

Case T-354/94

Stora Kopparbergs Bergslags AB

v

Commission of the European Communities

(Competition — Article 85(1) of the EC Treaty —

Admission of matters of fact or of law during the administrative procedure — Consequences — Liability for unlawful conduct — Information exchange — Order to desist — Fine — Statement of reasons — Mitigating circumstances)

Judgment of the Court of First Instance (Third Chamber, Extended Composition), 14 May 1998 II - 2116

Summary of the Judgment

1. *Competition — Administrative procedure — Commission decision finding an infringement — Infringements committed by subsidiaries of a group of undertakings — Decision addressed to the parent company in the light of its attitude during the administrative procedure — Reliance by the parent company on a plea in law alleging that it is not the proper addressee of the decision — Whether admissible*
(EC Treaty, Art. 173, fourth para.)
2. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision applying the competition rules — Decision concerning several addressees — Identification of the body liable for the alleged infringement*
(EC Treaty, Art. 190)

3. *Competition — Community rules — Infringement committed by a subsidiary — Responsibility attributed to the parent company — Conditions*
4. *Competition — Administrative procedure — Cessation of infringements — Obligations imposed on the undertakings — Proportionality — Criteria*
(Council Regulation No 17, Art. 3(1))
5. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision imposing fines on several undertakings for an infringement of the competition rules*
(EC Treaty, Art. 190; Council Regulation No 17, Art. 15)
6. *Competition — Fines — Amount — Determination thereof — Criteria — Gravity of the infringements — Mitigating circumstances — Setting up of an effective programme for compliance with the Community competition rules*
(Council Regulation No 17, Art. 15)
7. *Competition — Fines — Amount — Determination thereof — Criteria — Gravity and duration of the infringements — Criteria to be applied — Possibility of increasing the fines in order to strengthen their deterrent effect*
(Council Regulation No 17, Art. 15(2))

1. An undertaking which, following requests for information addressed under Article 11 of Regulation No 17 to several of its subsidiaries, advises that it represents the group as a whole, while maintaining an ambiguous attitude during the administrative procedure before the Commission, and which, being the addressee of the Commission's statement of objections, decides not to take a position on an express allegation made by the Commission concerning its *de facto* liability for the anti-competitive actions of its subsidiaries, is entitled to rely, as against the Commission's final decision, on a plea in law alleging that it is not the proper addressee thereof, even though the Commission was entitled to infer from its conduct that it was.

Although an undertaking's express or implicit acknowledgement of matters of

fact or of law during the administrative procedure before the Commission may constitute evidence for this Court in determining whether an action brought before it is well founded, such an acknowledgement cannot restrict the actual exercise of the right to bring proceedings under the fourth paragraph of Article 173 of the Treaty. In the absence of a specific legal basis, such a restriction would be contrary to the fundamental principles of the rule of law and of respect for the rights of the defence.

2. The statement of the reasons on which a decision having an adverse effect on an individual is based must enable effective review of its legal validity to be carried out and must provide the person concerned with information sufficient to

allow him to ascertain whether or not the decision is well founded. The adequacy of such a statement of reasons must be assessed according to the circumstances of the case, and in particular the content of the measure in question, the nature of the reasons relied on and the interest which addressees may have in receiving explanations. In order to fulfil those purposes, an adequate statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question.

Where a decision taken in application of Article 85 or Article 86 of the Treaty relates to several addressees and poses a problem of attribution of liability for the infringement, it must include an adequate statement of reasons with respect to each of the addressees, in particular those of them who, according to the decision, must bear the liability for that infringement.

3. The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent company, especially where the subsidiary does not independently decide its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company. Where a subsidiary is wholly owned, it necessarily follows a policy laid down by the bodies which determine the parent company's policy under its statutes.

Where the unlawful conduct of a wholly-owned subsidiary has been correctly imputed to its parent company, the Commission is also entitled to impute to the latter the conduct of other subsidiaries which the parent company controls and which have taken part in the same infringement, since the parent company could not have been unaware of their anti-competitive conduct.

4. Article 3(1) of Regulation No 17 may be applied so as to include an order directed at bringing an end to certain acts, practices or situations which have been found to be unlawful, and also at prohibiting the adoption of similar conduct in the future. Furthermore, since Article 3(1) of Regulation No 17 is to be applied according to the nature of the infringement found, the Commission has the power to specify the extent of the obligations on the undertakings concerned in order to bring an infringement to an end. Such obligations on the part of undertakings may not, however, exceed what is appropriate and necessary to attain the objective sought, namely to restore compliance with the competition rules infringed.

A prohibition fails to satisfy the conditions required for application of Article 3(1) of Regulation No 17 if it seeks to prevent the exchange of purely statistical information which is not in, or capable of being put into, the form of individual information, where it is not apparent from the decision that the Commission considered the exchange of statistical data to be in itself an infringement of Article

85(1) of the Treaty and where the mere fact that a system for the exchange of statistical information might be used for anti-competitive purposes does not make it contrary to Article 85(1) of the Treaty, since in such circumstances it is necessary to establish its actual anti-competitive effect.

Furthermore, when fixing the amount of each fine, the Commission has a margin of discretion and cannot be considered to be obliged to apply a precise mathematical formula for that purpose.

5. The purpose of the obligation to give reasons for an individual decision is to enable the Community judicature to review the legality of the decision and to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted.

Lastly, the reasons for a decision must appear in the actual body of the decision and, save in exceptional circumstances, explanations given *ex post facto* cannot be taken into account.

When the Commission finds in a decision that there has been an infringement of the competition rules and imposes fines on the undertakings participating in it, it must, if it has systematically taken into account certain basic factors in order to fix the amount of fines, set out those factors in the body of the decision in order to enable the addressees of the decision to verify that the level of the fine is correct and to assess whether there has been any discrimination.

As regards decisions imposing fines on several undertakings for infringement of the Community competition rules, the scope of the obligation to state reasons must be assessed in the light of the fact that the gravity of infringements falls to be determined by reference to numerous factors including, in particular, the specific circumstances and context of the case and the deterrent character of fines; moreover, no binding or exhaustive list of criteria to be applied has been drawn up.

6. When the Commission fixes the level of the fine to impose for infringement of the Community competition rules, the gravity of infringements falls to be determined by reference to numerous factors including, in particular, the specific circumstances and context of the case and the deterrent character of the fines; moreover, no binding or exhaustive list of the

criteria which must be applied has been drawn up.

Although the implementation of a programme for compliance with the Community competition rules demonstrates the intention of the undertaking in question to prevent future infringements and thus better enables the Commission to accomplish its task of applying the principles laid down by the Treaty in competition matters and of influencing undertakings in that direction, the mere fact that in certain of its previous decisions the Commission has taken the implementation of a compliance programme into consideration as a mitigating factor does not mean that it is obliged to act in the same manner in a particular case.

7. When assessing the general level of fines the Commission is entitled to take account of the fact that clear infringements of the Community competition rules are still relatively frequent and that, accordingly, it may raise the level of fines

in order to strengthen their deterrent effect. Consequently, the fact that in the past the Commission has applied fines of a certain level to certain types of infringement does not mean that it is estopped from raising that level, within the limits set out in Regulation No 17, if that is necessary in order to ensure the implementation of Community competition policy.

Moreover, the Commission is entitled, when assessing the gravity of the infringement, to take into account the measures adopted by the undertakings concerned to conceal the existence of the collusion.

Lastly, when fixing the general level of fines, the Commission is entitled to take into account, in particular, the lengthy duration and obviousness of an infringement of Article 85(1) of the Treaty which has been committed despite the warning which the Commission's previous decisions should have provided.