

DRIVING, PETROL and BANKING

A Report on EU Competition Litigation from Portugal before the European Court of Justice.

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RAPPORTEUR for PORTUGAL

INTRODUCTION

Professor Barry Rodger from Strathclyde Law School, in Glasgow, challenged Academics across Europe to participate in an ambitious project. The aim was to chart all the article 177 (234) TEC cases in relation to competition and State Aid considering not only ECJ jurisprudence but more importantly, ascertaining what happened to individual cases when they returned to the national court.

This is a *work in progress* version from the Portuguese Rapporteurs. A contribution that will be shortly published in English within a comprehensive report, including contributions from all other participants.

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Analysis of Cases

C-60/91 - C-30/92 - C-326/95 & C-66/97 of The European Court of Justice

I

OBJECTIVE

1. The objective of this global analysis is to **chart all the 177/234 cases in relation to competition/State aid**, and consider not only the ECJ jurisprudence, but more importantly to ascertain what happened to the case when it returned to the national court, did the case simply settle and there was no final judgment or how the national court did interpret and apply the ECJ's ruling.

2. Circa 150 cases across 13 Member States.

II

METHODOLOGY

3. Since the first and inevitable step is to gather the cases on which one will work, we have a first remark regarding the Portuguese system: **lack of a satisfactory national database**.

While it has been very simple to access the ECJ decision on the cases (we were given the EU reference and EU search engines are very effective), it is next to impossible to retrieve the Portuguese file.

4. The first problem is that the EU decision, does identify the national court involved in these episodes, but makes no reference to the number attributed to the cases within the national system, and under which they are filed.

5. The second problem is that national (electronic) databases cover material related to cases occurring only after the year 2000/2001 if you are looking for a specific Link between EC cases and national cases.

Portugal joined the EEC in 1986.

We have 14/15 years unaccounted for.

We are currently searching the archives of both Ministry of Justice (MJ) and Ministry of Foreign Affairs (MNE).

The GRIEC (Cabinet of International Affairs) in the Ministry of Justice has a non-exhaustive list of national cases subject to an ECJ reference that has been randomly drawn up. It dates from the year 2000/2001 on.

Furthermore and as an example, the Tribunal Cível da Comarca de Lisboa allegedly has a database that covers all cases filed at this court since 1994. By punching in the names of the parties involved, you are supposed to find the national numbering. In our case, and regarding the Banco de Fomento file we had to go back 3 times before the system gave us a suitable answer.

Another factor of difficulty is that each court seems to have its own rules and procedure for creating (or not creating) databases.

There is a database in Portugal at www.dgsi.pt that lists **recent** decisions of Courts of appeal – called Tribunais da Relação and all Supreme Courts (more or less the last 10 years). It is however not an entirely reliable database because it is not, in our opinion, Comprehensive.

6. The answer to these problems is through the **physical presence of the Rapporteur in the paper archives** of the national courts involved, and looking there for the **names of the parties**, through the examination of hundreds of national files covering approximately two years prior to the ECJ's preliminary ruling.

Another serious risk is that by now (2005) some of the **originals of national files may have been exterminated**, as there is a period of 5 years after which cases considered of a “non serious” nature (as was the Batista Morais case) are materially destroyed -irrespective of the fact that they have been the object of a preliminary reference to the ECJ-.

Costs are, or may be, another obstacle to thorough consultation of the national file. National files have, on average circa 300 pages. Xerox copies at the court's archives stand at 0.78 Euros per page. The rapporteur may, in certain cases obtain the so-called “*confiança do processo*” that is to be entrusted with the file in order to make a private copy elsewhere. The authorization for this depends on a discretionary decision of the head of unit of the archives, and may cost 84 Euros or nothing at all, depending on the court (we are not sure if there is a written rule for these cases).

7. Another way is by contacting the **Portuguese lawyers, academics or agents** named in the preliminary ruling.

Curiously we have come to know that famous names, called specifically in order to put pressure on the judge to refer the case to ECJ, or that intervene by submitting

written statements to the ECJ (on behalf of one of the parties or the Portuguese Republic), usually abandon the procedure once that has been managed, and can tell us little, or nothing, about the cases' final stages as they were no longer involved.

Lawyers involved in these cases MAY be contacted directly. WETHER they are going to be enthusiastic about it is another matter. We were fortunate because Mr. Manuel Martins was happy to cooperate and indeed helped us .

8. Help may also turn up under the **“Annotation of Judgements” reference stored in the ECJ's website**, nonetheless, in our particular situation, 3 references turned up for case C-60/91, 1 reference (in Danish or Dutch) for case C-39/92, and case C-66/97 is altogether not mentioned.

8.1 On September 29th 2005, Lisa Lernborg, a rapporteur for another Member State provided us with a precious specification. **The ECJ Directorate, Library, Research and Documentation, in Luxembourg**, can quickly provide researchers with the national reference of cases on which only the European reference is known: Contact nathalie.darche@curia.eu.int .

9. Concerning the information that Barry Rodger needed from the Portuguese rapporteur, we organized the data we found into a Table for each separate case. Each Table reflects the points mentioned in the eleven (11) point analysis described in our early exchanges of e-mail.

We have also written up introductions to all three cases, they are of different lengths due to the different complexity of the individual case concerned.

III

WORK IN PROGRESS

To all effects we consider the reports submitted as Drafts. We are Now expecting your comments and further specifications.

Lisbon 30th September 2005

C-60/91¹

Introduction

C-60/91 Portuguese Republic v José António Batista Morais

Whose internal national numbering at first instance is 495/90, Tribunal criminal de Loures, 2ª secção, 4º juízo and at second instance is 1144/90, Tribunal da Relação de Lisboa, 5ª secção.

