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(Announcements)

COURT PROCEEDINGS

COURT OF JUSTICE

Request for a preliminary ruling from the Tribunal da Relação de Lisboa (Portugal) lodged on 26 May 2021 — Autoridade da Concorrência EDP — Energias de Portugal, S.A. and Others

(Case C-331/21)

(2021/C 452/02)

Language of the case: Portuguese

Referring court

Tribunal da Relação de Lisboa

Parties to the main proceedings

Applicants: Autoridade da Concorrência, EDP — Energias de Portugal, S.A., EDP Comercial — Comercialização de Energia, S.A., Sonae Investimentos, SGPS, S.A., SONAE MC — Modelo Continente SGPS, Modelo Continente Hipermercados, S.A.

Other party: Ministério Público

Questions referred

1. Must Article 101 TFEU, on which Article 9 of the NRJC (Law 19/2012 of 8 May 2012) is based, be interpreted as meaning that it permits the classification of a non-competition clause such as those contained in clauses 12(1) and 12(2) … of the association agreement as an agreement restrictive by object which is concluded between an electricity supplier and a food retailer operating hypermarkets and supermarkets with a view to granting to customers, who sign up to a given energy tariff plan made available by the electricity supplier in mainland Portugal and are at the same time holders of a loyalty card offered by the food retailer, discounts which can be used only to buy products in the outlets operated by that retailer or by companies linked to it, in the case where that agreement includes other clauses providing that its purpose is to promote the pursuit of the activities carried on by the participating companies …and the benefits to consumers have been established … but no analysis has been carried out of the specific harmful effects which the aforementioned clauses 12(1) and 12(2) have on competition?

2. May Article 101(1) TFEU be interpreted as meaning that an agreement, which prohibits the pursuit of certain economic activities and provides for an alleged sharing of markets between two undertakings, may be regarded as being restrictive of competition by object, in the case where it is concluded between two entities which do not actually or potentially compete with each other on any of the markets affected by that obligation, even though the markets affected by that obligation may be regarded as liberalised or without insurmountable legal barriers to entry?

3. May Article 101(1) TFEU be interpreted as meaning that an electricity supplier and a food retailer operating hypermarkets and supermarkets which have concluded the aforementioned agreement with each other with a view to promoting each other's business activities and increasing each other's sales (and, in the case of the food retailer, the sales of companies in whose capital one of its parent companies has a majority shareholding) must be regarded as potential competitors, in the case where the food retailer and the aforementioned companies linked to it were not

engaged in the activity of electricity supplier, either on the geographical market in question or on any other market, at the time when the agreement was concluded, and it has not been shown in the proceedings that they intended to engage in that activity on that market or that they had taken any steps with a view to doing so?

4. Does the answer to the previous question remain unchanged if another company in whose capital a majority interest is held by a parent company of the food retailer that is a party to the agreement (where neither of those two entities has, however, been charged or convicted by the national competition authority or been a party to the proceedings before this court), which did not fall within the subjective scope of the non-competition obligation, held a 50 % interest in a third entity which pursued in Portugal activities in connection with the marketing of electricity that came to an end three and a half years prior to the conclusion of the agreement as a result of the dissolution of that entity?

5. Does the answer to the previous question remain unchanged in the case where the retailer that is a party to the agreement produces electricity via its mini-generation and micro-generation facilities on the roofs of its outlets, although it delivers all of the energy produced, at regulated prices, to the last-resort trader.

6. Does the answer to the fourth question remain unchanged in the event that the retailer that is a party to the agreement, eight years prior to the date thereof, concluded with a third party operating as a liquid fuel distributor, for the purpose of granting cross-discounts, another commercial cooperation agreement (still in force on the date of the former agreement) relating to the purchase of those products and of products sold in the retailer's hypermarkets and supermarkets, in the case where the undertaking that is the other party to the agreement, in addition to marketing liquid fuels, also markets electricity in mainland Portugal, and it has not been shown that, at the time when the agreement was concluded, the parties had any intention of extending that contract to the marketing of electricity or had taken any steps with a view to doing so?

7. Does the answer to the fourth question remain the same in the event that another company in whose capital a majority interest is held by a parent company of the food retailer that is a party to the agreement (where neither of those two entities has, however, been charged or convicted by the national competition authority or been a party to the proceedings before this court), which did not fall within the subjective scope of the non-competition obligation, produced electricity in a cogeneration facility, although it delivered all of the energy produced, at regulated prices, to the last-resort trader?

