



Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

11 April 2013 *

(Appeals — Competition — Agreements, decisions and concerted practices — Italian market for the purchase and first processing of raw tobacco — Payment of the fine by the jointly and severally liable debtor — Interest in bringing proceedings — Burden of proof)

In Case C-652/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 15 December 2011,

Mindo Srl, in liquidation, established in Rome (Italy), represented by G. Mastrantonio, C. Osti and A. Prastaro, avvocati,

applicant,

the other party to the proceedings being:

European Commission, represented by N. Khan and L. Malferrari, acting as Agents, assisted by F. Ruggeri Laderchi and R. Nazzini, avvocati, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Seventh Chamber),

composed of G. Arestis, President of the Chamber, J.-C. Bonichot and A. Arabadjiev (Rapporteur),
Judges,

Advocate General: V. Trstenjak,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 15 October 2012,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: English.

Judgment

1 By its appeal, Mindo Srl ('Mindo') asks the Court to set aside the judgment of the General Court of the European Union (Third Chamber) of 5 October 2011 in Case T-19/06 *Mindo v Commission* [2011] ECR II-6795, dismissing its action seeking the partial annulment or variation of Commission Decision C(2005) 4012 final of 20 October 2005 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.281/B.2 — Raw tobacco — Italy) (OJ 2006 L 353, p. 45, 'the contested decision') and, in the alternative, reduction of the fine imposed on it.

Background to the dispute and the contested decision

2 Mindo is an Italian company, currently in liquidation, whose main activity consists in the first processing of raw tobacco. It was originally a family business, which was purchased in 1995 by a subsidiary of Dimon Inc. Following that purchase, its company name was changed to Dimon Italia Srl. On 30 September 2004, the whole of its shareholding was sold to four individuals with no connection to the Dimon group and its company name was changed to Mindo. In May 2005, Dimon Inc. merged with Standard Commercial Corporation to form a new entity, Alliance One International Inc. ('AOI').

3 On 19 February 2002, the Commission of the European Communities received an application for immunity from fines from one of the Italian raw tobacco processors, namely Deltafina SpA.

4 On 4 April 2002, the Commission received an application from Mindo – which at that time was still named Dimon Italia Srl – for immunity from fines and, in the alternative, an application for a reduction of any fine imposed on it. On 8 April 2002, the Commission also received evidence from Mindo.

5 On 9 April 2002, the Commission acknowledged receipt of Mindo's application for immunity from fines and of its application for the reduction of any fine imposed. The Commission informed Mindo that its application for immunity did not meet the requirements of the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

6 On 20 October 2005, the Commission adopted the contested decision, in which it found that, during the period from 1995 to the beginning of 2002, the Italian raw tobacco possessors concerned by that decision, including Mindo, engaged in practices constituting a single and continuous infringement of Article 81(1) EC.

7 The Commission stated *inter alia* that since the group to which Mindo belonged during the infringement period had ceased to exist following its merger with the Standard Commercial Corporation group, AOI, as the legal successor of those two groups, was an addressee of the contested decision. Mindo, as the legal successor of Dimon Italia Srl, was also an addressee of that decision.

8 The Commission set the starting amount of the fine imposed on Mindo at EUR 12.5 million, which it increased by 25% on the basis of the very serious nature of the infringement, and by 60% on the basis of the length of the infringement, six years and four months. It limited the liability of the company to 10% of its turnover for the most recent business year. It granted the application for a reduction in the fine and applied a reduction of 50% on the basis of cooperation. Thus, the Commission set the final amount of the fine to be imposed on Mindo and AOI at EUR 10 million, AOI being liable for the whole fine and Mindo being jointly and severally liable for EUR 3.99 million only.

9 On 14 February 2006, AOI paid in full the fine imposed by the Commission on it and on Mindo.

10 On 4 July 2006, Mindo was placed in liquidation, but did not at any time inform the General Court of this.

- 11 On 5 March 2007, Mindo lodged, under Article 161 of Royal Decree No 267 of 16 March 1942, laying down rules for bankruptcy, arrangement with creditors, supervised administration and compulsory administrative liquidation (regio decreto 16 marzo 1942, n. 267, recante disciplina del fallimento, del concordato preventivo, dell'amministrazione controllata e della liquidazione coatta amministrativa), as amended (ordinary supplement to GURI No 81, 6 April 1942), an application for opening of the procedure for arrangement with creditors with assignment of the assets before the Tribunale ordinario di Roma, sezione fallimentare (District Court, Rome, Bankruptcy Section). By judgment of 27 November 2007, that court approved the arrangement with creditors proposed by Mindo.

