

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

16 November 2006*

In Case T-120/04,

Peróxidos Orgánicos, SA, established in San Cugat del Vallés (Spain), represented by A. Creus Carreras and B. Uriarte Valiente, lawyers,

applicant,

v

Commission of the European Communities, represented by A. Bouquet and F. Castillo de la Torre, acting as Agents,

defendant,

APPLICATION for partial annulment of Commission Decision 2005/349/EC of 10 December 2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 — Organic peroxides) (OJ 2005 L 110, p. 44),

* Language of the case: English.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of M. Jaeger, President, J. Azizi and E. Cremona, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 24 November 2005,

gives the following

Judgment

Legal context

- ¹ Article 1 of Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1; 'regulation on limitation'), entitled 'Limitation periods in proceedings', provides:

'1. The power of the Commission to impose fines or penalties for infringements of the rules of the European Economic Community relating to ... competition shall be subject to the following limitation periods:

...

(b) five years in the case of all ... infringements [other than those of provisions concerning applications or notifications of undertakings or associations of undertakings, requests for information, or the carrying out of investigations].

2. Time shall begin to run upon the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.'

2 Article 2 of the regulation states, under the heading 'Interruption of the limitation period in proceedings':

'1. Any action taken by the Commission ... for the purpose of the preliminary investigation or proceedings in respect of an infringement shall interrupt the limitation period in proceedings. The limitation period shall be interrupted with effect from the date on which the action is notified to at least one undertaking or association or undertakings which have participated in the infringement.

Actions which interrupt the running of the period shall include in particular the following:

(a) written requests for information by the Commission ...;

...

2. The interruption of the limitation period shall apply for all the undertakings or associations of undertakings which have participated in the infringement.

3. Each interruption shall start time running afresh.’

Background

³ Commission Decision 2005/349/EC 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) (OJ 2005 L 110, p. 44) (‘the contested decision’) concerns a cartel concluded and implemented on the European market for organic peroxides, chemicals used in the plastics and rubber industry, by inter alia the AKZO group (‘AKZO’), Atofina SA, successor to Atochem (‘Atochem/Atofina’), and Peroxid Chemie GmbH & Co. KG, a company controlled by Laporte plc now named Degussa UK Holdings Ltd. That cartel was implemented in Spain in a sub-arrangement which involved the applicant and, either directly or indirectly, the aforementioned companies.

⁴ The cartel was founded in 1971 by a written agreement, amended in 1975, between AKZO, Luperox GmbH (which later became Atochem/Atofina) and Peroxid Chemie (‘the main agreement’). It consisted initially of several sub-arrangements concerning various chemical products, such as high polymers, polyester thermoset resins and cross-linking agents. The cartel was also split up in regional sub-arrangements, of which the one concerning Spain (‘the Spanish sub-arrangement’) followed the principal rules of the main agreement. The cartel aimed inter alia at preserving the market shares of the participating companies and coordinating price increases. In order to achieve this objective, a firm of consultants established in

Switzerland — initially Fides Trust AG and subsequently AC Treuhand AG — was entrusted with collecting and processing the detailed sales data of the participating companies, and with communicating the data thus processed to those companies. Regular meetings took place in order to ensure that the main agreement and the sub-arrangements worked properly.

- 5 The applicant, a Spanish company active in the chemical industry and controlled jointly by the companies FMC Foret ('Foret') and Degussa UK, participated only in the Spanish sub-arrangement. The contested decision found that the applicant had participated from 31 December 1975 to 31 December 1999 (recitals 2, 210 to 219 and Article 1(e) of the contested decision).

- 6 The Commission had initiated an investigation into the cartel following a meeting on 7 April 2000 with AKZO's representatives, who informed it about an infringement of the Community competition rules in order to gain immunity under the Commission notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice'). Subsequently, Atochem/Atofina also decided to collaborate with the Commission and provided it with additional information (recitals 56 and 57 of the contested decision).

- 7 On 31 January and 20 March 2002, the Commission sent requests for information under Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) to the main participants in the infringement, that is, to Laporte, AKZO and Atochem/Atofina (recitals 61 and 64 of the contested decision). However, it did not request information from the applicant until 29 November 2002 (recital 72 of the contested decision).

- 8 On 27 March 2003, the Commission initiated the formal examination procedure and adopted a statement of objections which was subsequently served on the applicant. The applicant submitted its observations on the objections on 17 June 2003 and attended the hearing on 26 June 2003. The Commission adopted the contested decision on 10 December 2003, served on the applicant on 13 January 2004, imposing on it a fine of EUR 0.5 million (Article 2(f) of the contested decision).

Procedure and forms of order sought by the parties

- 9 By application lodged at the Court Registry on 22 March 2004, the applicant brought the present action.
- 10 By letter lodged at the Court Registry on 13 September 2004, the applicant stated that it would forgo its right to submit a reply and requested the Court to take certain measures of organisation of procedure and of inquiry. The defendant filed its observations on that letter on 26 October 2004.
- 11 Upon hearing the report of the Judge Rapporteur, the Court (Third Chamber) decided to open the oral procedure. The parties presented oral argument and their answers to the questions put by the Court at the hearing on 24 November 2005.

12 The applicant claims that the Court of First Instance should:

- annul Articles 1, 2 and 4 of the contested decision in so far as they affect the applicant;

- in the alternative, cancel the fine imposed on the applicant;

- order the defendant to pay the costs.

13 The defendant contends that the Court of First Instance should:

- dismiss the action as inadmissible in so far as it concerns Articles 1 and 4 of the contested decision;

- in the alternative, dismiss the action;

- order the applicant to pay the costs.