In this case, the Tribunal da Relação de Lisboa, Court of Appeal of Lisbon (hereafter Relação) referred for a preliminary ruling four questions concerning the compatibility with EC Law of certain national restrictions on the provision of driving instruction.

The reference was made in the course of an appeal to the Relação against the decision of the local court of Loures, in which Mr. Morais was held to have infringed article 7 (1) of Decree-Law 6/82 of 12 January 1982 (hereafter DL) and ordered to pay a fine of 100 Euros.

Mr. Morais was a driving instructor in a school established in Lisbon and was charged with giving lessons on the motorway in a municipality adjoining Lisbon. Portuguese legislation makes it an offence to give driving lessons in a municipality other than that in which the driving school is established.

¹ The Tribunal Criminal de Loures, court of first instance where this case took place, is undergoing an extensive reorganization of its archives and records.

Curiously enough, even though we know through the ECJ's decision, that it was in Loures that the proceedings began, there is no available record, at this court of first instance of a case whose parties are named **Batista Morais v Ministério Público**.

At the court of second instance, Tribunal da Relação de Lisboa, there is a record of the date on which an appeal regarding a first instance decision of a case called Batista Morais v Ministério Público was registered.

The date on which the case was assigned to the 5th chamber of the Tribunal da Relação was **October 9th 1990**.

Data from the ECJ ruling gives us the period during which the judges suspended the proceedings while waiting for the ECJ's decision **10.11.90 until 19.03.92 (13 months)**.

The date on which the court of second instance's final decision was delivered is probably available at the Tribunal da Relação. The paper file is not.

Supposedly, after the second instance's decision, the paper file would have returned to the archives of the Tribunal Criminal de Loures. There is no record of it ever having arrived there. No one seems to know where the paper file is presently. It is likely that it may have been physically exterminated.

In the absence of suitable data, in order to draft this report we used:

From the European Court Reports (ECR),

The ECJ Decision on Case C-60/91; the Advocate General's Opinion; the Report for the Hearing.

From the ECJ's website,

we found a reference about a Portuguese comment of this ECJ decision written by Ana Maria GUERRA MARTINS, Colecção Divulgação do Direito Comunitário, Ministério da Justiça.

From the Tribunal da Relação.

The prosecutor to whom this case was at the time assigned, at the Tribunal da Relação (court of second instance) Maria Helena Delgado António, generously made available the allegations she sent on behalf of the Portuguese Republic to the ECJ.

Cronograph.

I

<u>1989</u>	Mr. Morais is found giving driving lessons on a motorway in Loures
<u>1990</u>	1 st instance final decision (Tribunal criminal de Loures - 2 ^a secção do 4 ^o juízo -) Date: ?
	Case is assigned to the 5 th chamber of the Tribunal da Relação of Lisbon – Appeal Court Date: October 9th
<u>1991</u>	Reference to the ECJ from the Tribunal da Relação Date: 13th February
<u>1992</u>	Opinion of Advocate General Jacobs Date: 13th February
	Decision of the ECJ Date: 19th March
	2 nd instance final decision (Tribunal da Relação) Date: ?

<p>I</p> <p>C-60/91</p> <p>Portuguese Republic v José António Batista Morais</p> <p>Whose internal national numbering:</p> <p>At first instance is 495/90 - Tribunal criminal de Loures, 2ª secção, 4º juízo</p> <p>At second instance is 1144/90 - Tribunal da Relação de Lisboa, 5ª secção.</p>	
<p>II.</p> <p>Disparities in the rate of references between Mb States</p> <p>Institutional, Social Legal and Historical Reasons</p>	
<p>III.</p> <p>Trends in terms of frequency</p> <p>Rationale for case-law clusters</p>	
<p>IV.</p> <p>Route from which references are made</p> <p>Relationship between discretionary and mandatory references</p>	<p>This is a Criminal Case brought before a Criminal Court</p> <p>It was a Court of Second Instance discretionary reference.</p> <p>Mr. Morais appealed against the judgment of the court of 1st instance in which it was fined.</p> <p>The court of second instance, hearing the appeal, decided to stay the proceedings pending a preliminary ruling, raising four questions.</p>
<p>V.</p> <p>Substantive issues raised:</p>	<p>The rules of the EEC Treaty on the free movement of persons and services do not apply to barriers affecting nationals of a member State in that State where there is no connecting factor between the situations of those nationals and any of the situations envisaged by EC Law.</p> <p>National legislation is such as to hinder the application of article 85(1) of the Treaty only if the anti-competitive practices which it encourages are likely to affect trade between member states, which presupposes that it has the effect of denying access to the market to new national and foreign competitors.</p> <p>That is not so in the case of legislation which limits the activities of a</p>

