Case T-299/08

Elf Aquitaine SA

v

European Commission

(Competition — Agreements, decisions and concerted practices — Sodium chlorate market — Decision finding an infringement of Article 81 EC and Article 53 of the EEA Agreement — Imputability of the unlawful conduct — Rights of the defence — Duty to state reasons — Principle that penalties should be applied only to the offender — Principle that penalties must be strictly defined by law — Presumption of innocence — Principle of sound administration — Principle of legal certainty — Misuse of powers — Fines — Aggravating circumstance — Deterrence — Attenuating circumstance — Cooperation during the administrative procedure — Significant added value)

Judgment of the General Court (Second Chamber), 17 May 2011 . . . . . II - 2159

Summary of the Judgment

1. *Competition — Community rules — Infringements — Attribution — Parent company and subsidiaries — Economic unit — Criteria for assessment*
   (Arts 81 EC and 82 EC; Council Regulation No 1/2003, Art. 23(2))

2. *Competition — Administrative procedure — Statement of objections — Necessary content — Observance of the rights of the defence — Scope*
   (Council Regulation No 1/2003, Arts 23 and 27(1))

3. *Competition — Community rules — Infringements — Attribution — Parent company and subsidiaries — Economic unit — Criteria for assessment*

   (Art. 81(1) EC)

4. *Competition — Community rules — Infringements — Attribution — Parent company and subsidiaries — Economic unit*

   (Arts 81 EC and 82 EC; Council Regulation No 17, Art. 15(2); Council Regulation No 1/2003, Art. 23(2))

5. *Competition — Community rules — Infringements — Attribution — Parent company and subsidiaries — Economic unit — Criteria for assessment*

   (Art. 81(1) EC)

6. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision to apply competition rules — Decision relating to several addresses — Need for an adequate statement of reasons in particular with respect to the entity which must bear the liability for an infringement*

   (Arts 81(1) EC and 253 EC)

7. *Acts of the institutions — Presumption of validity — Commission decision attributing to a parent company the infringement of competition law committed by its subsidiary*

   (Art. 249 EC)

8. *Competition — Fines — Amount — Determination — Deterrent effect*

   (Art. 81 EC; Counci1 Regulation No 1/2003, Art. 23(2); Commission Notice 2006/C 210/02, Sections 25 and 30)

9. *Competition — Fines — Amount — Determination — Non-imposition or reduction of the fine for cooperation by the undertaking concerned — Need for conduct which facilitated the Commission's finding of an infringement*

   (Council Regulation No 1/2003, Arts 18 and 23(2); Commission Notice 2002/C 45/03, Sections 20, 21 and 23b))

10. *Competition — Fines — Amount — Determination — Discretion of the Commission — Judicial review — Unlimited jurisdiction of the European Union judicature*

    (Art. 229 EC; Council Regulation No 1/2003, Art. 31)

1. The conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities. That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking, which enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement.

In the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed the competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary.

In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will then be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market.

The Commission is not required to corroborate that presumption of the exercise of decisive influence by additional indicia. Even though an earlier practice of the Commission in taking decisions consisted in corroborating that presumption by additional indicia, such an assertion does not affect the conclusion that the Commission is entitled, to rely solely on the fact that a parent company held virtually all the shares in its subsidiary to presume that it exercised decisive influence over that undertaking.

(see paras 49-52, 59)

2. Respect for the rights of the defence requires that the undertaking against which proceedings have been brought for infringement of the competition rules

must have been afforded the opportunity, during the administrative procedure initiated before the Commission, 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 of the Treaty.

Regulation No 1/2003 provides in Article 27(1) that the parties are to be sent a statement of objections which must set forth clearly all the essential facts upon which the Commission is relying at that stage of the procedure, to enable those concerned to be aware of the conduct in which the Commission alleges they have been engaged and to put forward their defence before the Commission adopts a final decision.

That statement of objections constitutes the procedural safeguard applying the fundamental principle of Community law which requires observance of the rights of the defence in all proceedings. That principle requires, in particular, that the statement of objections which the Commission sends to an undertaking on which it envisages imposing a penalty for an infringement of the competition rules contain the essential elements used against it, such as the facts, the characterisation of those facts and the evidence on which the Commission relies, so that the undertaking may submit its arguments effectively in the administrative procedure brought against it.