Law

1. *The admissibility of the applications for annulment of Articles 1 and 4 of the contested decision*

Arguments of the parties

- ¹⁴ The defendant puts forward a plea of inadmissibility in respect of the applications for annulment of Articles 1 and 4 of the contested decision. It contends that, since the sole plea raised by the applicant concerns limitation and not the finding of an infringement, the arguments in this context are irrelevant and the applications for annulment of Articles 1 and 4 of the contested decision are inadmissible. Even if the power to impose a fine on the applicant on the basis of the infringement which it is alleged in the contested decision to have committed were time-barred, the Commission takes the view that it was able to find that infringement, whose existence rather than duration the applicant does not appear to dispute, and to address a decision to it to that effect. Therefore, to the extent that the applicant seeks annulment of Article 1, in that that article finds that the applicant committed an infringement, and of Article 4, which only contains the addressees of the contested decision, those applications are not admissible.
- ¹⁵ The applicant disputes that the applications for annulment are inadmissible, referring to Joined Cases T-22/02 and T-23/02 *Sumitomo Chemical and Sumika Fine Chemicals v Commission* [2005] ECR II-4065.

Findings of the Court

- 16 The Court finds, first of all, that the plea of inadmissibility put forward by the defendant is not, contrary to what it claims, capable of calling into question the admissibility of the applications for annulment of Articles 1 and 4 of the contested decision. In essence, the defendant argues only that the pleas and arguments raised by the applicant, in support of its contention that the Commission's power to pursue the infringement is time-barred, are not such as to justify the annulment of those articles as they are not in reality directed at the finding of an infringement as contained in the contested decision. However, first, that issue does not concern admissibility, but rather the substance of those pleas and arguments, and, secondly, the defendant does not call into question the applicant's legal interest in bringing proceedings against the finding of an infringement as such.
- 17 Furthermore, even if it were to concern admissibility, it is clear, at least indirectly, from the defendant's written pleadings, as referred to in paragraph 14 above, that it is of the view that the mere finding of an infringement in the contested decision is not covered by the concept of 'penalty' within the meaning of Article 1 of the regulation on limitation and that, even if there was a time-bar, it was entitled to address a decision to that effect to the applicant.
- 18 In this respect, it should be recalled that the Court of First Instance has held that a decision finding an infringement is not a penalty within the meaning of Article 1(1) of the regulation on limitation and is not therefore covered by the limitation period laid down by that provision. Therefore, the fact that the Commission's power to impose fines is time-barred cannot affect its implicit power to find an infringement (*Sumitomo Chemical and Sumika Fine Chemicals v Commission*, paragraph 15 above, paragraphs 61 and 62). However, the exercise of that implicit power to adopt a decision finding an infringement after expiry of the limitation period is conditional on the Commission's showing a legitimate interest within the meaning of Case 7/82

GVL v Commission [1983] ECR 483, paragraph 24 (see, to that effect, *Sumitomo Chemical and Sumika Fine Chemicals v Commission*, paragraph 15 above, paragraphs 130 to 132) in making such a finding.

19 In the light of all the above, the plea of inadmissibility raised by the defendant cannot succeed.

20 First, if the conditions of limitation are met in the present case, it follows from the case-law cited above that the Commission must have shown that there was a legitimate interest in order to be able to find, lawfully, that the applicant committed an infringement. Thus, contrary to the defendant's view, in such a case the Court must rule on the applicant's applications for annulment in order to assess whether the Commission has in fact established that interest in the contested decision.

21 Second, as the defendant itself admits, the determination of the duration of the infringement constitutes both an integral and inseparable part of any finding of an infringement and one of the conditions governing the limitation period in respect of proceedings for a continuing infringement. Consequently, contrary to what the defendant seems to contend, the applicant's applications for annulment of Articles 1 and 4 of the contested decision are not separable from its plea alleging that the Commission failed to apply the rules on limitation correctly. Compliance with those rules entails a correct assessment by the Commission of the period in which the applicant participated in the infringement.

22 It follows from the foregoing that the plea of inadmissibility raised by the Commission must be rejected.

2. *The plea in law alleging that the Commission misapplied the rules on limitation*

Arguments of the parties

Preliminary observation

- 23 In support of its action, the applicant puts forward a plea alleging that the Commission wrongly imposed a fine on it despite the fact that the proceedings were time-barred under the regulation on limitation after more than five years had passed between its alleged final involvement in the Spanish sub-arrangement and the Commission's first measures of inquiry. The applicant maintains, in this regard, that the Commission was wrong to reject its argument that there was a time-bar by arguing that the applicant knew about the main agreement and that there was lack of clarity as to the exact time its participation in the Spanish sub-arrangement finally ended.

The applicant's knowledge of the main agreement

- 24 The applicant claims, in essence, that the existence of the main agreement cannot be held against it when limitation is determined because it was not involved in or aware of that agreement.
- 25 In support of its argument, the applicant states, first, that the contested decision on the one hand makes a distinction between the main agreement and the regional sub-

arrangements, and, on the other, makes apparent the particularities of the Spanish sub-arrangement, which was separate from the main agreement from the beginning until the very end of the cartel, without, as with the other sub-arrangements, being integrated into the main agreement (recitals 47, the end of 80, 86, 92, 203, 209 to 267 and 268 of the contested decision).

26 Secondly, it argues that the Commission did not assert clearly, but only indirectly on the basis of a misinterpretation of the Spanish sub-arrangement, or demonstrate to the requisite legal standard that the applicant was aware of the main agreement. The applicant maintains in this respect that the reasoning in recitals 217, 236 and 250 of the contested decision is confused and contradictory. The applicant infers that the Commission concluded that the applicant knew about the existence of the cartel on a European scale solely on the basis of the contacts with employees of the companies involved in the main agreement and because there may have been pan-European contracts, concluded by the participants in the main agreement with their major customers.

