

Case T-58/01

Solvay SA

v

European Commission

(Competition — Agreements, decisions and concerted practices — Soda ash market in the Community — Decision finding an infringement of Article 81 EC — Agreement guaranteeing to an undertaking a minimum sales tonnage in a Member State and guaranteeing to purchase the quantities necessary to attain that minimum tonnage — Limitation in time of the Commission's power to impose fines or penalties — Reasonable time — Essential procedural requirements — Effect on trade between Member States — Right of access to the file — Fine — Gravity and duration of the infringement — Aggravating and attenuating circumstances)

Judgment of the General Court (Sixth Chamber), 17 December 2009 II - 4793

Summary of the Judgment

1. *Competition — Administrative procedure — Limitation periods in proceedings — Suspension — Commission decision which is the subject of proceedings pending before the Court of Justice — Scope*
(Council Regulation No 2988/74, Art. 3)
2. *Community law — Principles — Duty to act within a reasonable time — Scope — Competition — Administrative procedure — Judicial proceedings — Distinction for the purposes of assessing the duty to act within a reasonable time*
(Council Regulation No 17)

3. *Competition — Administrative procedure — Obligations of the Commission — Duty to act within a reasonable time*
(Council Regulation No 17)
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(Merger Treaty, Art. 17)
5. *Plea of illegality — Scope — Measures the illegality of which may be pleaded — Internal rules of an institution*
(Art. 241 EC)
6. *Acts of the institutions — Authentication of acts adopted — Procedures*
(Commission's Rules of Procedure of 1999, Art. 16, first para.)
7. *Community law — Principles — Rights of the defence — Scope — Competition — Administrative procedure — Scope of that principle after annulment of an initial decision of the Commission*
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(Art. 81(1) EC)
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12. *Competition — Administrative procedure — Commission decision — Decision finding an infringement and imposing a fine — Annulment on account of a procedural defect*
(Council Regulation No 17)
13. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Assessment — Market-sharing arrangement — Infringement which can be characterised as serious independently of its secret nature*
(Art. 81(1) EC; Council Regulation No 17, Art. 15(2))
14. *Competition — Administrative procedure — Commission decision finding an infringement — Burden of proving the infringement and its duration on the Commission*
(Art. 81(1) EC; Council Regulation No 17, Art. 15(2))

15. *Competition — Dominant position — Holding of a very large market share an indicator (Art. 82 EC)*
16. *Procedure — Application initiating proceedings — Formal requirements — Brief summary of the pleas in law on which the application is based (Rules of Procedure of the General Court, Art. 44(1)(c))*
17. *Competition — Fines — Amount — Determination — Criteria — Attenuating circumstances — Cooperation of an undertaking during investigations by Commission officials — Not included (Art. 81(1) EC; Council Regulation No 17, Art. 14)*
18. *Competition — Fines — Amount — Determination — Deterrent effect (Art. 81(1) EC; Council Regulation No 17, Art. 15(2))*

1. Under Article 3 of Regulation No 2988/74 concerning limitation periods in proceedings and the enforcement of sanctions under the rules relating to competition, the limitation period in proceedings is to be suspended for as long as the decision of the Commission is the subject of proceedings 'pending before the Court of Justice of the European Communities.' That reference must be understood, since the establishment of what is now the General Court, as envisaging in the first place proceedings pending before this Court, since actions imposing fines or penalties in the field of competition law fall within its jurisdiction.

The limitation period is also suspended throughout the duration of appeal

proceedings before the Court of Justice. Since Article 60 of the Statute of the Court of Justice and Article 3 of Regulation No 2988/74 are different in scope, the fact that an appeal does not have suspensory effect does not deprive Article 3 of that regulation, which concerns situations in which the Commission must await the decision of the Community judicature, of all effect. In addition, Article 3 of Regulation No 2988/74 protects the Commission against the effect of the limitation period in situations in which it must await the decision of the Community judicature in proceedings beyond its control before knowing whether the contested act is or is not vitiated by illegality. The argument that the establishment of a second court does not permit the period of suspension of the limitation period to be extended cannot therefore be accepted. The suspension of the limitation period allows the Commission to adopt a new decision only where the appeal against a judgment of the General

Court annulling a decision of the Commission is dismissed. That suspension of the limitation period has no effect on the decision annulled by the judgment of the General Court. In the event of an appeal, the Commission is indeed not formally prevented from acting and adopting a new decision following the annulment of the initial decision by this Court. However, an action brought against the decision imposing penalties suspends the limitation period in proceedings pending delivery by the Community judicature of a final ruling on that action. If the Commission were to adopt a new decision following annulment of a decision of the General Court, without awaiting the judgment of the Court of Justice, there would be a risk that two decisions having the same object would coexist if the Court of Justice should set aside the judgment of the General Court. It seems to be contrary to the requirements of the economy of the administrative procedure to require the Commission, with the sole aim of ensuring that the limitation period does not expire, to adopt a new decision before it knows whether the initial decision is or is not vitiated by illegality.