In particular, the statement of objections must specify unequivocally the legal person on whom fines may be imposed, it must be addressed to that person and it must indicate in what capacity that person is called upon to answer the allegations. It is by the statement of objections that the undertaking concerned is informed of all the essential elements on which the Commission is relying 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 its rights of defence.

Thus, where the Commission, in a statement of objections, informs the parent company that it intends to impute to it, on the basis of the presumption of the exercise of decisive influence, the unlawful conduct of its subsidiary, the fact that the Commission did not carry out any measure of investigation against that company before notifying it of that statement of objections does not infringe the rights of defence of that undertaking. In this connection, that company is given the opportunity during the administrative procedure to put forward its views

on the reality and relevance of the facts and circumstances alleged by the Commission in the statement of objections, both in its observations in response to the statement of objections and at a hearing before the hearing officer.

(see paras 134-140)

3. Under the principle that penalties should be applied only to the offender, a natural or legal person may be penalised only for acts imputed to it individually. That principle applies in any administrative procedure that may lead to the imposition of sanctions under competition law.

However, that principle must be reconciled with the concept of undertaking within the meaning of Article 81 EC. Thus, where the economic entity infringes the competition rules, it must, according to the principle of personal liability, answer for that infringement.

It is not a relationship between the parent company and its subsidiary in which the parent company instigates the infringement or, a fortiori, the parent company's involvement in the infringement, but the fact that they constitute a single undertaking for the purposes of Article 81 EC that enables the Commission to address the decision imposing fines to the parent company of a group of companies.

Accordingly, the Commission is not infringing the principle that penalties should be applied only to the offender in condemning a parent company for an infringement which it is deemed to have committed itself because of its economic and legal links with its subsidiary, which enabled it to determine the latter's conduct on the market.

(see paras 178-181)

4. The principle that penalties must be strictly defined by law requires that legislation must clearly define offences and the penalties which they attract. That condition is satisfied where the individual concerned is in a position, on the basis of the relevant provision and if need be with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable.

Under Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003, the Commission may by decision impose fines on undertakings which infringe, in particular, Article 81 EC. In so far as a parent company and its subsidiary were considered to form an undertaking

within the meaning of that latter article, the Commission is able, without committing a breach of the principle that penalties must be strictly defined by law, to impose a fine on the legal persons forming part of that undertaking.

(see paras 187-189)

5. The principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.

In a Commission decision imposing a fine on a parent company for an infringement of the competition rules committed by its subsidiary, in accordance with the presumption of the decisive influence of the parent company holding virtually all the shares in its subsidiary, the Commission has a discretion to decide whether it is appropriate to impute liability for an infringement to the parent company.

Consequently, since the Commission is able, but under no obligation, to impute liability for the infringement to a parent company, where the conditions on which such liability may be imputed are met, the mere fact that the Commission did not impute such liability in another case does not mean that it is under an obligation to make the same assessment in the contested decision. However, such imputation is subject to review by the European Union judicature, to which it falls to determine that the conditions of such imputation are met.

(see paras 196-198)

6. The statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.

Where a decision taken in application of Article 81 EC relates to several addressees and raises a problem with regard to liability for the infringement, it must include an adequate statement of reasons with respect to each of the addressees, in

particular those of them who, according to the decision, must bear the liability for the infringement. Thus, in order to contain an adequate statement of reasons in regard to the parent companies of the subsidiaries which have committed the infringement, the Commission's decision must contain a detailed statement of reasons for imputing the infringement to those companies.

(see paras 216-217)

which commit an infringement of Article 81 EC, it falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking. For the purposes of their application and their implementation, decisions adopted by the Commission under Article 81 EC must, however, be addressed to entities having legal personality. Thus, when the Commission adopts a decision pursuant to Article 81(1) EC, it must identify the natural or legal person or persons, who may be held liable for the conduct of the undertaking in question and who may be penalised on that basis, to whom the decision will be addressed.

7. The Commission's decisions are presumed to be lawful and produce legal effects until such time as they are annulled or withdrawn. In addition, the Commission is not required to suspend the procedure brought against a company, for infringement of the competition rules, pending the decision of the European Union judicature in an action brought by the same company against another decision penalising it for other infringements of the competition rules. There is no legal provision that requires that the Commission suspend the adoption of decisions in cases relating to different facts.