27 The applicant takes the view, thirdly, that the fact that, according to recital 252 of the contested decision, 'the other participants involved in Spain [AKZO, Atochem/ Atofina and Peroxid Chemie] gave the impression that [the applicant] did know about the main agreement' and that it 'knew perfectly well about the agreement as members of its Board of Directors knew about the main agreement' does not constitute relevant evidence, particularly because the companies in question sought to gain the immunity provided for under the leniency notice. It goes on to state that the fact that the members of the Board of Directors representing the two companies which jointly control the applicant — Foret and Laporte, now Degussa UK — knew about the main agreement does not establish that those members provided information to it on the European cartel. Neither of those two companies made a statement to that effect. The applicant concludes, in essence, that in any event such knowledge cannot be imputed to it.

- 28 Finally, the applicant observes that if the Commission actually considered that it was only the executing arm of Peroxid Chemie in Spain, it should not have been fined separately, but together with Peroxid Chemie. If, on the contrary, it was acting independently (recital 267 of the contested decision), the Commission had no grounds for considering that the applicant knew or should have known about the main agreement.
- 29 The applicant concludes from all the above that, in the present case, the Commission did not reach the standards of proof required pursuant to, inter alia, the *Cartonboard* judgment. The Commission failed to show that the applicant 'knew or should have known' within the meaning of that case-law (see recital 320 and footnote 231 of the contested decision, referring to Case T-295/94 *Buchmann v Commission* [1998] ECR II-813, paragraph 121; Cases T-310/94 *Gruber + Weber v Commission* [1998] ECR II-1043, paragraph 140; and T-9/99 *HFB and Others v Commission* [2002] ECR II-1487, paragraph 231).
- 30 The defendant contends, in essence, that the applicant, as the main player in the Spanish market, a participant in the centralised mechanism for exchange of data via a Swiss consultancy and controlled by parent undertakings involved in the European cartel, knew or should have known about the main agreement. In addition, according to the other parties to the main agreement, the Spanish sub-arrangement was part of that agreement and the applicant had contributed, through its involvement in that sub-arrangement and in the implementation of pan-European contracts with the major customers, to the common objectives of all the participants in the main agreement.

The end of the applicant's involvement in the Spanish sub-arrangement

- 31 The applicant maintains that the Commission's finding that its participation in the Spanish sub-arrangement did not end until 1999 — when the main agreement ended

— is inaccurate. The applicant considers that it has already proved satisfactorily in its observations on the statement of objections that it stopped attending the meetings of the Spanish sub-arrangement from 14 January 1997, the date of the last meeting, which, according to the Commission's findings, was attended by Mr K., who represented the applicant for the purposes of that sub-arrangement. Mr K. has not been in the applicant's employ since 14 February 1997. Moreover, the evidence gathered by the Commission concerning the Spanish sub-arrangement in fact makes no reference to any meeting held after January 1997 in which the applicant could have participated.

32 The only evidence of the end of the infringement in Spain consists essentially of rather general and vague statements made by AKZO (recitals 211, 213, 216 to 219 of the contested decision). According to the applicant, the Commission erred in its view that, despite the lack of evidence in support of its argument, the applicant's involvement did not cease in 1997.

33 The applicant maintains, first, that the Commission wrongly concluded from the statements of AKZO and Atochem/Atofina, according to which the Spanish sub-arrangement lasted until 1999, that it is illogical to think that those two players on the Spanish market would have continued that sub-arrangement if the applicant, with its large market share in Spain, had already left the sub-arrangement in early 1997. Similarly, the Commission is mistaken in its conclusion that it does not seem plausible that AKZO and Atochem/Atofina would have calculated deviations between theoretical and actual market shares until the third quarter of 1999 if the applicant had left the sub-arrangement earlier (recital 258 of the contested decision). According to the applicant, the existence of the Spanish sub-arrangement after 1997 cannot be explained solely by the applicant's continued participation. On the contrary, its withdrawal from that sub-arrangement could only make the discussions about the Spanish market more consistent with the ones at European level and with the same participants. Furthermore, the only contact person for the sub-arrangement, Mr K., left the applicant in February 1997, which explains why the

other participants in the Spanish sub-arrangement were not informed of his departure. Finally, there is no evidence that AKZO informed the applicant of its intention to end either the main agreement or the Spanish sub-arrangement, although AKZO did notify the other participants.

34 Secondly, the Commission wrongly concluded that the applicant's continued participation was confirmed by a table submitted by AKZO regarding the Spanish market, which compares the applicant's actual sales with the quotas allocated to it for 1997, and shows the applicant's prices, volumes and customers until 1999 (recital 259 of the contested decision). In its observations and at the hearing, the applicant disputed 'that the figures were provided by [the applicant] before [AKZO, which sought to benefit from the] leniency [notice]', and it maintains that 'no reaction or further statement that may implicate [the applicant] did come forward' and that '[t]he Commission had to infer that the figures had to come from somewhere, and that the best placed was the applicant'. Moreover, the applicant provided alternative explanations, which have not been refuted by the Commission, as to the findings that Peroxid Chemie admitted exerting influence on the applicant to prevent it exporting from Spain (recital 236 of the contested decision), and that Peroxid Chemie received sales data concerning the applicant, transferred it to AC Treuhand and sent the tables for Spanish sales data compiled by AC Treuhand back to the applicant (recital 237 of the contested decision). Furthermore, the information contained in those tables cannot be taken to constitute 'adequate legal proof' of the applicant's continued participation in the Spanish sub-arrangement, in view of the fact that it was easy to calculate the applicant's quota by way of a simple addition and then subtraction after taking account of the shares of the other participants, namely AKZO and Atochem/Atofina.

35 Thirdly, the Commission's finding that 'in any case, the effects of the alleged last meeting of 14 January 1997 lasted beyond May 1997' (recitals 257 and 330 of the contested decision) is inaccurate and unsupported by evidence.

