



Reports of Cases

Case C-606/18 P

**Nexans France SAS
and
Nexans SA**

v

European Commission

Judgment of the Court (Second Chamber), 16 July 2020

(Appeal — Competition — Cartels — European market for submarine and underground power cables — Market allocation in connection with projects — Regulation (EC) No 1/2003 — Article 20 — European Commission's powers of inspection in cartel proceedings — Power to copy data without a prior examination and to examine the data subsequently at the Commission's premises — Fines — Unlimited jurisdiction)

1. *Appeal — Grounds of appeal — Mere repetition of the pleas and arguments put forward before the General Court — Inadmissibility — Challenge to the General Court's interpretation or application of EU law — Admissibility*
(Art. 256(1), second para., TFEU; Statute of the Court of Justice, Art. 58, first para.; Rules of Procedure of the Court of Justice, Art. 168(1)(d))

(see paragraph 54)

2. *Court proceedings — Introduction of new pleas in the course of proceedings — Conditions — Expanding upon an existing argument — Admissibility*
(Rules of Procedure of the General Court, Arts 84(1) and 177(1)(d))

(see paragraph 55)

3. *Competition — Administrative proceedings — Commission's power of inspection — Scope and limits — Making a copy-image of the hard drive of computers during an inspection — Whether permissible — Conditions — Assessing the relevance of the data copied for the subject matter of the inspection before placing in the file — Obligation to delete non-relevant data*
(Council Regulation No 1/2003, Art. 20(2)(b))

(see paragraphs 57-68)

4. *Competition — Administrative proceedings — Commission's power of inspection — Scope and limits — Specific examination procedures — Discretion of the Commission (Council Regulation No 1/2003, Art. 20(2)(b))*

(see paragraphs 61, 62)

5. *Competition — Administrative proceedings — Commission's power of inspection — Scope and limits — Whether provisions conferring the powers of investigation on the Commission are to be interpreted strictly — Not to be interpreted strictly — Due regard to the rights of the undertakings concerned (Council Regulation No 1/2003, Art. 20)*

(see paragraphs 64, 86)

6. *Competition — Administrative proceedings — Commission's power of inspection — Scope and limits — Making a copy-image of the hard drive of computers during an inspection — Searches in the contents of the copy-image conducted at the Commission's premises — Whether permissible — Conditions — Due regard to the rights of the defence — No encroachment on the rights of the undertaking exceeding that inherent in an inspection at its premises (Council Regulation No 1/2003, Art. 20(1), (2)(b) and (c), and (4))*

(see paragraphs 78-91)

7. *Appeal — Jurisdiction of the Court of Justice — Review of the Commission's assessment of the gravity of the infringement in order to set the amount of a fine — Exclusion — Review limited to ensuring that the General Court has taken account of the essential factors for assessing the gravity of the infringement and all the arguments raised against the fine imposed (Art. 101 TFEU; Statute of the Court of Justice, Art. 58, first para.; Council Regulation No 1/2003, Art. 23)*

(see paragraph 95)

8. *Competition — Fines — Amount — Determination — Judicial review — Unlimited jurisdiction of the EU Courts — Scope (Arts 261 and 263 TFEU; Charter of Fundamental Rights, Art. 47; Council Regulation No 1/2003, Art. 31)*

(see paragraphs 96, 97, 104-106)

9. *Appeal — Grounds of appeal — Inadequate statement of reasons — Reliance by the General Court on implied statement of reasons — Admissibility — Conditions (Art. 256 TFEU; Statute of the Court of Justice, Art. 36 and Art. 53, first para.)*

(see paragraph 101)

10. *Competition — Fines — Amount — Determination — Setting the basic amount — Gravity of the infringement — Assessment criteria — Involvement in an additional element of the infringement increasing the harm to competition*
(Council Regulation No 1/2003, Art. 23(2) and (3); Commission communication 2006/C 210/02, point 22)

(see paragraphs 113-115)

Résumé

By its judgment *Nexans France and Nexans v Commission* (C-606/18 P) of 16 July 2020, the Second Chamber of the Court of Justice dismissed the appeal brought by Nexans France SAS and its parent company Nexans SA ('the appellants') against the judgment of the General Court of 12 July 2018 in Case T-449/14.¹ The appeal raised, in particular, the issue of the General Court's interpretation of the scope of the powers conferred on the Commission by Article 20 of Regulation No 1/2003² to conduct inspections in relation to cartels.

The appellants, who are active in the sector concerning the production and supply of submarine and underground power cables, were the subject of a Commission decision finding an infringement of Article 101 TFEU in that sector ('the decision at issue').³ The decision at issue stated that the appellants had been involved in a cartel involving, on the one hand, allocation of territories and customers among the European, Japanese and South Korean producers ('the A/R configuration') and, on the other hand, allocation of territories and customers by the European producers for projects to be carried out within Europe or allocation to the European producers ('the European configuration'). Consequently, the Commission imposed on the appellants fines exceeding EUR 70 000 000.

