LISBON APPEAL COURT

PROCESS: 3855/05.9TVLSB.L1-7
REDACTOR: ANA RESENDE
DATE: 07/06/2011

THEMATIC: CARTELS| AGREEMENTS, CONCERTED PRACTICES AND DECISIONS BY ASSOCIATIONS OF UNDERTAKINGS
LEGISLATION AT ISSUE: ARTICLE 85, NOS. 1 AND 3, EEC TREATY (PRESENT ART. 101, NOS. 1 AND 3 OF TFEU), COUNCIL REGULATION (EC) NO. 1/2003 OF 16 DECEMBER; DECREE-LAW NO. 371/93 OF 29TH OCTOBER; ARTICLE 4 OF LAW NO. 18/2003 OF 11 JUNE (REVOKED AND SUBSTITUTED BY LAW NO. 18/2003 OF 11TH JUNE, WHICH WAS LATER REVOKED AND SUBSTITUTED BY LAW NO. 19/2012 OF 8TH MAY)

DECISION SUMMARY:

1. While reevaluating the case's factual basis with the necessary critical scrutiny of the evidence, given that it is important for the appellant to invoke evidence that undeniably supports its plea, the Appeal Court must act under further caution, given the lack of immediacy and oral statements, on which the Court cannot, as a rule, rely to reach a ruling on the contested facts.

2. The mere inclusion of an exclusivity clause in a contract which, for tacit contract renewals aimed at reaching a certain goal, surpasses the five year-deadline does not necessarily translate into an anticompetitive practice leading to contract nullity.

3. The right to cancel a contract is like an potestive termination right subject to the existence of a ground. Therefore, the default or not complying party has no contract termination legitimacy in bilateral contracts.

4. A judge has the power to reduce, but not to invalidate or suppress a clearly unreasonable penal clause. Therefore, any judicial intervention depends on a substantial, evident disproportion between caused damages and the stipulated penalty. The Court cannot conduct such act, so the debtor must ask for its reduction, directly or indirectly, contesting the calculated amount on grounds of its overt excessiveness.

(Redactor's Summary)

PROCEEDING'S RELEVANCE IN COMPETITION LAW ENFORCEMENT:

These legal proceedings resulted from a supposed contractual default of D., Lda (Defendant), which led S., SA (Plaintiff) to plea upon the Trial Court to declare the contract cancelled and the Defendant to be sentenced to pay it a compensation.

The Plaintiff claimed a supply contract had been concluded between both parties (after C assigned its contractual position to the Plaintiff, as supplier), in which the Defendant obliged itself to buy fabricated or commercialized products from the Plaintiff to be resold at its commercial establishment, regardless of who the supplier was. Furthermore, during the validity of the

contract, the Defendant was not allowed to buy, sell, nor tout, by itself or resorting to an intermediary, products similar to the ones object of the agreement.

Having that in consideration, the Plaintiff claimed the Defendant started to acquire and commercialize similar products from another suppliers, ceasing to comply with the contract. So, after heckling the Defendant, the Plaintiff issued a registered letter to cancel the contract.

The Defendant contested that it had only stopped acquiring one of the Plaintiff's products because the latter had ceased to provide technical assistance to the necessary equipment, but claimed that it kept selling the other supplied products.

The first instance ruling found the Plaintiff's claims well-founded, declaring the contract cancelled since 2004 and sentencing the Defendant to pay a compensation under the penal clause contractually defined by the parties, as well as interests.

The Defendant appealed to Lisbon's Appeal Court, claiming that, in what Competition Law was concerned, the contested decision had wrongly applied Commission Regulation (EEC) no. 1984/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive purchasing agreements, because the contract validity period had not been taken into account.

In response, the Plaintiff claimed the Regulation was not applicable, given the nature and business volume did not affect the commerce between EU Member-States.

It also claimed Law no 18/2003 of 11 June (Portuguese Competition Act) was not applicable either, since neither the contract's object, nor its effect were to prevent, restrict or distort competition within the national relevant market.

The Appeal Court considered Regulation (EEC) no. 1984/83 of 22 June 1983 should not be applied to the contract cancelation issue.

The Court also ruled upon the exclusivity clause's supposed nullity in light of the mentioned Community legislation. In that context, regarding the exemption regime under article 85, no. 3 of the EEC Treaty (now, article 101 (3) TFEU), Regulation (EEC) no. 1984/83 established, under article 6, "*no. 1 of article 85 of EEC Treaty is not applicable to agreements where there are only two undertakings and one of them, the retailer, obliges itself towards the other, the supplier, in return for concession of special economic and financial advantages, to only acquire products from such supplier, from an undertaking connected in any way to the supplier or from an intermediary responsible for distributing the supplier's products, concerning beers and contractual specified beverages, even though such exemption is applicable, under article 8, if it is an indefinite contract or its validity period exceeds 5 years, inasmuch as the obligation of exclusive buy concerns certain beers and other determined beverages, so a contract will be considered as concluded for an undefined period, for a 10 year period, when the acquisition only concerns certain beers, subparagraphs c) and d).*

It follows from the foregoing that the mere inclusion of an exclusivity clause in a contract which, for tacit contract renewals towards reaching a certain goal, surpasses the five year-deadline does not necessarily translate into an anti-competitive practice leading to contract nullity."

Therefore, even though there was an agreement between two undertakings in which there was an exclusivity clause, no evidence proved the existence of the remaining conditions, like affecting commerce between EU Member States or restricting competition, under article 81 of EC Treaty (previously, article 85 EEC Treaty; now, article 101 of TFEU) and Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

The Court also found the evidence insufficient to find the invoked clause able to relevantly restrict free competition within the national relevant market, under article 2 of Decree-Law no. 371/93 of 29th October and article 4 of the Portuguese Competition Act.

As Lisbon's Appeal Court stressed, the procedural party (in this case, the Defendant) has the burden of proof if it intends to prove the existence of a Competition Law infringement. In other words, the procedural party has to, in the proper moment, present facts necessary to assert and prove the existence of any situation undermining competition within the relevant market.

In conclusion, the Appeal Court found the Defendant's appeal inadmissible.