



Judgment of the Supreme Court of Justice (Supremo Tribunal de Justiça)

PROCESS: 39/2000.L1.S1

DATE: 24/01/2012

REDACTOR: FONSECA RAMOS

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

LEGISLATION AT ISSUE: REGULATION (EC) No. 1475/95, OF 28 JUNE 1995; ARTICLE 85(3) OF THE EEC TREATY [NOW, ARTICLE 101 TFEU].

DECISION SUMMARY:

I) - Since the commercial concession contract is a commercial cooperation and distribution agreement, presupposing integration of organizational efforts for the implementation of goods, stability and continuity – its long-lasting, durable character – assume particular importance, as without them its economic profitability strand would be difficult to achieve.

II) – Compensation for loss of costumers is based on the assumption of the concession contract termination (by analogous application of the legal regime of the agency agreement) and, it has, according to Article 33(1) (a), (b) and (c) of Decree-Law No. 178/86, the following cumulative legal requirements: (i) the concessionaire has raised new customers for the grantor or substantially increased the turnover with existing customers; (ii) the grantor will considerably benefit, after the end of the contract, from the activity carried out by the concessionaire; (iii) and the concessionaire no longer receives any remuneration per contract.

III) – The grounds for compensation for loss of costumers is the idea of justice (and the criterion of its determination is equity), based on the consideration that if the concessionaire has contributed to a significant increase in grantor's number of clients, the grantor will benefit "substantially" from that increase in terms of turnover and, therefore, the concessionaire must be compensated for the effort.

IV) – In the contract at issue, Clause 17 establishes the grantor's right of termination, which is a right that can be exercised *ad nutum*. However, its exercise needs to safeguard the rule of good faith, especially in the case of a long-term contract, as well as a reasonable period of notice for the contract termination. This Clause excludes any compensation, and the parties agreed that the period of notice for the contract termination (two years) could be extended for one more year.

V) – Regulation (EC) No. 1475/95 of 28 June 1995, already replaced by Regulation (EC) No. 1400/2002 of 31 July 2002, concerned the application of Article 85(3) of the EEC Treaty [now, Article 101 TFEU] to certain categories of motor vehicle distribution and servicing agreements where cross-border relationships are involved. Its Article 5 provided the right of the supplier to end the contract by means of a period of notice of at least one year in the event of the need to reorganize all or a substantial part of the distribution network.

VI) – Those Community rules on the motor vehicle distribution sector are not applicable here because the present case is not about cross-border business relationships, but about a contract in a very restricted area of Portuguese territory. On the other hand, that Community legislation



essentially seeks to regulate and discipline competition and, above all, to protect the concessionaires.

VII) – Clause 17 of the contract, which allows the grantor to end the contract in any situation and without the duty to any compensation is a clause that accentuates the congenital fragility of the concessionaire, with the encumbrance of disregarding the posterior analysis of a situation which may breach the rules of good faith. Therefore, it should be considered null for violating cogent precepts and also equivalent to an early waiver of the concessionaire's right, regardless of any degree of guilt, thereby breaching Article 809 of the Portuguese Civil Code.

VIII) – Considering that client compensation is established on grounds of equity, the long period of cooperation of the concessionaire in the structure and commercial organization of the grantor must be taken into account. In the present case, the concessionaire cooperated with the grantor for about 18 years, where the former went through periods of greater or less consumerist glow, with the inherent repercussion in the level of sales of motor vehicles and in the investments made by the concessionaire to reach the goals targeted in the contract. The economic increase (clients) that the grantor may benefit from with the contract termination should also be considered.

PROCEEDINGS' RELEVANCE IN COMPETITION LAW ENFORCEMENT:

The Plaintiff, "AA - Sociedade de Automóveis da Maia, Lda.", is engaged in the commercialization of motor vehicles, automotive parts and accessories, and in the repair of these vehicles. The Defendant, "Renault Portuguesa - Sociedade Comercial, S.A.", is engaged in the import of *Renault* motor vehicles, automotive parts and accessories.

The Plaintiff, by concession contract concluded with the Defendant on 1981, acquired facilities and equipment and admitted staff. Afterwards, the parties concluded other contracts and it was established that the Plaintiff would commercialize *Renault* motor vehicles and accessories, acquired from the Defendant, and would provide assistance services to these vehicles, operating exclusively in Maia (Porto, Portugal). It was also agreed between the parties that the Plaintiff could sell in the Oporto area.

The last contract between the Plaintiff and the Defendant was concluded for an undetermined period, with the possibility of resolution at any time, provided that the one-year notice of termination of the contract was respected.

On 30 July 1997, the Defendant communicated to the Plaintiff the resolution of the contract effective from 31 July 1999. On 10 April 2000, the Plaintiff brought proceedings before the Judicial Court of Lisbon against the Defendant, seeking for payment of compensation for the loss of costumers (in the amount of about € 2,564,392.23, plus interest), under the terms of Article 34 of Portuguese Decree-Law No. 178/96, of 3 June, on grounds of unjust enrichment.



The Judicial Court of Lisbon dismissed the Plaintiff's plea. Faced with that decision, the Plaintiff lodged an appeal before the Lisbon Court of Appeal, which annulled that decision and ordered the Defendant to pay the sum of € 1000,000.00, plus interest, to the Plaintiff.

Both parties lodged an appeal regarding the Lisbon Court of Appeal's judgment before the Supreme Court of Justice. The appeal of the Plaintiff was grounded on the amount of compensation and the Defendant's appeal was based on the argument that no costumers compensation was due, since, on the one hand, the parties had agreed, in the contract, that no compensation would be payable on termination of the contract and, on the other hand, that this compensation would be contrary to European Union Law.

The Supreme Court of Justice examined, in the context of Competition Law, the application of Regulation (EC) No. 1475/95, of 28 June 1995 (in force at the time of the facts), on the application of Article 85(3) of the EEC Treaty [now Article 101 TFEU] to categories of motor vehicle distribution and servicing agreements where cross-border relationships are involved. Article 5 of that Regulation provided that the supplier was entitled to terminate the contract by giving at least a one-year notice in case of the need to reorganize all distribution network or a substantial part of it. Consequently, the Defendant claimed that the exclusion of compensation was aligned with that legislation.

Nevertheless, the Supreme Court of Justice pointed out that European Union rules on the motor vehicle distribution sector were not applicable because, first of all, in this case there were no cross-border business relationships at stake, but a contract in a very restricted Portuguese territorial area.

In addition, the Supreme Court of Justice stated that such Regulation, which allowed for exemption from certain rules and procedures – which were not allowed, in the name of the competition protection in the internal market – was aimed at regulating competition and protecting traders.

Therefore, since Competition rules were not applicable and customers compensation could not be precluded in advance, because it could virtually affect the weaker contractual party and, as such, have the potential to undermine the rules of good faith and the contractual balance, or provide the grantor an unjust enrichment, the Supreme Court of Justice concluded that such EU legislation was not applicable in the present case. The Court maintained the condemnation of the Defendant to pay the sum set by the Lisbon Court of Appeal.