



## Portuguese Supreme Court of Justice Decision

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**PROCESS:** 178/07.2TVORT.P1.S1

**REDACTOR:** SERRA BAPTISTA

**DATE:** 20/06/2013

**THEMATIC:** ABUSE OF ECONOMIC DEPENDENCE

**LEGISLATION AT ISSUE:** ARTICLE 7 (1) OF LAW NO. 18/2003 AND ARTICLE 81 (3) OF CE TREATY (PRESENT ARTICLE 101)

### **DECISION SUMMARY:**

1. Notwithstanding the primacy of European Union Law over National Law, the truth is Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty on European Union to certain categories of vertical agreements and concerted practices in the motor vehicle sector only applies as European Law when cross-border relations are at stake.

According to Articles 85 and 86 of the Treaty, European Competition Law only regulates competition prohibitions if they are susceptible of affecting commerce between Member States. These legal regulations do not apply to contracts with legal strength in a national geographical area only.

2. If the national court considers that the dispute should be decided on a national law basis, it is not obliged, according to the Treaty, to a preliminary ruling before the CJEU.

3. The commercial concession contract, a consensual contract (article 219 Civil Code) can be understood as a frame-contract which contributes to the emergence of a complex obligation-oriented legal relationship between parties, in which the grantor, undertakes to sell its products to the concessionaire and the concessionaire undertakes to buy from the grantor, for reselling purposes, a certain amount of goods, accepting certain requirements – in what concerns their organization, commercial policy and customer assistance – and submitting to the control and monitoring of the grantor.

The main features of the contract are: (i) bond stability; (ii) obligation to sell products at the responsibility of the grantor; (iii) obligation to acquire at the responsibility of the concessionaire; (iv) obligation to resell; (v) concessionaire's actions on its behalf and responsibility; (vi) autonomy; (vii) exclusivity; (viii) area of practice.

4. The commercial concession contract, being atypical, does not benefit from juridical rules of its own; therefore, although typically social, it should be regulated by the provisions agreed between the parties, and, by analogy, by the regulations stipulated for agencies

5. Resolution is a mechanism used to extinguish the contractual relationship validly created between parties and is activated in a posterior act by one of them. Its basis can be accorded between the parties. The party that wants to activate this mechanism has to plead and prove the basis on which it justifies the unilateral extinction of the contract. This resolution can be effective on an extra-judicial environment, but has to be based on certain grounds. The parties cannot



plead the contract's resolution if no violation of the contract has occurred prior to its exercise, nor any situation contrary to the *bona fide* principle and it can be considered an abuse of law.

6. The illegal resolution of the contract implies the duty to pay the damages caused.

7. Abuse of economic dependence can be understood as a company's illicit use of power (dominance) over another company which is dependent on it for having no equivalent alternative for the supply of the goods or services at issue.

8. Abuse of economic dependence – not directly foreseen in European Union Law, although there are similar figures in other legal orders of Member States – is a prohibited practice which restricts competition. It is laid down in the Competition Act (Article 7 of Law no. 18/2003 of 11 June, revoked by Law no. 19/2012, of 8 May) and refers to situations in which there is an abuse of power (dominance) of one company over another susceptible to affect market functioning or competition structure.

9. Damages related to customers constitute a compensation in favour of the smaller company, after the contract termination, for the profits the bigger company continues to make from the clients that the first raised.

What should be considered are the proportional benefits of the smaller company, the agent, which, in the life of the contract, were common profit and after its termination, will become a unilateral profit in favour of the bigger company.

10. The clause including a waiver of the right to damages in the event of a contract extinction has to be considered null since it constitutes an advanced waiver to the damages of clientele.

11. The court, in the majority of its case law, considers admissible the possibility of non-material damages refunding in what concerns contractual responsibility.

In conclusion, it is possible to acknowledge this type of damages to undertakings.

#### **PROCEEDINGS' RELEVANCE IN COMPETITION LAW ENFORCEMENT:**

During these proceedings there was a concession contract in analysis. The Defendants ended the contract with the Plaintiff, thereby abusing of its economic dependence towards them. The Plaintiff incurred in losses due to the termination of the contract and came to ask for their payment in Court. The Court of First Instance considered the facts proven and the Defendants were condemned to pay for the damages caused. Unsatisfied with the decision, the latter lodged an Appeal before the Oporto Appeal Court. Having found the Defendants' plea unfounded and the Plaintiff's plea partially unfounded, this Court rose the amount to be payed to the Plaintiff for client compensation. Still not resigned as to the Court's decision, both Plaintiff and Defendants pleaded to the Supreme Court of Justice.

THE SUPREME COURT OF JUSTICE ADDRESSED THE FOLLOWING QUESTIONS RELATED TO COMPETITION LAW ENFORCEMENT:

- (1) VALIDITY OF EUROPEAN COMPETITION LAW IN SITUATIONS THAT DO NOT COMPROMISE COMMERCIAL RELATIONS BETWEEN MEMBER-STATES
- (2) DEFINITION OF ECONOMIC DEPENDENCE ABUSE AND *IN CASU* SITUATION ANALYSIS



(1) The Court, confirming previous decisions, acknowledges the primacy of European Union Law over National Law, assuring that Commission Regulation (EC) no. 1475/95 of 28 June 1995, now replaced by Commission Regulation (EC) no. 1400/2002 of 31 July 2002, on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, only applies, as European Law, to cross-border relations between Member-States.

(2) The Court understands Abuse of Economic Dependence as the big undertakings' illegal use of power over small undertakings in a dependent position due to the inexistence of an equivalent offer for the supply of goods or service provisions needed. This is a prohibited practice since it restricts competition, according to Article 7 of Law no. 18/2003.

The Court specifies various characteristic elements of abuse of economic dependence: (i) the abuse of economic dependence only happens when there is a vertical connection between undertakings; (ii) the aggrieved undertaking has to be in a position of economic dependence towards the dominant undertaking, meaning there should be no similar alternative available for the former; (iii) there must have been damaging actions by the dominant undertaking directed to the aggrieved undertaking; and lastly, (iv) the abuse of this economic dependence has to be susceptible to affect market functioning or market competition. In conclusion, the Court found the Defendants' actions illegal.