Lastly, since the limitation period is suspended in accordance with Article 3 of Regulation No 2988/74 throughout the duration of the entire appeal proceedings before the Court of Justice, the Commission cannot be criticised for breaching the 'reasonable time' principle solely because it waits until the Court makes a

determination in the context of such an appeal before adopting a new decision.

(see paras 73, 79-80, 83-84, 86-89, 102)

2. In the context of the examination of a complaint alleging breach of the 'reasonable time' principle, a distinction must be drawn between the administrative procedure conducted in competition matters pursuant to Regulation No 17 and the judicial proceedings in the event of an action against the Commission's decision. The period during which the Community judicature examines the legality of the decision and, in the event of an appeal, the validity of the judgment delivered at first instance cannot be taken into account in determining the duration of the procedure before the Commission.

(see para. 105)

3. A breach of the 'reasonable time' principle in the adoption of a decision following an administrative procedure in a competition matter warrants annulment of a decision adopted by the Commission only where it also entails a breach of the rights of defence of the undertakings concerned. Where it has not been established that the undue delay has adversely affected the ability of the undertakings concerned to defend themselves

effectively, failure to observe the 'reasonable time' principle cannot affect the validity of the administrative procedure.

(see para. 113)

4. The principle of collegiality is based on the equal participation of the Commissioners in the adoption of decisions, from which it follows in particular that decisions should be the subject of collective deliberation and that all the members of the College of Commissioners should bear collective responsibility at the political level for all decisions adopted. Compliance with that principle, and especially the need for decisions to be deliberated upon by the Commissioners together, must be of concern to the individuals affected by the legal consequences of such decisions, in the sense that they must be sure that those decisions were actually taken by the College of Commissioners and correspond exactly to its intention. This is particularly so in the case of acts, expressly described as decisions, which the Commission finds it necessary to adopt with regard to undertakings or associations of undertakings for the purpose of ensuring observance of the competition rules and by which it finds an infringement of those rules, issues directions to those undertakings and imposes pecuniary sanctions upon them.

The mere fact that a press release which is not issued by the Commission and is not in any way official mentions a statement

by a Commission spokesperson specifying the date on which a decision in a competition matter will be adopted and the content thereof does not suffice to support the conclusion that the Commission breached the principle of collegiality. Since the College of Commissioners is not in any way bound by such a statement, it may decide, following collective deliberation, not to adopt such a decision.

(see paras 132-136)

5. Article 241 EC must extend inter alia to internal rules of an institution which, although they do not constitute the legal basis of the contested decision and do not produce effects similar to those of a regulation within the meaning of that article, determine the essential procedural requirements for adopting that decision and thus ensure legal certainty for those to whom it is addressed. Any addressee of a decision must be able indirectly to challenge the legality of the measure determining the formal validity of that decision, notwithstanding that the measure in question does not constitute the legal basis of the latter if it was not in a position to apply for the annulment of that measure before receiving notification of the contested decision. Consequently, those of the Commission's Rules of Procedure which are designed to ensure the protection of individuals may be the subject-matter of a plea of illegality. The plea of illegality must be limited to what is essential to the outcome of the dispute.

Since Article 241 EC is not intended to enable a party to contest the applicability of any measure of general application in support of any action whatsoever, the general measure claimed to be illegal must furthermore be applicable, directly or indirectly, to the issue with which the action is concerned and there must be a direct legal connection between the contested individual decision and the general measure in question.

(see paras 146-148)

6. The first paragraph of Article 16 of the Commission's Rules of Procedure of 1999 provides that instruments adopted by the Commission in the course of a meeting must be attached, in the authentic language or languages, in such a way that they cannot be separated, to a summary note prepared at the end of the meeting at which they were adopted and that they are to be authenticated by the signatures of the President and the Secretary-General on the last page of the summary note. That provision is not vitiated by illegality. The formalities of authentication fixed by that provision are consistent with the requirements of the principle of legal certainty.

(see paras 151, 156-157)

7. Where, following the annulment of a decision imposing sanctions on undertakings which have infringed Article 81(1) EC on account of a procedural defect concerning exclusively the procedures governing its final adoption by the College of Commissioners, the Commission adopts a new decision, having substantially the same content and based on the same objections, it is not required to conduct a new hearing of the undertakings concerned.