36 The defendant disputes the relevance of the arguments advanced by the applicant in this regard. It contends, in essence, that it based its conclusion that the applicant had participated in the Spanish sub-arrangement until 1999 on a number of pieces of evidence, and not on the statements of AKZO alone, evidence which included inter alia a table and handwritten minutes of the meeting of 6 November 1997, provided by AKZO. Those documents show that the applicant's competitors had access to sensitive data relating to the applicant until 1999 (recitals 215, 218 and 258 to 260 of the contested decision), and the applicant has been unable really to dispute the accuracy and veracity of that data. In addition, the applicant had to show that it had distanced itself publicly from the cartel — which it did not — after January 1997 and ensure that its sensitive customer data was not used by the other parties for calculating quotas. Finally, the applicant admitted that it did not inform its parent companies, Foret and Degussa UK, of Mr K.'s dismissal or of the reasons for that dismissal.

The beginning of the limitation period

37 The applicant states that the Commission took the first investigatory action on 31 January 2002 by sending a request for information to Laporte and other companies involved in the European cartel (recital 61 of the contested decision). Subsequently, on 20 March 2002, it sent a request for information to AKZO and Atochem/Atofina, companies involved in the European cartel and in the Spanish sub-arrangement (recital 64 of the contested decision). It was not until 29 November 2002 that the Commission sent a request for information to the applicant (recital 72 of the contested decision).

38 The applicant takes the view that 29 November 2002 is the relevant date for determining an interruption of the limitation period, because it is the first point of interaction between the Commission and the applicant for the purpose of

investigating this case. The applicant concludes that, between 14 January 1997 and 29 November 2002, a period longer than five years had elapsed and there was therefore a time-bar. This follows from the need to interpret the regulation on limitation narrowly in the course of a procedure under the leniency notice, such as in the present case, since that regulation is based on the reasoning underlying traditional investigations carried out by the Commission. In those investigations, obtaining information is generally slower, more difficult and more complex than in a procedure in which an undertaking seeks to benefit from the leniency notice. In that context, the Commission has been in possession of all the information from the outset. Furthermore, even if the reference date were 20 March 2002, the date on which the first request for information was sent to a participant in the Spanish sub-arrangement, there would still be a time-bar because five years had elapsed since 14 January 1997.

- ³⁹ The applicant points out that the Commission nevertheless finds, in recital 262 of the contested decision, that the limitation period was interrupted by its request for information of 31 January 2002 on the ground, first, that ‘the Spanish sub-arrangement was part of the main agreement’, secondly, that the request for information also covered the applicant, since it was sent to Laporte and asked for information about any involvement of Laporte and its subsidiaries in an agreement on organic peroxides, and thirdly, even if the Spanish sub-arrangement were to be considered an agreement in its own right, the first request for information sent, among others, to Laporte, interrupted the limitation period. The applicant maintains, however, that the Commission cannot use the date on which it sent the first request for information, 31 January 2002, solely to the participants in the main agreement and not to those in the Spanish sub-arrangement, in order to maintain that the limitation period was interrupted under Article 2 of the regulation on limitation. According to the applicant, such an effect would imply the Commission has proved — which it has not — that the two infringements, the one at European level and the other committed in Spain, form an inseparable whole and that the applicant knew about the main agreement.

40 The applicant also considers that the lack of evidence of its participation in the Spanish sub-arrangement after 14 January 1997 cannot be disguised by the vague statements of *inter alia*, AKZO, which merely stated that its own participation ended in 1999 and made no reference to the applicant. This is all the more so because AKZO and other companies alleged to have been involved in the infringements had actively cooperated with the Commission's investigation for more than three years, without that investigation producing any cogent evidence of the applicant's involvement in the Spanish sub-arrangement after January 1997.

41 For the sake of completeness, the applicant submits that it has unjustifiably been treated differently from Pergan GmbH as regards limitation. In respect of Pergan, the Commission concluded, in recital 319 of the contested decision, that there is no evidence that the company's involvement lasted beyond 31 January 1997. However, there is no evidence, apart from its own statements, that Pergan informed the other participants of its withdrawal from the cartel. On the contrary, according to recital 172 of the contested decision, Peroxid Chemie provided a document originating from Pergan with information about prices and quantities for 1997 and until 30 September 1998. In this regard, Peroxid Chemie was unable to confirm or deny Pergan's statement that the document was used only in the context of a due diligence procedure, but it had doubted this (recitals 173 and 175 of the contested decision). However, in Pergan's case, unlike the applicant's, the Commission concluded that there was a time-bar because it accepted Pergan's statement, similar to the applicant's, that it had stopped participating in November 1996, barely two months before the date of 31 January 1997, which was taken as the start of the limitation period for the main agreement.

42 The defendant submits, in essence, that the limitation was interrupted at the latest on 31 January 2002, the date on which it sent a request for information to Laporte, a company involved in the Spanish sub-arrangement, through, on the one hand, its wholly-owned subsidiary, Peroxid Chemie, and, on the other, its 50% stake in the

share capital of the applicant on the other (recitals 262 and 328 of the contested decision). The defendant then denies that it treated the applicant differently from Pergan in applying the rules on limitation, since, unlike the applicant's case, there was no evidence of Pergan's participation beyond 31 January 1997.

The requests for measures of organisation of procedure and of inquiry

- 43 The applicant requests that oral evidence be given by two Commission officials in charge of the case as to the conduct of the case in general and the issues affecting the applicant in particular. The reason for that request is to be found in the plea for annulment, which is a factual plea, and in the inconsistencies found in the Commission's decision; those two officials will be able to enlighten the Court as to the real contents of the decision and facilitate judgment of the case. The applicant also asks the Court to order the production of documents in the Commission's possession and not yet disclosed which may be relevant to the applicant's case. Those measures are also designed to obtain possible exculpatory evidence, including evidence that the applicant ceased participating in the Spanish sub-arrangement in January 1997.
- 44 The Commission asks the Court to declare the requests for measures of organisation of procedure and of inquiry submitted by the applicant to be inadmissible.