	<p>driving school to the municipality in which it is established.</p> <p>Directive 80/1223 – introduction of a Community driving license, confers on member states, with regard to the locations of the driving test, a discretionary power which enables them to take account not only of the accessibility of certain types of highway but also of considerations relating to the need to ensure both uniform testing throughout the territory of a member state and road safety.</p> <p>It does not therefore require them to hold the driving test on motorways whenever they are accessible from the test center. Nor, therefore, are the member states under any obligation to ensure the driving instruction can be given on highways of that type.</p>
<p style="text-align: center;">V. (I)</p> <p>Text of question posed by the national judge to the ECJ</p>	<p>The questions contained in the order were the following:</p> <div style="border: 1px solid black; padding: 10px; margin: 10px 0;"> <p><i>(1) May or must Article 7(1) of Decree-Law 6/82 be regarded as infringing the rules on the free movement of persons and services and, in particular, Articles 52, 53, 54(2) and (3)(c), 56 and 57 of the Treaty (on the right of establishment), Articles 60(a), 63(2) and 65 of the Treaty (on the free movement of services), and Article 85(1)(c) (on the rules of competition), and as such is it inapplicable in national law?</i></p> <p><i>(2) Must the rules on the free movement of persons, services and goods laid down in the Treaty, which relate to the citizens or goods of one State in connection with situations arising in another Member State of the Community, also be applied in cases where barriers to freedom of movement may arise in relation to citizens of only one State and within its geographical territory?</i></p> <p><i>(3) May or must Directive 80/1263/EEC, although it concerns driving tests, be interpreted as meaning that driving instruction itself is subject to similar requirements, such as the requirement that it should be given, as far as possible, on motorways and in the different traffic conditions as advised for the purposes of the test?</i></p> <p><i>(4) Finally, may or must the directive in question be interpreted as being simply a directive within the meaning of Article 189 of the Treaty, inasmuch as it is left to the national authorities to determine the choice of form and methods for its implementation (that is to say, where it needs merely to be implemented) or, must it, on the contrary, notwithstanding its designation as a directive, be regarded as a generally applicable and mandatory directive of the kind adopted pursuant to Articles 56, 63 and 87 of the Treaty?"</i></p> </div>

<p>VI.</p> <p>Structural appraisal of individual rulings</p> <ul style="list-style-type: none"> • Length of rulings • Competition issue 	<p>The ECJ ruling is 21 paragraphs long</p> <p><u>Duration of litigation:</u></p> <p><u>National 1st instance:</u> 27/05/89 - ? 1990</p> <p><u>National 2nd instance:</u> 09/10/1990 - ? 1992</p> <p><u>ECJ ruling:</u> 13/02/1991 – 19/03/1992(13 months)</p>
<p>VII.</p> <p>Manner issue is considered</p> <p>Amount of guidance - ECJ Vs national court</p> <p>ECJ and Advocate General: disagreement</p>	<p>Paragraph 8 of the ECJ ruling is very clear as to the fact that this is a purely internal situation.</p> <p>Given that trade between Member States is not affected, This case does not belong to a European dimension of litigation.</p> <p>The ECH followed practically on all points Advocate General Jacobs' opinion of 13/02/1991 (ECR 1992 I-02085).</p>
<p>VIII.</p> <p>What happened next: Settled out of court Approval of the court Can it be ascertained</p>	<p>Prosecutor Maria Helena Delgado António provided us with the information that the court of 2nd instance decided according to the ECJ ruling. We did not have access to this ruling.</p>
<p>IX.</p> <p>Did the case return to domestic courts?</p> <p>Was there a national ruling where the ECJ opinion was mentioned?</p>	<p>The information we are providing here is a detail we came across that might actually be considered irrelevant.</p> <p>It gives us the idea that the defendant was very stubborn, and made it a point of honour that a formal, final decision should be given, rejecting an opportunity to have charges brought against him dropped.</p> <p>There is insufficient data to trace the actual path the case followed. However, we know that during the proceedings at the court of 2nd instance the € 100 fine was pardoned by a article 1(y) of Law 23/91 of July 4th. In spite of that, Mr. Morais asked that the pardon should not produce effects on his particular situation in order to permit the litigation to proceed, ensuring thus that a final substantive decision would be delivered.</p>

<p>X. Route and post-decision</p>	<p>There was no further appeal. In any case see Footnote n°1 for details.</p>
<p>XI. Influence of art 234 rulings</p>	<p>We have come across this information through Prosecutor Maria Helena Delgado António who told us that: The national court followed the ECJ ruling <i>ipsis verbis</i>. The national court was also of the opinion that that this was a purely internal situation, not covered either by the articles in the TEC, nor by the Directive. The Portuguese ruling is missing (probably exterminated) we have not been able to find it and we have not read it.</p>

C-39/92

Introduction

Petrogal S. A v Correia Simões & Companhia, Lda. & Correia, Sousa & Crisóstomo, Lda.

Whose internal national numbering is Case 550/90², Tribunal Cível da Comarca de Lisboa (2^a secção do 7^o juízo).

On the 17th of May **1982**, a public undertaking, Petrogal EP³, concluded an agreement with Correia Simões & Companhia, Lda., and Correia, Sousa & Crisóstomo, Lda., for a period of 15 years. Under that agreement, Petrogal undertook to supply lubricants and fuels to Correia Simões & Companhia, Lda., who would be the reseller of such products in its service station and on exclusive terms. Correia, Sousa & Crisóstomo, Lda., undertook to act as guarantor for the reseller vis-à-vis Petrogal.

Although it was a 15 year contract the reseller Correia Simões & Companhia, Lda., terminated it on 14 May **1990**, 7 years in advance of the deadline established in 1982.

To justify this behavior and owing to the fact that Portugal became a member of the EEC in **1986** the reseller claimed that the legal framework of its agreement with Petrogal EP had changed. Relying on Article 85 TEC's prohibition of exclusive purchasing that automatically voids situations of this kind⁴, Correia Simões & Companhia Lda alleged that the agreement was now in breach of European competition rules.

To counter this reasoning, Petrogal EP invoked a European Regulation passed in **1983**: EEC Block Exemption Regulation n°. 1984/83, of 22nd June 1983 (from now on *1983 Regulation*). The 1983 Regulation provided a block exemption for exclusive purchasing agreements. In its article 10 it established that as long as service-station agreements these complied with certain conditions set out in its articles 11, 12 and 13, Article 85(1) of the TEC would be inapplicable.

