Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 16 July 2015 [1]

Case C-617/13 P

Repsol Lubricantes y Especialidades, SA, (formerly Repsol Lubricantes YPF y Especialidades, SA)
Repsol Petróleo, SA
Repsol, SA
v

European Commission

(Appeal — Agreements, decisions and concerted practices — Spanish market for road pavement bitumen — Notion of 'facts previously unknown' within the meaning of the final paragraph of point 23 of the Commission notice on immunity from fines and reduction of fines)

I – Introduction

1. By their appeal, Repsol Lubricantes y Especialidades, SA, Repsol Petróleo, SA, and Repsol SA (hereinafter 'Repsol and Others') request the Court of Justice to set aside the judgment in *Repsol Lubricantes y Especialidades and Others* v *Commission* (T-496/07; 'the judgment under appeal') [2] by which the General Court dismissed their action seeking annulment of Commission Decision C(2007) 4441 final (hereinafter 'the decision at issue') [3] and their request put forward in the alternative seeking a reduction in the amount of the fine imposed on them. [4]

2. Pursuant to the request of the Court the present Opinion will be limited to an analysis of the second ground of appeal, which poses, in substance, a question of interpretation of the Commission's Notice on the immunity from fines and their reduction in cartel cases, in the version dating from 2002 (hereinafter 'the 2002 Leniency Notice'). [5]

1 — Original language: French.

2 — EU:T:2013:464.

3 — Decision of 3 October 2007 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/38.710 — Bitumen (Spain)).

4 — So far as it may be relevant I would point out that the present case forms part of a group of appeals brought before the Court of Justice against judgments of the General Court on the decision at issue. My Opinion dealing with the case of *Galp Energía España and Others*, C-603/13 P, which is one of those appeals, will be delivered on 16 July 2015.

5 — Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

II – Legal framework

3. Under Heading B of the 2002 Leniency Notice, entitled 'Reduction of a Fine', point 23 provides:

'The Commission will determine in any final decision adopted at the end of the administrative procedure:

(a) whether the evidence provided by an undertaking represented significant added value with respect to the evidence in the Commission's possession at that same time;

(b) the level of reduction an undertaking will benefit from …

In order to determine the level of reduction within each of these bands, the Commission will take into account the time at which the evidence fulfilling the condition in point 21 was submitted and the extent to which it represents added value. It may also take into account the extent and continuity of any cooperation provided by the undertaking following the date of its submission.

In addition, if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these elements into account when setting any fine to be imposed on the undertaking which provided this evidence.'

III – Background to the dispute

4. The background to the dispute was set out in paragraphs 1 to 91 of the judgment under appeal, to which reference is made.

5. In so far as is necessary, suffice it to point out that on 20 June 2002 British Petroleum (hereinafter 'BP') submitted a leniency application pursuant to the 2002 Leniency Notice relating to all agreements contrary to Article 101 TFEU on the market for road pavement bitumen in Spain. [6] On 31 March 2004 Repsol and Others submitted an application for a fine reduction under the same notice.

6. On 3 October 2007, the Commission adopted the decision at issue. The Commission recognised a right to immunity for BP from fines which would normally have had to be imposed on it after having found that it had satisfied the conditions set out in point 11 of the 2002 Leniency Notice. [7] With regard to the request of Repsol and Others, the Commission applied a 40% reduction to the amount of the fine which would normally have had to be imposed on them. [8] Consequently Repsol and Others were held jointly and severally liable for a fine of EUR 80 496 000.

7. By way of an application lodged with the General Court between 18 and 20 December 2007, Repsol and Others contested the content of the decision at issue and sought to have it annulled in whole or in part. By the judgment under appeal the General Court rejected in their entirety the eight pleas in law presented in support of their claims for annulment and alteration.

6 — The other parties involved, apart from BP, were the following companies: Productos Asfalticos, SA; Nynäs Petroleo SA; and Galp Energía España SA.

7 — These conditions relate to cooperation with the Commission, ceasing involvement in an infringement and the absence of measures aimed at coercing other undertakings to participate in an infringement (recital 573 of the decision at issue).

8 — See recital 580 of the decision at issue.

IV – The procedure before the Court and the forms of order sought

8. By statement of appeal lodged with the Registry of the Court of Justice on 27 November 2013 Repsol and Others brought an appeal by which they request that the Court set aside the judgment under appeal and annul the decision at issue; reduce the amount of the fine; declare the length of the judicial proceedings before the General Court to have been excessive and unjustified; and order the Commission to pay the costs. The Commission requests that the Court dismiss the appeal and order Repsol and Others to pay all of the costs.

