



The Court of Justice sets aside the judgments of the General Court and annuls the Commission decisions imposing fines on Solvay for its anti-competitive conduct on the soda ash market

The Commission failed to respect Solvay's right of access to the procedural file and its right to be heard

On 13 December 2000, the Commission adopted decisions¹ imposing fines on two companies active on the soda ash market². The Belgian company, Solvay SA, was fined €20 million for abuse of its dominant position and €3 million for its participation in a pricing agreement with one of its competitors.

Those decisions were substantially identical in content to decisions adopted by the Commission in 1990³ which had been annulled by the General Court⁴ – by rulings subsequently upheld by the Court of Justice⁵ – on the ground that they had not been properly authenticated in that the detailed rules for their definitive adoption by the College of Commissioners had not been followed.

Solvay brought two separate actions before the General Court for annulment of the new decisions adopted by the Commission in 2000, or for reduction of the fines imposed on it. Solvay pleaded, in particular, breach of its right of access to the file since it had not been sent all the documents on which the Commission based its allegation of an infringement. The Commission admitted that it had mislaid some files and that it was unable to draw up the list of the documents which they contained, because – it explained – the indexes to those binders could not be found either. In addition, Solvay submitted that the Commission had adopted the new decisions without opening a new administrative proceeding and, accordingly, without first giving Solvay a hearing.

By judgments of 17 December 2009,⁶ the General Court dismissed those actions in so far as they sought annulment of the decisions at issue. In particular, the General Court found that the fact that Solvay had not had access to all the documents covered by the investigation had not prevented it from defending itself. As regards the hearing of Solvay, the General Court pointed out that the new Commission decisions were framed in terms substantively identical to those of the 1990 decisions and that, accordingly, the Commission was not required to hear Solvay again. Nevertheless, the General Court decided to reduce the fine from €20 million to €19 million since the Commission had erroneously taken certain repeated infringements into account by way of aggravating circumstances. The General Court also reduced the second fine from €3 million to €2.25 million on the ground that the Commission had incorrectly assessed the duration of the infringement.

¹ Commission Decision 2003/5/EC of 13 December 2000 relating to a proceeding under Article 81 of the EC Treaty (COMP/33.133-B: Soda-ash – Solvay, CFK) (OJ 2003 L 10, p. 1) and Commission Decision 2003/6/EC of 13 December 2000 relating to a proceeding pursuant to Article 82 of the EC Treaty (COMP/33.133-C: Soda-ash – Solvay) (OJ 2003 L 10, p. 10).

² Soda ash is a material principally used in the manufacture of glass, in the chemical industry, for the manufacture of detergents, and in metallurgy.

³ Decision 91/298/EEC of 19 December 1990 relating to a proceeding under Article [81 EC] (IV/33/133-B: Soda ash – Solvay, CFK) (OJ 1991 L 152, p. 16) and Commission Decision 91/299/EEC of 19 December 1990 relating to a proceeding under Article [82 EC] (IV/33.133 C: Soda ash – Solvay) (OJ 1991 L 152, p. 21).

⁴ Cases [T-30/91 Solvay v Commission](#), [T-31/91 Solvay v Commission](#) and [T-32/91 Solvay v Commission](#).

⁵ Joined Cases [C-287/95 P and C-288/95 P Commission v Solvay](#).

⁶ Cases [T-57/01 Solvay v Commission](#) and [T-58/01 Solvay v Commission](#).

Solvay appealed both judgments of the General Court before the Court of Justice.

The Court notes, first, that **the right of access** to the file means that the Commission must provide the undertaking concerned with the opportunity to examine all the documents in the investigation file that might be relevant for its defence. Infringement of the right of access to the file during the procedure prior to adoption of a decision can, in principle, cause the decision to be annulled if the rights of the defence have been infringed.

In the present case, the Court points out that it cannot be excluded that Solvay could have found in the missing sub-files evidence originating from other undertakings which would have enabled it to offer an interpretation of the facts different from the interpretation adopted by the Commission, which could have been of use for its defence.

The Court states that the matter at issue in the present case is not that of a few missing documents, the content of which could have been reconstructed from other sources, but of whole sub-files which could have contained essential documents relating to the procedure before the Commission which might have been relevant to Solvay's defence.

Accordingly, the Court finds that **the General Court erred in law in concluding that the fact that Solvay had not had access to all the documents in the file did not constitute an infringement of the rights of the defence.**

As regards **the hearing of the undertaking concerned** before the Commission adopts a decision, the Court states that this forms part of the rights of the defence and that it must therefore be examined in relation to the specific circumstances of each particular case.

The Court explains that, where – following the annulment of a decision because of a procedural defect relating exclusively to the procedures governing its final adoption by the College of Commissioners – the Commission is to adopt a fresh decision, with substantially the same content and based on the same objections, it is not required to conduct a new hearing of the undertakings concerned.

However, the Court finds that, in the present case, the question of the hearing of Solvay cannot be separated from the issue of access to the file. In that connection, the Court points out that, during the administrative proceeding which led to the adoption of the first decisions in 1990, the Commission had not granted Solvay access to all the documents in its file. Yet, despite those circumstances and notwithstanding the importance placed by the case-law of the Court of Justice and the General Court on access to the file, the Commission proceeded to adopt decisions which were the same as those which had been annulled owing to the lack of proper authentication, without opening a new administrative proceeding in which it would have had to hear Solvay after granting it access to the file.

The Court finds that **the General Court erred in law in holding that it was unnecessary, for the purposes of adopting fresh decisions, for the Commission to give Solvay a hearing.**

In consequence, the Court sets aside the judgments of the General Court and, on the merits, annuls the decisions of the Commission.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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The full text of the judgments ([C-109/10](#) & [C-110/10](#)) is published on the CURIA website on the day of delivery.

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