² The date on which the case was lodged in Lisbon is the 9th of November 1990.

The original paper file on the case is at the archives of the Tribunal Cível da Comarca de Lisboa, known as **Palácio de Justiça**.

³ At the time, Petrogal, EP, was the lubricants and fuels distributor in the Portuguese market, with its own brand. On the 4th of May **1989**, Petrogal EP, became a private company and is now Petrogal S.A., succeeding Petrogal EP, in what concerned the entire legal heritage attributable to the latter.

⁴ Article 85 (1) Declares the limitation of distribution as incompatible with the common market.

Article 85 (2): states that any agreement or decision prohibited under article 81 (1) shall be automatically void.

The rationale for this exception is the fact that through exclusive distribution, a supplier provides a reseller with economic and financial advantages. In order to secure these advantages the European legislator here creates conditional incentives for long term, cooperation between them.

On the 5th November 1990 Petrogal SA brought an action against the reseller in the Tribunal Cível da Comarca de Lisboa, for breach of the contract, alleging that the 15 year agreement could not be terminated earlier than 1997.

Petrogal SA, also alleged the total compliance of the contract with the 1983 Regulation. This was a curious allegation given that the EC Regulation only exempted contracts from the prohibition established in the TEC's Article 85(1) if the maximum duration of the exclusive distribution agreement was 10 years. Petrogal's agreement with the reseller established a 15 year duration, therefore it apparently did not qualify for the exemption.

The main justification for this controversial statement was that under the transitional rules of the EC Regulation applicable to this type of agreements⁵, the beginning of the 10 year period should be considered as being the 1st of January 1989⁶. Moreover, in the eventuality of the contract being declared incompatible even with the transitional rules Petrogal SA, alleged⁷ that all effects produced by the contract for the first 10 years⁸ should be upheld. Thus the contract would be -at the most- only partially void and consequently all effects originating from it during the first 10 years of existence were safeguarded.

Cronograph

<u>1982</u>	<u>Agreement concluded for 15 years</u>
<u>1983</u>	<u>Block exemption Regulation</u>
<u>1984</u>	
<u>1985</u>	
<u>1986</u>	<u>Accession of Portugal to the EEC</u>
<u>1987</u>	
<u>1988</u>	
<u>1989</u>	
<u>1990</u>	<u>Reseller terminates agreement</u>

⁵ (Par 6, Opinion of the Advocate General ECR 1993 I-5671)

⁶ (par 17 of the Hearing Report, 1993 ECR I- 5663)

⁷ (on the basis of article 292 of the Portuguese Civil Code)

⁸ from the 17 th May 1982 until the 17th May 1992

<u>1991</u>	
<u>1992</u>	
<u>1993</u>	
<u>1994</u>	
<u>1995</u>	
<u>1996</u>	
<u>1997</u>	<u>Initial deadline agreed by the parties</u>

Decision of the ECJ:

The ECJ confirmed that the 1983 Regulation establishes a block exemption: its article n° 10 rendering article 85(1) of the Treaty inapplicable to certain service-stations' exclusive distribution agreements. However, in order to qualify for this block exemption, those agreements must satisfy the conditions set out in the Regulation's articles 11, 12 and 13.

The ECJ also confirmed that article 12(c) establishes the inapplicability of the exemption whenever the agreement is celebrated for more than 10 years, and added a decisive clarification: this is so unless the agreement in question is prior to the relevant Member State's act of accession to the EC. Consequently, **an agreement concluded before the date on which Portugal joined the EEC** even if concluded for an indefinite period or for more than 10 years may benefit from the exemption described in the 1983 Regulation. It will be exempted from Article 85 TEC until the expiry of the initial deadline agreed on by the parties (in this case 1997) or, at the latest, until 31 December 1997.

In other words, the agreement concluded between supplier and reseller, was apparently exemptable from article 85 TEC. This meant that Petrogal SA, would have consistent chances of saving the contract before a national court.

<p>I</p> <p>C-39/92</p> <p>Petrogal S. A (supplier) v Correia Simões & Companhia, Lda. (reseller) & Correia, Sousa & Crisóstomo, Lda. (guarantor).</p> <p>Whose internal national numbering is Case 550/90⁹, Tribunal Cível da Comarca de Lisboa (2^a secção do 7^o juízo).</p>	
<p>II.</p> <p>Disparities in the rate of references between Mb States</p> <p>Institutional, Social Legal and Historical Reasons</p>	

⁹ The date on which the case was lodged in Lisbon is the 9th of November 1990.
The original paper file on the case is at the archives of the Tribunal Cível da Comarca de Lisboa, known as Palácio de Justiça.

