Court of Justice of the European Union
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Judgments in Cases C-520/09 P Arkema SA v Commission
and C-521/09 P Elf Aquitaine v Commission

Press and Information

The Court of Justice has set aside the judgment of the General Court and the Commission Decision in so far as the latter imputed to Elf Aquitaine participation by its subsidiary, Arkema, in a cartel on the market for monochloroacetic acid

However, the Court of Justice has dismissed the appeal lodged by Arkema

By decision of 19 January 2005,[1] the Commission imposed fines on several companies, including Elf Aquitaine SA and its subsidiary at the material time, Arkema SA (formerly Atofina SA), relating to a cartel on the market for monochloroacetic acid.[2]

According to that decision, from 1984 to 1999 the members of that cartel were parties to an agreement to maintain their market shares through a volume and customer allocation system. They also exchanged information on prices and examined, at regular multilateral meetings, actual sales volumes and prices so as to monitor the implementation of agreements.

A fine of EUR 45 million was imposed, jointly and severally, on Elf Aquitaine and Arkema. In addition, the Commission imposed an increase for repeated infringement on Arkema alone owing to its participation in an earlier cartel,[3] since, at the time of that first infringement, it was not yet controlled by Elf Aquitaine. Thus, Arkema was also fined, individually, the sum of EUR 13.5 million.

The companies brought two separate actions before the Court of First Instance (now 'the General Court') seeking annulment of the Commission Decision or reduction of the amount of the fines which had been imposed on them.

By two judgments delivered on 30 September 2009,[4] the General Court rejected all the arguments put forward by Elf Aquitaine and Arkema. It held, inter alia, that where all or nearly all of the share capital of a subsidiary is owned by its parent company the Commission is entitled to presume that the parent company exercises a decisive influence over the commercial policy of its subsidiary. In order to rebut that presumption, the burden is on the parent company to adduce adequate evidence to show that its subsidiary acts independently on the market. The General Court held, inter alia, that the Commission was correct in considering that joint and several liability for the infringements committed by Arkema should be imputed to Elf Aquitaine, since it had failed to adduce sufficient evidence.

The companies, by two separate appeals, referred the matter to the Court of Justice, asking the Court to set aside the judgments of the General Court or reduce the amounts of their respective fines.

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[1] Decision C(2004) 4876 final of 19 January 2005 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/37.773 – MCAA).

[2] A substance used as a chemical intermediate, in particular in the manufacture of detergents, adhesives, textile auxiliaries and thickeners in food products, pharmaceuticals and cosmetics.

[3] Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article [101 TFEU] (IV/31865-PVC) (OJ 1994 L 239, p. 14).

[4] Case T-168/05 *Arkema SA* v *Commission* and Case T-174/05 *Elf Aquitaine SA* v *Commission* (see PR No 79/09).

With regard to Elf Aquitaine, the Court notes that where a decision in a competition case relates to several addressees and concerns the imputability of an infringement, it must include an adequate statement of reasons with respect to each of the addressees. Thus, in the case of a parent company held liable for the illicit conduct of its subsidiary, such a decision must, in principle, contain a detailed statement of reasons justifying the imputability of the infringement to that company.

The Court states that, as regards more particularly a Commission decision which is based exclusively, with regard to certain addressees, on the presumption of the actual exercise of a decisive influence over the conduct of a subsidiary, the Commission is in any event required - if that presumption is not to be rendered irrebuttable in practice - to set out adequate reasons why the facts or law relied upon were not sufficient to rebut that presumption. The Commission's duty to give reasons for its decisions in this regard results inter alia from the rebuttable nature of the presumption, and rebuttal of such a presumption requires interested parties to adduce evidence of economic, organisational and legal links between the companies concerned.

According to the Court, in view of all the specific circumstances of the case,[5] it was incumbent on the General Court to give particular attention to the question whether the Commission Decision contained a detailed statement of reasons why the evidence submitted by Elf Aquitaine was not sufficient to rebut the presumption of liability applied in that decision.

The Court found that, in the case before it, the Commission had not given sufficiently reasoned answers to several of the arguments put forward by Elf Aquitaine in order to establish that Arkema determined its conduct on the market independently.

The Court held that the statement of reasons for the Commission Decision on those arguments consisted solely of a series of mere assertions and negations, which were repetitive and by no means detailed. In the particular circumstances of the case, in the absence of further details, that series of assertions and negations was not such as to enable Elf Aquitaine to ascertain the matters justifying the measure adopted or to enable the court having jurisdiction to exercise its power of review. For example, owing to the way in which a key paragraph of the Commission Decision was worded, it was very difficult, or even impossible, to know whether the body of evidence adduced by Elf Aquitaine to rebut the presumption applied to it by the Commission was rejected because it was insufficient to carry conviction or because, as the Commission saw it, the mere fact that Elf Aquitaine owned nearly all the share capital of Arkema was sufficient for liability for the conduct of Arkema to be imputed to Elf Aquitaine, irrespective of the evidence adduced by the latter in response to the Commission's allegations.

In those circumstances, **the Court set aside the judgment of the General Court and the Commission Decision in so far as it imputed to Elf Aquitaine the infringement in question, and imposed a fine on it.**

With regard to Arkema, the Court rejected all its arguments. The Court held, inter alia, that the Commission did not breach the principle of proportionality when calculating the fines it imposed on that company.

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The full text of the judgment is published on the CURIA website on the day of delivery.

[5] Those circumstances include, inter alia, a change of approach – which is not disputed by the Commission – between an earlier decision relating to cartels (Decision C (2003) 4570 of 10 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 — Organic peroxides) (summary published in OJ 2005 L 100, p. 44)) and the contested decision. In the earlier decision, unlike the contested decision, it was not considered that Elf Aquitaine and Arkema were part of the same 'undertaking', for the purposes of European Union competition law.

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