The procedure before the General Court and the judgment under appeal

- 12 By application lodged at the Registry of the General Court on 20 January 2006, Mindo requested the partial annulment of the contested decision and, in the alternative, a reduction of the fine imposed on Mindo and, jointly and severally, on AOI.
- 13 At the hearing which took place on 29 November 2010, the Commission, which had learned a few days beforehand that Mindo had been in liquidation since July 2006, claimed, in essence, that Mindo no longer had any legal interest in bringing proceedings. The General Court therefore asked Mindo to provide it with any relevant information and documents concerning any agreement that it might have entered into with AOI regarding payment of the fine by AOI and the possibility of bringing an action against Mindo to recover a part of the fine. Mindo complied with that request.
- 14 By letter of 30 March 2011, AOI replied to the questions put by the General Court. It stated in essence that it had not yet brought an action for recovery against Mindo, since it preferred to await the outcome of the proceedings before the General Court.
- 15 It stated that, to take such action, it would have been compelled in all likelihood to seek a judgment and an order for payment based on that judgment, and that, if the fine were wholly or partially annulled, it would have been forced to return to Mindo the sum recovered with interest, which would have made the whole process cumbersome, expensive and lengthy. Furthermore, it took the view that its claim was not time-barred and would not be before the end of the proceedings before the General Court. Lastly, it stated that the existence of a procedure for arrangement with creditors did not prevent a creditor from bringing a case before the competent courts with the aim of obtaining a declaratory judgment against the debtor subject to that procedure and of requesting an order for payment once the judgment approving the arrangement was adopted.
- 16 After examining the circumstances of the case, and in particular the subject-matter of the application, the General Court concluded that Mindo had not demonstrated its vested and present interest in pursuing the proceedings, and that there was therefore no need to adjudicate on the action.

Forms of order sought

- 17 By its appeal, Mindo claims that the Court should set aside the judgment under appeal in its entirety, refer the case back to the General Court to be re-assessed on the merits, and order the Commission to pay all of the costs.
- 18 The Commission contends that the appeal should be dismissed and Mindo ordered to pay the costs.

The appeal

- 19 In support of its appeal, Mindo relies on two grounds of appeal. By the first ground of appeal, it is claimed, in essence, that the General Court erred in law by mischaracterising Mindo's situation and consequently finding that it had no interest in bringing proceedings. The second ground of appeal, submitted in the alternative, alleges an infringement of AOI's and Mindo's right to a fair trial.
- 20 The Commission maintains that the first ground of appeal is clearly inadmissible and that the second ground of appeal is clearly unfounded.

Admissibility of the first ground of appeal

- 21 In accordance with settled case-law, it follows from the second paragraph of Article 256(1) TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Articles 168(1)(d) and 169(2) of the Rules of Procedure of the Court of Justice of the European Union that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (see Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, paragraph 121, and judgment of 24 January 2013 in Case C-646/11 P *3F v Commission*, paragraph 51).
- 22 Mindo relies on errors of law made by the General Court, indicating, in a sufficiently precise manner, the contested elements of the judgment under appeal, in particular paragraph 87, and the reasons for which it considers that those elements are marred by such errors.
- 23 The Commission is therefore not justified in pleading that the first ground of appeal is inadmissible.

