Case T-40/06

Trioplast Industrier AB

v

European Commission

(Competition — Agreements, decisions and concerted practices — Market for plastic industrial bags — Decision finding an infringement of Article 81 EC — Duration of the infringement — Fines — Gravity of the infringement — Mitigating circumstances — Cooperation during the administrative procedure — Proportionality — Joint and several liability — Principle of legal certainty)

Judgment of the General Court (Sixth Chamber), 13 September 2010 . . . . II - 4900

Summary of the Judgment

1. *Competition — Administrative procedure — Commission decision finding an infringement — Burden of proving the infringement and its duration on the Commission — Extent of the burden of proof*

   (Art. 81(1) EC)

2. *Competition — Fines — Amount — Determination — Criteria — Undertaking transferred several times during the infringement — Succession of several parent companies*

   (Council Regulation No 1/2003; Commission Notice 98/C 9/03)

3. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Assessment — Economic reality at the time the infringement was committed to be taken into account*

   (Council Regulation No 1/2003, Art. 23(3); Commission Notice 98/C 9/03)

4. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Mitigating circumstances — Passive or 'follow-my-leader' role of the undertaking — Criteria for assessment*

   (Council Regulation No 1/2003, Art. 23; Commission Notice 98/C 9/03, Section 3, 1st indent)

5. *Competition — Fines — Amount — Determination — Criteria — Discretion of the Commission — Obligation to ensure a proportion between the amount of the fines and the overall volume of the relevant product market — No such obligation*

   (Council Regulation No 1/2003, Art. 23(3))

6. *Competition — Fines — Amount — Determination — Maximum amount — Calculation — Turnover to be taken into consideration — Fine in excess of the annual turnover achieved with the relevant product — Breach of the principle of proportionality — No such breach*

   (Council Regulation No 1/2003, Art. 23(2))

7. *Competition — Fines — Joint and several liability for payment — Determination of the amount of the fine having to be paid by the undertaking jointly and severally liable — Undertaking transferred several times during the infringement — Succession of several parent companies*

   (Council Regulation No 1/2003; Commission Notice 98/C 9/03)

1. The Commission must prove not only the existence of a cartel but also its duration. In this connection, it is important that, 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 dates.

Where it is established that an undertaking participated in an infringement both before and after a certain period, by attending a series of anti-competitive meetings without publicly distancing itself from what was discussed at those meetings, it is reasonable to accept that the infringement continued in uninterrupted fashion if the undertaking was invited to attend the anti-competitive meetings held during that period and offered its apologies on a number of occasions.

(see paras 41-42, 46-48)

2. In the calculation of fines imposed for infringement of the competition rules, the Commission's approach of ascribing to a parent company the same starting amount as that attributed to a subsidiary participating directly in a cartel, without dividing up that starting amount where there are several successive parent companies, is not in and of itself inappropriate. Indeed, the objective pursued by the Commission in using this calculation method is to make it possible to ascribe to a parent company which is liable for an infringement by virtue of the attribution of liability the same starting amount as would have been ascribed to it if it had been directly involved in the cartel. That is in line with the objective of competition policy and, in particular, with the objective of the instrument used to implement that policy, namely fines, which is to guide the conduct of undertakings towards observance of the competition rules.

The fact that the combined value of the amounts ascribed to the successive parent companies is greater than the amount ascribed to their subsidiary cannot, by itself, lead to the conclusion that the calculation method is manifestly wrong. Given the methodology set out 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 and the principle that penalties must be specific to the offender and to the offence, it is permissible for the Commission, once it has proved that an economic unit has participated in an infringement, to hold one of the legal persons belonging to that economic unit, or once having belonged to it, whether it be a parent company or a subsidiary, liable for the payment of a greater sum than that for which the other legal person or persons forming, or having formed, that economic unit is or are liable. It follows that, where an infringement is committed by a subsidiary which has belonged to various successive economic units during the course of the infringement, it cannot be considered a priori inappropriate for the combined value of the amounts

ascribed to the parent companies to be greater than the amount, or combined amounts, ascribed to the subsidiary.

(see paras 74, 76)

3. In the calculation of fines imposed for infringement of the competition rules, the assessment of the gravity of an infringement must have regard to the economic reality as revealed at the time when that infringement was committed. The aspects relevant in that assessment are, inter alia, the size and economic power of each undertaking and the scale of the infringement committed by each of them. When those factors are being assessed, it is necessary to refer to the turnover achieved at the time in question.

The reference year does not necessarily have to be the last full year in which the infringement persisted.

