



## Reports of Cases

### Case C-243/12 P

FLS Plast A/S

v

European Commission

(Appeal — Competition — Agreements, decisions and concerted practices — Plastic industrial bags sector — Decision finding an infringement of Article 81 EC — Unlimited jurisdiction of the General Court — Obligation to state reasons — Attribution to the parent company of the infringement committed by the subsidiary — Liability of the parent company for payment of the fine imposed on the subsidiary — Proportionality — Proceedings before the General Court — Adjudication within a reasonable time)

Summary — Judgment of the Court (First Chamber), 19 June 2014

1. *Appeals — Pleas in law — Plea submitted for the first time in the context of the appeal — Plea directed against a ground of the judgment under appeal — Plea seeking to contest the merits of the judgment under appeal — Plea arising from the judgment under appeal itself — Admissibility*

(Art. 256(1) TFEU; Statute of the Court of Justice, Art. 58, first para.; Rules of Procedure of the General Court, Art. 48(2))

2. *Competition — European Union rules — Infringements — Attribution — Parent company and subsidiaries — Economic unit — Criteria for assessment — Presumption that the parent company exercises decisive influence over its wholly-owned subsidiaries — Rebuttable — Burden of proof — Infringement of the presumption of innocence — No such infringement*

(Arts 101 TFEU and 102 TFEU; Charter of Fundamental Rights of the European Union, Art. 48; Council Regulation No 1/2003, Art. 23(2))

3. *Appeals — Pleas in law — Mistaken assessment of the facts — Inadmissibility — Review by the Court of the assessment of the facts and evidence — Possible only in the event of distortion*

(Art. 256 TFEU; Statute of the Court of Justice, Art. 58)

4. *Appeals — Pleas in law — Inadequate statement of reasons — Scope of the obligation to state reasons*

(Art. 256 TFEU; Statute of the Court of Justice, Arts 56 and 58; Rules of Procedure of the General Court, Art. 81)

5. *Appeals — Pleas in law — Grounds of a judgment vitiated by an infringement of European Union law — Operative part well founded on other legal grounds — Rejection*

(Art. 256 TFEU; Statute of the Court of Justice, Art. 58)

6. *Competition — Fines — Amount — Determination — Non-imposition or reduction of the fine for cooperation of the undertaking concerned — Conditions — Parent company and subsidiaries — Need to form an economic unit at the time of the cooperation*

(Art. 101(1) TFEU; Council Regulation No 1/2003, Art. 23(2); Commission Notice 96/C 207/04, Section D.2)

7. *Competition — European Union rules — Infringement committed by a subsidiary — Attribution to the parent company — Joint and several liability for payment of the fine — Scope — Parent company and subsidiary having formed an undertaking within the meaning of Article 101 TFEU at the time of commission of the infringement and having ceased to exist in that form when a decision imposing a fine was adopted — Consequences on the determination of the maximum amount of the fine*

(Art. 101(1), TFEU; Council Regulation No 1/2003, Art. 23(2))

8. *European Union law — Principles — Fundamental rights — Observance ensured by the Court — Right of every person to a fair hearing — Duty to act within a reasonable time — Enshrined in the European Convention on Human Rights — Reference to the Charter of Fundamental Rights of the European Union — Right to effective judicial protection*

(Charter of Fundamental Rights of the European Union, Art. 47)

9. *Judicial proceedings — Duration of the proceedings before the General Court — Reasonable time — Proceedings concerning the existence of an infringement of the competition rules — Failure to adjudicate within a reasonable time — Consequences*

(Charter of Fundamental Rights of the European Union, Art. 47, second para.)

10. *Non-contractual liability — Claim based on an excessive length of the proceedings before the General Court — Conditions — Unlawfulness — Harm — Causal link — Criteria for assessment — Composition of the chamber hearing the case*

(Arts 256 TFEU, 268 TFEU and 340 TFEU; Charter of Fundamental Rights of the European Union, Art. 47, second para.)

1. See the text of the decision.

(see paras 25, 44-48)

2. See the text of the decision.

(see paras 27, 30)

3. See the text of the decision.

(see paras 32, 76-78)

4. See the text of the decision.

(see paras 49, 51, 79)

5. See the text of the decision.

(see para. 84)

6. In the field of competition, only the undertaking which has cooperated with the Commission on the basis of the leniency notice can be granted, under that notice, a reduction of the fine which would have been imposed upon it without that cooperation. That reduction cannot be extended to a company which, for part of the infringement period, had formed part of the economic entity constituted by that undertaking, but no longer formed part of it at the time when that undertaking cooperated with the Commission.

A contrary interpretation would mean generally that, in instances where one undertaking succeeds another, a company which participated initially in an infringement, as the parent company of a subsidiary directly involved in it, and which then transferred that subsidiary to another undertaking would benefit, as the case may be, from a fine reduction granted to the latter undertaking in respect of its cooperation with the Commission, although that company neither contributed itself to the detection of the infringement in question nor exercised decisive influence at the time of the cooperation on its former subsidiary.

Consequently, in the light of the objective pursued by the leniency notice, consisting in promoting the detection of conduct contrary to Article 101 TFEU, and in order to ensure effective application of that provision, there is nothing to justify extending a fine reduction granted to an undertaking in respect of its cooperation with the Commission to an undertaking which, whilst having controlled, in the past, the subsidiary involved in the infringement in question, did not itself contribute to detection of the infringement.

(see paras 85-87)

7. In European Union competition law, as regards payment of a fine imposed for breach of the competition rules, the joint and several liability between two companies constituting an economic entity cannot be reduced to a type of security provided by the parent company in order to guarantee payment of the fine imposed on the subsidiary. Therefore, the argument that that parent company could not be ordered to pay a fine higher than the fine imposed on its subsidiary is unfounded.

The principle that penalties must be specific to the offender and the offence requires, in accordance with Article 23(3) of Regulation No 1/2003, that the amount of the fine to be paid jointly and severally must be determined by reference to the gravity of the infringement for which the undertaking concerned is considered individually responsible and the duration of the infringement.

(see para. 107)

8. See the text of the decision.

(see paras 131-133)

9. Having regard to the need to ensure that the competition rules of European Union law are complied with, the Court cannot allow an appellant to reopen the question of the amount of a fine which has been imposed upon it, on the sole ground that there was a failure to adjudicate within a reasonable time, where all of its pleas directed against the findings made by the General Court concerning the amount of that fine and the conduct that it penalises have been dismissed.

The sanction for a breach, by a Court of the European Union, of its obligation under the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union to adjudicate on the cases before it within a reasonable time must be an action for damages brought before the General Court, since such an action constitutes an effective remedy. It follows that a claim for compensation

for the damage caused by the failure by the General Court to adjudicate within a reasonable time may not be made directly to the Court of Justice in the context of an appeal, but must be brought before the General Court itself.

(see paras 134, 135)

10. When hearing a claim for compensation for the damage caused by its failure to adjudicate within a reasonable time, the General Court, sitting in a different composition from that which heard the dispute giving rise to the proceedings whose duration is criticised, has the task of assessing both the actual existence of the harm alleged and the causal connection between that harm and the excessive length of the legal proceedings at issue by examining the evidence submitted for that purpose.

(see para. 136)