

Portuguese Supreme Court of Justice Decision

PROCESS: 627/09.5TVLSB.L1.S1

REDACTOR: BETTENCOURT DE FARIA

DATE: 03/04/2014

THEMATIC: CARTELS | AGREEMENTS, CONCERTED PRACTICES AND DECISIONS BY ASSOCIATIONS OF UNDERTAKINGS

LEGISLATION AT ISSUE: ARTICLE 4 (1) OF LAW NO. 18/2003, OF 12 JUNE AND ARTICLE 81 (1) TEC (PRESENT ARTICLE 101 TFEU)

DECISION SUMMARY:

I - Free competition can be defined as the competition in a market where there are equal opportunities for all producers and unlimited possibilities of choice for all consumers.

II - This definition is valid according to both European and National Law.

III – Therefore, all practices resulting either in the decrease of one or more producers' opportunities or in the decline of consumers' choices are considered practices which violate market rules.

IV - The concession contract clause which provides that the concessionary can only commercialize the product in a certain geographic area does not violate free competition, since it does not constitute market sharing.

PROCEEDINGS' RELEVANCE IN COMPETITION LAW ENFORCEMENT:

During these proceedings there was a concession contract in analysis where there was an exclusivity clause which obliged the Plaintiff to buy products only from the Defendant, to resell them. In the same contract, it was established that the Plaintiff could only practice its activity in a delimited geographical area. The Plaintiff considered this part of the contract discriminatory since it did not inhibit the Defendant from contracting with third parties in the same terms in that delimited geographical area.

THE SUPREME COURT OF JUSTICE DECIDED UPON SOME RELEVANT QUESTIONS RELATED TO COMPETITION LAW ENFORCEMENT:

- (1) DEFINITION OF COMPETITION
- (2) CONSIDERATIONS ON THE RESTRICTIVENESS OF PROHIBITED PRACTICES IN COMPETITION LAW AND EU LAW
- (3) DEFINITION OF MARKET SHARE AND ANALYSIS OF THE SITUATION.

(1) The Court understands that the objective of competition law is strictly connected with the assurance of a free competition where actions restricting it are forbidden. Therefore, it is understandable that "market competition where there are equal opportunities to all producers and non-restricted possibility of choice to all consumers" be a theoretical definition accepted by both Portuguese Law (Law no. 18/2003, of 11 June, in force at the time of the case's contract

ending, and revoked by Law no. 19/2012, of 8 May) and EU Law – Article 81 EC Treaty (present Article 101 TFEU).

(2) The prohibited practices foreseen in both national (Article 4 of Law no. 18/2003) and EU law (Article 81 EC Treaty, present article 101 TFEU) are not restrictive, but merely indicative, *i.e.*, prohibited practices are those which could endanger free competition. In these proceedings, practices resulting in the decreasing of opportunities for one or more producers or of the possibility of choice for consumers should be considered prohibited practices.

(3) Considering Article 4 (1) (d) of Law no. 18/2003 and also Article 81 (1) (c) CE Treaty (present Article 101 (1) (c) TFEU), we are in the presence of an illegal practice: market sharing. The court considers market sharing situations in which *«producers collude in ways to separate their offers, so that, at a certain point, consumers only find products of one of them, therefore restricting their possibility to choose and, consequently, the competition between producers themselves»*. The Court also analysed if the concession contract at issue would constitute Market Sharing: according to Article 2 (2) of Law no. 18/2003 (present Article 3 of Law no. 19/2012) *«[a] group of undertakings is deemed to be a single undertaking, even if the undertakings themselves are legally separate entities, where such undertakings make up an economic unit (...)»*. The court considered that the Defendant and each one of its concessionaires constituted a single market offer, having found no place for competition. Therefore, the clause that limited the action of the Plaintiff to a delimited geographical area was not considered illegal, since it did not constitute market sharing.