



Judgment of the Judicial Court of Lisbon (Tribunal Judicial da Comarca de Lisboa – Instância Central de Lisboa – 1ª Secção Cível – J20)

PROCESS: 1774/11.9TVLSB

DATE: 03/10/2016

THEMATIC: ABUSE OF DOMINANT POSITION

LEGISLATION AT ISSUE: ARTICLE 10 LAW NO. 18/2003 [PRESENT, ARTICLE 11 LAW NO. 19/2012]; ARTICLE 82 TCE [PRESENT, ARTICLE 102 TFEU].

DECISION SUMMARY:

I – It has been concluded that the Plaintiff failed to prove the elements necessary to demonstrate a negative margin between the wholesale price and the retail price or even a positive margin but insufficient to meet the costs, and, as a consequence, it failed to demonstrate that the provision of the (wholesale) price established in clause 7 of the agreement translated a margin squeeze. Therefore, the Plaintiff failed to demonstrate that the immediate object of the price clause breaches the rules of competition law.

II- The obligation not to abuse of a dominant position is not a contractual obligation and its infringement is not a legal ground to an action for contractual liability, laid down in Article 798 of the Portuguese Civil Code.

PROCEEDINGS' RELEVANCE IN COMPETITION LAW ENFORCEMENT:

"Optimus Comunicações, S.A.", now called "Nos Comunicações, S.A.", sued "Portugal Telecom, SGPS, S.A.", now called "Pharol, SGPS, S.A.", and "PT Comunicações, S.A.", now called "Meo - Serviços de Comunicações e Multimédia, S.A.", for the sum of €11.273.000,00 plus interest, for the damages caused by the alleged abuse of their dominant market position.

In 2000, the Defendant "Portugal Telecom" launched a contractual offer for access to services and basic telecommunications network (broadband data transmission over its telephone lines) for other operators, called "ADSL.PT Network" ("Rede ADSL.PT"). In March 2001, the Plaintiff started to use this network access service, after the conclusion of a non-written "ADSL.PT Network" service agreement with "Portugal Telecom".

In July 2002, the "Portugal Telecom Group", through "Telepac", launched the first broadband offer under the "SAPO ADSL.PT" brand. At that moment, the Plaintiff began to lose customers and decided to launch a commercial broadband offer for residential customers ("Clix Turbo") in September 2002, using the new access service provided by the Defendant "Portugal Telecom".

Although the price charged by "Portugal Telecom" to the Plaintiff was higher than the price charged to "Telepac" (through discounts that only "Telepac" benefited from), the Plaintiff was obliged to accept the conditions, otherwise it would disappear from the market. According to the Plaintiff, it operated with negative margins due to the contractual conditions imposed by the Defendants and this practice was considered an abuse of dominant position, which was



corroborated by the Portuguese Competition Authority, which in August 2009 imposed sanctions to the Defendants for this anticompetitive practice.

The Plaintiff requested the annulment declaration of the price clauses, the refund of the money overpaid between September 2002 and April 2005, in the amount of €2,761,000.00 plus interest, and the compensation for the damages caused by the abuse of dominant position, in the amount of €8,603,000.00 plus interest.

REGARDING THE RELEVANCE FOR COMPETITION LAW ENFORCEMENT, THE COURT ESSENTIALLY EXAMINED THE FOLLOWING QUESTIONS:

- (1) IDENTIFICATION OF THE PRICE CLAUSE (CLAUSE 7 - "PRICES OF THE SERVICE" AND ANNEX 6 - "PRICES AND DISCOUNTS" OF THE "ADSL.PT NETWORK" OFFER);
- (2) COMPATIBILITY OF THE IMMEDIATE OBJECT OF THE PRICE CLAUSE WITH THE RULES ON THE ABUSE OF DOMINANT POSITION BY MARGIN SQUEEZE;
- (3) SINCE THE PRICE CLAUSE WAS CONSIDERED NULL, WHETHER THE OVERPAID PRICE (PAID BETWEEN SEPTEMBER 2002 AND APRIL 2005) SHOULD BE REFUNDED BY THE DEFENDANT "PORTUGAL TELECOM";
- (4) WHETHER THE OBLIGATIONS NOT TO ALTER UNLAWFULLY THE CONTRACT AND NOT TO USE THE CONTRACT AS A VEHICLE TO ABUSE THE DOMINANT POSITION AROSE FROM THE CONTRACT, AND WHETHER THE BREACH OF SUCH OBLIGATIONS RESULTED IN THE OBLIGATION TO COMPENSATE THE AUTHOR FOR DAMAGES; AND
- (5) IN CASE OF A NEGATIVE ANSWER TO THE PREVIOUS QUESTION, WHETHER THIS WAS A CASE OF NON-CONTRACTUAL LIABILITY.

(1) Concerning the price clause, the Court considered that the discounts provided for in the contractual offer of "PT ADSL Network" (and that only "Telepac" benefited from) depended on the operator's number of final customers, the period of validity of the Agreement with "Portugal Telecom", and the conclusion of such agreement in writing, which was not the case with the Plaintiff. Accordingly, the Court held that if the discounts were not part of the contract, they did not have any legal existence in the relationship between the parties and, therefore, there were no legal grounds to declare them null.

(2) About the compatibility of this clause with the rules of competition law, the Court made the following considerations:

- a) Taking into account that "Portugal Telecom, SA" and "PT Comunicações, S.A." were 100% owned by Portugal Telecom, SGPS SA" and "Telepac, S.A." was 100% owned by "PT Comunicações, S.A.", those four undertakings were a single undertaking, under the terms and for the purposes of Article 2(2) and Article 10(1)(b), first line, of Law No. 18/2003 (Law on Competition in force at the time of the facts);
- b) This single undertaking was vertically integrated in the market, since "Portugal Telecom" operated in the wholesale market and "Telepac" operated in the retail market;
- c) Portugal Telecom's relevant product market was defined as follows: (i) on the one hand, the upstream/wholesale market for access to the "Portugal Telecom" network and, in particular, the "ADSL Network .PT ", which aimed to enable other companies to offer



broadband Internet access services to final consumers; and (ii) on the other hand, the downstream/retail market for the provision of broadband Internet access services, based on the basic telecommunications network and, more specifically, the "ADSL.PT Network" platform.

- d) The relevant geographic market of Defendant "Portugal Telecom" extended to the whole national territory, inasmuch as the Defendant's basic telecommunications network had national coverage;
- e) "Portugal Telecom" was in a dominant position in the wholesale market because it was the sole supplier of broadband access to operators and the commercial terms and conditions of the "ADSL.PT Network" offer were, until June 2003, freely formed by the Defendant, without intervention of the sector regulator.

Faced with this factuality, the Court was required to state that the author had no alternative but to use the "ADSL.PT Network" platform in order to enter the retail market for the provision of broadband Internet access services.

(3) After the Plaintiff's revenues and costs, the Court concluded that it did not prove a negative margin between the wholesale price and the retail price, nor a positive margin but insufficient to cover the costs. Consequently, the Court considered unfounded the claim for the refunding of the price that the Plaintiff allegedly overpaid for the service.

(4) Regarding the contractual liability of the Defendants, the Court stated that the duty of non-abuse of a dominant market position is a general duty of abstention and respect and not a contractual duty. For that reason, its breach could not lead to contractual liability, under article 798 of the Portuguese Civil Code.

(5) According to the Court, the compensation of damages could not be justified under non-contractual liability, because the abuse of dominant position by margin squeeze was not proved by the Plaintiff.

As a result, the Court ruled in favour of the Defendants and considered the present action totally unfounded.