



Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

22 May 2014 *

(Appeal — Competition — Agreements, decisions and concerted practices — Plastic industrial bags market — Single and continuous infringement)

In Case C-35/12 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 24 January 2012,

Plásticos Españoles SA (ASPLA), established in Torrelavega (Spain), represented by E. Garayar Gutiérrez, M. Troncoso Ferrer and E. Abril Fernández, abogados,

appellant,

the other party to the proceedings being:

European Commission, represented by F. Castilla Contreras and F. Castillo de la Torre, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Sixth Chamber),

composed of A. Borg Barthet, President of the Chamber, E. Levits and M. Berger (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 15 January 2014,

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

gives the following

Judgment

- 1 By its appeal, Plásticos Españoles SA (ASPLA) (hereinafter 'ASPLA') asks the Court to set aside the judgment of the General Court of the European Union in Case T-76/06 *ASPLA v Commission* EU:T:2011:672 ('the judgment under appeal') by which the General Court dismissed its action for annulment in part of Commission Decision C(2005) 4634 final of 30 November 2005 relating to a

* Language of the case: Spanish.

proceeding pursuant to Article 81 [EC] (Case COMP/F/38.354 — Industrial bags) ('the decision at issue') and for annulment or, in the alternative, reduction of the fine which was imposed upon it by that decision.

Background to the dispute and the decision at issue

- 2 ASPLA is a limited company governed by Spanish law which has been manufacturing and marketing a wide range of plastic products, including industrial bags, since 1982. It is the subsidiary of Armando Álvarez SA ('Armando Álvarez'), a company governed by Spanish law, which, in 2002, held 98.6% of its shares.
- 3 In November 2001, British Polythene Industries plc informed the Commission of the European Communities of the existence of a cartel in the industrial bags sector ('the cartel').
- 4 After carrying out inspections in June 2002, the Commission initiated the administrative procedure on 29 April 2004 and adopted a statement of objections against several companies, including ASPLA and Armando Álvarez.
- 5 On 30 November 2005, the Commission adopted the decision at issue, Article 1(1)(j) of which states that ASPLA and Armando Álvarez infringed Article 81 EC by participating from 8 March 1991 until 26 June 2002 in a complex of agreements and concerted practices in the plastic industrial bags sector in Belgium, Germany, Spain, France, Luxembourg and the Netherlands; this consisted in the fixing of prices and the establishment of common price calculation models, the sharing of markets and the allocation of sales quotas, the assignment of customers, deals and orders, the submission of concerted bids in response to certain invitations to tender and the exchange of individualised information.
- 6 On that ground, the Commission, in point (h) of the first paragraph of Article 2 of the decision at issue, imposed on ASPLA and Armando Álvarez a fine of EUR 42 million, for which amount those two companies were held jointly and severally liable.

The judgment under appeal

- 7 By application lodged at the Registry of the Court of First Instance (now 'the General Court') on 24 February 2006, ASPLA brought an action challenging the decision at issue. In that action ASPLA sought, in essence, annulment of that decision in so far as it concerned it or, in the alternative, reduction of the fine imposed on it by the Commission.
- 8 In support of its action, ASPLA put forward five pleas in law. The first three pleas concerned matters of fact in that they alleged an error of assessment as to the facts relating (i) to the scope of the conduct engaged in by ASPLA, (ii) the definition of the product market and the geographic market in issue and (iii) the market shares used as a basis for calculating the fines. The fourth plea alleged infringement of Article 81 EC and of the principle of legal certainty in so far as the Commission had classified the infringement as single and continuous. The fifth plea alleged infringement of the provisions applicable to the calculation of the fines and infringement of the principles of equal treatment and proportionality in the determination of the fine imposed on ASPLA.
- 9 The General Court dismissed the action in its entirety.

