Court of Justice of the European Union
PRESS RELEASE No 86/12
Luxembourg, 21 June 2012

Press and Information

Advocate General's Opinion in Case C-89/11 P
E.ON Energie AG v Commission

Advocate General Bot proposes that the Court of Justice should partially annul the judgment of the General Court concerning the breaking of a seal committed by E.ON Energie during an inspection in competition matters

The General Court did not exercise its unlimited jurisdiction when examining the proportionality of the fine imposed by the Commission for that infringement

The Commission may, under EU law, impose on undertakings fines of up to 1% of their turnover where, deliberately or through negligence, they break seals placed by the Commission during an inspection in competition matters.

In May 2006, the Commission carried out an inspection at the commercial premises of E.ON Energie AG in Munich in order to verify its suspicions that that undertaking had participated in anti-competitive agreements. As the inspection could not be completed the same day, the documents selected for closer examination were stored in a room placed at the Commission's disposal by E.ON Energie. The door of the room was locked and an official Commission seal affixed.

Commission seals are made of self-adhesive plastic. If removed, they do not tear, but 'VOID' markings appear irreversibly on the surface of the sticker. When the inspection team returned to the scene on the morning of the second day of the inspection, they found, *inter alia*, that 'VOID' markings were visible on the seal affixed the previous day.

Consequently, by decision of 30 January 2008, the Commission imposed a fine of €38 million on E.ON Energie for breaking the seal. E.ON Energie sought the annulment of that decision by bringing an action before the General Court, which was dismissed by judgment of 15 December 2010[1].

E.ON Energie therefore lodged an appeal against the judgment of the General Court.

In his Opinion delivered today, Advocate General Yves Bot, recalls, first, that the General Court has unlimited jurisdiction with regard to the fines imposed by the Commission and must make its own assessment in that regard. Consequently, where the question of the amount of the fine is submitted for its assessment, the General Court may cancel the fine, reduce it, or increase its amount, while knowing that it is bound neither by the Commission's calculations nor the extent of the action by the penalised undertaking.

In that context, the Advocate General emphasises that, in exercising its unlimited jurisdiction, the General Court is required to comply with the principle of proportionality, which constitutes a general principle of EU law enshrined in the EU Charter of Fundamental Rights. Moreover, the European Court of Human Rights has also held that the review of an administrative penalty means that the judicial body ascertains and determines in a detailed way whether the penalty is appropriate for the infringement, taking account of the relevant factors, including the proportionality of the penalty itself, and, where appropriate, replaces it.

[1] Case T-141/08 *E.ON Energie AG* v *Commission*, see also Press Release 120/10.

Next, the Advocate General states that, in the context of procedures for implementing competition rules, application of the proportionality principle means that a fine imposed on a company must not be disproportionate to the Commission's objectives and that it must be proportionate to the infringement, particular account being taken of its seriousness. To that end, the General Court must examine all the relevant factors, such as the conduct of the undertaking and the part it played in setting up the anti-competitive practice, its size, the value of the products concerned or the profit derived from the infringement, the deterrent effect which is desired and the risks which infringements of that kind represent to the objectives of the EU.

The Advocate General finds that, in the present case, the General Court did not fully exercise its unlimited jurisdiction in assessing the proportionality of the amount of the fine imposed on E.ON Energie.

In that regard, Mr Bot considers that the General Court did not carry out an assessment that was sufficiently independent of that adopted by the Commission inasmuch as it relied solely on the amount fixed in a rather general way by the Commission.

Moreover, the Advocate General finds that the General Court did not have all the financial information, such as the exact turnover of E.ON Energie, necessary to assess the proportionality of the amount of the fine imposed by the Commission on that company. The Advocate General considers it essential to know and to consider those financial figures in order to assess the fine justly.

First, those figures make it possible to appraise the amount of the penalty actually incurred by E.ON Energie for the offence of breaking the seal, which is one factor to be taken into account with regard to the proportionality of the fine. Second, the figures make it possible to assess the fine that E.ON Energie could have incurred if it had been found to have engaged in the anti-competitive practices which the Commission was investigating. Moreover, in a situation in which the maximum fine incurred for such a conviction[2] is ten times higher than that incurred for breaking a seal, that information is capable of illustrating the considerable benefit that E.ON Energie could gain from breaking the seal affixed by the Commission and seizing the stored documents.

That information is also indispensable in ensuring that the fine has a sufficiently deterrent effect and is not negligible in light, particularly, of the financial capacity of the penalised company.

Finally, the Advocate General considers that, in assessing the proportionality of the fine, the General Court should have taken into account the fact that the infringement was due to negligence. Inasmuch as negligence constitutes an attenuating circumstance for the calculation of fines imposed in the case of breach of the competition rules, the General Court should have examined whether the latter was not also relevant for calculating the amount of the fine imposed for breaking a seal.

In those circumstances, the Advocate General, Mr Bot, proposes that the Court of Justice should set aside the judgment of the General Court in so far as the latter did not exercise its unlimited jurisdiction when examining the proportionality of the fine imposed by the Commission on E.ON Energie. Since, according to the Advocate General, the dispute is not capable of being adjudicated upon by the Court of Justice, he proposes that the latter should refer the matter back to the General Court for it to rule on the proportionality of the fine in question.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, an appeal does not have suspensory effect. If it is

[2] 10% of the total turnover of the undertaking in question.

admissible and well-founded, the Court of Justice will set aside the decision of the General Court. If the case is in a condition in which it can be adjudicated upon, the Court of Justice may definitively determine the dispute itself. 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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