Nor is it required to consult the Advisory Committee on Restrictive Practices and Dominant Positions again even if, between the time that that committee is consulted and the adoption of the new decision, several Member States acceded to the European Community and the composition of that committee was therefore changed. A change in the composition of an institution does not affect the continuity of the institution itself, and its final or preparatory acts in principle retain their full effect. In addition, there is no general principle of Community law requiring continuity in the composition of an administrative body handling a procedure which may lead to a fine.

As for other questions of law which may arise in the context of the application of Article 233 EC, such as those relating to the passage of time, the possibility of resuming proceedings, the access to the file required on resumption of the proceedings, the intervention of the hearing officer and the possible implications of

Article 20 of Regulation No 17, they do not render a new hearing necessary either, since they do not alter the substance of the objections, being at most amenable to subsequent judicial review.

Furthermore, the capability of a cartel to affect trade between Member States, that is to say, its potential effect, is sufficient for it to fall within the scope of Article 81 EC and it is not necessary to demonstrate an actual effect on trade. It is none the less necessary for the potential effect of the cartel on inter-State trade to be appreciable, or, in other words, that it be not insignificant.

(see paras 165-166, 183, 188-190)

8. For an agreement between undertakings to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability and on the basis of objective factors of law or of fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market between States. Thus, the effect on intra-Community trade is normally the result of a combination of several factors which, taken separately, are not necessarily decisive.

An agreement providing a guarantee with respect to a minimum annual sales tonnage on a national market is by definition likely to divert trade patterns from the course which they would otherwise have followed, as it has the effect of removing from the market a part of the production that might have been exported to other Member States.

(see paras 208-210, 215)

9. The right of access to the file, which is a corollary of the principle of respect for the rights of the defence, means, in an administrative procedure applying the rules on competition, that the Commission provides the undertaking concerned with the opportunity to examine all the documents in the investigation file that might be relevant for its defence. Those documents comprise both inculpatory and exculpatory evidence, with the exception of business secrets of other undertakings, documents which are internal to

It is of little importance in that regard that the influence of a cartel on trade is unfavourable, neutral or favourable. A restriction of competition is liable to affect trade between Member States when it is likely to divert trade patterns from the course which they would otherwise have followed.

the Commission and other confidential information.

As regards the inculpatory evidence, the undertaking concerned must demonstrate that the result which the Commission reached in its decision would have been different if a document that was not disclosed on which the Commission relied to make a finding of infringement against that undertaking ought to have been excluded as inculpatory evidence. As regards the exculpatory evidence, the undertaking concerned must establish that its non-disclosure was able to influence, to its detriment, the course of the procedure and the content of the Commission's decision. It is sufficient for the undertaking to show that it would have been able to use the exculpatory documents for its defence, in the sense that, if it had been able to rely on them during the administrative procedure, it would have been able to invoke evidence which was not consistent with the inferences made at that stage by the Commission and therefore could have had an influence, in any way at all, on the assessments made by the Commission in any decision, at least as regards the gravity and duration of the conduct in which the undertaking was found to have engaged and, accordingly, the level of the fine. The possibility that a document that had not been disclosed might have had an influence on the conduct of the procedure and the content of the Commission's decision can be established only after a provisional examination of certain evidence showing that the undisclosed documents might have had — from the aspect of that evidence — a significance which ought not to have been overlooked.

A breach of the right of access to a file can entail annulment of a Commission decision in whole or in part only where the lack of proper access to the investigation file during the administrative procedure had prevented the undertaking or undertakings concerned from perusing documents which were likely to be of use in their defence and had thus infringed their rights of defence. That would be the case if disclosure of a document would have had even a slight chance of altering the outcome of the administrative procedure if the undertaking concerned had been able to rely on it during that procedure.

(see paras 224-226, 237)

10. Access to the file is one of the procedural safeguards intended to protect the rights of the defence, and a breach of the right of access to the Commission's file during the procedure preceding the adoption of a decision can, in principle, cause the decision to be annulled if there has been a breach of the rights of defence of the undertaking concerned.

A breach of the rights of the defence must be examined in relation to the specific circumstances of each particular case, since it depends essentially on the objections raised by the Commission in order to prove the infringement which the undertaking concerned is alleged to have committed. It is therefore necessary

to examine the burden of the substantive objections raised by the Commission in the statement of objections and in the contested decision and to take account of the arguments which the undertaking concerned has specifically raised against the contested decision.

In a situation in which, during the administrative procedure preceding the adoption of a decision penalising an undertaking, the Commission did not draw up an enumerative list of the documents making up the file and did not communicate to the undertaking concerned all the documents in the file which were accessible to that undertaking, but only the inculpatory documents, without inviting the applicant to come and inspect all the documents at its premises, the administrative procedure is irregular. However, it is not necessary to annul the final decision if it has not been established that the undertaking did not have the opportunity to examine all the documents in the file that might be relevant for its defence, even if, in the context of the judicial proceedings brought against that decision, following measures of organisation of procedure designed to ensure full access to the file, it transpires that a part of the file is missing.