Forms of order sought and proceedings before the Court of Justice

- 10 ASPLA claims that the Court should:
- set aside the judgment under appeal;
 - in the alternative, substantially reduce the fine imposed on it by the Commission; and
 - order the Commission to pay the costs.
- 11 The Commission contends that the Court of Justice should:
- dismiss the appeal; and
 - order ASPLA to pay the costs.
- 12 By decision of the President of the Sixth Chamber of the Court of Justice of 15 May 2013, the proceedings in the present appeal were suspended until conclusion of the proceedings in Case C-40/12 P *Gascogne Sack Deutschland v Commission* EU:C:2013:768, Case C-50/12 P *Kendrion v Commission* EU:C:2013:771 and Case C-58/12 P *Groupe Gascogne v Commission* EU:C:2013:770. The proceedings resumed following delivery of the judgments in those cases on 26 November 2013.

The appeal

The first plea in law

Arguments of the parties

- 13 ASPLA submits that the judgment under appeal contains errors relating to the legal characterisation of the facts and the conclusions which were drawn from that characterisation as regards the application, so far as ASPLA is concerned, of the concept of a single and continuous infringement.
- 14 ASPLA submits, in the first place, that the General Court, in paragraphs 30, 31 and 33 of the judgment under appeal, made three errors concerning ASPLA's participation in the infringements relating to the sector for what are known as 'open-mouth' bags. The General Court relied in that regard on mere assumptions, whilst the available indicia, namely the fact that ASPLA did not participate in regional-level discussions in the course of which questions concerning those bags were addressed, not only raised doubts about its participation in the cartel but even suggested that it did participate in it at all.
- 15 In the second place, the General Court also erred in finding that ASPLA had taken part in the infringement in the 'block bags' sector when it is apparent from the findings made in paragraphs 44 to 52 of the judgment under appeal that the indicia described in those paragraphs tend to show that it did not take part in the discussions relating to 'block bags' and that it was therefore not involved in the anti-competitive conduct concerning them.
- 16 In the third place, the evidence relied on by the General Court, in paragraphs 67 to 69 of the judgment under appeal does not show that ASPLA, even taking account of its attendance at certain meetings in which unlawful conduct was discussed, knew or ought to have known that that conduct formed part of the general collusive arrangements comprising the cartel that is described in the decision at issue.

- 17 The Commission contends that the first plea put forward in support of the appeal is inadmissible in that it calls in question the General Court's assessment of the evidence.

Findings of the Court

- 18 In order to address the aspect of the plea which alleges that the General Court made an error in the legal characterisation of the evidence submitted to it, it is appropriate to recall the scope of the complaints levelled at ASPLA in the decision at issue.
- 19 As the General Court pointed out in paragraph 57 of the judgment under appeal, the decision at issue concerned a multi-faceted cartel, affecting a number of types of bags and a number of territories. According to the description which is given of the cartel in recital 444 to that decision, the structure of the cartel entailed 'an overall group ... and subgroups of a regional or functional nature ... that were apparently distinct', with the cartel as a whole forming 'a consistent and coordinated entity, as is established, inter alia, by [a number of] factors'. As the General Court pointed out, the Commission complained, not that the undertakings to which the decision at issue was addressed had taken part in all the various manifestations of the cartel, but that they had taken part in it 'to varying degrees'.
- 20 So far as the extent of ASPLA's participation in the unlawful conduct described in the decision at issue is concerned, the General Court, after examining all the arguments put forward by it, stated, in paragraph 63 of the judgment under appeal, that ASPLA was objecting, in essence, to a complaint which was not included in the decision at issue, namely that it had participated in all the supranational, regional and functional manifestations of the cartel. On that basis, the General Court concluded that the evidence which had been submitted to it did not show that ASPLA's degree of involvement in the cartel was any different from that which the Commission had attributed to it in the decision at issue, ASPLA's participation being shown by a set of sufficiently precise and consistent indicia.
- 21 As regards membership of the cartel, the General Court held, in paragraph 70 of the judgment under appeal, that the Commission had correctly concluded that, even though ASPLA did not take part in the subgroups, it was involved in the overall cartel. The General Court, in paragraph 68 of the judgment under appeal, justified that finding by pointing out, inter alia, that ASPLA had taken part in the cartel at its central level, that is to say, at the level where impetus was generated.
- 22 Contrary to what is maintained by ASPLA, such an appraisal of the evidence is compatible with a well-established line of authority which has accepted that the existence of unlawful conduct may be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* EU:C:2004:6, paragraph 57, and Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel v Commission* EU:C:2007:52, paragraph 51).
- 23 In so far as ASPLA seeks to show that the evidence examined by the General Court is ambiguous and insufficiently precise or consistent to substantiate the conclusions reached by that Court, it should be observed that the appraisal by the General Court of the probative value of the documents submitted to it cannot, save where the rules on the burden of proof and the taking of evidence have not been observed or the evidence has been distorted, be challenged before the Court of Justice (Case C-238/12 P *FLSmidth v Commission* EU:C:2014:284, paragraph 31 and the case-law cited).
- 24 It follows from the foregoing considerations that the first plea put forward by ASPLA in support of its appeal must be rejected.

