Judgment of the Supreme Court of Justice

PROCESS: 3855/05.9TVLSB.L1.S1.
REDACTOR: GRANJA DA FONSECA
DATE: 17/05/2012

THEMATIC: CARTELS| AGREEMENTS, CONCERTED PRACTICES AND DECISIONS BY ASSOCIATION OF UNDERTAKINGS
LEGISLATION AT ISSUE: ARTICLE 85 (1) OF CE TREATY (PRESENT ARTICLE 101 TFEU); LAW NO. 18/2003, OF 11 JUNE; ARTICLES 6 AND 8 OF REGULATION (EC) NO. 1984/83

DECISION SUMMARY:

I - The final decision on the contract expiry, which is the subject of the present case, has been definitively ruled out in the preliminary order and the judicial power in this matter is exhausted.
II - But even if that were not the case, Regulation (EC) No. 1984/83 of 22/06/1983, of the Commission, could not be applied to the present proceedings since the contract in question did not have the potential to affect, due to its nature and the business's volume involved, the market between the Member States of the European Union by restricting its influence to the national market.
III - Furthermore, this contract and all other contracts of a similar nature that were concluded by the Defendant with points of sale in the "XXX" sector are not subject to the application of Law No, 18/2003, of 11 June, since, in order for those agreements to subsume the impositions of such law, they must have as their object or effect the prevention, distortion or restriction of competition in whole or in part of the national beer market, which is not the case in these contracts concluded by the Plaintiff, in view of the fact that they are of little importance to the national beer market and cannot, therefore, have a significant effect on competition in that market.
IV - However, even if it were understood that this contract was under Community law, it has not been shown that such contract could be a restriction of free competition; therefore, there is no nullity to it.
V - The evidence produced by the Plaintiff related to the non-fulfilment of the non-acquisition of the contracted litres cannot be censored by the Supreme Court of Justice, since there is no provision requiring expressly specific evidence for this event, nor the requirement of a document.
VI - On the other hand, none of the facts that the Defendant intends to see re-examined offends the express provision of the law that establishes the force of certain evidence.
VII - There is also no reason to refer the case to the court *a quo*, since there are no contradictions in the decision on the facts.
VIII - Due to the fact that the agreement was in force at the time the Defendant ceased to acquire the Plaintiff's draft beer and started to acquire barrelled beer of the "Y" brand, the Plaintiff ended the contract effectively.

IX – Taking into consideration that the compensation for the contract resolution was required and the Defendant had a period of ten days, from the receipt of the resolution letter, for the payment of the penalty clause, the Defendant is in default since the end of such period.
X - In the light of the terms of the proceedings established by the Plaintiff – invoking the resolution of the contract and the payment of the corresponding compensation due as a penalty clause, as agreed by the parties –, it is not apparent that the Defendant has, directly or indirectly, pleaded the reduction of the clause at issue. Thus, it must be understood that the disproportionality of the penalty clause, insofar as it can be understood as a request for its reduction, is a new question invoked in the course of the appeal.
XI - If the alleged disproportionality of the penalty clause was a new issue for the Lisbon Court of Appeal, it will also be a new issue for the Supreme Court of Justice. Therefore, it is not necessary to analyse whether the clause is manifestly excessive or disproportionate. There is no ground for reducing the compensation.
XII - Therefore, since Article 812 of the Portuguese Civil Code is not applicable to the present case, it cannot be claimed that the interpretation given to this article breaches the principle of proportionality, enshrined in Article 18 of the Portuguese Republic Constitution.

PROCEEDINGS' RELEVANCE IN COMPETITION LAW ENFORCEMENT:

"CC", a company currently incorporated in company "AA"[1] (Author and Appealed in the present case), entered into an agreement with "BB" (Defendant and Appellant in the present case), on 21/04/1995, under which it was obliged, on the one hand, to purchase from any supplier certain products manufactured or traded by "CC", for resale at the establishment of beverages called "O Díficil da Alameda" and, on the other hand, not to purchase or sell similar products on its premises and to prevent third parties from doing so or to advertise such practice. The contract also entailed the obligation, in case of the commercial business's transfer, to insert a clause in the contract in the same terms, forcing "CC" to deliver a certain amount and 24 barrels of beer per year (free of charge and two per month). This agreement would remain in force until the Defendant acquired 100.000 litres of the stipulated products.

However, since September 2003, the Defendant stopped buying the products and started to trade similar products of competing companies before making up the 100.000 litres contracted. As a result, the Plaintiff ended the contract in February 2004.

The present case was settled by the First Instance Court and an appeal was lodged against that judgment before the Lisbon Court of Appeal. Following this one, a second appeal was lodged before the Supreme Court of Justice, which had the opportunity to examine such exclusivity clause.

The Supreme Court of Justice considered that Regulation (EEC) No. 1984/83, on the application of Article 85 (3) of the Treaty EEC [now Article 101 TFEU] to categories of exclusive purchasing

[1] "Sociedade Central de Cervejas" ["Central Beer Company"].

agreements, is not applicable to the present case because that Regulation was only applicable to contracts under Community Competition Law, which was not the case of the present contract, since it was not able, either by its nature or by the volume of business at issue, to affect the market between the Member States of the European Union.
The Supreme Court of Justice also declared that in the competition law context, the only legislation potentially applicable to this contract would be the Portuguese Competition Act, namely Law No. 18/2003 of 11 June [now Law No. 19/2012]. However, the Supreme Court of Justice concluded that such national legislation was not applicable, since the contract at issue did not have as object or effect the prevention, distortion or restriction of competition on all or part of the national beer market.

In addition, as the Plaintiff only pleaded the breach of the national and European Competition Law and did not provide any evidence to fulfil the conditions for the application of that legislation, the Supreme Court of Justice stated that the contract was not null.

In addition, the Court clarified that, even if the contract in question were under the aegis of European Union law that would not mean that it was an anti-competitive practice. In fact, Article 6 of Regulation (EEC) 1984/83 provided that, as regards beer supply agreements, Article 85 (1) of the EEC Treaty was not applicable to those involving only two undertakings and in which the dealer undertakes before the supplier to buy only from the latter, a related undertaking or a third undertaking which has been in charge of the distribution of its products in exchange of special economic and financial advantages and for the purpose of reselling certain beers or drinks specified in the agreement at a beverage shop specified in the agreement as well.

However, under Article 8(c) and (d) of such Regulation, if the agreement is concluded for an unlimited period or for a period exceeding five years, such inapplicability would be ruled out, insofar as the exclusive purchasing obligation relates to certain beers and other specified beverages, just as if the agreement is concluded for an indefinite duration or for a period of more than 10 years and the exclusive purchasing obligation relates only to specified beers. Therefore, the Supreme Court of Justice concluded that the fact that the exclusivity clause exceeds, due to tacit renewals, the period of five years, does not necessarily constitute an anti-competitive practice and, for that reason, the clause was not null. Consequently, the Supreme Court of Justice dismissed the appeal lodged by the Defendant ("BB").