Findings of the Court

Preliminary observations

- 45 First of all, it should be recalled that the applicant's plea alleges that the Commission erred in its application of Articles 1 and 2 of the regulation on limitation.

46 As regards limitation under Article 1(1)(b) and (2) of the regulation on limitation, the Court points out that in the case of continuing or repeated infringements, for the Commission's power to impose fines to be time-barred, five years must have elapsed from the day on which the infringement ceased. Under Article 2(1), that period may be interrupted by any action taken by the Commission to investigate the infringement, in particular written requests for information, that interruption taking effect from the date on which that request is notified to the addressee and with the consequence, under Article 2(3), that time starts running afresh from that date.

47 In that regard, the Court points out that the applicant admitted, at the hearing, that the sending on 20 March 2002 of the request for information to undertakings which participated in the Spanish sub-arrangement was capable of interrupting the limitation period according to the second paragraph of Article 2(1) of the regulation on limitation, an interruption, which, pursuant to Article 2(2), also applied to the applicant as a participant in that sub-arrangement.

48 Accordingly, to enable the Court to rule on whether or not the five-year limitation period had elapsed, in the present case it need only be established whether the Commission has shown, to the requisite legal standard, that the applicant's participation in the Spanish sub-arrangement lasted, at the very least, until 20 March 1997. It also follows that there is no need for the Court to assess, in this context, the arguments raised by the applicant that, first, there was no link between the Spanish sub-arrangement and the main agreement, and, second, that the applicant did not know about that main agreement.

49 Therefore, the Court considers it appropriate to establish, in the first place, the date on which the applicant's participation in the Spanish sub-arrangement ceased.

The date on which the applicant's involvement in the Spanish sub-arrangement ceased

— Apportionment of the burden of proof between the applicant and the Commission

- 50 As regards the issue of the date on which the applicant's participation in the infringement ceased, as a preliminary point it is appropriate to recall the settled case-law that it is for the party or the authority alleging an infringement of the competition rules to prove its existence by establishing, to the requisite legal standard, the facts constituting an infringement, and it is for the undertaking invoking the benefit of a defence against a finding of an infringement to demonstrate that the conditions for applying such defence are satisfied, so that the authority will then have to resort to other evidence (see, to that effect, Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, paragraph 58, and Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraph 78).
- 51 In addition, the duration of the infringement is an intrinsic element of an infringement under Article 81(1) EC, the burden of proof of which is borne principally by the Commission. In this respect, according to the case-law, if there is no evidence directly establishing the duration of an infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates (Case T-43/92 *Dunlop Slazenger v Commission* [1994] ECR II-441, paragraph 79).
- 52 In the present case, the general principle that the Commission is required to prove every constituent element of the infringement, including its duration, that is likely to have an effect on its definitive findings as to the gravity of that infringement, is not

called into question by the fact that the applicant raised a defence of limitation, the burden of proof of which is in principle borne by the applicant. Not only does that defence not relate to the finding of an infringement, but it is clear that reliance on such a plea necessarily requires that the duration of the infringement and the date on which it came to an end be established. Those circumstances cannot alone provide justification for transferring the burden in this regard to the applicant. The duration of the infringement, which requires that the date on which it ended be known, is one of the essential elements of the infringement, which must be proved by the Commission, irrespective of the fact that the disputing of those elements also forms part of the defence of limitation (see paragraph 21 above). That conclusion is also justified in light of the fact that the non-limitation of a Commission proceeding under the regulation on limitation is the application of an objective legal criterion, pursuant to the principle of legal certainty (see, to that effect, *Sumitomo Chemical and Sumika Fine Chemicals v Commission*, paragraph 15 above, paragraphs 80 to 82), confirmed by the second recital in the preamble to that regulation, and, thus, is a condition for the validity of any decision imposing a penalty. The Commission is required to comply with this condition even if the undertaking concerned has raised no defence in this regard.

53 That apportionment of the burden of proof is likely to vary, however, inasmuch as the evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged (see, to that effect, *Aalborg Portland and Others v Commission*, paragraph 50 above, paragraph 79).

54 It is in the light of these principles that it should be ascertained whether the Commission correctly established the facts on which it based its assessment that the applicant's participation in the Spanish sub-arrangement ended in 1999. More specifically, given that the limitation period was interrupted on 20 March 2002, which the applicant accepts, it suffices to establish whether the Commission proved, to the requisite legal standard, that that participation lasted at least until 20 March 1997.

— The probative value of the evidence on which the Commission based its assessment that the applicant's participation in the Spanish sub-arrangement lasted at least until 20 March 1997

55 As a preliminary point, it is appropriate to recall the main evidence on which the Commission based its assessment in the contested decision that the applicant's participation in the Spanish sub-arrangement lasted until 1999. In this regard, the Commission relied *inter alia* on the following evidence (recitals 215, 218, 250 to 267 and 320 to 330 of the contested decision). First, the contested decision refers to a table provided by AKZO concerning the Spanish market, showing detailed sales and market share figures of the applicant, AKZO and Atochem/Atofina until the third quarter of 1999, the 'theoretical' market shares, that is, those agreed within the cartel, and the 'deviations', at the very least until the third quarter of 1998 (recitals 259 and 327). Secondly, the contested decision refers to handwritten minutes of a meeting held on 6 November 1997, in which the figures '1', '2' and '3' represented codes designating AKZO, the applicant and Atochem/Atofina (recital 218). Thirdly, the Commission considered the claims of AKZO and Peroxid Chemie as established that certain data, including that from the applicant, was exchanged via Peroxid Chemie and AC Treuhand until 1999 (recitals 215 and 237). In that respect, it should be pointed out that the Commission accepts that it was unable to prove fully that that data was exchanged directly between the applicant and the Spanish subsidiaries of AKZO and Atochem/Atofina.

