General Court of the European Union
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Press and Information

Judgments in Case T-206/06
Total SA and Elf Aquitaine SA v Commission
and Case T-217/06 Arkema France and Others v Commission

The General Court reduces the fine imposed on Arkema and its subsidiaries for their participation in a cartel in the methacrylates sector from €219.1 million to €113.3 million

However, the Court upholds the fines imposed on the parent companies Total and Elf Aquitaine

By decision of 31 May 2006[1] the Commission found that Arkema SA (now Arkema France) and its subsidiaries – Altuglas International SA and Altumax Europe SAS – and also their parent companies at the time – Total SA and Elf Aquitaine SA – had participated in a cartel in the methacrylates sector (commonly known as acrylic glass) from 23 January 1997 to 12 September 2002 (from 1 May 2000 to 12 September 2002 in respect of Total SA). The infringement consisted, in essence, in competitors' discussing prices, in agreeing, implementing and monitoring price agreements and in exchanging commercially important information and confidential market and company information.

The Commission imposed a fine of €219.1 million on Arkema and its subsidiaries. Total, which controlled the capital of all the companies in the group from April 2000 until the end of the infringement, was held jointly and severally liable for the payment of €140.4 million of the fine. Elf Aquitaine held more then 96% of Arkema's share capital throughout the period of the infringement and was held jointly and severally liable for the payment of €181.35 million.

By two separate actions, the companies brought an action before the General Court seeking annulment of the Commission's decision or a reduction in the fines imposed on them.

In its two judgments today, the General Court rejects the arguments seeking annulment of the decision and confirms, in particular, the liability of Total and Elf Aquitaine for the infringement.

The Court observes that there is a presumption that a subsidiary which is wholly-owned by its parent company does not decide independently on its conduct in the market. According to settled case-law, in such a situation, the Commission may issue a decision imposing a fine on the parent company, without its being required to establish the individual involvement of the parent company in the infringement, unless that company adduces sufficient evidence to rebut that presumption. The Court considers that that same presumption also applies when a parent company holds almost all of the capital of its subsidiary. The Court goes on to examine the evidence adduced by the companies concerned and finds that it is not sufficient to establish that Arkema conducted itself independently on the market during the period of the infringement. Consequently, the Commission did not err in holding Total and Elf Aquitaine liable for the unlawful conduct of their subsidiaries.

As regards the request for a reduction in the fine imposed on Arkema France and its subsidiaries, the Court observes that, in calculating the fine, the Commission imposed an increase of 200%, in order to ensure that the pecuniary penalty would have a sufficient deterrent effect, in the light of the undertaking's size and economic strength. That increase was based on Total's worldwide turnover.

[1] Commission Decision C (2006) 2098 final of 31 May 2006 relating to a proceeding pursuant to Article 81 EC and Article 53 of the EEA Agreement (Case COMP/F/38.645 - Methacrylates).

However, the Court takes the view that, since Arkema and its subsidiaries were no longer controlled by Total and Elf Aquitaine as from 18 May 2006, when Arkema was floated on the stock exchange, that is, a few days before the Commission adopted its decision, a 200% increase in the fine by way of deterrent effect is not justified in respect of them.

The Court observes that the need to ensure a sufficient deterrent effect for a fine requires, inter alia, that its amount be adapted to take account of the impact sought on the undertaking on which it is imposed, so that the fine is not made negligible or, on the contrary, excessive, in the light of, inter alia, its financial capacity. Consequently, the objective of deterrence can be legitimately attained only by reference to the situation of the undertaking on the day when it is imposed.

In the present case, the Court considers that the 200% increase could be justified only in the light of Total's sizeable turnover figures on the day when the fine was imposed. Since the economic unit which linked Arkema to Total was broken before the date on which the decision was adopted, the latter company's resources could not be taken into account in determining the increase in the fine imposed on Arkema and its subsidiaries. The Court accordingly holds that the 200% increase is excessive in respect of them and that a 25% increase is adequate to ensure a sufficiently deterrent effect of the fine imposed on them. **On that ground, the Court decides to reduce the amount of the fine imposed on Arkema France and its subsidiaries to €113.3 million**. It rejects, however, all the other arguments relied on in support of the request for reduction of the fine.

As regards Total and Elf Aquitaine, the Court upholds the amount of the fines imposed and dismisses their actions in their entirety.

The Court rejects, inter alia, the request for reduction of the fines due to those companies' having recently had other substantial pecuniary penalties imposed on them due their participation in other cartels[2]. It holds that the imposition of a fine for various anti-competitive activities aimed at other products does not affect the existence of the infringement in question. Consequently, the mere fact that the companies were recently ordered to pay other fines, for partially simultaneous infringements, cannot justify a reduction of the fine imposed in the present case. Moreover, if the fact of already having had a fine imposed were to justify the reduction of a subsequent fine, that would lead to the paradoxical situation where an undertaking could multiply its participation in cartels and see the cost of each fine diminish progressively, which would clearly be contrary to the objective of deterrence pursued by the fines.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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[2] Commission Decision C (2004) of 19 January 2005 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case No C.37.773 MCAA); Commission Decision C (2006) 1766 of 3 May 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F/C.38.620 — Hydrogen Peroxide and perborate).