8. If the foregoing questions are answered in the affirmative, must Article 101(1) TFEU be interpreted as meaning that a clause may be regarded as being restrictive by object, where it prohibits such a food retailer, during the term of the agreement and in the year immediately thereafter, from pursuing activities in connection with the marketing of electricity, either by itself or through a company in whose capital a majority interest is held by one of its parent companies, and which clause is the subject of proceedings in the territory covered by the agreement?

9. Can the concept of 'potential competitor' for the purposes of Article 101(1) TFEU, Article 1(1)(c) of Commission Regulation (EU) No 330/210 ([1]) of 20 April 2010 on the application of Article 101(3) [TFEU] to categories of vertical agreements and concerted practices and paragraph 27 of the European Commission's Guidelines on Vertical Restraints (OJ 2010 C 130, p. 1) be interpreted as meaning that it includes an undertaking, bound by a non-competition clause, which is present on a product market that is completely separate from that of the other party to the agreement, in the case where the documents in the case file of the dispute brought before the national court contain no specific indication (such as projects, investments or other preparations) that, before and in the absence of that clause, the undertaking in question might enter the other party's market in the short term, and it has not been shown that, before and in the absence of that clause, that undertaking was perceived by the other party to the agreement as a potential competitor on the market concerned?

10. May Article 101(1) TFEU be interpreted as meaning that the mere fact that an association agreement, concluded between an undertaking engaged in the marketing of electricity and an undertaking engaged in the retail sale of food and non-food products for household consumption for the purposes of the cross-promotion of their respective activities (in which, inter alia, the first undertaking grants to its customers discounts on their electricity consumption which the second undertaking deducts from the price of the purchases made by such customers in its retail outlets), contains a clause whereby both parties undertake not to compete with each other or to conclude similar agreements with each other's competitors, means that the purpose of that clause is to restrict competition within the meaning of Article 101(1) TFEU, even if:

— the temporal scope of the clause in question (one-year term of the agreement plus one year) coincides with the period, laid down in the same agreement, during which the parties are not authorised to use business secrets or know-how acquired in the course of implementing their association in projects with third parties;

— the geographical scope of the clause is confined to the geographical scope of the agreement;

— the subjective scope of the clause is confined to the parties to the agreement, to undertakings in whose capital they hold a majority interest and to other undertakings in the same group which also own or operate retail sales outlets falling within the scope of that agreement;

— the subjective scope of the clause excludes the vast majority of the companies belonging to the same economic group as the parties, which, in consequence, are not bound by the clause and may compete with the other party to the agreement during and after the term of that agreement;

— the undertakings subject to the non-competition clause are present on completely separate product markets, and it has not been shown that, at the time when the agreement was concluded, they had pursued any projects or plans, made any investments or taken any other steps with a view to entering the other party's market?

11. Must the concept of 'vertical agreement' for the purposes of Article 101(1) TFEU, Article 1(1)(a) of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) [TFEU] to categories of vertical agreements and concerted practices and paragraph 25(c) of the European Commission's Guidelines on Vertical Restraints (OJ 2010 C 130, p. 1) be interpreted as meaning that it includes an agreement exhibiting the characteristics described in the foregoing questions, in which the parties are present on completely separate product markets and it has not been demonstrated that, prior to and in the absence of the agreement, they undertook any projects, investments or plans with a view to entering the other party's product market, but in which each party, for the purposes of that agreement, makes its commercial networks, sales teams and know-how available to the other party in order to promote, secure and grow the other party's customer base and business?

([1]) OJ 2010 L 102, p. 1.

Request for a preliminary ruling from the Supremo Tribunal Administrativo (Portugal) lodged on 5 July 2021 — Instituto do Cinema e do Audiovisual, I.P. v NOWO Communications, S.A.

(Case C-411/21)

(2021/C 452/03)

Language of the case: Portuguese

Referring court

Supremo Tribunal Administrativo

Parties to the main proceedings

Appellant: Instituto do Cinema e do Audiovisual, I.P.

Respondent: NOWO Communications, S.A.

Questions referred

1. Is Article 10(2) of Lei n.º 55/2012, de 6 de setembro (Law No 55/2012 of 6 September 2012), if interpreted as meaning that the fee for which it provides is to be used exclusively to finance the promotion and dissemination of Portuguese film and audiovisual works, liable to give rise to indirect discrimination against the provision of services between Member States as compared with the corresponding national provision of services, inasmuch as it makes the provision of services between Member States more difficult than the purely domestic provision of services within a Member State, thus infringing Article 56 TFEU?

2. Might the answer to be given to the first question referred be altered by the fact that other Member States of the European Union operate schemes which are identical or similar to that provided for in Law No 55/2012?