

**Appeal brought on 13 September 2018 by the Czech Republic against the order of the General Court  
(Seventh Chamber) made on 28 June 2018 in Case T-147/15 Czech Republic v Commission**

**(Case C-575/18 P)**

(2018/C 408/56)

*Language of the case: Czech*

**Parties**

*Appellant:* Czech Republic (represented by: M. Smolek, J. Vláčil and O. Serdula, acting as Agents)

*Other party to the proceedings:* European Commission

**Form of order sought**

- set aside the order under appeal;
- reject the plea of inadmissibility raised by the European Commission;
- refer the case back to the General Court for it to rule on the form of order sought by the Czech Republic in the application; and
- order the European Commission to pay the costs.

**Grounds of appeal and main arguments**

In support of its appeal, the appellant puts forward a single ground of appeal, alleging infringement of Article 263 of the Treaty on the Functioning of the European Union (TFEU) in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

In the order under appeal the General Court incorrectly concluded that the contested act, having regard in particular to the Commission's lack of power to adopt a decision in the field of traditional own resources, was not an act against which an action could be brought under Article 263 TFEU, which according to the General Court did not conflict with the Czech Republic's right to effective judicial protection within the meaning of Article 47 of the Charter, in so far as it was possible for the Czech Republic to pay the disputed amount conditionally, express objections to the soundness of the Commission's legal view, and wait for the Commission to make an application under Article 258 TFEU.

The General Court's conclusions are contrary to Article 263 TFEU in conjunction with Article 47 of the Charter, as conditional payment does not ensure that the dispute will in future be judged on the merits by the Court of Justice. That follows from the settled case-law of the Court of Justice on the Commission's discretion in connection with proceedings for failure to fulfil obligations, from the absence of any provision on the concept of conditional payment, and in particular from the previous practice of the Commission in this field.

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**Appeal brought on 21 September 2018 by Pirelli & C. SpA against the judgment of the General Court  
(Eighth Chamber) delivered on 12 July 2018 in Case T-455/14 Pirelli & C. v Commission**

**(Case C-611/18P)**

(2018/C 408/57)

*Language of the case: Italian*

**Parties**

*Appellant:* Pirelli & C. SpA (represented by: M. Siragusa, G. Rizza, lawyers)

Other parties to the proceedings: European Commission, Prysmian Cavi e Sistemi Srl

### Form of order sought

Pirelli claims that the Court should:

In accordance with Article 169(1) of the Rules of Procedure, set aside the decision of the General Court contained in the operative part of the judgment of 12 July 2018 in Case T-455/14, *Pirelli & C. S.p.A. v Commission*, notified to the appellant on that day by means of e-Curia;

and

in accordance with Article 170(1) of the Rules of Procedure, uphold, without referring the case back to the General Court, the claims put forward by Pirelli at first instance, *mutatis mutandis*, and accordingly:

as a principal claim

- annul the Decision <sup>(1)</sup> in so far as it concerns the appellant, specifically Articles 1(5)(d), 2(g) and 4 thereof, only as regards the inclusion of Pirelli in the list of persons to whom the measure is addressed;

in the alternative

- Allow *beneficium ordinis seu excussionis* in favour of Pirelli, in the exercise of its unlimited jurisdiction under Article 31 of Council Regulation (EC) No 1/2003 <sup>(2)</sup> and Article 261 TFEU;

in the event that Prysmian brings an appeal before the Court against the decision of the General Court of 12 July 2018 in Case T-475/14 and the Court upholds that appeal:

- annul the Decision or amend Article 2(g) thereof, by reducing the fine imposed jointly and severally on Prysmian and Pirelli;
- in any event, order the European Commission to pay the costs of the proceedings;

in the event that the decision of the General Court contained in the operative part of the judgment of 12 July 2018 in Case T-455/14, *Pirelli & C. S.p.A. v Commission*, is not set aside, allow in any event *beneficium ordinis seu excussionis* in favour of Pirelli, in the exercise of its unlimited jurisdiction under Article 31 of Regulation (EC) No 1/2003 and Article 261 TFEU.

### Pleas in law and main arguments

*First ground of appeal, alleging infringement by the General Court of its duty to state reasons regarding: the General Court's finding that Pirelli's claim alleging failure to state reasons was unfounded; the rejection by the Commission of its detailed arguments concerning the inapplicability in the present case of the presumption of decisive influence, and unequal treatment by the Commission in that it applied the 'dual basis' method to Goldman Sachs alone*

The General Court erred in its determination of the purpose and scope of the Commission's duty to state reasons, by failing to recognise and declare that the statement of reasons in the Decision does not meet the requirements established by the EU judiciary. The General Court should have annulled the Decision in so far as it concerns the appellant, since the measure in question does not contain a detailed statement setting out precise, clear and concrete grounds to substantiate the presumption that Pirelli is liable for the infringement, even though Pirelli had adduced evidence that its economic, organisational and legal links with Prysmian did not have the effect of precluding or limiting the degree of autonomy enjoyed by its subsidiary. Furthermore, in the judgment under appeal, Pirelli's arguments relating to the unequal treatment it suffered were completely disregarded, since the Commission applied only the presumption of the exercise of decisive influence to Pirelli, rather than the attribution method, which involves a dual basis, and which was, however, applied to Prysmian's other parent company, Goldman Sachs.