Where, in calculating fines, the Commission adopts an individualised approach, by which it intends to treat the addressees of the decision that are held liable only in their capacity as parent company in the same way as it does the companies directly involved in the infringement, the reference year cannot, unless there is additional relevant evidence, be a year in which the economic unit formed by the parent company and the subsidiary did not yet exist.

(see paras 91, 93, 95)

4. In accordance with Section 3, first indent, 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, an 'exclusively passive or "follow-my-leader"' role in the infringement will, where it is established, constitute a mitigating circumstance. A passive role implies that the undertaking adopts a 'low profile', that is to say, does not actively participate in the creation of any anti-competitive agreements.

Among the factors likely to demonstrate an undertaking's passive role in a cartel, significantly more sporadic participation at meetings than that of the other ordinary members of the cartel can be taken into account, as well as the undertaking's late entry on the market which is the subject of the infringement, independently of the duration of its participation in the infringement, and also the existence of express statements to that

effect made by representatives of other undertakings which participated in the infringement.

Moreover, the fact that other undertakings participating in a single cartel may have been more active than a given participant does not necessarily imply that the latter had an exclusively passive or follow-my-leader role. In fact, only complete passivity could be taken into account as a factor, and must be proved by the party alleging it.

(see paras 106-108)

5. When determining the amount of a fine for an infringement of the competition rules, the Commission has a discretion and cannot be considered obliged to apply a precise mathematical formula for that purpose. Under Article 23(3) of Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, the amount of the fine is to be determined on the basis of the gravity of the infringement and its duration. In addition, that amount is the result of a series of arithmetical calculations performed by the Commission in accordance with 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. That amount is set, inter alia, on the basis of various factors linked to the individual conduct of the undertaking in question, such as the existence of aggravating or mitigating circumstances.

It cannot be inferred from that legal framework that the Commission must ensure a proportion between the total amount of the fines, as thus calculated and imposed on the members of the cartel, and the volume of the relevant product market, in any given year of the infringement, when the infringement in question lasted more than 20 years and when the amounts of the fines also depend on other factors linked to the individual conduct of the undertakings concerned.

(see paras 141-142)

6. The purpose of Article 23(2) of Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty is to prevent fines from being disproportionate. Where the final amount of the fine does not exceed the 10 % of turnover limit, it cannot be considered disproportionate by virtue of the fact that the combined value of the fines exceeds the overall volume of the relevant market, or the fact that the fine exceeds the annual turnover achieved by an undertaking with the product in question. The 10 % of turnover limit must be applied without any regard

being had to the particular role played by the undertaking in the cartel.

As regards the comparison between the addressees of a decision imposing fines on them, a difference in treatment may be the direct consequence of the maximum limit placed on fines by Regulation No 1/2003, which clearly applies only where the fine envisaged exceeded 10% of the turnover of the undertaking concerned. Such a difference in treatment cannot amount to a breach of the principle of equal treatment.

(see paras 144, 147)

7. The principle of legal certainty constitutes a general principle of European Union law and requires, inter alia, that any act of the institutions of the European Union, in particular when it imposes or permits the imposition of sanctions, must be clear and precise so that the persons concerned may know without ambiguity what rights and obligations flow from it and may take steps accordingly.

Where a parent company and a subsidiary form or have formed an economic unit which has participated in an infringement, the Commission may hold them jointly and severally liable for the infringement of the competition rules.

In the case of a subsidiary that has belonged successively to a number of parent companies, there is nothing to prevent the Commission from holding the various parent companies jointly and severally liable for payment of the fine imposed on their subsidiary. However, a decision which confers on the Commission an unfettered discretion to recover the fine from one or other of the legal persons concerned, pursuant to which the Commission may decide to recover all or part of the fine from the subsidiary or from one or all of the parent companies that have successively controlled the subsidiary, until its right to recover is extinguished, means — before any justification based on the dissuasive nature of fines can be suggested — that the amount actually recovered from one of the parent companies will depend on the amounts recovered from the others. Since those successive parent companies have never together formed a common economic unit, they cannot be bound together by any joint and several liability. The principle that penalties should be specific to the offender and to the offence requires that the amount actually paid by one of the parent companies does not exceed its share of the joint and several liability. In failing to indicate the shares falling to the parent companies, whilst at the same time allowing the Commission full discretion in calling on the respective joint and several liabilities of the successive parent

companies which never together formed an economic unit, a decision is inconsistent with the obligation which rests upon the Commission, in accordance with the principle of legal certainty, to enable those companies to know for certain the exact amount of the fine which they must pay in respect of the period for which they are held jointly and severally liable with the subsidiary for the infringement. Such a decision breaches both the principle of legal certainty and the principle that penalties should be specific to the offender and to the offence.

(see paras 161, 163-167, 169-170)