

Case C-407/04 P

Dalmine SpA

v

Commission of the European Communities

(Appeals — Competition — Agreements, decisions and concerted practices — Seamless steel tubes market — Protection of domestic markets — Supply contract — Rights of the defence — Self-incrimination — Anonymous evidence — Fine — Statement of reasons — Equal treatment — Guidelines on the method of setting fines — Size of the relevant market and of the undertaking concerned — Attenuating circumstances)

Opinion of Advocate General Geelhoed delivered on 12 September 2006 . . . 1 - 838
Judgment of the Court (First Chamber), 25 January 2007 1 - 901

Summary of the Judgment

1. *Competition — Administrative procedure — Observance of the rights of the defence (Council Regulation No 17, Art. 11)*

2. *Competition — Administrative procedure — Observance of the rights of the defence*
3. *Competition — Administrative procedure — Statement of objections — Access to the file — Subject-matter — Observance of the rights of the defence and of the right to a fair legal process*
4. *Competition — Administrative procedure — Means of proof*
5. *Actions for annulment — Subject-matter — Reasons for a decision — Exclusion unless exception*
(Art. 230 EC)
6. *Competition — Agreements, decisions and concerted practices — Adverse effect on competition — Assessment criteria*
(Art. 81(1) EC)
7. *Competition — Agreements, decisions and concerted practices — Dominant position — Effect on trade between Member States — Assessment criteria*
(Arts 81 EC and 82 EC)
8. *Appeals — Grounds — Misuse of powers — Definition*
(Arts 220 EC and 230 EC)
9. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement*
(Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03, point 1A)
10. *Competition — Fines — Amount — Determination — Criteria*
(Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03, point 1A, sixth para.)
11. *Competition — Fines — Amount — Determination — Maximum amount*
(Council Regulation No 17, Art. 15(2))

12. Appeals — Jurisdiction of the Court

(Art. 81(1) EC; Council Regulation No 17, Art. 15(2))

13. Competition — Fines — Amount — Determination — Criteria — Attenuating circumstances

(Council Regulation No 17, Art. 15(2))

1. In the exercise of the powers conferred on it to ensure compliance with the Community competition rules, the Commission is entitled, if necessary by adopting a decision, to compel an undertaking to provide all necessary information concerning such facts as may be known to it but may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.
2. In competition law, respect for the rights of the defence requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement.

However, since the questions it was required to answer did not imply acknowledgement of an infringement, an undertaking cannot effectively rely on its right not to be compelled by the Commission to admit having participated in an infringement.

However, the interpretation that the rights of the defence were not respected owing to the very fact that the origin of the documents was unknown and that their reliability had not been demonstrated by the Commission could compromise the evaluation of evidence where it is necessary to establish the existence of an infringement of Community competition law.

(see paras 34, 35)

In effect, the evaluation of evidence in Community competition law cases is

characterised by the fact that the documents examined often contain business secrets or other information that cannot be disclosed, or the disclosure of which is subject to significant restrictions.

It is by the statement of objections that the undertaking concerned is informed of all the essential evidence on which the Commission relies at that stage of the procedure. Consequently, it is only after notification of the statement of objections that the undertaking is able to rely in full on the rights of the defence.

In those circumstances, the rights of the defence cannot be compromised in the sense that documents containing incriminating evidence must automatically be excluded as evidence when certain information must remain confidential. That confidentiality may also attach to the identity of the authors of the documents and also to the persons who transmitted them to the Commission.

If the rights in question were extended to the period preceding the notification of the statement of objections, the effectiveness of the Commission's investigation would be prejudiced, since the undertaking would already be able, at the first stage of the Commission's investigation, to identify the information known to the Commission and therefore the information that could still be concealed from it.

(see paras 44, 46-48)

3. In administrative proceedings in competition law, it is precisely the notification of the statement of objections, on the one hand, and access to the file enabling the addressee of the statement of objections to peruse the evidence in the Commission's file, on the other, that ensure the rights of the defence and the right to a fair legal process for the undertaking in question.

Thus, since there is no indication that the fact that the Commission did not inform the undertaking in question during the investigation stage that it was in possession of minutes of certain examinations conducted in national investigations might have an impact on its subsequent possibilities of defending itself during the administrative procedure initiated by the notification of the

statement of objections, no infringement of the rights of the defence or the right to a fair legal process on the basis of Article 6(1) of the European Convention for the Protection of Human Rights can be found.

dence which ought to be removed from the file.

(see paras 62, 63)

(see paras 54, 58-61)

4. The lawfulness of the transmission to the Commission by a national prosecutor or the authorities competent in competition matters of information obtained in application of national criminal law is a question governed by national law and the Community judicature has no jurisdiction to rule on the lawfulness, as a matter of national law, of a measure adopted by a national authority.