The Commission's investigation which led to the imposition of that fine included an inspection at the appellants' premises, where the Commission inspectors examined, in particular, certain employees' computers. They made a copy-image of the hard drives of those computers and, by reference to that, conducted a keyword search in the data contained on those computers using computer investigation software. The inspectors subsequently decided to make a copy of selected data and to place the data on data recording devices ('DRDs'). They also made three copy-images of a hard drive which were each recorded onto a separate DRD. The DRDs were placed in sealed envelopes and taken back to the Commission's offices in Brussels where the envelopes were opened and the DRDs examined in the presence of the appellants' representatives.

The action seeking annulment of the decision at issue lodged by the appellants before the General Court was dismissed in its entirety by the judgment of 12 July 2018, *Nexans France and Nexans v Commission*. In support of their appeal against that judgment, the appellants relied on five grounds of appeal, relating, first, to the General Court's rejection of their arguments concerning the conduct of the inspection in question and, second, the General Court's refusal to reduce the fines imposed on them.

¹ Judgment of the General Court of 12 July 2018, *Nexans France and Nexans v Commission* (T-449/14, EU:T:2018:456).

² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1).

³ Commission Decision C(2014) 2139 of 2 April 2014, relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.39610 — Power cables).

First, in relation to the first ground of appeal, the Court examined whether the Commission, when conducting the inspection at the premises of the appellants, was entitled to make the copy-image of a hard drive and copies of sets of emails without carrying out a meaningful examination of those documents beforehand. Recalling that the EU legislature granted the Commission a certain discretion regarding its specific examination procedures, the Court confirmed the Commission's right to decide, depending on the circumstances, to examine data contained on the digital data carrier of the undertaking under inspection by reference to a copy of such data. The Court explained that that right of the Commission, which falls within the scope of Article 20(2)(b) of Regulation No 1/2003, affects neither the procedural safeguards nor the other rights of the undertaking under inspection, provided that the Commission, after completing its examination, places on the file only documents which are relevant to the subject matter of the inspection. As the General Court had done, the Court of Justice took the view that that was so in the present case. The Court added that, having regard to the fact that the time required for processing electronic data may prove to be considerable, it is also in the interest of the undertaking concerned that the Commission relies, in conducting its examination, on a copy of that data, thereby enabling that undertaking to continue to use the original data and the media on which it is located as soon as that copy has been made, thereby reducing the interference in that undertaking's operations caused by the Commission's inspection.

Next, in relation to the appellants' second and third grounds of appeal, the Court examined whether the Commission had the power to continue the inspection in question at its premises in Brussels. The Court stated that to require the Commission to process such data exclusively at the premises of the undertaking under inspection, could, in the case of particularly large volumes of data, have the effect of significantly extending the duration of the inspectors' presence at that undertaking's premises, which could hamper the effectiveness of the inspection and needlessly increase the interference in that undertaking's operations on account of the inspection. That being said, the Court explained that the Commission may make use of that possibility of continuing, at its premises in Brussels, its examination of the business records of the undertaking concerned only where it can legitimately take the view that it is justified in doing so in the interests of the effectiveness of the inspection or to avoid excessive interference in the operations of the undertaking concerned. In addition, the Court stated that that possibility is subject to the condition that such continuation does not give rise to any infringement of the rights of the defence and does not constitute an additional encroachment on the rights of the undertakings concerned. Such an encroachment would have to be identified if the continuation of that examination at the Commission's premises in Brussels gave rise to additional costs for the undertaking under inspection solely as a result of that continuation. Consequently, where that continuation is capable of giving rise to such additional costs, the Commission may undertake that continuation only where it agrees to reimburse those costs if a duly reasoned request to that effect is presented by the undertaking concerned.

Subsequently, the Court of Justice examined the fourth ground of appeal and whether the General Court erred in law regarding its assessment of how the amount of the fines was determined. The Court of Justice found that that the General Court had not misapplied the principle of unlimited jurisdiction which empowers it, in addition to carrying out a review of legality with regard to the penalty, to substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed, and held that the General Court could reach the conclusion that the alleged lack of effects of the infringement in question, as claimed by the appellants, was not capable, because of the other factors taken into consideration by the General Court, of persuading it to reduce the fines imposed on the appellants.

Finally, the Court of Justice gave a ruling on the fifth ground of appeal, concerning the General Court's finding that because of the appellants' participation in the European cartel configuration, which had increased the harm to competition caused by the A/R configuration of that cartel, the Commission was entitled to increase the gravity factor used to calculate the amount of the fines imposed on them by 2%. In that regard, the Court of Justice found that the close connection between those two configurations did not alter the fact that the European cartel configuration constituted, by its very nature, a separate commitment to allocating projects not inherent in the A/R cartel configuration. The Court of Justice therefore held that the General Court's finding that that additional harm to competition could legitimately be punished by an increased fine was not vitiated by an error of assessment.

Since none of the grounds of appeal put forward by the appellants in support of their appeal could succeed, the Court dismissed the appeal in its entirety.