



OPORTO APPEAL COURT

PROCESS: 572/07.9TBVLC.P1

REDACTOR: RODRIGUES PIRES

DATE: 03/11/2009

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

LEGISLATION AT ISSUE: LAW 18/2003 OF 11 JUNE (REPLACED BY LAW 19/2012 OF 8 MAY)

DECISION SUMMARY:

I – If, in a Loan Agreement, the borrower fulfils the obligation it is compelled to, paying the amount owed and correspondent interest, there is no place for compensation and, consequently, the penalty clause is excluded.

II - Adding to a Loan Agreement a clause which obliges the borrower so sell the whole of its milk production violates Article 4 (1) (c), (g) of Law 18/2003, of 11 June, which approves the Competition Law Act. Therefore, and according to Article 4 (2), this clause should be considered void.

PROCEEDINGS' RELEVANCE IN COMPETITION LAW ENFORCEMENT:

The Plaintiff presented a declarative action before the Court to condemn the Defendant to pay €5000 plus interest.

The Plaintiff and the Defendant had a 10-year-long commercial relation in which the Defendant would buy milk from the Plaintiff. At the first request of the proceedings, the Plaintiff argued that it sold milk to the Defendant amounting to €8263,10, but only received €2923,10 as payment.

In its initial petition, the Defendant brought to the knowledge of the Court that, between both parties, there was a Loan Agreement in which the Defendant borrowed €15000 to the Plaintiff. This loan was to be returned in 20 payments of €750 each. In this contract, it was established that if the Plaintiff failed to complete one of these payments, it would be bound to sell its entire milk production to the Defendant. Failing to do that, the Plaintiff would have to pay a penalty of €5000.

OPORTO'S APPEAL COURT DECIDED UPON THE FOLLOWING RELEVANT QUESTIONS RELATED TO COMPETITION LAW ENFORCEMENT:

- LEGAL VALIDITY OF THE EXCLUSIVITY CLAUSE ACCORDING TO LAW 18/2003, OF 11 JUNE, WHICH APPROVES THE COMPETITION LAW ACT

The Court begins by analysing Article 4 (1) (c) and (g) – *“Agreements between undertakings, (...) which have as their object or effect the prevention, distortion or restriction of competition in the domestic market, in whole or in part, and to a considerable extent, are prohibited, in particular those which:*

(...)



c) Limit or control production, distribution, technical development and investment;

(...)

g) Make the conclusion of contracts subject to the other parties' acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts." – and Article 7 (1) – "It is prohibited for one or more undertakings to abuse the economic dependence under which any of its suppliers or customers may find themselves as a result of the inexistence of an equivalent alternative , to the extent that such a practice affects the way the market or competition operate."

Considering the exclusivity clause within the loan contract in hand, it implicates a time-limited restriction for the Plaintiff to obtain the best selling price for its milk within the market and also that *"other buyers are restricted to compete to buy the Plaintiff's milk production"*.

In this analysis, the Court also clarified that this exclusivity clause has no connection with the subject of the loan contract and should therefore be considered void, since it violates Article 4 (1) (c) of Law 18/2003.

As a consequence, the penalty clause should also be considered void as it was supposed to be activated by the non-compliance with the exclusivity clause.

To rebut these arguments, the Defendant contributed with two arguments – both immediately discarded by the Court. First, that the clauses were valid under compulsion of Article 405 (1) of the Civil Code, which establishes the freedom to contract; and, second, that the Appeal Court should not appraise this argument due to the lack of a possibility of pronouncement by the Court of First Instance.

Regarding the freedom to contract, the Court clarified that this freedom is always limited to legal boundaries, which is why the limits established within the Competition Act and in accordance with European Law do not allow the loan contract to have an exclusivity clause which is not connected with the subject of the contract.

As for the appraisal of the argument by the Appeal Court, the Court observed that the appeal regime is one of revision and reconsideration, which is why the appeal court should not appraise arguments not considered by the first instance court. However, there are exceptions considered under the law in which this particular situation is included. As the exclusivity clause constitutes a direct violation of Article 4 of Law 18/2003, it is a matter which the Court is obliged to consider even if it was not considered in first instance or raised by the parties.