(see paras 242, 246, 248, 250, 257, 259-260, 263-264)

11. The General Court is free, in the context of the judicial proceedings brought against a Commission decision imposing sanctions on an undertaking for infringement of the Community competition rules, to order measures of organisation of procedure designed to ensure full access to the file, in order to determine whether the Commission's refusal to disclose or communicate a document might have been detrimental to the defence of the undertaking concerned. Since that examination is limited to a judicial review of the pleas in law, it has neither the object nor the effect of replacing a full investigation of the case in the context of an administrative procedure. Belated disclosure of documents in the file does not put the undertaking which has brought the action back into the situation it would have been in if it had been able to rely on those documents in presenting its written and oral observations to the Commission. Furthermore, where access to the file is granted at the stage of the judicial proceedings, the undertaking concerned does not have to show that, if it had had access to the non-disclosed documents, the Commission decision would have been different in content, but only that those documents could have been useful for its defence.

(see paras 250-251)

12. Where a Commission decision in a competition case is annulled on the ground of a procedural defect, the Commission is entitled to adopt a new decision without a new administrative procedure being initiated. Where the content of the

new decision is virtually identical to that of the previous one, and where both decisions are based on the same grounds, the new decision is subject, in the context of the fixing of the fine, to the rules in force at the time when the previous decision was adopted. The Commission resumes the procedure at the stage at which the procedural error was committed and adopts a new decision without reappraising the case in the light of rules which did not exist when the first decision was adopted.

fact that such an agreement constitutes an obvious restriction of competition.

(see paras 279-280, 284-286)

(see paras 270-272)

13. An agreement by which undertakings agree to regulate, on the territory of a Member State, the placing on the market of the goods that they produce, constitutes a market-sharing agreement. Agreements of this type are among the examples of agreements explicitly declared to be incompatible with the common market in Article 81(1)(c) EC and are obvious restrictions of competition that the Commission is in any event entitled to characterise as serious for the purposes of determining the amount of fines. Even if the Commission is unable to infer the secret nature of such an agreement from the mere fact that there was no official record of a meeting, it is none the less entitled to characterise such an infringement as serious in the light of the

14. In order to calculate the duration of an infringement whose object is to restrict competition, it is necessary merely to determine the period during which the agreement existed, that is to say, the time between the date on which it was entered into and the date on which it was terminated. The duration of the infringement is an intrinsic element of an infringement under Article 81(1) EC, the burden of proof of which is borne principally by the Commission. In this respect, if there is no evidence directly establishing the duration of an infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates. That apportionment of the burden of proof is likely to vary, however, inasmuch as the evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged. Even on the assumption that particular circumstances may be present in which the burden of proof as to the duration of an infringement may be reversed, it does not follow that, in a decision establishing an infringement of

Article 81 EC, the Commission can decline to state, with supporting evidence, when the infringement ended and to provide any information which it may have on the duration of the infringement.

(see paras 293-295, 302)

15. The concept of a dominant position relates to a position of economic strength which enables the entity holding that position to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers. Whether it is an individual entity or a collective entity, an entity which holds more than 50% of the market is capable of enjoying such independence.

An objection that a Commission decision fails to state reasons for finding that an undertaking holds a dominant position where that decision states *inter alia* that that undertaking holds nearly 60% of the total Community market must therefore be rejected.

(see paras 314-316)

16. A plea referring the General Court to the reasoning developed in the context of another action brought on the same day by the same applicant, the relevant pages of which are annexed to the application, is inadmissible because the basic matters of fact and law relied on do not appear in the text of the application itself. Whilst specific points in this text can be supported and supplemented by references to specific passages in the documents attached, a general reference to other documents, even those annexed to the application, cannot compensate for the lack of essential elements in the application.

(see paras 317-318)

17. An undertaking's cooperation with the Commission during visits to its premises is covered by the obligations borne by the undertaking and cannot therefore constitute an attenuating circumstance justifying a reduction in the amount of the fine imposed for infringement of the Community competition rules.

(see paras 331, 333)

18. In determining the amount of fines for infringements of Community competition law, the Commission must take into account not only the gravity of the

infringement and the particular circumstances of the case but also the context in which the infringement was committed and must ensure that its action has the necessary deterrent effect, especially as regards those types of infringement which are particularly harmful to the attainment of the objectives of the Community. A fine cannot therefore lose its punitive and deterrent effect, provided that it is established that the undertaking concerned infringed competition law, in

particular by committing an infringement of extreme gravity, even if the fine is imposed by a decision adopted, after a certain time has elapsed, following annulment of a first decision.

(see paras 344-345)