



Reports of Cases

Case T-91/10

Lucchini SpA

v

European Commission

(Competition — Agreements, decisions and concerted practices — Market for concrete reinforcing bars in bars or coils — Decision finding an infringement of Article 65 CS after the expiry of the ECSC Treaty on the basis of Regulation (EC) No 1/2003 — Fixing of prices and payment terms — Limiting or controlling output or sales — Infringement of essential procedural requirements — Legal basis — Rights of the defence — Fines — Gravity and duration of the infringement — Mitigating circumstances — Taking account of an annulment judgment in a related case)

Summary — Judgment of the General Court (Eighth Chamber), 9 December 2014

1. *Judicial proceedings — Reply — Formal requirements — Brief summary of the pleas in law on which the application is based — Reply referring to documents annexed to the pleadings — Admissibility — Conditions — Those documents performing the purely probative and instrumental function defining an annex*

(Statute of the Court of Justice, Art. 21; Rules of Procedure of the General Court, Art. 44(1)(c))

2. *Judicial proceedings — Producing evidence — Time-limit — Evidence lodged out of time — Conditions*

(Rules of Procedure of the General Court, Arts 44(1)(e), 46(1), and 48(1))

3. *Acts of the institutions — Presumption of validity — Non-existent measure — Concept*

4. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision to apply competition rules notified without its annexes — Context known to the person concerned, enabling him to understand the scope of the measure taken against him — No infringement of the duty to state reasons*

(Arts 15 CS and 36 CS)

5. *Commission — Principle of collegiality — Scope — Decision to apply competition rules notified without its annexes — No infringement of the principle of collegiality — Matters set out to a sufficient legal standard in the text of the decision*

(Art. 219 EC)

6. *Acts of the institutions — Acts of the Commission — Powers — Scope — Power to adopt an act including the power to amend that act in accordance with the provisions on the relevant power and the formal requirements laid down by the Treaty*

7. *Judicial proceedings — Introduction of new pleas during the proceedings — Plea raised for the first time at the reply stage — Inadmissibility — Analogous requirements with regard to grounds in support of a plea*

(Rules of Procedure of the General Court, Art. 48(2))

8. *Judicial proceedings — Introduction of new pleas during the proceedings — Amplification of a plea made earlier — Admissibility*

(Rules of Procedure of the General Court, Arts 44(1), and 48(2))

9. *Acts of the institutions — Choice of legal basis — EU rules — Requirements of clarity and foreseeability — Express indication of the legal basis — Commission decision finding, after expiry of the ECSC Treaty, an infringement of Article 65 CS and penalising the undertaking in question — Legal basis constituted by Article 7(1), and Article 23(2) of Regulation No 1/2003*

(Art. 65(1) CS; Council Regulation No 1/2003, Arts 7(1), and 23(2))

10. *Agreements, decisions and concerted practices — Agreements, decisions and concerted practices falling within the scope of the ECSC Treaty — Expiry of the ECSC Treaty — Continuity of the regime of free competition under the ECSC Treaty — Maintenance of control by the Commission acting within the legal framework of Regulation No 1/2003*

(Art. 65(1) CS; Council Regulation No 1/2003)

11. *Acts of the institutions — Temporal application — Procedural rules — Substantive rules — Distinction — Expiry of the ECSC Treaty — Decision to apply competition rules adopted after that expiry and concerning facts prior thereto — Principles of legal certainty, protection of legitimate expectations and that penalties have a sound legal basis — Legal situations established prior to the expiry of the ECSC Treaty — Whether subject to the legal regime of the ECSC Treaty*

(Art. 65(1) CS; Charter of Fundamental Rights of the European Union, Art. 49(1))

12. *Competition — Administrative procedure — Observance of the rights of the defence — Scope of the principle — Annulment of a first decision of the Commission finding an infringement — Adoption of a new decision based on a different legal foundation and earlier preparatory measures — Lawfulness — No obligation to issue a new statement of objections*

(Art. 65 CS)

13. *Agreements, decisions and concerted practices — Effect on trade between Member States — Criteria for assessment — Assessment on the basis of several factors taken together, not necessarily having a decisive effect taken in isolation — Cartels extending to the whole territory of a Member State — Existence of a strong presumption that trade affected*

(Art. 81(1) EC)

14. *Competition — Union rules — Infringements — Attribution — Undertaking — Concept — Economic unit — Existence capable of being deduced from a series of consistent factors — Companies controlled by the same family — Criteria for assessment with a view to establishing the existence of an economic unity between those companies*

(Art. 65(1) CS)

15. *Competition — Union rules — Infringements — Attribution — Legal person responsible for the operation of the undertaking at the time of the infringement — Exceptions — Transfer of the business of a company not having ceased to exist to another belonging to the same group — Imputation to the legal person carrying on the business — Conditions*

