



## Oporto Appeal Court

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**PROCESS:** 0326904

**REDACTOR:** ALBERTO SOBRINHO

**DATE:** 09/03/2004

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

**LEGISLATION AT ISSUE:** DECREE 371/93 OF 29 OCTOBER (REPLACED BY LAW 18/2003 OF 11 JUNE, THEN REPLACED BY LAW 19/2012 OF 8 MAY)

### DECISION SUMMARY:

1- A commercial concession contract is an innominate contract according to which an independent trader (concessionaire) obliges himself to buy from other trader (licensor) a certain amount of goods from a specific brand to re-sell to general public in a certain geographical area, usually with an exclusivity clause.

2- Restrictive legislation or regulation in general contractual clauses (Decree 446/82 of 22 October) are only applicable regarding clauses that are not previously negotiated and accepted by both parties, where one party simply agrees to comply with a clause previously redacted without the possibility of intervening in its drafting.

### PROCEEDINGS' RELEVANCE IN COMPETITION LAW ENFORCEMENT:

At the center of the proceedings there is a commercial concession contract between the Plaintiff, as a concessionaire, and the Defendant, which obliges himself to *"sell in exclusivity, in its establishment, a certain brand of coffee and to consume a minimum amount monthly"*. For the Plaintiff, the non-compliance with the contract by the Defendant sustains the end of the contract and the activation of the agreed penalty clause.

In the first instance, the Court decided in favour of the Plaintiff, condemning the Defendant to pay 5932,80€, plus interest.

The Defendant appealed, alleging the change of facts, the voidance of the contract and, consequently, the derogation of the Court's decision.

REGARDING THE ALLEGATION OF THE CONTRACT'S NULLITY, OPORTO'S APPEAL COURT DECIDED UPON THE FOLLOWING RELEVANT QUESTIONS RELATED TO COMPETITION LAW ENFORCEMENT:

- (1) DETERMINATION OF THE EXISTENCE OF AN AGREEMENT OR CONCERTED PRACTICES BY UNDERTAKINGS:
  - a. BY ANALYSING THE EXCLUSIVITY CLAUSE
  - b. BY ANALYSING THE MINIMUM AMOUNT OF PURCHASE CLAUSE

Considering the decisions by both the Judicial Court and the Appeal Court, there is a consensus upon the rejection of the argument implying there is a violation of competition law.



The Court enlightens that competition law (as explained in Decree 371/93 of 29 October, in force on the date of the signing of the contract), forbids agreements and concerted practices amongst undertakings which may *“prevent, forge or restrict competition widely or in a more restricted area of the national market”*. Restrictive practices prohibition aims *“to contribute to the creation of freedom of both supply and demand regarding market access to balance trade relations between all economic agents, to strengthen competitiveness and to protect consumer’s interests.”*

After clarifying the objectives of competition law, the Court underlined that antitrust practices could, in the abstract, exist, which is why, in order to determine the existence of such situation, it was necessary to evaluate the circumstances concretely.

Regarding the alleged voidance of the contract, the Court decided that the contract should remain valid, since, when the Defendant signed the contract, it was obliged to purchase only the Plaintiff’s products, not being allowed to sell other competitors’ products.

Considering competition law, the Court concluded that: *“Neither the exclusivity clause nor the quota clause restrict nor limit the free market game; therefore, there is no antitrust practice”*.