9. The parties set out their positions in writing before the Court and presented oral arguments at the hearing held on 15 April 2015.

V – The second ground of appeal

A – *Arguments of the parties*

10. By their second ground of appeal Repsol and Others allege that the General Court erred in law in paragraphs 339 to 349 of the judgment under appeal in so far as it confirmed the Commission's interpretation and application of the notion of 'facts previously unknown' within the meaning of the final paragraph of point 23 of the 2002 Leniency Notice. That point, it is submitted, does not refer simply to mere physical possession of documents but rather requires a consideration of a separate criterion that Repsol and Others describe as a 'cognitive test'.

11. Repsol and Others stress that it is their account of the facts that would have enabled the Commission to know the actual length of the agreement, namely that the agreement continued not only until 1998, as BP had informed the Commission, but until 2002. Consequently, Repsol and Others should not have had a fine imposed on them for the period from 1998 to 2002.

12. Moreover, the grounds of the judgment under appeal are, they submit, weakened by confusion as to the legal argument put forward by Repsol and Others at first instance. Paragraph 343 of the judgment under appeal, justifying non-application of point 23 of the 2002 Leniency Notice, provides no answer to the argument of Repsol and Others according to which not only did Repsol and Others produce documentation proving the actual duration of the agreement in their application for leniency, but their version of events would have allowed the Commission to discover that BP had not told the truth concerning the duration of the agreement.

13. For its part, the Commission submits that this ground of appeal is inadmissible. Given the plea in law invoked by Repsol and Others at first instance (section 3.3 of the application),[9] it claims that they never submitted that they should benefit from a reduction on the basis of the application of a so-called 'cognitive' criterion.

14. The Commission takes the view that the ground of appeal is in any event unfounded. It notes that the conclusion reached by the General Court, according to which the Commission had already been informed of the existence of the agreement from a certain date, constitutes a finding of fact that comes within the powers of appraisal of the General Court.[10] Finally, it maintains that, in the light of point 7 of the 2002 Leniency Notice, the reduction of a fine must be limited to undertakings which provide evidence to the Commission which adds value to information already in its possession. Moreover, the criterion advocated by Repsol and Others would be difficult, if not impossible, to apply.

9 — This point made reference to an alleged 'obvious error of assessment or, alternatively, an infringement of the general principles of protection of legitimate expectations, of proportionality and of equal treatment, in fixing the percentage for reduction of the fine by virtue of the Leniency Notice'.

10 — Order in *Otis Luxembourg and Others* v *Commission* (C-494/11 P, EU:C:2012:356, paragraph 88).

B – *The admissibility of the second ground of appeal*

15. In view of the Commission's claims, according to which the second ground of appeal constitutes a new plea, a decision must first be taken on the admissibility of the current ground of appeal.

16. In that regard it is worth recalling that, as is apparent from Article 58 of the Statute of the Court of Justice, the grounds of appeal must be founded on the arguments made in the proceedings before the General Court. Furthermore, according to Article 170(1) of the Rules of Procedure of the Court of Justice, a party may not change the subject matter of the proceedings by putting forward a plea in law before the Court of Justice for the first time which could have been raised before the General Court but was not raised, since to do so would be to allow it to bring before the Court of Justice a case of wider scope than that which came before the General Court. Such a plea in law must therefore be regarded as inadmissible at the appeal stage. [11]

17. As regards the application submitted at first instance, it must be noted that section 3.3.1 thereof was entitled 'manifest error of assessment of the percentage reduction in connection with cooperation with the Commission in the context of the Leniency Notice'. It is apparent from paragraph 147 of the application, which features in that section, that Repsol and Others, while indicating that they were the second undertaking to submit a leniency application, in order to secure a reduction in the fine, referred clearly to point 23 of the 2002 Leniency Notice in criticising the Commission for not having taken account of the added value of the information provided and of the date at which the leniency application was made.

18. Furthermore, it is clear from paragraphs 150 to 157 of the application that this problem was addressed on its merits at first instance, even though it was not discussed under the so-called 'cognitive' criterion. Thus, in particular in paragraph 156 of the application at first instance, the decision at issue was clearly criticised on the ground that it did not apply point 23 of the 2002 Leniency Notice. Furthermore, in paragraph 157 of that application Repsol and Others claimed to have provided the information which would have made it possible to interpret the documents to which the Commission refers and to become aware of the developments which occurred over the period between 1998 and 2002.

