



Guimarães Appeal Court

PROCESS: 1/08.OTBVNC.G1

REDACTOR: FERNANDO FERNANDES FREITAS

DATE: 20/11/2012

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

LEGISLATION AT ISSUE: ARTICLE 81, 1 TEC (PRESENT ARTICLE 101 TFEU)

DECISION SUMMARY:

I – As a consequence of the loyalty principle, present within the commitment of Member-States of the European Community, the primacy of European Law over National Law results in the non-application of National Law when it is incoherent with European Law.

II – Articles 101 and 102 TFEU aim to protect market competition amongst Member-States, preventing undertakings from restricting competition among themselves or regarding third parties through coordination between them.

III – Therefore, an exchange of information that creates a concerted practice which is susceptible to affect trade between Member-States is prohibited by Article 101 TFEU. Considering the primacy of European Law, this prohibition prevails over National Law; so, the provision of an information right as it was invoked by the undertaking's shareholder – which is present in the market as a direct competitor – is ineffective.

IV – The transfer prices folder includes precise information on the production costs, so anyone who accesses it also accesses information on the profit margins of the undertaking. Considering the confidentiality of this information and its key importance in the undertaking's activity it is legitimate to block its access to a shareholder that is in direct competition with the company, on the grounds of Article 290 (2) of the Portuguese Commercial Societies Code.

PROCEEDINGS' RELEVANCE IN COMPETITION LAW ENFORCEMENT:

The proceedings take into consideration the annulment of a corporate resolution of the First Defendant of which the Plaintiff is a shareholder. The Plaintiff claims that it did not receive the information that it asked for and that according to Portuguese Law (Commercial Societies Code) the Defendant is obliged to provide. The First Defendant refused to provide this information because the Plaintiff is its competitor and this exchange of information would be damaging for the First Defendant.

The Plaintiff also plead for the Second Defendant to be condemned to pay damages that would emerge from the findings in trial and that would correspond to the difference of profit that the Plaintiff did not receive of its social share.

THE GUIMARÃES COURT OF APPEAL DECIDED UPON SOME RELEVANT QUESTIONS RELATED TO COMPETITION LAW ENFORCEMENT:

- (1) PRIMACY OF EUROPEAN COMPETITION LAW OVER NATIONAL LAW



- (2) FRAMING OF THE SITUATION AS ABUSE OF DOMINANT POSITION
- (3) EXCHANGE OF INFORMATION AS A CONCERTED PRACTICE PROHIBITED BY COMPETITION LAW

(1) The Court begins by acknowledging the primacy of European Competition Law over National Law, which means that if there is a conflict between Law no. 18/2003, of 11 June (Competition Law) and European Law, the latter prevails. The Court also clarified that Regulation (EC) 1/2003, on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (present Articles 101 and 102 TFEU), standardises the implementation of these Articles into Member-States' legal systems. Yet, this does not prevent Member-States from putting into practice more restrictive measures, *e.g.*, such as prohibiting undertakings' unilateral acts.

(2) The Abuse of Dominant Position is considered under Article 82 of the EC Treaty (present Article 102 TFEU); however, the proceedings in hand do not fit into this legal figure because, according to European Commissions' investigations, the undertakings in this particular situation, in spite of being important players on the market, are not market leaders.

(3) Focusing on the question whether "information exchange between competitors, even when unilateral, *i.e.*, when only one competitor provides information to another, should be considered an «agreement», under the provisions of Article 81 of the EC Treaty", the Commission responded that "if a unilateral exchange of information occurs on a continuous contact base resulting from the participation of a competitor in the corporate decision process – for also being this undertaking's shareholder – and if the exchange of information allows the undertaking to change its behaviour according to the data received, this practice may be considered as an "agreement" or a "concerted practice" under Article 101 TFEU".

Exchange of Information is included under Article 101 TFEU when it results in conditions different from the ordinary, through causal connection, *i.e.*, it is enough if it results in the decrease of the uncertainty level in which competition is based. Therefore, the Court examined the influence on competition under objective factors. As a consequence, the knowledge of the Defendants' structure on production costs, as it is considered a sensitive matter, should be surrounded by the highest level of secrecy possible. It is, thus, certain that if the Plaintiff had this knowledge it could modify its own prices, using the information to its benefit.

In conclusion, the Court decided that in this particular case, the exchange of information is a concerted practice susceptible to affect trade between Member-States on the grounds established in Article 101 TFEU. This provision prevails over National Law, where Article 290 (2) of the Commercial Societies Code establishes shareholders' right to information.