROM THE RURITANIAN HIGH COURT IN THE CASE OF:**

Fresco, Kronos and Smarkt v Ruritanian Competition Authority

Introduction

1. The following paragraphs set out the factual and legal background to the questions referred to below, together with a summary of the parties' submissions to the Ruritanian High Court.
2. The case raises a number of issues relating to the interpretation of Article 101 of the Treaty on the Functioning of the European Union (TFEU) and the compatibility of Ruritanian law with EU law, and it is these issues that form the subject matter of the reference.

Background*The parties*

3. In Ruritania the grocery landscape has been traditionally dominated by three major supermarket chains: Fresco, Kronos and Smarkt. Together, these three supermarket chains represent about two-thirds of the total grocery retail market in Ruritania. In the past five years, Fresco has consistently enjoyed a market share of nearly 30%, whereas Kronos and Smarkt have had a market share of around 20% each. Discounter supermarkets, online grocery stores and convenience stores represent the remaining approximate 30%.
4. All the three major supermarket chains, Fresco, Kronos and Smarkt, operate hundreds of stores across Ruritania and offer online grocery delivery services for their customers, which are free of charge for orders over €50. Since the COVID-19 pandemic, many more consumers have started to buy their groceries online and the value of online food retailing soared by 90% between 2020-2024.

Banana trade

5. Bananas are a staple food for millions of people around the world and are the favourite fruit in Ruritanian consumers' grocery basket. Ruritania imports around 3 billion bananas every year, with

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around 90% sold through the three major supermarkets, i.e., Fresco, Kronos and Smarkt.

6. Bananas are grown on plantations in tropical regions. The trade in bananas is a cornerstone of many countries' economies. However, banana production is rife with significant challenges. Banana plantations are particularly vulnerable to extreme weather events, climate change, disease, and supply chain disruptions. Moreover, workers in banana plantations are faced with poor working conditions, including very low wages, long hours, precarious employment, and exposure to unsafe chemicals. At the same time, the average price per box of bananas is very low, meaning that producers are unable to invest in sustainable production, including through trialling different varieties, employing agroecological or regenerative farming methods, and paying their workers a living wage.

7. In recent years, several international organizations, such as the Fairtrade Global Forum, have highlighted these challenges and have emphasised that sustainable banana production is a shared responsibility among all stakeholders across the supply chain and can only be achieved through greater stakeholder collaboration.

The Sustainable Banana Initiative

8. Fresco, Kronos and Smarkt are of the view that supermarkets have an important role to play in making banana production more sustainable. On 1 January 2024, Fresco, Kronos and Smarkt launched the 'Sustainable Banana Initiative'. It provides that, by 1 February 2024, Fresco, Kronos and Smarkt will source at least 30% of their needs in bananas from plantations that employ sustainable production practices, including:

- experimenting with different banana varieties, capturing carbon, reducing water footprints, and improving biodiversity and soil health (the 'sustainable farming practices condition'), and/or
- paying their employees the minimum living wage, as calculated by the Fairtrade Global Forum (the 'minimum living wage condition').

9. Soon after launching this initiative, a senior director at Fresco spoke to his counterparts at Kronos and Smarkt on a Teams call and suggested that they all agree minimum retail selling prices for bananas bought under the Sustainable Banana Initiative. Both of the directors at Kronos and Smarkt made it absolutely clear to Fresco that they were not at liberty to discuss prices with their competitors and that they would not agree to, or participate in, any price fixing arrangement of the type proposed by Fresco.

Online shopping delivery charges

10. Still worried about the increase in its costs from its participation in the Sustainable Banana Initiative, Fresco announced in an earning call in February 2024 that because of the likely impact of these policies on its financial performance, it was considering whether to start charging for standard shipping of all

online grocery orders, even those over €50. In an earnings call shortly afterwards, Kronos stated that it was discussing internally whether it was now time to start charging consumers for online grocery delivery, so helping to reduce the cost of its groceries across the board and improving its financial performance. On 1 March 2024, Fresco posted the following announcement on its website,

‘Unfortunately, Fresco can no longer continue to offer its valuable customers free standard shipping for online grocery orders over €50. From 1 May 2024, standard shipping for orders over €50 will incur a fixed fee of €5’.