56 As regards, first of all, the table provided by AKZO, the Court finds first that this table contains figures corresponding to units of 'MT' (metric tonnes), expressed as a '%' and combined, on the one hand, horizontally, with four categories of heading entitled 'ACTUALS', 'THEORETICAL', 'DEVIATIONS' and 'CUMM. DEVIATIONS' respectively, and, on the other, vertically, with the years 1988 to 1999, subdivided quarterly for the years 1998 and 1999 until the third quarter of 1999. Further, under each of the categories referred to above the figures '2', '1' and '3' have been inserted, which, according to the explanations given by AKZO and placed on the administrative file (page 10214 of the Commission's file), designate the applicant,

AKZO and Atochem/Atofina as participants in the Spanish market. AKZO subsequently explains that the category 'ACTUALS' contains the quantities actually sold by those participants and their respective market shares. The category 'THEORETICAL' designates the sale quantities intended for each participant, whereas the category 'DEVIATIONS' indicates the deviations between the quantities actually sold and those intended. The category 'CUMM. DEVIATIONS' designates the deviations which accumulated over the past years. In relation more particularly to 1998 and 1999, AKZO states in its explanations that the category 'THEORETICAL' contains the apportionment of market shares for the Spanish market as agreed between the participants, namely 32.2% for AKZO, 53.9% for the applicant and 13.9% for Atochem/Atofina.

57 It should be noted that, as regards the table at issue, the applicant does not dispute in detail either AKZO's allegations in that regard or the finding at the end of recital 259 of the contested decision that AKZO was aware, *inter alia*, of the applicant's intended prices for 1997 to 1999. Further, the applicant did not challenge in detail, either during the administrative procedure or in the course of these proceedings, the data relating to it provided by AKZO (recital 260). The applicant merely submitted that it could not verify the accuracy and veracity of that data, without however denying its relevance as a whole (paragraph 4.12 of the applicant's observations on the statement of objections, see paragraph 8 above).

58 As regards, secondly, the handwritten minutes of the meeting of 6 November 1997, the Court finds that they confirm and reinforce the explanations provided by AKZO in relation to the table referred to above, in that the same coded designations are used to identify the participants in the Spanish sub-arrangement. The applicant disputes neither the content nor the Commission's interpretation of those minutes, nor the fact that the number '2' is intended to designate the applicant.

59 Thirdly, in relation to the allegations of AKZO and Peroxid Chemie relating to the exchange of the applicant's data via Peroxid Chemie and AC Treuhand until 1999, the applicant accepted, first, the relevance of the findings set out in recital 237 of the contested decision that it provided Peroxid Chemie with commercial data, which, in turn, passed it on to AC Treuhand to then get it back from the latter in the form of tables relating to the Spanish market and finally sent it back to the applicant, and, secondly, that that exchange of information could have lasted at least until the middle of 1997 (minutes of the hearing, page 2).

60 The Court infers from this that the applicant continued to participate, albeit indirectly, in the centralised system for the exchange of sensitive information via AC Treuhand beyond 20 March 1997.

61 Finally, as regards more particularly the exchanges of data with Peroxid Chemie, the subsidiary of its 50% parent company Laporte, the applicant does not dispute the fact that these exchanges occurred, but merely alleges that they were legitimate and carried out without its knowledge that the data in question would be used for anti-competitive purposes (recital 246 of the contested decision).

62 The Court finds that this evidence is capable of corroborating the Commission's assessment regarding the applicant's continuing participation in the Spanish sub-arrangement beyond 20 March 1997 and there is no need to verify in that context, on the basis of the evidence available, whether that participation in fact lasted until 31 December 1999, as found in the contested decision.

63 In the light of these indicia, it must next be established whether the applicant has advanced arguments and provided evidence capable of contradicting those indicia or casting doubt on their probative value.

— The applicant's arguments as to the lack of evidence concerning its participation in the infringement until at least 20 March 1997

64 The Court considers, first of all, that contrary to the applicant's claims, the Commission was correct to find that the applicant's participation in the infringement did not cease on the exact date of the last meeting attended by one of its representatives, Mr. K., on 14 January 1997. First, the exchanges of information between the participants via AC Treuhand, even if the applicant had no direct contact with the latter but only via Peroxid Chemie, still continued after that date. Secondly, Mr. K.'s dismissal, on 14 February 1997, does not in itself indicate that the applicant had ceased its participation by 20 March 1997. In this respect, the applicant admitted in the hearing that, first, it continued to keep in its employ another of its representatives, Mr. V., who had accompanied Mr. K. to certain meetings in which anti-competitive matters were discussed, and, secondly, Mr. K.'s dismissal was not even made known to its corporate shareholders, let alone to the other participants in the Spanish sub-arrangement (recital 242 of the contested decision). Laporte, as shareholder in the applicant, and Peroxid Chemie, another subsidiary of Laporte, both having participated in the cartel at European level, had every interest in receiving information on this, particularly since Mr K. was the applicant's main contact person in the context of the Spanish sub-arrangement. It is also clear that the applicant's explanation that Mr K.'s dismissal was the reason for not informing the other participants that it had ceased to participate in the infringement, and that, in any event, Mr K.'s departure, as commercial director, must have been noticed by the other participants, cannot be accepted. That explanation confirms, on the contrary, that the applicant did not distance itself overtly from the infringement in accordance with the requirements laid down in the case-law (see paragraph 68 below).