<p>I</p> <p>C-39/92</p> <p>Petrogal S. A (supplier) v Correia Simões & Companhia, Lda. (reseller) & Correia, Sousa & Crisóstomo, Lda. (guarantor).</p> <p>Whose internal national numbering is Case 550/90^a, Tribunal Cível da Comarca de Lisboa (2^a secção do 7^o juízo).</p>	
<p>III.</p> <p>Trends in terms of frequency</p> <p>Rationale for case-law clusters</p>	<p>The case-law precedents quoted by the ECJ to support its appraisal of the case are the following:</p> <p>BRT/SABAM (C-127/73 ECR, p. 33, n. 15 to 17) – Arts. 85 and 86 of the Treaty are directly applicable and so they ought to be applied by national courts.</p> <p>Béguelin (C - 22/71, of 25th November 1971, ECR, p. 355) - This was the case-law used to support that there was no breach of Art. 85 of the Treaty. <i>An agreement celebrated between undertakings in the same Member-State concerning products resale in a concrete store within that same Member-State does not affect in sensitive terms the free trade and competition among the Member States.</i></p> <p>Société Technique Minière/Maschinenbau (C - 56/65, of 30th June, 1966, ECR, p. 381) - This precedent was quoted by the ECJ to ascertain that the prohibition of contracts for a more than 10 year period does not affect the essence of an exclusive purchasing agreement.</p> <p>Brasseries de Haecht (C-23/67, of 12th December 1967, ECR, 1965-1968, p. 703) – In this precedent case, the ECJ has stated that <i>it is necessary to examine the contract in the light of its economic and juridical context.</i></p> <p>Delimitis/Henninger Brau (C-324-89 of 28th February 1991, ECR, p. I-935) – In this precedent decision the ECJ established guidelines that should be followed by national courts in this kind of situation: <i>In the case where there is no doubt on the incompatibility of the agreement with Art. 85 (1) of the Treaty and where the exemption stated in par. 3 of the same article is inapplicable, the national court may go on with the litigation proceedings and issue a final decision on the subject. Differently, if the court concludes that the agreement fulfils the formal conditions in order to obtain the exemption and in the case that the judge considers that the Commission should concede that benefit, it should take all the adequate measures in order to avoid contradictory decisions on the subject. Also according to this precedent case-law, a service station agreement may prevent, restrain or distort free competition in the terms stated in Art. 85 (1) of the Treaty and then fall into its scope of application.</i></p> <p>Regarding the situation where an agreement not covered by a block exemption may escape the application of Article 85 (1) TEC (this would automatically void it), the ECJ quotes cases Consten and o./Commission, 56 and 58/64, of 13 June 1966 and VAG France (C - 10/86 of 18th December 1986, ECR p. 4084). In the same sense it re-quotes all other ECJ precedents mentioned under this heading.</p>
<p>IV.</p> <p>Route from which references are made</p> <p>Relationship between discretionary and mandatory references</p>	<p>This is a national first instance reference, therefore discretionary.</p>

<p>I C-39/92</p> <p>Petrogal S. A (supplier) v Correia Simões & Companhia, Lda. (reseller) & Correia, Sousa & Crisóstomo, Lda. (guarantor). Whose internal national numbering is Case 550/90^o, Tribunal Cível da Comarca de Lisboa (2^a secção do 7^o juízo).</p>	
<p>V.</p> <p>Substantive issues raised:</p>	<p>Petrogal alleged that the reseller would have acted in breach of the contract because it was terminating the agreement before the period settled. It was consequently claiming damages in the amount of *****.</p> <p>Correia Simões & Companhia, Lda., and Correia, Sousa & Crisóstomo, Lda., invoked the nullity of the contract because it was celebrated for a 15 year period, which was forbidden under article 85 of the Treaty. Since there was no adaptation of the agreement according to the new EEC Regulation, the contract should be declared totally void and Petrogal should receive no damages at all.</p>
<p>V. (I)</p> <p>Text of question posed by the national judge to the ECJ</p>	<p>The arguments advanced by the reseller lead to a reference for preliminary ruling to the ECJ. The question raised was the following:</p> <p><i>Where, in breach of article 12(1)(c) of Regulation (EEC) no 1984/83 of 22 June 1983, it is provided in a service-station agreement as contemplated in article 10 of the regulation that the said agreement is concluded for an indefinite duration or for a period of more than 10 years, does this, by virtue of art. 85(2) of the Treaty, render the agreement void in its entirety or is it possible, on the ground that the nullity affects only that point, to abridge the agreement by making it apply for a period of 10 years, the maximum permitted by the regulation?</i></p>

<p>I</p> <p>C-39/92</p> <p>Petrogal S. A (supplier) v Correia Simões & Companhia, Lda. (reseller) & Correia, Sousa & Crisóstomo, Lda. (guarantor). Whose internal national numbering is Case 550/90^o, Tribunal Cível da Comarca de Lisboa (2^a secção do 7^o juízo).</p>	
<p>VI.</p> <p>Structural appraisal of individual rulings</p> <p>Length of rulings</p> <p>Competition issue</p>	<ul style="list-style-type: none"> • Length of rulings The ECJ delivered a short ruling, 15 paragraphs long. • Duration of litigation <u>National ruling</u>: 9th November 1990 until 21st November 1994 <u>ECJ ruling</u>: 30th October 1991 until 10th November 1993 • Competition issue <ul style="list-style-type: none"> ○ Exclusive purchasing agreements – service-station agreement concluded before the accession of Portugal to the EEC for an indefinite period or for more than 10 years. ○ Prohibition Vs. Benefit of Block exemption <p>Legal Basis Raised: Arts. 85, 86 and 90, of the Treaty Regulation n. 1984/83, 22nd June 1983 (arts. 1, 10, 12, 15)</p> <p>Scope of application of the prohibition stated by art. 85, par. 1, of the Treaty</p> <ul style="list-style-type: none"> • <i>Is this particular contract under art. 85's prohibition? Is it covered by the regulation?</i>