19. With regard to the judgment under appeal, the General Court ruled in paragraphs 339 to 349 of that judgment on the Commission's contested refusal to allow Repsol and Others to benefit from the final paragraph of point 23 of the 2002 Leniency Notice on the ground that, according to recital 592 of the decision at issue, the Commission already had in its possession the relevant information contained in up-to-date documents collected during investigations conducted on 1 and 2 October 2002 even before it received, on 31 March 2004, Repsol's declaration attached to its application under the 2002 Notice. In particular, it is clear from paragraph 343 of the judgment under appeal that 'the applicants are therefore wrong in alleging that it was Repsol which produced, in its application under the 2002 Notice, the information that allowed the Commission to become aware that the cartel had continued from 1998 to 2002'.

20. On the basis of all of the foregoing, I consider this ground of appeal to be admissible.

11 — *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:620, paragraph 35).

C – The criteria for the application by the Commission of the final paragraph of point 23 of the 2002 Leniency Notice.

1. General observations on the final paragraph of point 23 of the 2002 Leniency Notice.

21. By their second ground of appeal, Repsol and Others argue that the General Court erred in law with regard to the interpretation of the 2002 Leniency Notice.

22. Let us bear in mind, briefly, that the object of the leniency programme is to obtain the reporting of infringements by those carrying them out so that those infringements may be brought rapidly and completely to an end. This swift and reliable detection is in the general interest of the markets and the protection of the individual interests of those adversely affected by cartels. [12]

23. To this end, and in the interests of transparency, the Commission adopted guidelines in which it sets out the basis on which it will take account of the given circumstances of the infringement and what this will imply with regard to the amount of the fine. This is therefore an indicative rule of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment. [13]

24. With regard to the 2002 Leniency Notice, the General Court has held that the logic behind that notice was to encourage undertakings engaged in illegal agreements to cooperate with the Commission in its efforts against cartels. From that aspect, the final paragraph of point 23 of the 2002 Leniency Notice seeks to reward an undertaking, even if it is not the first to submit an application for immunity in relation to the cartel concerned, if the evidence provided by an undertaking relates to facts which allow the Commission to modify its assessment on the gravity or the duration of the cartel that it held at that time. [14]

25. Having regard to the characteristics thus set out in the notices, and in so far as the leniency procedure is of an exceptional character vis-à-vis existing provisions of EU law that prohibit anti-competitive agreements, the principle of legal certainty calls for the adoption of a strict interpretation of the provisions of the 2002 Leniency Notice.

2. The concept of 'facts previously unknown'

26. I note that the final paragraph of point 23 of the 2002 Leniency Notice refers to evidence of 'facts previously unknown to the Commission'. The divergent views provoked by the present case demonstrate that the wording of that point is open to two distinct interpretations.

27. Under a literal interpretation, it concerns the absence of *knowledge* on the part of the Commission of the relevant facts, which also appears to emerge from other language versions. [15]

12 — Chaput, Y., 'Philosophie des programmes de clémence et de transaction', in *Clémence et transaction en matière de concurrence — Actes du colloque du 19 janvier 2005*, p. 5, available on the CREDA website (www.creda.ccip.fr).

13 — Jugdments in *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* (C-397/03 P, EU:C:2006:328, paragraph 91) and in *Chalkor* v *Commission* (C-386/10 P, EU:C:2011:815, paragraphs 59 and 60).

14 — *Transcatab* v *Commission* (T-39/06, EU:T:2011:562, paragraphs 378 to 382).

15 — English version: 'In addition, if an undertaking provides evidence relating to facts previously unknown to the Commission …'; German version: 'Falls ein Unternehmen Beweismittel für einen Sachverhalt vorlegt, von denen die Kommission zuvor keine Kenntnis hatte …'.

28. A second interpretation, which I am inclined to favour, may identify in that expression an objective criterion that is applicable to the *communication* or *transmission* of evidence to the Commission, allowing it therefore to distinguish evidence touching on new facts from evidence already in the Commission's possession. [16] In my view this second interpretation is more consistent with the first two paragraphs of point 23 of the 2002 Leniency Notice, which concern the possession of evidence as a criterion defining the value added without mentioning the knowledge of the Commission.