On 1 and 15 April 2024 respectively, Kronos and Smarkt also posted statements on their websites announcing a €5 standard delivery charge for orders over €50 after 1 May 2024 (the ‘Website Announcements’ and ‘Delivery Charges’).

The Ruritanian Competition Authority’s Decision

11. On 15 May 2024, the Ruritanian Competition Authority (‘RCA’) received a complaint from ConsumerPro, a Ruritanian Consumer Association, that Fresco, Kronos and Smarkt had violated Article 101 TFEU and Article 1 of the Ruritanian Competition and Fairtrade Act (‘RCFA’, Article 1 is modelled on Article 101) both by concluding the ‘Sustainable Banana Initiative’ and by conspiring to introduce a €5 standard delivery charge for online orders over €50. ConsumerPro also complained that, in any event, Fresco’s, Kronos’ and Smarkt’s public announcements relating to the introduction of Delivery Charges infringed Article 1A RCFA, which provides:

‘Invitation to collude and announcement relating to communicating future pricing intentions for products and services between competitors’

‘1. It is prohibited for an undertaking to propose, coerce, motivate or in any way invite another undertaking to participate in an agreement between undertakings or in decisions of associations of undertakings or in concerted practices aimed at preventing, restricting or distorting competition in the Ruritanian Territory and which consist in: a) directly or indirectly fixing purchase or selling prices on a market, or b) limiting or controlling production, supply, technological development, or investments, or c) sharing markets or sources of supply.

2. An undertaking is prohibited from disclosing price, discount, supply or credit information about products or services it supplies or is supplied where the disclosure restricts effective competition in the Ruritanian Territory. In order to assess whether a disclosure restricts effective competition, the following shall be taken into account: a) the degree of specification and the individual nature of the information; b) whether the information relates to future activities; c) the extent to which the information is readily accessible to the public; d) whether the disclosure is part of a pattern of similar disclosures by the undertaking; e) whether there is a history of past collusion in the specific market or industry between the same undertakings, and f) whether the market to which the disclosure relates is concentrated and oligopolistic in nature.

3. Practices that fall under paragraphs 1 and 2 are not prohibited, as long as they meet by analogy the conditions of paragraph 3 of Article 1 of this Act.’

12. On investigating the complaint, the RCA uncovered evidence relating to the Teams call between Fresco, Kronos and Smarkt. Following the RCA’s investigation of the course of conduct, it sent Fresco,

Kronos and Smarkt a statement of objections setting out its concerns about their Sustainable Banana Initiative and the Delivery Charges under Article 101 TFEU and Article 1 of the RCFA. In the statement of objections, the RCA also set out its concerns relating both to Fresco's invitation to Kronos and Smarkt to fix minimum retail banana prices and to all three supermarkets' public announcements about their Delivery Charges under Article 1A RCFA.

13. Following the RCA's administrative procedure, on 15 October 2024 the RCA adopted a decision against Fresco, Kronos and Smarkt finding that the Sustainable Banana Initiative and the Delivery Charges infringed Article 101 TFEU and Article 1 RCFA. The RCA also found that Fresco had unlawfully invited other undertakings to participate in a restrictive agreement contrary to Article 1A RCFA and that Fresco, Kronos and Smarkt had each infringed Article 1A RCFA through their public announcements. Specifically, the RCA found that:

- The Sustainable Banana Initiative constitutes a restriction of competition by object within the meaning of Article 101(1) TFEU and Article 1(1) RCFA. It fixes the conditions under which Fresco, Kronos and Smarkt may obtain supplies of bananas and amounts to the collective boycott of banana plantations that do not employ sustainable production practices and/or pay their employees a minimum living wage, regardless of whether they can afford to do so or whether relevant national law requires them to pay such a wage. Since the Sustainable Banana Initiative restricts competition by object, the fact that it is claimed to pursue a potentially legitimate objective, i.e., promoting sustainable banana production, is irrelevant for the purposes of applying Article 101(1) TFEU and Article 1(1) RCFA. This is especially so since Fresco, Kronos and Smarkt are not regulatory bodies, nor do they pursue a regulatory function.
- The Sustainable Banana Initiative cannot be justified under Article 101(3) TFEU and Article 1(3) RCFA. First, the benefits allegedly stemming from the 'sustainable farming practices condition' and the 'minimum living wage condition' do not amount to an improvement in the production or distribution of the products or services concerned, or to the promotion of technical or economic progress. Second, the restriction of competition is not essential to achieving the claimed benefits, since Fresco, Kronos and Smarkt may encourage sustainable banana production through means other than a minimum sourcing requirement and in any event there is no need for them to cooperate. Third, the claimed benefits of the Initiative only accrue to citizens outside of Ruritania and the EU, and cannot compensate for the harm to competition caused by the Initiative in the relevant market in Ruritania: the two markets are not related and the group of consumers that is affected by the restriction of competition and that benefits from the alleged efficiencies is not substantially the same.
- The parallel introduction of identical Delivery Charges, following Fresco's and Kronos' earning calls and Fresco's, Kronos' and Smarkt's Website Announcements, constitutes an anticompetitive

concerted practice to fix prices within the meaning of Article 101(1) TFEU and Article 1(1) RCFA. In particular, in the absence of a plausible explanation, the public announcements and parallel introduction by Fresco, Kronos and Smarkt of an identical standard shipping charge of €5 for orders over €50 constituted a strategy for reaching a common understanding as to their future pricing behaviour and are sufficient proof of a concerted practice – by which the parties had knowingly substituted cooperation for the risks of competition. In particular, the unilateral public announcements of Fresco and Kronos, referring to their intentions relating to future pricing, before committing to them, were clearly designed to signal their intended strategy to each other and to Smarkt.

- In any event, Fresco's, Kronos' and Smarkt's public announcements also constitute a violation of Article 1A(2) RCFA as unilateral public price disclosures that restrict effective competition in online grocery delivery services in Ruritania. Fresco had also infringed Article 1A(1) RCFA by unlawfully inviting other undertakings to participate in an agreement aimed at restricting competition in the Ruritanian Territory which consists in directly fixing selling prices on a market.

14. The RCA imposed fines on Fresco, Kronos and Smarkt in respect of the violations of Article 101(1) TFEU, Article 1(1) RCFA, and Article 1A RCFA.

The Action for Annulment before the Ruritanian High Court

15. On 15 November 2024, Fresco, Kronos and Smarkt brought an action for annulment of the RCA's decision before the Ruritanian High Court. The applicants complained that the RCA decision is vitiated by multiple errors of law.

- The RCA was wrong to conclude that the Sustainable Banana Initiative restricts competition by object within the meaning of Article 101(1) TFEU and Article 1(1) RCFA. The aim of the Initiative is to promote sustainable banana production by favouring banana plantations that employ sustainable farming practices and pay their employees a minimum living wage. These conditions do not involve any exchange of commercially sensitive information relating to purchasing or selling prices or other costs or margins along the supply chain. On the contrary, the Sustainable Banana Initiative provides Ruritanian consumers with access to a wider range of bananas, including ones that have been produced under better conditions, and thus strengthens competition in terms of choice and quality. In fact, the Sustainable Banana Initiative does not come within the scope of Article 101(1) TFEU and Article 1(1) RCFA at all, as restraints in an agreement which are inherent, necessary, and proportionate to the pursuit of a legitimate objective fall outside their scope entirely. In this case, the Initiative (a) is justified by the pursuit of a legitimate objective in the public interest; (b) the specific means used to pursue this objective, i.e., the sourcing requirement, is genuinely necessary for that purpose; and (c) any inherent effect of, at very least potentially, restricting or distorting competition,

does not go beyond what is necessary, in particular by eliminating all competition, since Fresco, Kronos and Smarkt are free to source the remaining of their needs in bananas from any source they wish. The fact that Fresco, Kronos and Smarkt are not regulatory bodies, and do not perform a regulatory function is irrelevant.