Substance of the first plea

Arguments of the parties

- 24 First, Mindo claims that, by paying the fine in full, AOI became Mindo's creditor, pursuant to Article 2055, second paragraph, and Article 1299 of the Italian Civil Code. Under Article 2946 of that Code, AOI's right to bring an action for recovery against Mindo for the claim in question is subject to the ordinary limitation period of 10 years. The General Court therefore erred in law in finding, in paragraph 85 et seq. of the judgment under appeal, that the annulment or alteration of the contested decision would be of no benefit to Mindo, inasmuch as AOI's right to bring an action against Mindo for recovery of its claim arose on the day of the payment of the fine, and that action is subject to a limitation period of 10 years.
- 25 Secondly, Mindo alleges that the General Court erred in finding that it had not been established that AOI had a claim against Mindo or that AOI had the possibility or intention of bringing an action to recover that debt. Mindo claims that it established the existence of its debt to AOI by producing evidence concerning Royal Decree No 267 of 16 March 1942 and AOI's actual right to recovery, in its reply to the Commission's observations on the documents produced by Mindo at the request of the General Court. It further claims that it was not required to show AOI's intention to recover the debt, but only AOI's actual right to bring an action for that purpose.
- 26 Thirdly, Mindo submits that the General Court incorrectly assessed the burden of proof in basing its judgment on the finding that 'it cannot be ruled out' that AOI had taken it upon itself to pay Mindo's share of the fine. Mindo stated at the hearing that the General Court's finding in that respect meant

that it had no means of defending itself and constituted a reversal of the burden of proof. The General Court's overall assessment of Mindo's lack of interest in bringing proceedings was based on speculative grounds relating to AOI's intention and other irrelevant contingencies.

- 27 In that respect, the Commission contends that the part of the fine for which Mindo was liable was paid in full by AOI, which, at the time of the delivery of the judgment under appeal, had still not brought an action for recovery of that payment, and that there was an undisclosed agreement between the two entities, according to which AOI would bear the liability for Mindo's anti-competitive conduct.
- 28 According to the Commission, the General Court's reasoning was not based on considerations relating to Italian law, but rather on a series of factual observations which contradict the claim that AOI had the right to bring an action for recovery against Mindo. In that respect, it stated at the hearing that, in its view, 'in a normal situation' and in the absence of any other arrangement, AOI's payment of the amount of the fine for which Mindo was liable would, in accordance with the Italian law in force, give rise to a right on the part of AOI to bring an action against Mindo for the reimbursement of that amount, but the General Court, relying on the evidence before it, had found that AOI and Mindo must have come to an agreement, in accordance with which AOI no longer had the right to bring an action against Mindo for that purpose.

Findings of the Court

- 29 The obligation to state the reasons on which a judgment is based arises under Article 36 of the Statute of the Court of Justice, which applies to the General Court by virtue of the first paragraph of Article 53 of the Statute, and Article 81 of the Rules of Procedure of the General Court. It has consistently been held that the statement of the reasons on which a judgment of the General Court is based must clearly and unequivocally disclose that court's reasoning in such a way as to enable the persons concerned to ascertain the reasons for the decision taken and the Court of Justice to exercise its power of review (see Case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission* [2012] ECR, paragraph 83 and the case-law cited).
- 30 It should be noted, moreover, that insufficiency or lack of reasoning constitutes an infringement of an essential procedural requirement and is a matter of public policy which the European Union judicature must raise of its own motion (see, to that effect, Case C-265/97 P *VBA v Florimex and Others* [2000] ECR I-2061, paragraph 114, and order of 7 December 2011 in Case C-45/11 P *Deutsche Bahn v OHIM*, paragraph 57).
- 31 It is clear that several findings in the judgment under appeal are vitiated by such an insufficiency of reasoning.
- 32 First, it must be recalled that, by the contested decision, the Commission imposed a fine of EUR 10 million on AOI and Mindo, stating that Mindo was jointly and severally liable for the payment of EUR 3.99 million. As the General Court noted in paragraph 82 of the judgment under appeal, AOI paid the fine in full on 14 February 2006.
- 33 The General Court rightly pointed out that, in accordance with Article 2 of the contested decision, Mindo is one of the addressees of the contested decision, and that it was jointly and severally liable for the payment of EUR 3.99 million of the fine.
- 34 In paragraph 85 of the judgment under appeal, the General Court found that 'the annulment or alteration of the contested decision on the basis sought by [Mindo] would not procure any advantage for it, since the fine imposed on it has already been paid in full by [AOI], its jointly and severally liable co-debtor, and because [AOI] ... has not claimed a contribution from it, even though more than five

years have elapsed since that payment'. Furthermore, the General Court found, in paragraph 87 of the judgment under appeal, that Mindo had failed to establish to the requisite legal standard that AOI had a claim against it.

