Secondly, they contend that the contested decision, in so far as it finds them liable for the disputed breach committed by their subsidiary, breaches the obligation to state reasons, firstly because the reasoning of the Commission, which the applicants consider to be partially contradictory, is insufficiently developed, having regard to the novelty of the position adopted in regard to them, and, secondly, because the Commission, by refusing to respond, ignored the specific factors put forward by the applicants to justify their lack of involvement in the management of the subsidiary.

The applicants also consider that the contested decision breaches the unitary nature of the concept of an undertaking within the meaning of Article 81 EC and Article 23(2) of Regulation 1/2003 [1], and also the rules which govern whether breaches committed by a subsidiary can be imputed to its parent company. As regards that plea, the applicants claim that the Commission has disregarded the restrictive guidelines of the Community Courts regarding its power to hold a parent company liable for breaches committed by its subsidiary. It also adopted an interpretation of the case-law relating to imputability which was incorrect and went against its decision-making practice. According to the applicants, the Commission also breached the principle of independence of legal persons.

The applicants consider in addition that the Commission made manifest errors of assessment by incorrectly applying to Total the presumption of imputability and by considering, when assessing the repetition of the breaches, that Total's subsidiary fined by the contested decision had always belonged to it.

Furthermore, the applicants contend that the Commission infringed several essential principles that are recognised by the Member States and which form part of Community law, such as the principle of non-discrimination, the principle of liability for one's own acts, the principle of the individual nature of penalties and the principle of legality.

The applicants also submit that the contested decision compromises the principles of good administration and legal certainty.

The applicants finally consider that the Commission infringes the rules governing the calculation of fines such as the principle of equal treatment, in so far as it does not apply a reduction of 25 % to the starting amount of the fine imposed on the applicants whereas it did apply it to another undertaking to which the contested decision was addressed. According to the applicants, the contested decision also exceeds the limits placed on the Commission's power regarding the taking into account of the deterrent effect, in breach of the principle of the presumption of innocence and the principle of legal certainty.

Lastly, the applicants claim that the contested decision constitutes a misuse of powers in that it holds them liable for the breach committed by their subsidiary and penalises them jointly and severally with it.

In the alternative, the applicants consider that the fine imposed upon their subsidiary, and for which they are held jointly and severally liable, should be reduced to a fair level. They seek to obtain a reduction of 25 % in the starting amount of the fine imposed upon them and also to rely on mitigating circumstances in that they were ordered to pay large fines almost simultaneously in two similar cases.

[1] 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

Action brought on 18 July 2006 — FMC Foret v Commission

(Case T-191/06)

(2006/C 212/71)

Language of the case: English

Parties

Applicant: FMC Foret S.A. (Sant Cugat del Vallés, Spain) (represented by: M. Seimetz, lawyer)

Defendant: Commission of the European Communities

Form of order sought

— Annulment of Commission Decision C(2006)1766 final of 3 May 2006 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (Case COMP/F/38.620 — Hydrogen peroxide and perborate) in so far as it imposes a fine on the applicant;

— in the alternative, reduce the fine imposed on the applicant, and

— order the Commission to pay the costs of the proceedings.

Pleas in law and main arguments

By means of its application, the applicant, as far as it is concerned, seeks annulment of Commission Decision C(2006)1766 final of 3 May 2006 in Case COMP/F/38.620 — Hydrogen peroxide and perborate, on the basis of which the Commission found that the undertakings concerned had infringed Article 81(1) EC and Article 53 of the EEA Agreement by participating in a single and continuous infringement regarding hydrogen peroxide and sodium perborate, covering the whole EEA territory, which consisted mainly of exchanges between competitors of information on prices and sales volumes, agreements on prices, agreements on reduction of production capacity in the EEA and monitoring of the anti-competitive arrangements.

In support of its claims for a reduction of charges, the applicant mainly contends the evidentiary standard set by the Commission on its behalf and, secondly, pleads violation of its rights of defence.

The applicant, first, claims the Commission has failed to discharge the burden of proof and has not engaged in a reasonable appraisal of the evidence relating to the existence of a cartel. Thus, the applicant criticises the Commission for having relied on vague and uncorroborated allegations contained in leniency applications submitted by other undertakings, despite its Hearing Officer concerns.

The applicant further submits that both its testimony and evidence produced at various instances of the procedure in order to demonstrate the falsity of submissions against it went unchallenged, to be finally rejected by the Commission without justification.

The applicant, secondly, accuses the Commission of having wrongfully withheld evidence from it. In this respect, it was allegedly denied the right of defence with regards to access in the replies given to the Commission's Statement of Objections, while it claims to have demonstrated, in its own reply, its refusal to participate in cartel activities.

Finally, FMC Foret estimates the fine levied by the Commission against it excessive and disproportionate with regard to its turnover and given the wholly passive role it claims to have played in the alleged cartel.

Action brought on 18 July 2006 — Caffaro v Commission

(Case T-192/06)

(2006/C 212/72)

Language of the case: Italian

Parties

Applicant(s): Caffaro S.r.l. (represented by: Alberto Santa Maria and Claudi Biscaretti di Rufia, lawyers,)

Defendant(s): Commission of the European Communities

Forms of order sought

— Annulment of Commission Decision C(2006) 1766 final of 3 May 2006 in Case COMP/F/38.620 — *Hydrogen peroxide and sodium perborate* in so far as it imposes on Caffaro S.r.l., jointly and severally with SNIA S.p.A., a fine of EUR 1 078 000.

— In the alternative, reduction of the fine on Caffaro S.r.l. to a symbolic amount.

— Further in the alternative, substantial reduction of the fine on Caffaro S.r.l., taking account of the short duration of the infringement and of attenuating circumstances

— The Commission to pay the costs.

Pleas in law and main arguments

The contested decision in this case is the same as in Case T-185/06 *L'air Liquide* v *Commission*.

In support of its arguments, the applicant argues:

— that it should be regarded as a victim rather than a participant in the hydrogen peroxide cartel. In assessing Caffaro's position in the proceeding in question, the Commission entirely failed to take account of the fact that, far from profiting from the cartel in question, Caffaro quit the the market in sodium perborate precisely as a consequence of the unlawful agreements made on the hydrogen peroxide market. The applicant emphasised to the Commission that it manufactured only sodium perborate, that it was merely a customer for hydrogen peroxide, and that it could therefore not be a member of the hydrogen peroxide cartel but rather a victim of it.

— that the Commission made an obvious error by using for all the participants in the infringement, save the applicant, overall market shares in 1999, the last full year of the infringement concerning both products (sodium perborate and hydrogen peroxide). Surprisingly, in relation to Caffaro, the Commission used instead market data for 1998, whereas, according to settled case-law, the Commission must, for the purpose of assessing the specific weight of an undertaking, take into consideration the turnover achieved by each undertaking during the reference year. The case-law has interpreted that principle to the effect that only the use of a common reference year for all the undertakings participating in the same infringement guarantees equal treatment.

The applicant also argues:

— Infringement of defence rights in that, contrary to what the Commission maintains, representatives of Caffaro did not participate in the meeting in Brussels of 26 November 1998.

— Misapplication of Article 25 of Regulation (EC) No 1/2003, and of the time-limit contained therein, inasmuch as Caffaro ceased participation in the presumed arrangement more than five years before the commencement of the Commission's investigation in relation to Caffaro.