- Even if an infringement of Article 101(1) TFEU and Article 1(1) RCFA is established, the RCA was wrong to conclude that the Sustainable Banana Initiative does not satisfy the requirements for an exemption under Article 101(3) TFEU and Article 1(3) RCFA. First, the Initiative contributes to improved conditions of production and the development of a wider choice of better-quality products insofar as it favours plantations that employ sustainable farming methods and pay their employees a minimum living wage. Second, the sourcing requirement is indispensable to achieving these benefits, as it is necessary in order to align Fresco's, Kronos' and Smarkt's incentives and to overcome the 'first mover disadvantage'. Third, the Initiative results in significant use and non-use benefits for Ruritanian consumers who value the consumption of sustainably produced bananas due to increased choice, their higher quality, and the positive externalities involved for society and future generations, which outweigh any restrictive effects of the Initiative. Consumers also benefit collectively from the advantages derived globally from the sustainability initiatives.
- The RCA was wrong to conclude that Fresco's and Kronos' e-mail calls and Fresco's, Kronos' and Smarkt's Website Announcements, and the parallel introduction of Delivery Charges establish the existence of an anticompetitive concerted practice within the meaning of Article 101(1) TFEU and Article 1(1) RCFA. The public disclosure of standard shipping rates for groceries bought online is normal business practice and the mere fact that Fresco, Kronos and Smarkt introduced an identical delivery charge within a short period of time is irrelevant, and, in any event, insufficient as proof of concertation.
- The RCA was wrong to fine Fresco, Kronos and Smarkt for having infringed Article 1A RCFA, as this provision is contrary to EU law, which makes it clear that Member States cannot prohibit under national law conduct which is not prohibited under Article 101 TFEU. Neither Fresco's alleged invitation to collude nor Fresco's, Kronos' and Smarkt's public announcements infringe Article 101 TFEU, and so they cannot infringe Article 1A RCFA either.

Questions Referred

16. Faced with such fundamental differences in interpretations and readings of the law, the Ruritanian High Court has decided to stay the proceedings before it and refer a number of questions relating to the interpretation of Article 101 TFEU and the compatibility of Ruritanian law with EU law to the Court of Justice of the European Union.

17. The Ruritanian High Court has referred the following questions to the Court of Justice:

Question 1. What criteria should be applied to determine whether an agreement among rivals to source a minimum percentage of their requirements in a product only from suppliers that satisfy certain criteria, such as the Sustainable Banana Initiative at issue in the main proceedings, restricts competition within the meaning of Article 101(1) TFEU or falls outside of its scope? In particular, what criteria should be applied to determine whether such an agreement restricts competition by object within the meaning of Article 101(1) TFEU and in what circumstances can restraints inherent in, and justified by a legitimate sustainability objective, fall outside the application of Article 101(1) TFEU?

Question 2. What factors should be taken into account in determining whether an agreement among rivals to source a minimum percentage of their requirements in a product from suppliers that meet certain criteria, such as the Sustainable Banana Initiative at issue in the main proceedings, satisfies the conditions of Article 101(3) TFEU? In particular, what factors should be taken into account in determining whether such an agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress in the meaning of Article 101(3) TFEU by means of its sustainability benefits? In what circumstances may consumers be deemed to receive a fair share of any sustainability benefits and what criteria should be applied to determine whether a minimum sourcing obligation is indispensable for the achievement of those benefits?

Question 3. What criteria should be applied to determine whether a series of earning calls and website announcements, followed by the parallel introduction by rivals of an identical delivery charge, such as the ones at issue in the main proceedings, constitute an indirect exchange of information between competitors sufficient to establish the existence of a ‘concerted practice’ within the meaning of Article 101(1) TFEU? Is it relevant that such behaviour constitutes ‘normal business practice’?

Question 4. Is a national law that prohibits an invitation to other undertakings to participate in an agreement aimed at restricting competition in the Ruritanian Territory and/or anticompetitive public price announcements, such as Article 1A RCFA, compatible with EU law?

18. The request for a preliminary ruling arrived at the Court of Justice on 2 December 2024. In accordance with Article 23 of the Statute of the Court of Justice, the Registrar has notified the claimant and defendant and has invited them to submit written observations to the Court. The deadline for submission is on 21 March 2025. Oral hearings are provisionally scheduled for 13 and 14 June 2025.

Note that in responding to questions posed by a Member State court, the Court of Justice will only deal with questions of EU law. Questions of fact and national law are for the national court to decide.