LISBON APPEAL COURT

PROCESS: 686/2009-6
REDACTOR: GRANJA DA FONSECA
DATE: 05/03/2009

THEMATIC: CARTELS | AGREEMENTS, CONCERTED PRACTICES AND DECISIONS BY ASSOCIATIONS OF UNDERTAKINGS
LEGISLATION AT ISSUE: ARTICLE 1, NOS. 1 AND 2 OF DECREE-LAW NO. 370/93 OF 29TH OCTOBER, ARTICLE 4, NOS. 1, POINT E), AND 2 OF LAW NO. 18/2003 OF 11TH JUNE.

DECISION SUMMARY:

1 – "C" is a limited liability company, given it aims at making profit by providing a certain activity (animal slaughter, industrialization and commercialization of derived product), and that was what its founding shareholder's intended it to be, which shows "C" is not a collaborative company.
2 – Shareholders agreements are covenants signed by all or some of the shareholders regarding the functioning of the company, exercising company rights or shares, or stocks transactions.
3 – Thus, neither the company's management and nor its supervision can be regulated in a shareholders agreement, which is why clauses intended to control company administrators' conduct and supervision power are forbidden by law and must be declared null.
4 – To assess whether a certain shareholders agreement clause constraints, limits or determines management's exclusive powers and respects article 17, no. 2 of the Portuguese Commercial Company Act, the competence of the company's governing bodies must be also assessed.
5 – Regarding limited companies, managers are in charge of the company's management and representation, practicing the necessary or convenient acts to fulfil the company's statutory goals in accordance with the shareholders' resolutions, which means the company's management encompasses all the company's material and legal actions which are not legally restricted to other company bodies.
6- The pricing table in Clause 1 of the shareholders agreement is null and void because it not only violates free competition legislation, but also overlaps the management body's exclusive competence.
7 – Clause 2 of the shareholders agreement is also null and void for the same reason – for overlapping the management body's exclusive competence area.
8 – Clause 9 of the same agreement is also null and void for clearly violating article 17, no. 2 and article 64, both of the Portuguese Commercial Company Act.
9 – The Plaintiff's conduct does not constitute a *venire contra factum proprium* type of abusive use of entitlement when invoking the nullity of some of the shareholders agreement clauses several years after they signed it, even though they were co-signatures.

PROCEEDINGS' RELEVANCE IN COMPETITION LAW ENFORCEMENT:

The judicial proceeding in hand was based in a shareholders agreement between a slaughterhouse's shareholders and a meat processing company. Such agreement set out rules regarding shareholder's votes in general assemblies concerning numerous types of issues.

One of the regulated issues was the price fixing of the slaughterhouse service. Such rule (clause 1) aimed at creating a calculation system to assure equality between the major shareholder (that used to slaughter more animals) and the minor shareholders (that used to slaughter fewer animals).

The rule intended, therefore, to establish maximum price gaps shareholders would be deemed to pay for the slaughterhouse's services, as well as to grant preferential treatment to shareholders in relation to other clients regarding equivalent services.

The Plaintiffs claimed such clause not only infringed national competition legislation, but also jeopardized the management bodies' exclusive area of competence.

Therefore, the Plaintiffs sought certain shareholders agreement clauses (of which they were also signatories) to be declared null and void (including clause 1), besides judicially ensuring that conducts foreseen in those clauses were not put into practice, even in case of annulment.

One of the Defendants claimed the Plaintiffs lacked legal interest to act judicially and that they were procedurally illegitimate; moreover, the lawsuit constituted a *venire contra factum proprium* type of abusive use of entitlement.

Given that the Plaintiffs' claims were deemed well-founded, the Defendant's appeal claimed, regarding what concerns our analysis, clause 1 and the other impugned clauses did not infringe any law, so the First Instance Court had misapplied article 17, no. 2 and 64 of the Portuguese Commercial Company Act and article 335 of the Portuguese Civil Act.

Considering the Defendant's conclusions and remaining evidence, the Court deliberated "(…) the prices determined in light of the shareholders agreement mechanism due by shareholders for company C's services [could] lead to different prices between shareholders and non-shareholders regarding the same services".

Therefore, Lisbon Appeal Court considered there was a Competition Law infringement, according to article 1 of Decree-Law no. 370/93 of 29th October and article 4, no. 1, point e) of Law no. 18/2003 of 11th June, due to the existence of discriminatory sale conditions for equivalent services (according to no. 2 of the same article referenced above as "(…) similar products or services that do not sensitively diverge in their essential commercial characteristics (…)"), which could not be justified by their supply or service costs - in other words, thereby breaching the national provision equivalent to article 101 TFEU.

In view of the considerations above, the Court declared clause 1 of the shareholders agreement null and void according to article 4, no. 2 of Law no. 18/2003, given the prices determined under that clause could lead to different prices for equivalent services, violating the equality principle under Competition Law.