Appeal brought on 1 March 2010 by Solvay SA against the judgment delivered by the General Court (Sixth Chamber) on 17 December 2009 in Case T-58/01 Solvay v Commission

(Case C-110/10 P)

(2010/C 161/22)

Language of the case: French

Parties

Appellant: Solvay SA (represented by: P.-A. Foriers, R. Jafferali, F. Louis, A. Vallery, avocats)

Other party to the proceedings: European Commission

Form of order sought

— Join the present action to the appeal brought by the appellant against the judgment of the General Court of 17 December 2009 in Case T-57/01;

— set aside the judgment delivered on 17 December 2009;

— therefore, re-examine the action in respect of the points that were annulled and annul the Commission's decision of 13 December 2000 in its entirety;

— cancel the fine of EUR 2.25 million or, failing that, reduce that fine by a very substantial amount in order to compensate the appellant for the serious damage it suffered on account of the extraordinary length of the proceedings;

— order the Commission to pay the costs of the appeal proceedings and the costs of the proceedings before the General Court.

Pleas in law and main arguments

The appellant submits three pleas in support of its appeal.

By way of its first plea, which comprises five parts, the appellant claims infringement of the right to be tried within a reasonable time. Solvay criticises, in particular, that the General Court did not undertake a comprehensive assessment of the duration, including both the administrative and the judicial phase of the proceedings (first part), (ii) did not take into account the duration of proceedings before the General Court (second part), (iii) made sanctions for exceeding a reasonable time subject to proof of concrete infringement of the appellant's procedural rights even though the two principles are separate and distinct (third part), (iv) found that no such infringement existed in the present case (fourth part), (v) misinterpreted the facts of the case in that the General Court took the view that the appellant waived its right to seek, by way of an alternative plea, a reduction in the fine because the reasonable time was exceeded (fifth part), even though the appellant expressly sought the cancellation or, at least, a reduction of the fine on those grounds.

By its second plea, which comprises five parts, the appellant claims that the General Court infringed its procedural rights in so far as it required the appellant to show that the documents which the Commission lost could have been useful for its defence (first part). Indeed, it cannot be automatically ruled out, without some sort of provisional examination of the file, that the documents in question might have influenced the Commission's decision (second and third part). Further, the appellant criticises the General Court for holding, in the judgment under appeal, that the appellant did not show that the documents that disappeared might have been useful for its defence on the grounds that the appellant did not raise a plea before the General Court to contest the existence of the agreement, which it could have done even without access to the file, even though the appellant had submitted that plea before the Commission and the content of the lost documents can no longer be determined by anyone (fourth part). Finally, the appellant criticises the General Court for not having shown any interest in the lost documents on the ground that it had already rejected the appellant's substantive plea as regards the lack of effect on trade between Member States, even though it did not know the content of the lost documents and could not therefore exclude that they might have allowed the appellant to present either additional or even entirely new arguments, both substantive and relating to the amount of the fine or the regularity of the procedure (fifth part).

By its third and last plea, the appellant claims infringement of its right to be heard following the annulment by the General Court of a first decision imposing a fine on the appellant but prior to the adoption, by the Commission, of the contested decision. Indeed, the judgment under appeal does not respond to its action for annulment and refuses to acknowledge that the Commission is under an obligation to hear the undertaking at issue where an earlier judgment of the General Court finds procedural irregularity which affected the preparatory measures.

Appeal brought on 8 March 2010 by the Commission against the judgment delivered on 15 December 2009 in Case T-156/04 Électricité de France (EDF) v Commission

(Case C-124/10 P)

(2010/C 161/23)

Language of the case: French

Parties

Appellant: European Commission (represented by: E. Gippini Fournier, B. Stromsky and D. Grespan, acting as Agents)

Other parties to the proceedings: Électricité de France (EDF), French Republic, Iberdrola SA

Form of order sought

— Set aside the judgment of the General Court of the European Union (Third Chamber) of 15 December 2009, notified to the Commission on 16 December 2009, in Case T-156/04 EDF v Commission, in so far as the judgment:

  — annulled Articles 3 and 4 of Commission Decision C(2003) 4637 of 16 December 2003 on the State aid granted to EDF and the electricity and gas industries (C 68/2002, N 504/2003 and C 25/2003);

  — ordered the Commission to bear its own costs and to pay the costs of Électricité de France (EDF)

— refer the case back to the Court of First Instance for reconsideration;

— reserve the costs of the proceedings.

Pleas in law and main arguments

The European Commission puts forward two pleas in support of its appeal.

By its first plea, the Commission submits that the General Court misinterpreted the facts of the case. Contrary to what is stated in the judgment under appeal, the French Republic did not in fact convert a tax claim into capital, but simply granted EDF aid in the form of a corporate tax exemption. The recapitalisation of EDF, itself, was not considered in the annulled decision to be State aid; the Commission only classified its tax implications as State aid.

By its second plea, which comprises four parts, the appellant submits that the General Court committed an error of law in taking the view that the French Government acted in the present case like a prudent private investor in a market economy.

First, the appellant contests the General Court's finding that the distinction between the State as shareholder and the State wielding public power depends primarily on the objective pursued by the State — in the present case, the recapitalisation of EDF — and not on objective and verifiable elements. First, in fact, the Court has repeatedly stated that Article 87(1) EC does not distinguish between the causes and objectives of State intervention. Second, a criterion based on the intention of the State would be particularly inappropriate for assessing the existence of State aid in so far as such a criterion is, by its very nature, subjective and subject to interpretations.

Second, the Commission criticises the General Court for not having based its assessment on a comparative study of, on the one hand, the behaviour that a prudent private operator without privileges would have adopted in similar circumstances and, on the other hand, the behaviour of the French State in the present case, with its prerogatives as public authority.

Third, the appellant submits that the judgment under appeal fails to apply the principle of equal treatment between State enterprises and private undertakings, thus allowing for more favourable tax treatment of the State, including undertakings in which the State is not the only shareholder.

Finally, according to the Commission, the General Court disregarded the rules governing the apportioning of the burden of proof as regards the applicability of the principle of the prudent private investor in a market economy, while taking into account facts that occurred after the date on which the annulled decision was adopted.

Reference for a preliminary ruling from the Bundespatentgericht (Germany) lodged on 9 March 2010 — Merck & Co Inc v Deutsches Patent- und Markenamt

(Case C-125/10)

(2010/C 161/24)

Language of the case: German

Referring court

Bundespatentgericht

Parties to the main proceedings

Applicant: Merck & Co Inc

Defendant: Deutsches Patent- und Markenamt

Question referred

Can a supplementary protection certificate for medicinal products [1] be granted if the period of time between the filing of the application for the basic patent and the date of first authorisation for marketing in the Community is shorter than five years?

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[1] Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products (codified version); OJ 2009 L 152, p. 1