5. There is no rule of law which enables the addressee of a decision to challenge some of the grounds of that decision by way of an action for annulment under Article 230 EC unless those grounds produce binding legal effects such as to affect that person's interests. The grounds of a decision are not in principle capable of producing such effects.

Since the principle which prevails in Community law is that of the unfettered evaluation of evidence and the only relevant criterion for the purpose of assessing the evidence adduced relates to its credibility, where the transmission of minutes to the Commission has not been declared unlawful by a national court, those documents cannot be considered to have been inadmissible evi-

As the findings in the contested decision were characterised by the appellant as superfluous grounds, it cannot in any event maintain that in the absence of those findings the contested decision would have had an essentially different content and consequently obtain annulment thereof.

(see paras 69, 70)

6. For the purposes of applying Article 81(1) EC, there is no need to take account of the actual effects of an agreement once it appears that its object is to restrict, prevent or distort competition. As regards, in particular, agreements of an anti-competitive nature which are reached at meetings of competing undertakings, Article 81(1) EC is infringed where those meetings have as their object the restriction, prevention or distortion of competition and are thus intended to organise artificially the operation of the market.

(see para. 84)

7. The interpretation and application of the condition relating to effects on trade between Member States contained in Articles 81 EC and 82 EC must be based on the purpose of that condition, which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by Community law and the law of the Member States. Thus, Community law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member

States, in particular by sealing off domestic markets or by affecting the structure of competition within the common market.

If an agreement, decision or practice is to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that they may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States. Moreover, that effect must not be insignificant

In that regard, the sharing of domestic markets in the Community is capable of significantly affecting the pattern of trade between Member States.

(see paras 89-91)

8. A misuse of powers exists when an institution exercises its powers with the

exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case.

The factors capable of affecting the assessment of the gravity of the infringements include the conduct of each of the undertakings, the role played by each of them in the establishment of the cartel, the profit which they were able to derive from it, their size, the value of the goods concerned and the threat that infringements of that type pose to the objectives of the Community.

Since no evidence has been adduced capable of supporting the allegation that the Court of First Instance exercised its powers for a purpose other than that, set forth in Article 220 EC, of ensuring that in the interpretation and application of the Treaty the law is observed, it cannot be criticised for having done so.

Point 1A of the Guidelines states that '[i]n assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market'.

(see paras 99, 100)

9. The gravity of infringements of Community competition law must be assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty.

The size of the relevant market is just one among a number of other factors to be taken into account in evaluating the gravity of the infringement and setting the amount of the fine.

The Commission has a wide discretion and the method of calculation defined in the Guidelines contains various flexible elements.

It is none the less for the Court of Justice to verify whether the Court of First Instance has correctly assessed the Commission's exercise of that discretion.

undertakings involved in the same infringement, to ensure that the final amount of the fines reflects the difference in overall turnover of the undertakings concerned.

(see paras 129-134)

10. The Commission is not required, when assessing fines in accordance with the gravity and duration of the infringement in question, as stated in the sixth paragraph of point 1A of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, to calculate the fines on the basis of the turnover of the undertaking concerned. It is permissible for the Commission to take account of the turnover of the undertaking concerned in order to assess the gravity of the infringement when determining the amount of the fine, but disproportionate importance must not be attributed to that turnover by comparison with other relevant factors.

This approach is all the more appropriate because all the addressees of the contested decision are large undertakings, a circumstance which may lead the Commission not to differentiate between the amounts adopted for the fines.

(see paras 141-145)

11. Only the final amount of the fine, and not the basic amount, must observe the maximum limit of 10% referred to in Article 15(2) of Regulation No 17.

(see para. 146)

The Commission therefore retains a certain margin of discretion as to whether it is appropriate to weight the fines according to the size of each undertaking. Thus, in determining the amount of the fines, it is not required, where fines are imposed on several

12. While, in the context of an appeal, it is not open to the Court of Justice to

substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law, the exercise of that jurisdiction in respect of the determination of those fines cannot result in discrimination between undertakings which have participated in an agreement or concerted practice contrary to Article 81(1) EC.

principle of equal treatment, failing which the plea is inadmissible.

(see paras 152, 153)

13. Since the infringement in question had ceased or at least was in the process of coming to an end when the Commission carried out its investigations the termination of the infringement could not constitute an attenuating circumstance for the purpose of setting the fine.

However, the appeal must indicate the legal arguments specifically advanced in support of the plea alleging breach of the

(see para. 160)