INFORMATION ON UNPUBLISHED DECISIONS

Reports of Cases

Judgment of the General Court (Seventh Chamber) of 2 February 2012 — Denki Kagaku Kogyo and Denka Chemicals v Commission

(Case T-83/08)

(Competition — Agreements, decisions and concerted practices — Market for chloroprene rubber — Decision finding an infringement of Article 81 EC and Article 53 of the EEA Agreement — Price-fixing — Market-sharing — Proof of participation in the cartel — Proof of distancing from the cartel — Duration of the infringement — Rights of the defence — Access to the file — Guidelines on the method of setting fines — Non-retroactivity — Legitimate expectations — Principle of proportionality — Mitigating circumstances)

1. *Competition — Agreements, decisions and concerted practices — Adverse effect on competition — Criteria for assessment — Anti-competitive purpose — Sufficient (Art. 81(1) EC) (see paras 51, 181)*

2. *Competition — Agreements, decisions and concerted practices — Participation of an undertaking in an anti-competitive initiative — Whether sufficient, for an undertaking to be liable, that it tacitly approved without public distancing or denunciation to the competent authorities (Art. 81(1) EC) (see paras 52, 53, 61, 62, 64, 184)*

3. *Competition — Agreements, decisions and concerted practices — Proof — Degree of precision required of the evidence used by the Commission (Art. 81(1) EC) (see para. 54)*

4. *Competition — Agreements, decisions and concerted practices — Concerted practice — Concept — Coordination and cooperation incompatible with the obligation on each undertaking to determine independently its conduct on the market — Operator receiving information from a competitor concerning its future market conduct (Art. 81(1) EC) (see para. 67)*

5. *Procedure — Time limit for producing evidence — Article 48(1) of the Rules of Procedure of the General Court — Scope (Rules of Procedure of the General Court, Arts 48(1), and 66(2)) (see para. 69)*

6. *Competition — Administrative procedure — Observance of the rights of the defence — Access to the file — Scope — Refusal to communicate a document — Consequences — Need to make a distinction, at the level of the burden of proof on the undertaking concerned, between inculpatory and exculpatory documents (Art. 81(1) EC; Council Regulation No 1/2003, Art. 27(2)) (see paras 82-84)*

7. *Community law — Principles — Non-retroactivity of penal provisions — Scope — Fines imposed for breach of the competition rules — Included — Whether breach by applying guidelines for the calculation of fines to an infringement prior to their introduction — Foreseeability of the modifications introduced by the Guidelines — No infringement (Council Regulation No 1/2003, Art. 23(2) and (3); Commission Notices 98/C 9/03 and 2006/C 210/02) (see paras 115-124)*

8. *Competition — Fines — Amount — Determination — Guidelines on the method of setting fines for infringements of the competition rules — Duty to apply the lex mitior — None (Council Regulation No 1/2003, Art. 23(2)) (see para. 126)*

9. *Competition — Fines — Amount — Determination — Turnover taken into consideration — Reference year — Last full year of the infringement (Council Regulation No 1/2003, Art. 23(2); Commission Notice 2006/C 210/02) (see paras 134, 135)*

10. *Competition — Agreements, decisions and concerted practices — Concerted practice — Evidence of the infringement — Burden of proof (Art. 81(1) EC) (see paras 173-178)*

11. *Competition — Administrative procedure — Commission decision finding an infringement — Use as evidence of statements of other undertakings which participated in the infringement — Lawfulness — Conditions (Arts 81 EC and 82 EC) (see para. 179)*

12. *Competition — Agreements, decisions and concerted practices — Agreements and concerted practices constituting a single infringement — Undertakings that may be held responsible for participating in an overall cartel — Criteria (Art. 81(1) EC) (see para. 180)*

13. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Mitigating circumstances — Global assessment (Council Regulation No 1/2003; Commission Notice 2006/C 210/02) (see paras 237-239, 242-256)*

Re:

APPLICATION for, principally, annulment of Commission Decision C(2007) 5910 final of 5 December 2007 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.629 — Chloroprene Rubber), in so far as it concerns the applicants and, in the alternative, a reduction in the amount of the fine imposed jointly and severally on the applicants by that decision.

Operative part

The Court:

1. Dismisses the action;

2. Orders Denki Kagaku Kogyo Kabushiki Kaisha and Denka Chemicals GmbH to pay the costs.