<p>I</p> <p>C-39/92</p> <p>Petrogal S. A (supplier) v Correia Simões & Companhia, Lda. (reseller) & Correia, Sousa & Crisóstomo, Lda. (guarantor). Whose internal national numbering is Case 550/90^o, Tribunal Cível da Comarca de Lisboa (2^a secção do 7^o juízo).</p>	
<p>VII.</p> <p>Manner issue is considered</p> <p>Amount of guidance - ECJ Vs national court</p> <p>VIII</p> <p>ECJ and Advocate General: Harmony.</p>	<ul style="list-style-type: none"> • Advocate General <ul style="list-style-type: none"> ○ <i>Article 12(c) establishes the inapplicability of the exemption whenever the agreement is celebrated for more than 10 years, unless the agreement is prior to the act of accession.</i> ○ In the case that the agreement is declared void under article 85, the nullity affects only the specific points which go against this article. It is not a totally void agreement. And it must be the national court to declare in what extent the contract should be declared null. • ECJ <p><i>Rendering of services agreements which are celebrated for more than 10 years and before the accession of Portugal and Spain may benefit from the block exemption stated in Regulation 1984/83, if they respect the conditions required in this regulation.</i></p> • National Court <p>The court didn't know if it would be admissible under EC Law to apply art. 292 of the Portuguese Civil Code where the agreement versed competition rules.</p> <p>The essential problem was whether to consider that the voidness of the contract should affect the entire agreement or just part of it. Portuguese law (art. 292 of the Civil Code) allows the survival of the part of the contract that is not affected.</p> <p>Insofar as it is not an essential component of the agreement, it should remain in existence and producing its effects.</p>

<p>I</p> <p>C-39/92</p> <p>Petrogal S. A (supplier) v Correia Simões & Companhia, Lda. (reseller) & Correia, Sousa & Crisóstomo, Lda. (guarantor). Whose internal national numbering is Case 550/90º, Tribunal Cível da Comarca de Lisboa (2ª secção do 7º juízo).</p>	
<p>IX.</p> <p>Did the case return to domestic courts?</p> <p>Was there a national ruling where the ECJ opinion was mentioned?</p>	<p>The parties reached an agreement and the court merely homologated the transaction. So we cannot truthfully state that this case was settled out of court.</p> <p>As to details on this agreement, the only information we have is that Petrogal reduced its initial claim of _____, to around 15.000 euros.</p> <p>Both Correia Simões and Correia & Crisostomo agreed to pay this (new and lighter) amount to Petrogal.</p> <p>Under Portuguese litigation law the judge should attempt that the litigants reach an agreement during the course of litigation and before a final decision is issued by the national court.</p> <p>That was precisely what happened: the parties reached an agreement and the court merely homologated the transaction.</p> <p>The plaintiff lowered the amount of damages claimed and the defendants have made an acknowledgement of this lower debt.</p> <p>In the national judges final decision (a mere homologation of the private transaction) there was no reference to the ECJ decision.</p> <p>There was no appeal</p>

<p>I</p> <p>C-39/92</p> <p>Petrogal S. A (supplier) v Correia Simões & Companhia, Lda. (reseller) & Correia, Sousa & Crisóstomo, Lda. (guarantor).</p> <p>Whose internal national numbering is Case 550/90^o, Tribunal Cível da Comarca de Lisboa (2^a secção do 7^o juízo).</p>	
<p>X</p> <p>Influence of art 234 rulings</p>	<p>The ECJ answered the question posed by the national court in an abstract manner in order to clarify the Portuguese's judge doubts. However, the ECJ didn't go further and it did not adapt its answer to the specific case. Even though, the ECJ stated that both Petrogal and Correia Simões & Companhia, Lda., and Correia, Sousa & Crisóstomo, Lda were right to a certain extent. Nevertheless, it did not indicate a clear victor between plaintiff and defendant. This element of uncertainty led both sides to partially capitulate and re-dimension voluntarily what they were claiming from each other.</p>

C-326/95 and C-66/97

I

Introduction

Both ECJ references are linked to one same Portuguese case¹⁰:

Banco de Fomento Exterior SA v Amândio Maurício Pechim, Maria da Luz Lima Barros Pechim and Confecções Texteis de Vouzela Lda (CTV)

Whose internal national numbering is case 152/A/94¹¹, Tribunal Cível da Comarca de Lisboa (2^a secção do 1^o juízo Cível)¹²

¹⁰ For this case analysis the authors received invaluable suggestions from José Luís Cruz Vilaça and Manuel Martins, two extremely competent lawyers and academics, to both, our sincere gratitude. The usual disclaimer applies.

¹¹ The date on which the case was lodged in Lisbon is 4th February 1994

¹² Readers should take note that on 4th February 1994, 3 cases were simultaneously lodged at the Tribunal Cível da Comarca de Lisboa by the Banco de Fomento Exterior against Confecções Texteis de Vouzela (CTV) e.a.

All 3 cases concern an enforcement of debt against the defendants. Of the three, only Case 152/A/94, was the object of a preliminary reference to the ECJ. To be precise, it came to be the object of two preliminary references, one in 1995 and one in 1997. Both were declared inadmissible by the ECJ.

The original paper file of case 152/A/94 is no longer at the Lisbon Court of first instance, we believe it has been moved to a court in São Pedro do Sul (Distrito de Viseu) that deals with enforcement of debt and bankruptcy. Tribunal Fiscal

Our analysis was conducted through consultation of the paper files generously made available by Manuel Martins, the Portuguese Lawyer who defended CTV in this particular case.