(Art. 65(1) CS)

16. *Competition — Union rules — Infringements — Attribution — Legal person responsible for the operation of the undertaking at the time of the infringement — No obligation to attribute liability to the parent company — Attribution of liability to the acquirer in the case of merger or takeover — Lawfulness*

(Art. 65(1) CS)

17. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — No binding or exhaustive list of criteria*

(Council Regulation No 1/2003, Art. 23(2); Commission Notice 98/C 9/03, point 1A)

18. *Competition — Fines — Amount — Determination — Complex evaluation of economic matters — Commission's margin of discretion — Judicial review — Review of legality — Scope*

(Council Regulation No 1/2003, Art. 23(2); Commission Notice 98/C 9/03, points 1A and 1B)

19. *Competition — Fines — Guidelines on the method of setting fines — Legal nature — Indicative rule of conduct implying a self-limitation on the discretion of the Commission — Obligation to comply with the principles of equal treatment, protection of legitimate expectations and legal certainty*

(Commission Notice 98/C 9/03)

20. *Competition — Fines — Amount — Determination — Method of calculation laid down by the guidelines drawn up by the Commission — Calculation of the basic amount of the fine — Account taken of the characteristics of the infringement as a whole*

(Council Regulation No 1/2003, Art. 23(2); Commission Notice 98/C 9/03, point 1A)

21. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision imposing fines — Indication of the factors which led the Commission to assess the gravity and the duration of the infringement — Sufficient indication*

(Art. 15 CS; Council Regulation No 1/2003, Art. 23)

22. *Competition — Fines — Amount — Determination — Infringements classified as very serious on the basis of their nature alone — No obligation to demonstrate an actual impact of the infringement on the market*

(Council Regulation No 1/2003, Art. 23(2); Commission Notice 98/C 9/03, point 1A)

23. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Classification of an infringement as very serious — Primary role of the criterion based on the nature of the infringement — Not independent of that based on the size of the product market in question — Infringement classified as very serious despite being limited to the territory of a single Member State — Lawfulness*

(Council Regulation No 1/2003, Art. 23(2); Commission Notice 98/C 9/03, point 1A)

24. *Agreements, decisions and concerted practices — Concerted practice — Exchange of information under a cartel agreement or with a view to setting up a cartel — Taking into account of information exchanged — Presumption*

(Art. 65(1) CS)

25. *Agreements, decisions and concerted practices — Prohibition — Infringements — Agreements and concerted practices constituting a single infringement — Responsibility for conduct of other undertakings in the context of the same infringement — Lawfulness — Criteria — Account taken when assessing the gravity of the infringement*

(Art. 65(1) CS)

26. *Competition — Fines — Amount — Determination — Guidelines on the method of setting fines for infringements of the competition rules — Non-imposition or reduction of the fine in return for the cooperation of the undertaking concerned — Case falling within the scope of the leniency notice — Exclusion of grounds for a reduction*

(Commission Notices 96/C 207/04, point A1, and 98/C 9/03, point 3)

27. *Competition — Fines — Amount — Determination — Non-imposition or reduction of the fine in return for the cooperation of the undertaking concerned — Cooperation in the investigation not exceeding performance of the obligations incumbent on undertakings under Article 11 of Regulation No 17 or under Article 18 of Regulation No 1/2003 — Not included*

(Council Regulations No 17, Art. 11, and No 1/2003, Art. 18)

28. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Mitigating circumstances — Absence of benefit — Not included — Poor financial state of the sector in question — Weak operating margins — Not included*

(Council Regulation No 1/2003, Art. 23(2); Commission Notice 98/C 9/03, point 1A)

29. *Competition — Fines — Amount — Determination — Deterrent effect — Turnover which may be taken into account*

(Art. 65 CS; Council Regulation No 1/2003, Art. 23(2))

30. *Competition — Fines — Legal context — Determination — Commission's previous decision-making practice — Indicative nature*

(Art. 65 CS; Council Regulation No 1/2003, Art. 23(2))

31. *Competition — Administrative procedure — Obligations of the Commission — Duty to act within a reasonable time — Infringement — Condition — Undermining of the defence rights of the undertaking concerned*

(Art. 65 CS)

1. See the text of the decision.

(see paras 56-60, 66, 67, 69)

2. See the text of the decision.

(see paras 61-65, 68)

3. See the text of the decision.

(see paras 70-72)

4. See the text of the decision.

(see paras 76-80, 102)

5. See the text of the decision.

(see paras 105, 106)

6. The Commission's power to adopt a particular act necessarily also includes the power to amend that act. Thus, for example, the Commission may append the missing tables as annexes to a decision. Exercise of the power to adopt amending decisions must be in accordance with the provisions on the relevant power and the formal requirements and procedures laid down in that regard in the Treaty.