(see para. 241)

8. In the context of the Commission's power to impose fines on undertakings

The Guidelines on setting fines which the Commission adopts ensure legal certainty on the part of undertakings, since they determine the method which the Commission has bound itself to use for the purposes of setting fines. The administration may not depart from those Guidelines in an individual case without giving reasons that are compatible with the principle of equal treatment.

In the case of two undertakings, namely a parent company and a subsidiary, forming, at the time the infringement was committed, an undertaking within the meaning of Article 81 EC, but no longer existing in that form at the time of the adoption of the decision imposing a fine upon them, the Commission is entitled, first, to impose jointly and severally on those two undertakings which have to answer for the infringement committed, a fine pursuant to Article 23(2) of Regulation No 1/2003, and, second, to impose an increase of the basic amount of the fine under Section 30 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 on the parent company alone, given that that company's turnover was on the date of adoption of the contested decision particularly large by comparison with the other entities penalised and it could thus more readily raise the necessary funds to pay a fine.

In that regard, the fact that the fine, imposed for deterrence on the parent company alone, is calculated by reference to the basic amount of the fine imposed jointly and severally on the two companies, which already includes a specific increase for deterrence, is not unfair.

The fine imposed jointly and severally on the two companies corresponds to the basic amount of the fine, which includes an additional increase calculated at a specified rate of the value of the subsidiary's sales, in accordance with Section 25 of the Guidelines, 'in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements'.

Conversely, the fine imposed on the parent company alone and including a significant increase of the basic amount of the fine is intended, in accordance with Section 30 of the Guidelines, to 'ensure that fines have a sufficiently deterrent effect' for undertakings whose turnover, beyond the sales of goods or services to which the infringement relates, is particularly large.

Therefore, first, the additional amount applied pursuant to Section 25 of those Guidelines, and, second, the specific increase imposed on the parent company pursuant to Section 30 of those Guidelines, correspond to two distinct objectives of deterrence, which the Commission is entitled to take into account when determining the fine.

(see paras 250-253, 255-256, 288-289)

9. The Commission has a wide discretion as regards the method of calculating fines and it may, in that regard, take account of numerous factors, including the cooperation provided by the undertakings concerned during the investigation conducted by its departments. In that context, the Commission is required to make complex assessments of fact, such as those relating to the cooperation provided by the individual undertakings concerned. In assessing the cooperation given by members of a cartel, only a manifest error of assessment on the part of the Commission is open to censure, since the Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, especially in comparison with the contributions made by other undertakings.

While the Commission is required to state the reasons for which it considers that information provided by undertakings under the Notice on Immunity from fines and reduction of fines in cartel cases constitutes a contribution which does or does not justify a reduction of the fine, it is incumbent on undertakings wishing to contest the Commission's decision in that regard to show that, in the absence of such information provided voluntarily by the undertakings, the Commission would not have been in a position to prove the essential elements of the infringement and therefore adopt a decision imposing fines.

The reduction of fines in cases where the undertakings which participated in infringements of competition law have offered cooperation is justified only where it is considered that the cooperation made it easier for the Commission to establish an infringement and, as the case may be, to put an end to it. In view of the rationale for the reduction, the Commission cannot disregard the usefulness of the information provided, which inevitably depends on the evidence already in its possession.

Where an undertaking providing cooperation does no more than confirm, in a less precise and explicit manner, certain information that has already been provided by another undertaking by way of cooperation, the extent of the cooperation provided by the former undertaking, while possibly of some benefit to the Commission, cannot be treated as comparable with that of the cooperation provided by the undertaking which was the first to supply that information. A statement which merely corroborates to a certain degree a statement which the Commission already had at its disposal does not facilitate the Commission's task significantly. Accordingly, it cannot be sufficient to justify a reduction of the fine for cooperation. Moreover, the cooperation of an undertaking in the

investigation gives no entitlement to a reduction in a fine where that cooperation went no further than the cooperation incumbent on it under Article 18 of Regulation No 1/2003.

(see paras 340-344)

Commission decisions on competition matters, more than a simple review of legality, which merely permits dismissal of the action for annulment or annulment of the contested measure, the unlimited jurisdiction conferred on the General Court by Article 31 of Regulation No 1/2003 in accordance with Article 229 EC authorises the Court to vary the contested measure, even without annulling it, by taking into account all the factual circumstances, so as to amend, for example, the amount of the fine.

10. As regards the review carried out by the European Union judicature in respect of

(see para. 379)