Cronograph

<u>1994</u>	Banco de Fomento brings suit against Confecções Vouzela at the Tribunal Cível da Comarca de Lisboa Date 4th February
<u>1995</u>	1 st Reference to ECJ Date: 16th October
<u>1996</u>	1 st ECJ ruling : C-326/95 Date: 13th March
<u>1997</u>	2 nd Reference to ECJ Date: 29th January
	2 nd ECJ ruling : C-66/97 Date: 30th June
	Final decision by Tribunal Cível da Comarca de Lisboa Date: 19th December

<p>I</p> <p>C-326/95 and C-66/97</p> <p>Banco de Fomento Exterior SA v Amândio Maurício Pechim, Maria da Luz Lima Barros Pechim and Confecções Texteis de Vouzela Lda (CTV) Whose internal national numbering is case 152/A/94, Tribunal Cível da Comarca de Lisboa (2ª secção do 1º juízo Cível</p>	
<p>II</p> <p>Disparities in the rate of references between Mb States</p> <p>Institutional, Social Legal and Historical Reasons</p> <p>Repeated or multiple references to the ECJ by the same judge regarding the same case within the same national instance.</p>	
<p>III</p> <p>Trends in terms of frequency</p> <p>Rationale for case-law clusters</p>	<p style="text-align: center;">This is a first instance Civil Court</p> <p>In this particular case (BFE) it is obvious that the national judge wanted specific guidance on the issue of State Aid under a non monetary form.</p> <p>This is emphasized by his repetition in 1997 through a new order of the same questions he had addressed the ECJ in 1995.</p> <p>1. One of the most interesting aspects of this case is that the national judge makes two preliminary references in the course of the same civil suit.</p> <p>The first reference/request to the ECJ is made on the 16th October 1995 and gives rise to ECJ ruling C-326/95.</p> <p>The ECJ dismissed this first preliminary reference as inadmissible on the grounds that “the order for reference contains no indication by the national court of the factual and</p>

	<p>legal situation of the case before it” (par 11 and 12). To support its own decision the ECJ quotes several precedents.</p> <p>The ECJ further emphasizes (par 11) that the Banco de Fomento case is clearly non comparable to Case C-316/93¹³ where the ECJ has acknowledged that the requirement for the national court to define the factual and legislative context of the questions it is asking is less pressing where the questions relate to specific technical points and enable the ECJ to give a useful reply even where the national court has not given an exhaustive description of the legal and factual situation.</p> <p>The second reference/request to the ECJ is made by order of the 29th January 1997 and is lodged at the ECJ on the 17th of February of the same year. It reproduces the 1995 request as regards the questions asked. Despite the fact that the national judge gives a more detailed description of the national legal framework involved, the second request is, in turn, and on the same grounds, declared inadmissible by the ECJ.</p>
<p style="text-align: center;">IV</p> <p>Route from which references are made</p> <p>Relationship between discretionary and mandatory references</p>	<p>This is a national first instance reference, therefore discretionary, but the national judge's insistence gives us a clear sign that even at the national first instance level, guidance from the ECJ on the application of EU concepts within national law is sought for.</p>
<p style="text-align: center;">V</p> <p>Substantive issues raised</p>	<p><u>State Aid under a Non Monetary form.</u></p> <p>BFE, a normal commercial bank, brought an action before the national court to enforce a debt against the defendants in the main proceedings.</p> <p>The defendants found the procedure followed by the BFE</p>

¹³ Vaneeveld (1994) ECR I 763, par 13

	<p>irregular since the BFE was relying on a national statute (Decree-law 41957 of 13 November 1958) that allegedly conferred public prerogatives upon private undertakings in order to enable these to proceed to recover (private) debts in accordance with the enforcement procedure provided for in (public) fiscal matters and, to that end to treat as (publicly) enforceable the certificate of debt extracted from a private commercial bank's books.</p>
<p>V (1) Text of the question put by the national judge to the ECJ</p>	<p>The questions contained in the order were the following:</p> <ol style="list-style-type: none"> 1. Must the BFE be regarded as an undertaking and in particular a public undertaking within the meaning of Arts 90/92 of the Treaty of Rome? 2. <u>May the Advantage that the BFE enjoys over its competitors be considered to be State Aid</u> within the meaning of Art 92 TR? 3. Must such advantages be taken to be restrictions on the freedom to provide services within the Community, within the meaning of Art 59 TR? 4. Do Arts 59, 90(1), and 92(1) of the TR have direct effect and may they be relied upon by a party which is the subject of enforcement proceedings in the present case? 5. Do the rules contained in the TR take precedence over and negate any conflicting provisions of national law?
<p>VI Regarding the ECJ ruling. Structural appraisal of individual rulings length of rulings duration of litigation</p>	<p>The ECJ delivered two extremely short and controversial rulings.</p> <p>The number of paragraphs in ECJ C-326/95 was 13 and ruling C-66/97 was 19 paragraphs long.</p> <p><u>duration of litigation</u></p> <p>National ruling: 04.02 1994 - 19. 12. 1997 (3 years)</p> <p>ECJ ruling: <u>1st one</u> 16.10.95 -13.03.1996 (5 months)</p> <p style="padding-left: 100px;"><u>2nd one</u> 29.01.1997 - 30.06.1997 (5 months)</p>