- 35 However, in that respect, Mindo claimed before the General Court that AOI's payment in full of the fine gave rise, on the part of AOI, to a claim which could be brought against Mindo, as jointly and severally liable co-debtor of a part of the fine imposed on those two undertakings by the Commission.
- 36 It is clear, moreover, from Mindo's replies of 6 January 2011 to the General Court's questions, that 'a party to a joint and several obligation who pays the full debt to the creditor may seek recovery from the other jointly and severally liable debtors for the proportional amount of the debt paid on their behalf'. Furthermore, it is clear from the Commission's observations of 21 February 2011 on the documents produced under Article 64 of the Rules of Procedure of the General Court that it was not disputed between the parties that Italian law relating to contribution between parties which are jointly and severally liable for a debt grants AOI the right to claim a contribution from Mindo for payment of the fine.
- 37 Despite that line of argument, the General Court found that AOI's payment of the fine in full was not sufficient to give rise to a claim on the part of AOI against Mindo, as jointly and severally liable co-debtor of a part of the fine. It must be found, in that respect, that the General Court failed to state reasons to the requisite legal standard for that finding.
- 38 Moreover, as may be seen from paragraph 72 of the judgment under appeal and the documents before the Court, Mindo raised, on several occasions before the General Court, the issue of whether AOI's right to bring proceedings was time-barred and, in particular, the argument that AOI had, from the date on which it paid in full the fine which the Commission had imposed on those two undertakings, a right to bring an action against Mindo allowing it to recover a contribution for the payment of Mindo's part of the fine. Mindo claimed that this right would not be time-barred until 14 February 2016.
- 39 In that respect, the General Court merely stated that 'more than five years have elapsed' since the payment by AOI and that Mindo had failed to establish to the requisite legal standard that AOI 'was still capable' of recovering that debt, without ascertaining whether or not AOI's right to bring the action in question was time-barred, even though Mindo had relied before the General Court on provisions of Italian law relating to the limitation period of 10 years applicable to actions by jointly and severally liable co-debtors, and the arguments raised in that respect were presented in a sufficiently clear and precise manner to allow the General Court to rule on that issue.
- 40 In those circumstances, it must be found that the General Court could not, on the basis that AOI had paid Mindo's debt, but without in any way explaining why that payment did not suffice to give rise to a claim on the part of AOI, conclude, as it did in paragraphs 85 and 87 of the judgment under appeal respectively, that the annulment or alteration of the contested decision would not procure any advantage for Mindo, and that Mindo had failed to establish to the requisite legal standard that AOI had a claim against it.
- 41 It follows from the foregoing that, by thus failing to respond to a central part of Mindo's line of argument, the General Court breached its duty to state reasons in accordance with Article 36 of the Statute of the Court of Justice, applicable to the General Court under the first paragraph of Article 53 of that Statute, and Article 81 of the Rules of Procedure of the General Court.
- 42 Secondly, the General Court stated, in paragraph 87 of the judgment under appeal, that even if AOI had a claim against Mindo, Mindo had failed to establish to the requisite legal standard that AOI was 'still capable' of recovering that claim.