The second plea in law

Arguments of the parties

- 25 ASPLA submits, principally, that the General Court, in paragraph 115 of the judgment under appeal, made an error of law in rejecting as inadmissible, because it was new, the argument which ASPLA had expounded at the hearing, which alleged that the Commission had made a manifest error of assessment in calculating its market share not on the basis of ASPLA's own sales, but by attributing to ASPLA the sales made by its parent company, Armando Álvarez, as well.
- 26 On the substance, ASPLA maintains that, since it is necessary to distinguish the undertaking which participates directly in the infringement — in this case the subsidiary — from the undertaking to which the subsidiary's conduct is attributed, namely the parent company, the gravity of the infringement must be determined solely on the basis of the subsidiary's turnover before, following calculation of the fine, the parent company is made jointly and severally liable for payment of the fine. That method was applied in the decision at issue to the other undertakings that took part in the cartel, ASPLA having been the only one to be penalised in that way, which it maintains is discriminatory and unjustified.
- 27 In the alternative, ASPLA submits that the General Court made an error of law in failing to determine of its own motion whether the reasoning in the decision at issue was sufficient to explain why the Commission had decided to depart, in ASPLA's case, from the applicable rules, the relevant case-law and the method applied to the other undertakings involved in the same cartel so far as calculation of the fine was concerned. In the absence of any objective justification for that difference in treatment, the latter constitutes an infringement of the principle of equal treatment.
- 28 The Commission contends that both limbs of the second plea in law are unfounded.

Findings of the Court

- 29 In order to address this plea, it is necessary to refer to the arguments put forward by ASPLA before the General Court.
- 30 It is apparent from the application lodged before the General Court and from paragraphs 98 to 103 of the judgment under appeal that ASPLA put forward, in essence, five lines of argument to challenge the determination of the starting amount used by the Commission in the calculation of the fines. In the first place, it reiterated that the Commission could not characterise the conduct in question as a single and continuous infringement. In the second place, it maintained that the starting amounts could not be calculated on the basis of market shares. In the third place, it complained that the Commission had infringed the principle of individual liability by taking into account all the sales of industrial bags made by it in the countries affected by the cartel. Fourth, it argued that the Commission could not base the calculation of market shares on sales from 1996 since its sales decreased significantly thereafter. Fifth, it maintained that its fine of EUR 42 million was clearly disproportionate, in particular in relation to any profits it might have made from the infringement.
- 31 In that regard, it is apparent from paragraphs 104 and 115 of the judgment under appeal that, at the hearing before the General Court, ASPLA argued that the Commission had made a manifest error of assessment in calculating its market share not on the basis of its own sales, but by attributing to ASPLA the sales made by its parent company, Armando Álvarez, as well. In response to a question from the General Court, ASPLA explained that this argument was to be regarded as a further development of the pleas put forward by it in the written procedure.

