



Reports of Cases

Case T-541/08

Sasol and Others
v
European Commission

(Competition — Agreements, decisions and concerted practices — Paraffin waxes market — Slack wax market — Decision finding an infringement of Article 81 EC — Price fixing and market sharing — Liability of a parent company for the infringements of the competition rules committed by its subsidiaries and by a joint venture owned in part by it — Decisive influence exercised by the parent company — Presumption where the parent company holds 100% of the shares — Succession of undertakings — Proportionality — Equal treatment — 2006 Guidelines on the method of setting fines — Aggravating circumstances — Role of leader — Setting a limit on the fine — Unlimited jurisdiction)

Summary — Judgment of the General Court (Third Chamber), 11 July 2014

1. *Competition — Union rules — Infringements — Attribution — Parent company and subsidiaries — Economic unit — Criteria for assessment — Presumption that a parent company exerts a decisive influence over its wholly-owned subsidiaries — Rebuttable presumption — Evidential obligations of the company seeking to rebut that presumption — Factors insufficient to rebut the presumption — No infringement of the principle of the presumption of innocence — No infringement of the principle of personal liability*

(Art. 81 EC; Council Regulation No 1/2003, Art. 23(2))

2. *Competition — Union rules — Infringements — Attribution — Parent company and subsidiaries — Economic unit — Criteria for assessment — Applicability to imputation of liability to parent companies for an infringement committed by their joint venture*

(Art. 81 EC; Council Regulation No 1/2003, Art. 23(2))

3. *Competition — Union rules — Infringements — Attribution — Parent company and subsidiaries — Economic unit — Criteria for assessment — Imputation of the anti-competitive conduct of a joint venture to only one of the parent companies — Conditions — Decisive influence exercised unilaterally by that parent company — Burden of proof on the Commission*

(Art. 81 EC; Council Regulation No 139/2004)

4. *Competition — Union rules — Infringements — Attribution — Parent company and subsidiaries — Economic unit — Joint and several liability of the current parent companies of the company directly involved in the infringement — Exoneration of the former parent companies of that company — Unequal treatment*

(Art. 81 EC; Charter of Fundamental Rights of the European Union, Arts 20 and 21; Council Regulation No 1/2003, Art. 23(2))

5. *Competition — Fines — Amount — Determination — Discretion conferred on the Commission by Article 23(2) of Regulation No 1/2003 — No infringement of the principle that penalties must have a sound legal basis — Foreseeable character of amendments introduced by the new guidelines — No infringement of the principle of non-retroactivity*

(Charter of Fundamental Rights of the European Union, Art. 49(1); Council Regulation No 1/2003, Art. 23(2); Commission Notices 98/C 9/03 and 2006/C 210/02)

6. *Competition — Administrative procedure — Commission decision finding an infringement — Proof — Proof adduced by a number of different manifestations of the infringement — Lawfulness — Reliance on a body of evidence — Degree of evidential value necessary as regards items of evidence viewed in isolation — Documentary proof — Criteria — Reliability of evidence produced — Evidential obligations on undertakings disputing the existence of the infringement*

(Art. 81(1) EC)

7. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Determination of the fine proportionately to the assessment factors for the gravity of the infringement*

(Art. 81(1) EC; Council Regulation No 1/2003, Art. 23(2) and (3); Commission Notice 2006/C 210/02)

8. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Aggravating circumstances — Role of leader in the infringement — Concept — Criteria for assessment*

(Council Regulation No 1/2003, Art. 23(2) and (3); Commission Notice 2006/C 210/02, point 28)

9. *Competition — Fines — Amount — Determination — Discretion of the Commission — Judicial review — Unlimited jurisdiction of the EU judicature — Scope — Ceiling on the amount of the fine*

(Art. 261 TFEU; Council Regulation No 1/2003, Art. 31)

1. See the text of the decision.

(see paras 29-32, 36, 134-141, 145-150, 153, 154, 163)

2. In competition matters, the conduct of a subsidiary may be imputed to the parent company, on the ground that they belong to the same undertaking, where that subsidiary does not decide independently upon its conduct on the market, because it is under the decisive influence of the parent company in that respect.

The market conduct of the subsidiary is under the decisive influence of the parent company in particular where the subsidiary carries out in all material respects the instructions given to it by the parent company.

The subsidiary's conduct on the market is, in general, also under the decisive influence of the parent company where the latter retains only the power to define or approve certain strategic commercial decisions, where appropriate by its representatives in the bodies of the subsidiaries, while the power to define the commercial policy *stricto sensu* of the subsidiary is delegated to the managers responsible for its operational management, chosen by the parent company and representing and promoting the parent company's commercial interests.

Those principles are also applicable to the imputation of liability to one or more parent companies for an infringement committed by their joint venture.

(see paras 33-35, 37)

3. In order to impute the anti-competitive conduct of a joint venture to the two parent companies which hold it in equal shares, the Commission cannot, in application of Article 81 EC, rely on the mere ability to exercise decisive influence, such as that applied in the context of the application of Regulation No 139/2004 when establishing control, without its being necessary to ascertain whether that influence was in fact exercised. On the contrary, it is, in principle, for the Commission to demonstrate such decisive influence on the basis of factual evidence. Such evidence includes the accumulation of posts by the same natural persons in the management of the parent company and that of its subsidiary or joint venture, or the fact that those companies were bound to follow the instructions issued by their single management and could not adopt conduct on the market independently of it.

