



LISBON APPEAL COURT

PROCESS: 6882/2005-8

REDACTOR: ANTÓNIO VALENTE

DATE: 24/11/2005

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

LEGISLATION AT ISSUE: ARTICLES 2, NO. 1 AND NO. 2, AND 5 OF DECREE-LAW NO. 371/93 OF 29TH OCTOBER;
ARTICLE 4-A, NO. 1 AND NO. 2 OF DECREE-LAW NO. 370/93 OF 29TH OCTOBER

DECISION SUMMARY:

It is an abusive negotiation practice to impose obligations to a supplier without a justifiable compensation or service, or if nothing justifies their large sum.

Thus, a contract is null if a major commercial centre demands its supplier several payments that do not have any objective connection to the supplies.

PROCEEDINGS' RELEVANCE IN COMPETITION LAW ENFORCEMENT:

Regarding two supply contracts set out by Carrefour (Portugal) Sociedade de Exploração de Centros Comerciais, S.A and Orex Dois – Comércio e Representações, Lda., the first filed a lawsuit against the latter seeking compensation.

The claim was grounded on the Defendant's alleged failure to pay the promotional services rendered, besides payment for Carrefour's Centralized Payment integrated services.

The Defendant filed a counterclaim, arguing the Plaintiff had never issued any debit notes regarding such promotional activity, besides having started to be supplied by a Defendant's competitor while the second contract signed was still in force. Therefore, the Defendant claimed there was no room for compensation, since the supply contract, which was the Defendant's service offset, was not maintained in force.

Similarly, the discounts, an investment effort demanded by the Plaintiff so the suppliers could place their products in those commercial centres, depended on the Plaintiff not resorting to other undertaking's supplies, which did not happen.

The First Instance Court deemed both claims partly founded, so the Defendant was sentenced to an € 85,00 compensation, whereas the Plaintiff was sentenced to a compensation of € 50.000,00.

In its appeal, the Plaintiff claimed that it was not contractually obliged to order products from the Defendant. The Court refused such claim, adding that resorting to a Defendant's direct competitor for the supply of products of the same type and nature implied an unlawful unilateral revocation of the contract, given it had clearly precluded the contract's execution, in accordance to article 236 of the Portuguese Civil Code.



The Court also stated promotional services were invoiced to the Defendant – at the same time the contract was revoked – for the opening of a supermarket that would only sell a direct competitor’s products, which constituted a clear abuse of contractual good faith by the Plaintiff.

Regarding the Defendant’s contract nullity claim, it was grounded on the contractual imposition to pay “referencing” and “opening rappel” charges. Evidence proves the Plaintiff demanded the acceptance of that clause to close the contract, even though it did not contemplate any justifiable compensation or service and the demanded amount was too high.

Given such evidence, the Court considered article 2, no. 1, point 7 of Decree-Law no. 371/93 of 29th October and article 4-A, no. 1 and 2 of Decree-Law no. 370/93 of 29th October to be applicable (the national equivalent of article 101, no. 1 of TFEU) because of the contract’s abusive nature, namely for imposing the Defendant to comply with certain obligations without any type of compensation or retribution.

Therefore, the contract would be, in fact, null, according to article 2, no. 2 of Decree-Law no. 371/93 (notwithstanding article 280, no.1 of the Portuguese Civil Code), given the Plaintiff was unable to prove that one of article 5 of that legal diploma’s exemptions was applicable. The Plaintiff was thus sentenced to pay compensation amounting to all the sums the Defendant had paid under those contracts because of the retroactive effect resulting from the contracts being declared void and null, according to article 289, no. 1 of the Portuguese Civil Code.