<p>competition issue</p>	<p>The ECJ is quick to state that it is essential that the national court defines the factual and legislative context of the questions it is asking.</p> <p>Paragraph 9 of case C-326/95 justifies the ECJ’s decision on the inadmissibility of the request put before it in a very short (1 sentence) and abrupt manner: “<i>However, that is not the case here</i>”</p> <p>The issue of WHY “<i>that is not the case here</i>” is left unanswered by the ECJ.</p> <p>In the subsequent C-66/97 the 1995 ECJ ruling is re-delivered <i>ipsis verbis</i> with the addition of 5 extra paragraphs by the ECJ that we assume are intended to clarify the meaning of the requirement “<i>define the factual and legislative context</i>”.</p> <p>Paragraphs 17 and 18 of this second ruling explain the shortcomings of the national request:</p> <ol style="list-style-type: none"> 1) Not only was the national judge vague about the general legal framework applicable to the case within the national legal order, 2) According to the ECJ the national judge also failed to specify whether the national statute relied on by BFE was actually still in force. 3) Furthermore the ECJ would have needed specification as to the nature of the BFE as a bank, its activity, its mission/task and objectives and would have welcomed a comprehensive description of the way in which the BFE had been legally constituted. <p>As such, the vague and incomplete, request was once again turned down as inadmissible¹⁴.</p>
<p>VII</p> <p>Manner issue is considered</p> <p>Amount of</p>	<p>The ECJ deliberately confines its ruling to the sole analysis of a FORMAL issue: whether the information provided by the national judge is sufficient or not.</p> <p>The case-law precedents quoted by the ECJ to support its</p>

¹⁴ We further emphasize that in the PETROGAL case (C 39/92) the judges of the ECJ, before issuing a ruling, suspended their judgment, contacted the national judge involved, and specified extra information they needed. The panel of ECJ judges for the Banco de Fomento case was obviously less flexible.

<p>guidance ECJ vs national court</p>	<p>qualification of the national reference as inadmissible are in open contradiction to a second cluster of cases that if considered, would most probably have supported a positive assessment of the quantity and quality of information provided to the ECJ in this BFE case¹⁵.</p>
<p>VIII</p> <p>ECJ and Advocate General:</p> <p>IX</p> <p>What happened next</p>	<p>No Input from AG since case was never allocated to any AG.</p> <p>The national judge possibly decided the case as if the ECJ has given him positive feed back especially on questions 1 and 2 of his order¹⁶.</p> <p>On the 19th of December 1997 there was a national ruling that protected the defendants.</p> <p>The ruling explicitly mentioned that attempts to obtain aid from the ECJ has been declared inadmissible.¹⁷</p> <p>The national judge stated that:</p> <p>“there is no legal basis that justifies the allocation to the debt enforcer (plaintiff) of the privilege of having its debts enforced according to the procedural rules regarding publicly enforceable debts (Codigo do Processo Tributário)”.</p>

¹⁵ **C-266/96** Decision of the ECJ (5th section) 18th June 1998 Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del Porto di Genova Coop. Arl. Gruppo Ormeggiatori del Golfo di La Spezia Coop.arl, Ministero dei Trasporti e della Navigazione. (Par 21-28).

C-373/95 Decision of the ECJ (5th section) 10th July 1997 Federica Maso, e. a., v Graziano Gazzetta e.a., e Istituto nazionale della previdenza sociale (INPS), Repubblica italiana. (Par 30-32)

C-261/95 Decision of the ECJ (5th section) 10th July 1997 Rosalba Palmisani v Istituto nazionale della previdenza sociale (INPS) (Par 33).

C-90/96 Decision of the ECJ (5th section) 20th November 1997 David Petric e.a. v Università degli Studi di Verona, Camilla Bettoni. (Par 23).

¹⁶ See **V(1)** of this table for full text.

¹⁷ (par 2 of the national ruling)

	There was no appeal on the plaintiffs' part.
X	<p>We have here a curious example of ambiguous influence of EU law over national law in spite of the “non-ruling” from the ECJ.</p> <p>In this case the State does not make financial transfers to the company involved, instead it “lends” the company a debt enforcement structure.</p> <p>Whether the national judge assumed that the correct qualification of the privileges allocated through statute to private undertakings were in fact a form of non-manifest State Aid, is difficult to ascertain. In his decision he says only that they are lacking in legal basis</p> <p>Apparently the only strong statement made by the national judge is that although the BFE alleges a right to procedural privileges based on a statute, it has failed to react actively in situations where debt enforcement has followed general civil law procedure instead of harsher public law enforcement rules.</p> <p>He may, on the other hand, have assumed that the lack of legal basis had its origin in an incompatibility between the behavior of the Portuguese State and the rules governing State Aid in the Treaty of Rome. We are unsure.</p> <p>The attitude of the ECJ throughout the course of this particular case is undoubtedly strange. It is also disappointing.</p> <p>1. Had the ECJ stated immediately that the BFE case was a ‘purely internal situation’ the options open to the national judge when motivating his decision would have necessarily been confined to national law.</p> <p>But this is not what the ECJ did.</p> <p>The ECJ clouded everyone’s capacity of interpretation of this case when it stated that to answer the question put by the national judge it would have needed “<i>specification as to the nature of the BFE as a bank, its activity, its mission/task and objectives and</i></p>

	<p><i>would have welcomed a comprehensive description of the way in which the BFE had been legally constituted</i>".</p> <p>2. This attitude of the ECJ potentially jeopardizes the <i>raison d'être</i> of the mechanism enshrined in article 234 TEC.</p> <p>It creates confusion regarding the conditions necessary for a question reaching the judges in Luxembourg through this mechanism to be admitted and examined¹⁸.</p>
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¹⁸ On this specific danger there are two detailed articles by A. BARAV: *Transmutations Préjudicielles*, Une Communauté de Droit, Festschrift für Gil Carlos Rodríguez Iglesias, 2003, 648 s.geb, 148- ISBN 3.8305-0606-6; *L'application judiciaire du droit communautaire par les juridictions nationales : la protection des juridictionnelle des particuliers*. February 1999, generously made available to us by José Luis Cruz Vilaça.