SUPREME COURT

PROCESS: 01B4170
REDACTOR: FERREIRA DE ALMEIDA
DATE: 24/04/2002

THEMATIC: ABUSE OF DOMINANT POSITION; ABUSE OF ECONOMIC DEPENDENCE
LEGISLATION AT ISSUE: ARTICLES 6, NO. 1, 7, NO. 1, 13 AND 14, NO. 1 AND NO. 3 OF DECREE-LAW NO. 422/83 OF 3RD DECEMBER; ARTICLES 2, NO. 1, 4, 7, NO. 2 AND 14, NO. 2 AND NO. 3 OF DECREE-LAW NO. 371/93 OF 29TH OCTOBER

DECISION SUMMARY:
I- A letter in which the subscriber clearly expresses its intention to terminate a supply contract, invoking as basis the fact that the other party agreed lower prices with other clients to supply the same services, is not suitable to embody a termination declaration.
II- "Equivalency", for the purposes of article 7, no. 1 of Decree-Law no 422/83, of 3/12, does not solely respect the existence of replaceable products or services within the market, since its notion portraits a wider scope of application, being able to assess the existence of economic dependence.
III- What is relevant here is the essential error, the one that led the party to close the contract, and not just how the contract was closed.
IV- Both duty to inform and pre-contractual duty of allegiance bound parties during the negotiation of a contract, and do not apply to previously closed contracts with third parties.

PROCEEDINGS' RELEVANCE IN COMPETITION LAW ENFORCEMENT:
Reuters and Mundiglobo closed a financial information supply contract. However, Mundiglobo stopped paying the agreed consideration, so Reuters filed a lawsuit for compensation.

The Defendant was sentenced to pay compensation by both the First Instance Court and the Appeal Court, so it filed an appeal to the Supreme Court.

The Defendant claimed, *inter alia*, that it had communicated the contract nullity through a termination letter grounded on the Plaintiff's abuse of dominant position and restrictive competition practices during the contract negotiation, under articles 14, no. 1 and 13 no. 1, point d) of Decree-Law no. 422/83 of 3rd December.

The Defendant, now Appellant, claimed it stopped paying the negotiated fee because the Plaintiff had allegedly negotiated supply contracts of the same services with other clients at a lower price than the one it had proposed, which sufficiently substantiated the Defendant's claim of contract nullity.

The Plaintiff argued the settled factuality was insufficient to conclude that its actions consubstantiated an abuse of dominant position or a restrictive competition practice.

It claimed that nothing precludes an undertaking from increasing services supply prices for future clients.

Furthermore, the alleged error concerning the concluded deals could not undermine the party's intention to close the contract, given that the Defendant always knew the price negotiated between both parties.

The Court found the Defendant's claims concerning the alleged abuse of dominant position as sufficient ground to declare the supply contract null inadmissible.

Therefore, the Court applied the institute of "economic dependence state" or "abuse of relative dominant position" to the present case, resorting to French doctrine to explain it encompasses situations in which undertakings oppose "(…) suppliers or costumers, in other words upstream or downstream undertakings part of the product production or distribution process (…) concerning horizontal relationships – v.g. between either production undertakings or distribution undertakings in the same branch or segment of the market, as well as vertical relationships, either in an ascending or descending point of view (distribution undertakings in relation to suppliers or producers and/or manufacturers or supplying undertakings or costumers in relation to producers or manufacturers).", according to article 4 of Decree-Law no. 371/93 of 29th October.

Thus, an undertaking would be precluded of abusing the economic state of dependency of a certain undertaking or of a client in relation to it, given the undertaking or client does not have an equivalent alternative within the relevant market, namely when such abuse is subsumable to one of the points of article 2, no. 1 of the legal diploma previously mentioned.[1]

Thereunder, the expression "equivalent services" under article 7 no. 1 of Decree-Law 422/83 referred to identical or similar products or services inasmuch as they would be similar in terms of essential commercial characteristics – in other words, they would be suitable to replace other products or services without affecting production or commercialization costs.

The Court considered "It becomes necessary to assess if there are sufficient alternatives, as well as to evaluate if those alternatives are reasonable under assessment criteria of objective nature.

Identifying an «equivalent solution» (…) will result of multiple factors, such as brand reputation and notoriety, supplier's market share, the extension of its relationship with clients, the period of time needed to find alternatives and also the existence of permutable products within a certain

[1] One of the forbidden practices takes place when an undertaking directly or indirectly sets the purchase or selling price, or interferes in its determination by the market's normal functioning, therefore inducing it artificially (article 2, no. 1, point a) of Decree-Law no 371/93).
In the same sense, whenever an undertaking systematically or occasionally sets out the price, leading to a situation of discriminatory pricing conditions in relation to similar situations, as portrayed by articles 13 and 6, no. 1 of Decree-Law no. 422/83 of 3rd December.

market, therefore gauging the cost of shifting suppliers, in order to assess if the «equivalent solution" exists…or not»."

Furthermore, the Court reminded that under article 7, no. 2 of Decree-Law 422/83, products and services are not considered equivalent if a lasting price modification or selling conditions alteration occurs between different conclusion dates.

Thus, the Defendant had to present evidence of the necessary requirements for the existence of an abuse of (relative) dominant position to be assessed, given the Defendant claimed its existence (as a result of article 342, no. 2 of the Portuguese Civil Code).

Thus, it had to prove that the undertakings who signed a supply contract with the Plaintiff were its competitors, as well as that those relationships were objectively equivalent to its own contract.

The Court found the produced evidence not only insufficient to determine the existence of objective equivalence – only then would it be admissible to compare the essential commercial characteristics of the contracts –, but also deficient in showing that the Defendant and the other mentioned undertakings were competitors.[2] Contrarily, the Court considered it was proven the Plaintiff had already started providing its services to the other undertakings before negotiating with the Defendant.

So, the Court concluded the relevant market was not defined, that it had not been proven the Plaintiff had a relative dominant position in this case, nor that it had acted in a way that discriminated the Defendant. Firstly, because the contracts were not closed at the same time. Secondly, and correlated to the previous consideration, because the functioning and specific rules of the market allow the Plaintiff to increase the pricing by which it obliges itself to provide its services.

[2] The Court stressed that it is not sufficient for the Defendant to claim that it provides the same services as the other undertakings to conclude that they are competitors.