- 32 The General Court considered that none of the pleas set out by ASPLA in its application concerned the alleged error in the calculation of market share raised at the hearing. It concluded that that argument had to be classified as a new plea and rejected it as inadmissible, in accordance with Article 48(2) of its Rules of Procedure.
- 33 In so far as ASPLA submits, in the appeal, that it advanced the argument concerning an error in the determination of market share in support of the pleas it put forward before the General Court under the headings ‘Error made by the Commission in the assessment of the facts’, ‘Infringement of Article 15(2) of [Council] Regulation No 17 [of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87)] and of the Guidelines on the method of setting fines [imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3)]’ as well as infringement of the ‘principles of equal treatment and proportionality in the determination of the amount [of the fine]’, it is sufficient to observe that the general nature of the heading of a plea put forward in the application at first instance cannot cover the development, at a later stage in the proceedings, of specific arguments which are not sufficiently closely related to the arguments raised in the application.
- 34 In the present case, an examination of the documents in the file shows that, in its application, ASPLA put forward, under the headings mentioned in the preceding paragraph, a number of specific arguments concerning the calculation of the fine imposed on it by the Commission, but did not, however, challenge the fact that its market share had been calculated by attributing to it both its own sales and those made by Armando Álvarez. The taking into account of market share, in relation to the effective economic capacity of entities which infringe EU law to cause significant damage to competition, is an essential element of the method of setting the fine; therefore, if ASPLA sought to challenge that method, this had to be specifically stated before the General Court at the stage of the application (see, to that effect, Case C-564/08 P *SGL Carbon v Commission* EU:C:2009:703, paragraph 31).
- 35 The General Court was therefore fully entitled, in paragraph 116 of the judgment under appeal, to reject ASPLA’s argument that the Commission had made an error of calculation in determining its market share by including the sales of its parent company in that share.
- 36 That being so, there is no need for the Court to consider the merits of such an argument.
- 37 In so far as ASPLA maintains, in the alternative, that the General Court made an error of law in failing to determine of its own motion whether the reasons stated in the decision at issue were sufficient to explain why the Commission had decided to depart from the rules governing the calculation of fines, as it had applied them to the other undertakings participating in the same cartel, it should be noted that, before the General Court, ASPLA did not allege that there was, as between those undertakings and itself, a difference in treatment with regard to the determination of its market share for the purpose of setting the fine.
- 38 Given that no arguments on that issue were raised before the General Court, the latter cannot be criticised for failing to determine of its own motion whether the reasons stated in the decision at issue were such as to justify any alleged difference in treatment, since it had not been required to exercise its power of review in that regard.
- 39 Since the argument concerning such a difference in treatment must be regarded as new, it cannot be examined at the stage of the appeal. In an appeal the jurisdiction of the Court of Justice is in principle confined to review of the findings of law on the pleas argued at first instance (*FLSmidth v Commission* EU:C:2014:284, paragraph 42). Accordingly, both limbs of the second plea must be rejected.
- 40 It follows from the foregoing considerations that neither of the two pleas in law put forward by ASPLA in support of its appeal can be upheld and, accordingly, the appeal must be dismissed in its entirety.

The Commission's request for substitution of grounds

Arguments put forward by the Commission

- 41 In its response, the Commission asks the Court to replace the legal reasoning in paragraph 47 of the judgment under appeal. It submits that, in relying on the statement of a participant at a meeting of the 'block-bags' subgroup to support its finding that ASPLA did not take part in that meeting although its name was included on the list of attendees, the General Court distorted the clear sense of the evidence submitted to it.

Findings of the Court

- 42 Under Article 116(1) of the Rules of Procedure of the Court of Justice, in the version in force at the date of the abovementioned request, a response must seek to dismiss, in whole or in part, the appeal, or to set aside, in whole or in part, the decision of the General Court, or must seek the same form of order, in whole or in part, as that sought at first instance. Article 113(1) of the Rules of Procedure sets out the same requirements as regards an appeal (Case C-263/09 P *Edwin v OHIM* EU:C:2011:452, paragraph 83).
- 43 In the present case, the Commission's request seeks not to have the judgment under appeal set aside, even in part, but amendment of a finding made by the General Court in the context of its examination of ASPLA's first plea, a plea which was, moreover, rejected.
- 44 Such a request can, therefore, only be rejected as inadmissible.

Costs

- 45 In accordance with Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to the costs.
- 46 Under Article 138(1) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and ASPLA has been unsuccessful, the latter must be ordered to bear its own costs and to pay those incurred by the Commission.

On those grounds, the Court (Sixth Chamber) hereby

- 1. Dismisses the appeal;**
- 2. Orders Plásticos Españoles SA (ASPLA) to pay the costs of this appeal.**

[Signatures]