

Pleas in law and main arguments

In 1970 a commitment was given to the promoters of Aughinish in respect of exemptions from customs duties on fuel oil to be used in the production of alumina in the then proposed plant at Shannon, Ireland. In 1983, the plant at Aughinish went into operation and the Irish authorities notified the Commission that it intended to implement the commitments in respect of the exemption from excise duty. The applicant states that the exemption was furthermore authorized by virtue of subsequent Council Decisions ⁽¹⁾. In 2000, the Commission raised the issue of State aid, which led to the institution of the formal investigation and, finally, the adoption of the contested decision.

In support of its application, the applicant submits that the Commission is wrong in law in concluding that the aid concerned constitutes new aid, as opposed to existing aid.

According to the applicant, even if the aid constituted new aid and was required to be notified upon its implementation in 1983, the Commission accepts that the aid was notified at that time. The failure of the Commission to take any decision within the time periods devised by itself rendered the aid concerned existing aid. In the alternative, the Commission treated the aid as existing aid at all material times, and the unequivocal statement made by it in 1992 confirms this to be the case.

Furthermore, by virtue of Article 15 read in conjunction with Article 1(b)(iv) of Regulation 659/1999 ⁽²⁾ since aid has been in existence in excess of ten years and the limitation period specified therein has expired, the aid has become existing aid and the procedures adopted by the Commission in relation to the supervision thereof are flawed.

In relation to its first plea, the applicant also claims that the aid was the subject of legally binding commitments entered into on the part of the Irish authorities prior to accession in 1973. According to the applicant the aid should have been found to constitute existing aid on this heading alone.

The applicant pleads by way of additional plea that the decision is in breach of the principle of legal certainty in circumstances where it conflicts with the unanimous decision of the Council taken on foot of a proposal submitted by the Commission. The decision is also in direct conflict with the provision of Article 8(5) of Directive 92/81/EEC ⁽³⁾ on the approximation of the rates of excise duty on mineral oils, which required the Commission to submit a proposal in respect of distortions of competition or incompatibility with the internal market for the unanimous approval of the Council.

Furthermore, the Commission has allegedly infringed, at least insofar as the beneficiary of the aid measure is concerned, the principle of legitimate expectation in circumstances where the Council has expressly authorised the derogation until 31 December 2006.

Finally, it is submitted that the Commission has breached a fundamental rule of law and has misused its powers by virtue of its conduct, including its delay in taking the contested decision, having regard in particular to the fact that it was first notified of the aid in question in 1983. In addition, the Commission disregarded the procedures contained in Directive 92/81/EEC, and made public statements regarding the compatibility of the aid scheme in issue. By virtue of its conduct therefore, the Commission is estopped from ordering the recovery of the aid in all the circumstances.

⁽¹⁾ 92/510/EEC: Council Decision of 19 October 1992 authorizing Member States to continue to apply to certain mineral oils when used for specific purposes, existing reduced rates of excise duty or exemptions from excise duty, in accordance with the procedure provided for in Article 8 (4) of Directive 92/81/EEC (OJ L 316, p. 16) and other subsequent decisions.

⁽²⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, p. 1)

⁽³⁾ Council Directive 92/81/EEC of 19 October 1992 on the harmonization of the structures of excise duties on mineral oils (OJ L 316, p. 12)

Action brought on 21 February 2006 — UPM-Kymmene v Commission

(Case T-53/06)

(2006/C 86/80)

Language of the case: English

Parties

Applicant: UPM-Kymmene Oyj (Helsinki, Finland) [represented by: B. Amory, E. Friedel, F. Bimont, lawyers]

Defendant: Commission of the European Communities

Form of order sought

— Partial annulment of the Decision insofar as it concluded that Rosenlew Saint Frères Emballage participated in the Valveplast meetings at the European level from 18 July 1994 until 31 January 1999 and that a single and continuous infringement was formed on the basis of Rosenlew Saint Frères Emballage's brief participation in the Valveplast meetings (from 21 November 1997 until 26 November 1998) and its cooperation in the French meetings on open mouth bags;

- an order for a reduction in the amount of the fine imposed on the applicant under the Decision;
- an order that the Commission reimburse the applicant for the unduly paid portion of the fine, with interests starting from the date of payment of the fine until full and final reimbursement by the Commission; and
- an order that the Commission pay for the costs of the proceedings.

Pleas in law and main arguments

The applicant seeks the partial annulment of the Commission Decision C(2005) 4634 final of 30 November 2005 in Case COMP/F/38.354 — Industrial bags. The applicant does not contest the substantive truth of the facts established, but submits that the Decision contains various errors of assessment of the facts concerning the applicant's subsidiary Rosenlew Saint Frères Emballage and its role in the cartel activities, and seeks a reduction of the amount of the fine imposed on the ground that it is unjustified and disproportionate.

In support of its application, the applicant alleges errors of fact in the application of Article 81(1) CE. The applicant submits that the Decision is vitiated due to the absence of evidence of a single and continuous infringement committed by Rosenlew Saint Frères Emballage. Second, the applicant submits that the Commission wrongly assessed the duration of the infringement. According to the applicant, the Commission failed to establish that Rosenlew Saint Frères Emballage took part in cartel activities in the block bags sector and participated in the Valveplast meetings at the European level as of 20 December 2004. In addition, the applicants states that there is insufficient proof of Rosenlew Saint Frères Emballage's involvement in the meetings of the French group on open mouth bags until 31 January 1999.

The applicant furthermore submits an infringement of the general principles of proportionality, equal treatment and fairness, and errors in assessment in setting the fine.

First, the applicant claims that the Commission exceeded the limits of its discretion under Article 23(3) of Regulation 1/2003 by setting a starting amount for its fine that is disproportionate to the gravity of the infringement committed. In this regard, the applicant challenges the application of a deterrent factor of 2 and contends that the market share held in 1996 in the industrial bags market covered by the overall cartel was not the appropriate basis for calculating the basic amount of the fine.

Second, the applicant submits that the Commission erroneously assessed the duration of Rosenlew Saint Frères Emballage participation in the cartel activities.

Third, the applicant contends that the Commission failed to give proper consideration to the fact that the applicant was held liable only in its capacity as parent company and, in so doing, breached the principle of fairness.

Fourth, the applicant submits that the Commission failed to consider certain mitigating circumstances and wrongly attributed the aggravating circumstances of recidivism.

Finally, in relation to the setting of the final amount of the fine, the applicant objects to the Commission's characterisation of the cartel as a very serious infringement of the competition rules, given the cartel's limited effect on competition and geographical scope.

The applicant also submits a breach of the rights of defence in that, during the administrative phase, it was not granted access to certain relevant pieces of evidence that were relied upon by the Commission to establish the duration and the scope of the infringement committed by Rosenlew Saint Frères Emballage

Action brought on 23 February 2006 — Low & Bonar and Bonar Technical Fabrics v Commission

(Case T-59/06)

(2006/C 86/81)

Language of the case: English

Parties

Applicants: Low & Bonar plc (Dundee, United Kingdom) and Bonar Technical Fabrics NV (Zele, Belgium) [represented by: L. Garzaniti, lawyer, M. O'Regan, Solicitor]

Defendant: Commission of the European Communities

Form of order sought

- Annul the Contested Decision of the Commission, no. C(2005)4634, of 30 November 2005, in case COMP/F/38.354 — Industrial bags in its entirety, insofar as it relates to the applicants; or