

## Case T-314/01

### **Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA**

**v**

### **Commission of the European Communities**

(Competition — Agreements, decisions and concerted practices — Sodium gluconate — Article 81 EC — Fine — Liability of the parent company for the unlawful conduct of an association without its own legal personality — Article 15(2) of Regulation No 17 — Rights of the defence — Exculpatory documents — Principle of proportionality — Obligation to state the reasons)

Judgment of the Court of First Instance (Third Chamber), 27 September 2006 II - 3089

#### Summary of the Judgment

1. *Competition — Administrative procedure — Observance of the rights of the defence (Art. 81(1) EC, Council Regulation No 17, Art. 19(1))*

2. *Competition — Administrative procedure — Observance of the rights of the defence (Council Regulation No 17)*
3. *Competition — Administrative procedure — Access to the file (Council Regulation No 17)*
4. *Competition — Community rules — Infringement by an undertaking — Attribution to another undertaking in view of the economic and legal links between them (Art. 81(1) EC)*

1. The observance of the rights of the defence constitutes a fundamental principle of Community law which must be respected in all circumstances, in particular in any procedure which may give rise to penalties, even if it is an administrative procedure. It requires that the undertakings and associations of undertakings concerned be afforded the opportunity, from the stage of the administrative procedure, to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission.

If the Commission wishes to rely on a passage in a reply to a statement of objections or on a document annexed to such a reply in order to prove the existence of an infringement in a proceeding under Article 81(1) EC, the other parties involved in that proceeding must be placed in a position in which they can express their views on such evidence. In such circumstances the

passage in question from a reply to the statement of objections or the document annexed thereto constitutes incriminating evidence against the various parties alleged to have participated in the infringement.

Those principles also apply when the Commission relies on a passage from a reply to a statement of objections to hold an undertaking liable for an infringement.

It is for the undertaking concerned to show that the result at which the Commission arrived in its decision would have been different if a document which was not communicated to that undertaking and on which the Commission relied to make a finding of infringe-

ment against it had to be disallowed as evidence.

(see paras 49-52)

2. In adversarial proceedings established by the regulations for the application of Articles 81 EC and 82 EC, it cannot be for the Commission alone to decide which documents are of use for the defence of undertakings in proceedings involving infringement of the competition rules. In particular, having regard to the general principle of equality of arms, it is not acceptable for the Commission to be able to decide on its own whether or not to use them against the applicant, when the applicant had no access to them and was therefore unable likewise to decide whether or not it would use them in its defence.

(see para. 66)

rights of the defence only if it is shown that the administrative procedure might have had a different outcome if that undertaking had had access to the documents in question during that procedure. Where those documents are in the Commission's investigation file, such an infringement of the rights of the defence is unconnected with the manner in which the undertaking concerned conducted itself during the administrative procedure. By contrast, where the exculpatory documents in question are not in the Commission's investigation file, an infringement of the rights of the defence may be found only if the undertaking expressly asked the Commission for access to those documents during the administrative procedure, failing which its right to put forward that plea is barred in any action for annulment brought against the final decision.

(see para. 67)

3. Where it is established that during an administrative procedure initiated due to infringement of the Community competition rules, the Commission did not disclose to an undertaking involved in that procedure documents which might have contained exculpatory evidence, there will be an infringement of the
4. The anti-competitive conduct of an undertaking can be attributed to another undertaking where it has not decided independently upon its own conduct on the market but carried out, in all material respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them.

The Commission cannot merely find that an undertaking 'was able to' exert such a decisive influence over the other undertaking, without checking whether that influence actually was exerted. On the contrary, it is, in principle, for it to demonstrate such decisive influence on the basis of factual evidence, including, in particular, any management power one of the undertakings may have over the other.

However, when a parent company holds 100% of the shares in a subsidiary which has been found guilty of unlawful conduct, there is a rebuttable presumption that the parent company actually exerted

a decisive influence over its subsidiary's conduct. In that situation, it is for the parent company to reverse that presumption by adducing evidence to establish that its subsidiary was independent.

The same holds true when two undertakings each hold a 50% stake in an entity which they manage jointly and in permanent close collaboration.

(see paras 135, 136, 138)