Moreover, the effective exercise of decisive influence by one or more parent companies on the commercial conduct of the joint venture can also be demonstrated by examining the way in which decisions are taken within the latter. Even if the power or the possibility to determine the commercial decisions of the joint venture does arise, as such, solely from the mere ability to exercise decisive influence over its commercial policy and thus from the concept of 'control' within the meaning of Regulation No 139/2004, the Commission and the Courts of the European Union may presume that the legislative provisions and the terms of the agreements relating to the functioning of that undertaking, in particular the terms of the contract setting up the joint venture and the shareholders' agreement on votes, were implemented and observed. To that extent, examination of the actual exercise of decisive influence over the commercial conduct of the joint venture may consist in an abstract analysis of the documents signed before it began to function.

However, since the examination relating to the actual exercise of decisive influence is retrospective and may therefore be based on specific evidence, both the Commission and the parties concerned may adduce evidence that the commercial decisions of the joint venture were determined according to different procedures from those arising solely from the abstract examination of the agreements relating to the functioning of the joint venture.

Moreover, where it examines the effective exercise of a decisive influence by a parent company over the commercial conduct of a joint venture, the Commission must take into consideration, in an impartial manner, all the relevant matters of fact and of law submitted to it by the interested parties. Unlike the situation where a single parent company holds all the capital of the subsidiary, in the case of a joint venture the relevant question is whether the parent company exercised a genuine influence over its operational management. In such a case, there is a plurality of shareholders, and the decisions of the bodies of the joint venture are taken by members representing the commercial interests of different parent companies, which may coincide but may also diverge.

In that respect, an examination of the organisational links between the joint venture and the parent company does not necessarily relate to the representation of the parent company under a formal mandate from it to the director of the joint venture. It is more useful to take into consideration representation, in the broad sense, of the parent company's commercial interests and the influence on the bodies of the joint venture with a view to aligning its commercial policy with that of the parent company, as shown, in particular, by an accumulation of posts in the parent company's management and the joint venture, and the ownership of part of the parent company's capital by a director of the joint venture.

Where the Commission finds only one of the parent companies solely liable for their joint venture's infringement, it must show that the decisive influence on the joint venture's commercial conduct was exercised unilaterally by that parent company.

(see paras 43, 44, 49, 50, 54, 76, 85, 112)

4. In competition matters, where the Commission finds joint and several liability on the part of the current parent companies of the company directly involved in an infringement of Article 81(1) EC, in respect of the period subsequent to the acquisition of the whole of the capital of that company by the current parent companies, and at the same time exonerates from joint and several liability the former parent companies which held all the capital of the company directly involved during an earlier period of the same infringement, it treats comparable situations differently.

However, compliance with the principle of equal treatment, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union, must be reconciled with that of the principle of legality, which implies that a party may not invoke to its advantage an illegality committed in favour of another. Moreover, where an undertaking has, by its own conduct, infringed Article 81(1) EC, it cannot escape being penalised altogether on the ground that other undertakings have not been fined, where those undertakings' circumstances are not the subject of proceedings before the Court.

Therefore, where it has not committed an error by imputing to the current parent companies liability for the infringement committed by the company directly involved during the period subsequent to the acquisition of the whole of the capital by the latter, the Commission is entitled to hold them liable, jointly and severally, in respect of the said period.

(see paras 181, 185-187, 194, 196)

5. See the text of the decision.

(see paras 202-214)

6. See the text of the decision.

(see paras 218-239, 265, 291, 427)

7. See the text of the decision.

(see paras 315-319, 405)

8. See the text of the decision.

(see paras 355-360, 375, 384, 393-396, 400)

9. The review of legality of decisions adopted by the Commission is supplemented by the unlimited jurisdiction conferred on the Courts of the Union by Article 31 of Regulation No 1/2003, in accordance with Article 229 EC, and now by Article 261 TFEU. That jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed. The review provided for in the Treaties therefore implies, in accordance with the requirements of the right to effective judicial protection set out in Article 47 of the Charter of Fundamental Rights, that the Union judicature exercises a review of both law and fact and that it is empowered to assess the evidence, annul the contested decision and vary the amount of fines. However, the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, and that proceedings before the Courts of the European Union are *inter partes*.

In so far as the inequality of treatment operated by the Commission, where it finds joint and several liability on the part of the current parent companies of the company directly involved in an infringement of Article 81(1) EC, in respect of the period subsequent to the acquisition of the whole of the capital of that company by the current parent companies, and at the same time exonerates the former parent companies which held all the capital of the company directly involved during an earlier period of the same infringement, in combination with the absence of a separate ceiling in respect of the part of the fine relating to that latter period, are capable of increasing the financial consequences for the current parent companies of the infringement committed by the company directly involved, it is appropriate to limit the part of the fine imposed on that company in respect of the infringement during the said period to 10% of its turnover for the reference year.

Similarly, in so far as the Commission's errors of assessment concerning the imputation of the anti-competitive conduct of a joint venture to only one of its parent companies, in combination with the absence of a separate ceiling in respect of the part of the fine relating to the joint venture period, are capable of increasing the financial consequences of the infringement directly committed by the said joint venture for that parent company, it is appropriate to limit the part of the fine imposed on that company in respect of the infringement during the said period to 10% of its turnover for the reference year.

(see paras 437, 439, 452, 453, 461, 462)