- 43 It is clear from paragraph 71 of the judgment under appeal that Mindo claimed before the General Court that, under the Italian law in force, it might in the future be faced with an action for recovery brought by AOI. In its reply of 20 May 2011 to the General Court's questions, Mindo stated *inter alia* that, in accordance with Italian law, creditors with claims arising from facts prior to the date of the court order, such as AOI, may, even after the implementation of the arrangement with creditors has come to an end, bring an action against Mindo for an order for payment, while complying with the share percentages and time limits established by the arrangement with creditors.
- 44 In order to respond to that argument, the General Court could not, therefore, merely state, as it did in paragraph 91 of the judgment under appeal, that Mindo had not provided any explanation as to why it categorised AOI as a 'prior creditor', or as to why AOI had not attempted to submit its claim.
- 45 Moreover, although Mindo claimed that AOI was still capable of recovering its claim, the General Court did not take account of the argument which was, in Mindo's view, decisive in that respect, according to which, as followed from a reply to the General Court's questions of 8 July 2011, an arrangement with creditors allows an insolvent undertaking to restructure its debt with all of its creditors and thus continue its activities.
- 46 It follows that the reasons stated by the General Court in the judgment under appeal do not set out not clearly and unequivocally, in such a way as to enable, *inter alia*, the Court of Justice to exercise its power of review, the reasons for which the General Court considered that Mindo had failed to establish to the requisite legal standard that AOI was capable of recovering its claim, and that, consequently, that statement of reasons does not meet the requirements of the case-law set out in paragraph 29 above.
- 47 Thirdly, the General Court, in paragraph 87 of the judgment under appeal, stated that even if AOI did have a claim against Mindo, Mindo had also failed to demonstrate to the requisite legal standard that AOI 'had the intention' of recovering that claim.
- 48 Thus, the General Court required that Mindo prove AOI's intention to recover its claim. That requirement is also clear from paragraph 91 of the judgment under appeal, where the General Court stated that Mindo had not provided any explanation as to why AOI had not even attempted to submit its claim in the procedure for the arrangement with creditors and had not objected to that procedure, despite the consequences which such a claim could have on the decision of the other creditors to accede to the proposed arrangement with creditors.
- 49 However, according to the judgment under appeal, by its letter of 30 March 2011 and in answer to the General Court's written questions, AOI stated that it intended to bring an action for recovery against Mindo, that its action for recovery was not time-barred, and that it preferred to await the outcome of the litigation pending before the General Court before bringing such an action. It must therefore be concluded that the General Court did not examine that document.
- 50 In so doing, the General Court made Mindo's interest in bringing proceedings subject to the condition that it prove a third party's intention to bring an action for recovery of its claim. Thus, by placing an impossible burden of proof on Mindo in order for it to demonstrate its interest in bringing proceedings, the General Court erred in law.
- 51 In view of the foregoing, it must be found that the General Court's conclusion in paragraph 87 of the judgment under appeal is based on a series of elements, set out in paragraphs 85 and 88 to 92 of that judgment, in the light of which the General Court found, in paragraph 93 of the judgment under appeal, that 'it cannot be ruled out' that AOI had taken it upon itself to pay Mindo's share of the fine or that it had waived its right to claim a contribution from Mindo.

- 52 It is also clear from the judgment under appeal that the General Court requested Mindo to provide it with any relevant information and documents concerning any agreement that it might have entered into with AOI regarding payment of the fine by AOI and the possibility of claiming a contribution from the applicant. It must be pointed out, in that respect, that the General Court itself found, in paragraph 92 of the judgment under appeal, that the documents provided by Mindo in response to that request contain no guarantee or indemnity in its favour regarding any fine that the Commission might impose on it.
- 53 The expression used in paragraph 93 of the judgment under appeal shows the inconclusive nature of those elements and the finding of a mere probability. The finding of a lack of interest in bringing proceedings on the part of the addressee of a Commission decision imposing a fine cannot be based on mere assumptions, particularly as the General Court has failed to take sufficiently into account a series of elements put forward by Mindo and intended to cast a different light on the facts of the case or to show that AOI could still bring an action for recovery and recover at least a part of its claim.
- 54 It follows from all of the foregoing that, since, first, the General Court's assessment is vitiated by an inadequate statement of reasons and, secondly, it placed an impossible burden of proof on Mindo, Mindo is justified in maintaining that the General Court erred in law in finding that it lacked an interest in bringing proceedings.
- 55 Accordingly, and without it being necessary to examine the second ground of appeal, the appeal must be upheld and the judgment under appeal set aside.
- 56 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, if the Court quashes a decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment. In the present case, the state of the proceedings does not permit the Court to give final judgment.
- 57 Consequently, it is necessary to refer the case back to the General Court and to reserve the costs.

On those grounds, the Court (Seventh Chamber) hereby:

1. **Sets aside the judgment of the General Court of the European Union of 5 October 2011 in Case T-19/06 *Mindo v Commission*;**
2. **Refers the case back to the General Court of the European Union;**
3. **Reserves the costs.**

[Signatures]