(see para. 108)

7. See the text of the decision.

(see paras 120-122, 161, 255, 256)

8. See the text of the decision.

(see paras 120, 159, 160)

9. Within the Community legal order, the institutions have conferred powers only. For that reason, Community measures refer in their preamble to the legal basis which enables the institution concerned to act in the field in question. The choice of the appropriate legal basis has constitutional significance.

A decision whereby the Commission finds, after the expiry of the ECSC Treaty, that an undertaking has infringed Article 65(1) CS and imposes a fine on that undertaking, is to be found in Article 7(1) of Regulation No 1/2003 as regards the finding of the infringement, and in Article 23(2) of Regulation No 1/2003 as regards the imposition of the fine.

(see paras 125, 129)

10. See the text of the decision.

(see paras 130-146)

11. The application of rules of the EC Treaty in a field which was originally governed by the ECSC Treaty must take effect in conformity with the principles governing the temporal application of the law. In this connection, whilst procedural rules are generally held to apply to all disputes pending at the time when such rules enter into force, substantive rules must, in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, be interpreted as applying to situations existing before their entry into force only in so far as it is clear from their wording, objectives or general scheme that such an effect must be given to them.

From that point of view, as regards the question of the substantive provisions applicable to a legal situation which was definitively established before the expiry of the ECSC Treaty, the continuity of the EU legal order and the requirements relating to the principles of legal certainty and the protection of legitimate expectations require the application of substantive provisions drawn from the ECSC Treaty to the facts which fall within their scope of application *ratione materiae* and *ratione temporis*. In that regard, the principle that offences and punishments are to be strictly defined by law does not require that the substantive rule on the basis of which a penalty is imposed must be in force not only when the unlawful act is committed but also when the decision imposing the penalty is adopted.

(see paras 147, 148, 150-153)

12. Since the annulment of an EU measure does not necessarily affect preparatory acts, the procedure for replacing the annulled measure may, in principle, be resumed at the very point at which the illegality occurred. Thus, a judgment of the General Court annulling a Commission decision finding an infringement of the competition rules and imposing fines does not affect the lawfulness of the statement of objections or of the supplemental statement of objections and the Commission is entitled to take up the procedure at the exact point at which the unlawfulness occurred. It follows that an applicant's defence rights are not infringed by the Commission not sending it a fresh statement of objections or as a result of its not having been consulted on the analysis and combined implementation of the new legal basis chosen by the Commission for the adoption of its new decision.

(see paras 173, 175, 177, 181)

13. See the text of the decision.

(see paras 186-193)

14. Whilst the mere fact that the share capital of two separate commercial companies is held by the same person or the same family is insufficient, in itself, to establish that those two companies form an economic unit, the existence of such an economic unit can be proven by a set of circumstances.

Such circumstances may include, for example, the fact that certain persons have assumed responsibilities simultaneously within both companies, especially by occupying key positions on their management bodies. Moreover, whether or not a legal person itself produces the product to which a cartel relates does not determine whether the conduct constituting an infringement of Article 65 CS may be imputed to it. Finally, an agency contract, tacitly renewed, whereby one of the companies undertakes to place orders in accordance with the contractual conditions established by the other with suppliers and customers (volumes, prices and payment terms) also tends to prove the economic unity of the two companies.

(see paras 198-201, 220, 223-225, 227, 229, 230, 236)

15. See the text of the decision.

(see paras 202-207)

16. See the text of the decision.

(see paras 212, 213)

17. See the text of the decision.

(see para. 239)

18. See the text of the decision.

(see paras 239, 249-251)

19. See the text of the decision.

(see paras 241-243)

20. See the text of the decision.

(see paras 246-248, 261, 262)

21. See the text of the decision.

(see para. 258)

22. See the text of the decision.

(see paras 263-266)

23. See the text of the decision.

(see para. 273)

24. See the text of the decision.

(see para. 286)

25. An undertaking which has participated in a single, complex infringement through conduct of its own which falls within the definition of an agreement or concerted practice having an anti-competitive object within the meaning of Article 65 CS and which was intended to help bring about the infringement as a whole may also be liable for the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants or could reasonably have foreseen such conduct and was prepared to accept the risk.

Accordingly, the fact that an undertaking has not taken part in all aspects of an anti-competitive scheme, or that it has played only a minor role in the aspects in which it did participate, is of no relevance to the establishment of an infringement.

On the other hand, as regards the assessment of the applicant's individual responsibility, such factors must be taken into consideration when the gravity of the infringement is assessed and if and when it comes to determining the fine.

(see paras 293, 294, 296)

26. See the text of the decision.

(see para. 305)

27. See the text of the decision.

(see para. 306)

28. See the text of the decision.

(see para. 309)

29. See the text of the decision.

(see para. 314)

30. See the text of the decision.

(see para. 320)

31. See the text of the decision.

(see para. 328)