65 The Court observes, secondly, that, contrary to the view taken by the applicant, the fact that the absence of statements of the other participants in the infringement to the effect that the applicant's participation did not come to an end at the beginning of 1997, but at a later date, does not invalidate the indicia adduced by the

Commission. In this connection, it should be recalled, first of all, that in the present case there is also no information provided by third parties to the effect that the applicant had in fact ceased to participate, or, at least, stated that it had ceased to participate actively in the infringement on the dates the applicant claimed. Next, the Court considers that the conduct of the other participants in the Spanish sub-arrangement, namely AKZO and Atochem/Atofina, in the course of 1997 to 1999, shows, on the contrary, that the applicant continued to participate beyond the dates that it claims. The applicant did not claim to have informed the other participants, at the time it alleged to have ceased its participation in the infringement, of its desire to end its involvement in the Spanish sub-arrangement, which lasted until 1999 (recital 298 of the contested decision). At the hearing, the applicant admitted, moreover, that there was no official statement to that effect, for example in the form of a letter sent to the other participants in the infringement. It also did not claim to have informed its corporate shareholders of this, or of Mr K.'s dismissal and the reasons for that dismissal. The applicant's assertion that Mr K. was dismissed for reasons connected with the applicant's desire to distance itself from the infringement (recital 261) is thus a mere assertion.

⁶⁶ In that context, the contention that AKZO and Atochem/Atofina continued the infringement without the applicant's participation, despite the fact that its withdrawal was not communicated to them and that it was the largest player on the Spanish market, is not well founded, as the Commission correctly points out in recital 258 of the contested decision. On the contrary, the applicant's hypothesis and — purely conjectural — argument that its withdrawal from the Spanish sub-arrangement could have only made the discussions between AKZO and Atochem/Atofina on the Spanish market more coherent are incompatible with the principles governing oligopolistic cartels, the operation of which depends in particular on the participation of the largest player on the relevant market. This is all the more so since, according to the table referred to in paragraphs 56 and 57 above, which, in this respect, was not disputed by the applicant, the latter's market share in Spain exceeded 50%. As the defendant correctly contended in the hearing, it would make

no sense, when calculating and apportioning the respective quotas, for AKZO and Atochem/Atofina to respect the market share of their largest competitor on the Spanish market if they had accepted that the applicant was no longer participating in the Spanish sub-arrangement.

67 Similarly, the Court cannot uphold the applicant's argument that the calculation of the market shares and other data referring to its economic activity, such as that contained inter alia in the tables relating to 1998 and 1999 provided by AKZO, were the result of information provided by third parties and not, even indirectly, by the applicant itself. This is all the more so since the applicant was unable to state a clear view as to the correctness and accuracy of that data, or to provide a cogent explanation as to why it could not confirm it or show that it might be wrong as regards the data from its own economic area (recital 260). The applicant also admits to continuing its participation, at least indirectly, in the centralised mechanism for the exchange of information via Peroxid Chemie and AC Treuhand (see paragraph 59 above). Finally, in the light of the consistent indicia referred to above, the Court cannot uphold the applicant's explanation that the data could have been derived from a simple calculation based on the data of the other participants in the Spanish sub-arrangement, namely AKZO and Atochem/Atofina (paragraph 4.13 of the applicant's observations on the statement of objections).

68 In that regard, the defendant correctly refers to the case-law that the fact of not distancing itself publicly from an infringement in which the undertaking concerned participated or of not reporting it to the administrative authorities effectively encourages the continuation of the infringement and compromises its discovery, so that that tacit approval may be deemed to be complicity or a passive mode of participation in the infringement (*Aalborg Portland and Others v Commission*, paragraph 50 above, paragraph 84). It should be pointed out that the applicant neither showed that it publicly distanced itself from the infringement following its alleged withdrawal from the Spanish sub-arrangement, nor even claimed that it had

informed the other participants in this regard, nor provided any cogent explanation as to why sensitive data continued to be exchanged via Peroxid Chemie and AC Treuhand.

69 Thirdly, contrary to what the applicant claims, the fact that AKZO may have failed to inform the applicant of its intention to terminate its participation in the cartel in 1999, whereas it did this in respect of the other participants (recital 187 of the contested decision), is not such as to indicate that the applicant was no longer participating in the Spanish sub-arrangement at that time and, a fortiori, in the years preceding that communication, that is, in 1997 and 1998 in particular.

70 Finally, the applicant essentially submits, on several occasions, that the information and explanations provided by AKZO and Atochem/Atofina are not reliable, inasmuch as those parties were seeking to benefit from the Leniency Notice and, to this end, had a certain interest in submitting incriminating evidence against the applicant. However, even if some caution as to the evidence provided voluntarily by the main participants in an unlawful agreement is generally called for, considering the possibility that they might tend to play down the importance of their contribution to the infringement and maximise that of others (see recital 278 of the contested decision), the fact remains that the applicant's argument does not correspond to the inherent logic of the procedure provided for in the Leniency Notice. The fact of seeking to benefit from the application of the Leniency Notice in order to obtain a reduction in the fine does not necessarily create an incentive for the other participants in the offending cartel to submit distorted evidence. Indeed, any attempt to mislead the Commission could call into question the sincerity and the completeness of cooperation of the person seeking to benefit, and thereby jeopardise his chances of benefiting fully under the Leniency Notice. Therefore, having regard to the significance and number of consistent indicia supporting the statements of AKZO and Atochem/Atofina, the applicant's argument cannot be upheld.