*Second ground of appeal, alleging infringement of Articles 48 and 49 of the Nice Charter and inadequate and illogical grounds in the judgment under appeal as regards the breach of the fundamental rights of Pirelli, a legal person, and the Commission's infringement of the principle of proportionality*

The General Court's position — according to which Pirelli's liability established by way of presumption is not strict criminal liability based on the acts of another person, but rather represents the personal liability of the 'undertaking' which it constituted with its subsidiary Prysmian, the direct perpetrator of the infringement — is based on the erroneous overlap of two analytical approaches which cannot, however, be overlapped: the application of the rules of competition to undertakings and the protection of the fundamental rights of legal persons against whom legal proceedings are brought. Furthermore, the judgment under appeal did not give any consideration to Pirelli's argument that the presumption of decisive influence was a dual presumption. In the Decision, in fact, the Commission assumed that Pirelli exercised decisive influence not only over Prysmian's commercial policies but also, without the applicant being given the opportunity to prove otherwise, over the specific anti-competitive behaviour of the subsidiary. Pirelli complains that the judgment under appeal also fails to state adequate reasons in respect of the argument that the Commission did not weigh up the interests at stake in particular as regards the presumption of decisive influence, taking into account the specific circumstances of the individual case and respect for the rights of the defence, as is required, however, by the case-law of the European Court of Human Rights (ECtHR). Finally, as regards Pirelli's claim that the presumption of decisive influence was not applied to it in the Decision in a manner proportionate, for the purpose of Article 5(4) TEU, to the achievement of the objectives of ensuring the actual payment of fines and enabling the imposition of more substantial fines as a deterrent, the General Court addressed that claim by referring to irrelevant case-law.

*Third ground, alleging infringement of the principles of joint and several liability, proportionality and equal treatment, and illogical reasoning as regards the substantive error of assessment of the application to Pirelli of the principle of joint and several liability with Prysmian for the purpose of the payment of the fine and failure to state reasons in the judgment under appeal in respect of the failure to apply *beneficium ordinis seu excussionis* in favour of Pirelli*

Although Pirelli was ordered, like Prysmian, to pay the fine imposed on them by the Decision in full, the appellant's situation was completely different to that of its former subsidiary, which the Decision clearly identified as the direct perpetrator of the infringement. As the judgment under appeal acknowledges — while providing contradictory reasons — purely secondary and vicarious liability was attributed to Pirelli; that liability is therefore entirely dependent on Prysmian's liability. The Commission should have mitigated the unreasonable and disproportionate effects, when imposing the fines, of its distorted view of the powers that Pirelli enjoys as a parent company holding all the share capital of its subsidiary, by refraining from applying to it the constraint of joint liability for the fine, or by applying it only to part of the fine imposed on Prysmian, or at least by allowing *beneficium ordinis seu excussionis* in favour of Pirelli. In addition to failing to provide any reasons in relation Pirelli's complaint that that benefit was not granted, the General Court infringed the principles of joint and several liability, proportionality and equal treatment.

*Fourth ground, alleging infringement of Article 261 TFEU and Article 31 of Regulation No 1/2003 in relation to the rejection of Pirelli's claim that it should be allowed *beneficium ordinis seu excussionis* set out in the heads of claim of its action before the General Court*

In accordance with the provisions referred to above, both the power to vary the amount of the fines imposed by the Commission and the power to vary the methods of payment and enforcement of fines fall within the powers of General Court. The case-law referred to in the judgment under appeal — according to which the Commission's power to impose penalties does not include the ability to set the respective share of the fines of joint and several debtors in their relations with each other — is not relevant for the purpose of the assessment of the different question raised by Pirelli, which the General Court has thus essentially failed to address, relating to the Commission's power, and the General Court's power, when carrying out judicial review of the Commission's decisions, to allow *beneficium ordinis seu excussionis* in favour of the parent company holding all the share capital of its subsidiary and which has been found jointly and severally liable for payment of the fine. That benefit does not relate to the internal relationship between those jointly and severally debtors but to the obligations owed by each of them, separately, to the Commission (namely, 'external relationships').

<sup>(1)</sup> Decision C(2014) 2139 final of the European Commission of 2 April 2014 (Case AT.39610 — Power cables)

<sup>(2)</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1)