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Judgment of the Court of Justice in Case C-280/06

Autorità Garante della Concorrenza e del Mercato and Others v Ente tabacchi italiani and Others

RESPONSIBILITY FOR BREACH OF THE COMPETITION RULES CAN BE PASSED ON FROM ONE ECONOMIC ENTITY TO THE ONE THAT SUCCEEDS IT, IF BOTH ANSWER TO THE SAME PUBLIC AUTHORITY

The principle of personal responsibility does not preclude the penalty for an infringement imposed by a national competition authority from being passed on in its entirety from one entity to another that succeeds it, even though the first entity is still in existence.

All manufacturing and sales activities in the tobacco sector were until 1999 assigned to the autonomous body administering State monopolies ('AAMS'), and were then transferred to another public body, called Ente tabacchi italiani ('ETI'). Initially 100% owned by the Ministry of the Economy and Finance, ETI was privatised following a call for tenders launched in 2003.

In 2003, following an investigation, the Italian Competition Authority found that the companies in the Philip Morris group had – with AAMS, then with ETI – formed and implemented a cartel which had the effect of bringing about a distortion of competition as regards the sale price of cigarettes on the national market between 1993 and 2001. It imposed fines totalling EUR 50 million on the companies in the Philip Morris group and EUR 20 million on ETI.

In its decision, the Authority attributed the conduct adopted by AAMS in the period prior to 1999 to ETI. AAMS ceased its manufacturing and sales activities in the tobacco sector once ETI became operational. Under those circumstances, even though AAMS did not cease to exist, ETI is AAMS' successor in accordance with the principle of economic continuity.

All the companies concerned challenged that decision before the Tribunale amministrativo regionale del Lazio, which dismissed the action brought by the companies in the Philip Morris group and in part upheld the action brought by ETI. It accordingly annulled the decision in so far as it attributed responsibility to ETI for acts committed by AAMS, thereby basing its assessment on the criterion of personal responsibility.

The Consiglio di Stato, the court before which the cases were brought on appeal, considered it appropriate to ask the Court of Justice about the criterion to be applied in order to determine the undertaking on which a penalty is to be imposed for infringement of the competition rules where, in connection with this conduct, two economic entities succeeded each other, but the first remained in existence.

The Court finds that where, from an economic point of view, two entities are identical, a legal or organisational change affecting the entity that has committed an infringement of the competition rules does not necessarily create a new undertaking free of liability for the conduct of its predecessor.

In the present case, the fact that AAMS does not have legal personality is not a factor that can justify imposing the penalty on its successor. However, the penalty imposed on ETI for the infringement committed by AAMS could be justified by the fact that those two entities answer to the same public authority, namely the Ministry of the Economy and Finance, and that they have carried out, in all material respects, the same commercial instructions, which it is for the Consiglio de Stato to determine.

Consequently, the Court declares that in the case of entities answering to the same public authority, where conduct amounting to one and the same infringement of the competition rules was adopted by one entity and subsequently continued until it ceased by another entity which succeeded the first, which has not ceased to exist, that second entity may be penalised for that infringement in its entirety if it is established that those two entities were subject to the control of the said authority.

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Languages available: FR DE EN ES IT PL

The full text of the judgment may be found on the Court's internet site

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-280/06>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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