- 71 In the light of all the foregoing, the Court considers that the Commission had sufficient indicia to support the assessment in the contested decision that the Spanish sub-arrangement operated, in any event, until the end of March 1997, and did so with the participation, at least indirectly, of the applicant. Further, the applicant has been unable to dispute specifically, with supporting evidence, those indicia in such a way as to cast doubt on their probative value, or to provide an alternative convincing explanation as to why such indicia existed, in accordance with the case-law. As the Commission had established the above evidence corroborating the applicant's continued participation in the Spanish sub-arrangement beyond 20 March 1997, it was for the applicant to provide an alternative explanation or justification capable of contradicting the interpretation given to that evidence, failing which it is permissible to conclude that the burden of proof borne by the Commission has been discharged (see, to that effect, *Aalborg Portland and Others v Commission*, paragraph 50 above, paragraph 79).
- 72 Accordingly, the Court concludes that the Commission's findings contained, in particular, in recitals 257 to 261 of the contested decision, in so far as they concern the applicant's participation in the Spanish sub-arrangement at the very least until the end of March 1997, are not manifestly erroneous or unlawful. Since it has been established that the applicant continued to participate in the Spanish sub-arrangement at the very least until 20 March 1997, and that the limitation was interrupted at the latest on 20 March 2002, the Commission's proceedings in respect of the applicant for the purposes of imposing a fine under Article 81 EC were not time-barred.
- 73 It follows that, in the present case, the Commission has not disregarded the rules on limitation laid down in Articles 1 and 2 of the regulation on limitation.
- 74 It is also clear that there is no need to assess the merits of the applicant's other submissions in support of its plea, namely those relating to the applicant's lack of

knowledge of the main agreement and of the link between that agreement and the Spanish sub-arrangement and that relating to the exact date on which the limitation period was interrupted.

75 Therefore, the applicant's plea must be rejected as unfounded.

The alleged discriminatory treatment of the applicant as compared with Pergan

76 As regards the applicant's argument in the alternative that it was the subject of discriminatory treatment as compared with Pergan, in respect of which the Commission recognised that the limitation period had elapsed even though that company was in a comparable situation to the applicant's, there are two possibilities: first, the possible unlawfulness, and second, the possible lawfulness of the Commission's approach to Pergan.

77 In relation to the first possibility, based on the premiss that the Commission misapplied the criteria governing limitation in respect of Pergan, the Court considers that in any event such unlawfulness, which is not the subject of proceedings in the present case, would not mean that the applicant's application for annulment is well founded. In this respect, it is appropriate to recall that the principle of equal treatment must be reconciled with the principle of legality and thus a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (see, to that effect, Case 134/84 *Williams v Court of Auditors* [1985] ECR 2225, paragraph 14; Case T-327/94 *SCA Holding v Commission* [1998] ECR II-1373, paragraph 160; and Case T-23/99 *LR AF 1998 v Commission* [2002] ECR II-1705, paragraph 367). A possible unlawful act committed with regard to another undertaking, which is not party to the present proceedings, cannot induce

the Court to find that it is discriminatory and, therefore, unlawful with regard to the applicant. Such an approach would be tantamount to laying down a principle of 'equal treatment in illegality' and to requiring the Commission, in the present case, to disregard the evidence in its possession to sanction the undertaking which has committed a punishable infringement, solely on the ground that another undertaking which may find itself in a comparable situation has unlawfully escaped being penalised. In addition, as is clear from the case-law on the principle of equal treatment, where an undertaking has acted in breach of Article 81(1) EC, it cannot escape being penalised altogether on the ground that other undertakings have not been fined, where, as in this case, those undertakings' circumstances are not the subject of proceedings before the Court (Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I-1307, paragraph 197, and Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie v Commission* [2003] ECR II-5761, paragraph 430).

78 As regards the second possibility, that the Commission's findings in relation to Pergan are not unlawful — inter alia because of limitation owing to lack of sufficient evidence of that undertaking's continued participation in the infringement — the Court observes that the question of possible discrimination does not arise here either. In that respect, it should be recalled that the principle of equal treatment is breached only where comparable situations are treated differently or different situations are treated in the same way, unless such treatment is objectively justified (see *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie v Commission*, paragraph 77 above, paragraph 428, and the case-law cited therein). The Court points out that, unlike Pergan's situation if the second hypothesis applies, the Commission had sufficient evidence to conclude that the applicant continued to participate in the infringement and to penalise it under Article 81 EC (see paragraphs 50 to 72 above). Therefore, the Court considers that the Commission could legitimately take the view that the applicant's situation and that of Pergan were not comparable owing to the presence or absence of evidence as to the duration of those undertakings' respective participation in the infringement.

79 Accordingly, the argument alleging that the applicant was the victim of discrimination cannot be upheld in relation to either of the above hypotheses.

The requests for measures of organisation of procedure and measures of inquiry

80 The Court considers that the applicant's requests that witnesses be heard and the Commission be ordered to produce certain confidential documents from the investigation file are manifestly inadmissible and unfounded. First, those requests lack the precision required as to the evidence and relevant documents which may be the subject of such measures under Article 64(3)(d) and Article 65(b) and (c), in conjunction with Article 68(1), of the Rules of Procedure of the Court of First Instance to be admissible. In addition, the applicant has not submitted any precise and relevant evidence capable of explaining why the testimony requested and the documents in question would be of relevance to the result of the present case. Secondly, in the light of the parties' written pleadings, the evidence placed on the file and the results of the hearing, the Court considers that it has sufficient information to rule on the present case.

81 Therefore, the requests for measures of organisation of procedure and measures of inquiry submitted by the applicant must be rejected.

82 It follows from all the foregoing that the whole of the applicant's plea must be dismissed as inadmissible.

Costs

⁸³ Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, as applied for by the defendant.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders the applicant to pay the costs.**

Jaeger

Azizi

Cremona

Delivered in open court in Luxembourg on 16 November 2006.

E. Coulon

Registrar

M. Jaeger

President

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