29. According to the case-law, it is apparent from the wording of point 23 of the 2002 Leniency Notice that the partial immunity provided for therein requires two conditions to be satisfied: *firstly*, the undertaking in question must be the first to provide evidence on facts previously unknown to the Commission; and *secondly*, those facts, by reason of their direct bearing on the assessment of the gravity or duration of the suspected cartel, enable the Commission to make new findings concerning the infringement. In particular, the Court has stressed that the term 'facts … unknown to the Commission', relating to the first of those conditions, is unambiguous and allows for a restrictive interpretation of the final paragraph of point 23 of the 2002 Leniency Notice by limiting that provision to cases in which a company party to a cartel provides the Commission with new information relating to the gravity or the duration of the infringement and by excluding from it cases in which the company has merely provided information which strengthens the evidence relating to the existence of the infringement. [17]

30. That interpretation has its basis in the fact that the effectiveness of the leniency programme would be undermined if undertakings no longer had an incentive to be the first to submit information revealing the existence of a cartel to the Commission. [18]

31. In general terms the present case raises questions relating to the scope of the previously cited case-law. A hypothesis that could trigger the application of the final paragraph of point 23 of the 2002 Leniency Notice which has not yet been contemplated by the case-law is, in my opinion, one where a second informer provides evidence allowing the Commission to 'decode' evidence already in its possession but not used due to the lack of the 'key' information subsequently provided. Such a possibility does not constitute 'strengthening', but rather 'establishment', of new evidence.

32. In the present case I must point out that the so-called 'cognitive' criterion advocated by Repsol and Others is irrelevant in that it does not stand up to an analysis founded on 'ordinary legal logic', [19] which is applicable to the leniency mechanism resulting from the Commission's Notice.

33. With regard to the ordinary legal logic, it is common ground that, as an institution, that is to say, an agent of collection, the Commission does not possess cognitive capacity equivalent to that of an individual but can possess such a capacity only in a metaphorical sense. [20]

16 — My reading of the final paragraph of point 23 of the 2002 Leniency Notice is based on the commonly accepted distinction between the legal fact to be proved ('Beweistatsache') and the method of proof employed ('Beweismittel').

17 — Judgment in *LG Display and LG Display Taiwan* v *Commission* (C-227/14 P, EU:C:2015:258, paragraph 79); see also, to that effect, order in *Kuwait Petroleum and Others* v *Commission* (C-581/12 P, EU:C:2013:772, paragraph 19).

18 — See, to that effect, judgment in *LG Display and LG Display Taiwan* v *Commission* (C-227/14 P, EU:C:2015:258, paragraph 84) and order in *Kuwait Petroleum and Others* v *Commission*, C-581/12 P, EU:C:2013:772, paragraph 20.

19 — I refer here to the various non-conceptual assumptions of fact which, due to their obviousness, form the basis of the structure of our legal culture.

20 — Thus, the knowledge or lack of knowledge of a matter on the part of the Commission can be determined only through the knowledge acquired by one of its agents or officials. The so-called 'cognitive' criterion proposed by Repsol and Others would require the identification of individuals whose understanding is sufficient in order to establish knowledge on the part of the institution.

34. Furthermore, the classical rules relating to legal consequences attached to a communication of facts or of information are founded on the assumption that the possession of a document which has been communicated is equivalent to knowledge of its content.[21] Were that not the case, a large number of provisions of civil or administrative and procedural law would be rendered ineffective.

35. To my mind, such logic also applies, *mutatis mutandis*, to the final paragraph of point 23 of the 2002 Leniency Notice. Thus, the Commission is not unaware of the facts in respect of which it has evidence, independently of whether or not that evidence has been investigated and analysed by its agents, officials or servants. I note in this respect that, according to the second paragraph of point 23 of the 2002 Leniency Notice, the 'Commission will take into account the time *at which the evidence* … was submitted'.[22]

36. A different approach would not only generate insurmountable evidentiary difficulties but would also give rise to unacceptable legal uncertainty for undertakings that have already submitted leniency applications.

37. Let us imagine that two undertakings, A and B, submit to the Commission documents of identical value one month apart. The examination of the applications is entrusted to two officials within the competent Commission department. Official AA, who is known for his meticulousness and slowness, is in charge of the examination of the application submitted by undertaking A, which reached the Commission first. It is ultimately official BB, in charge of the examination of the application submitted by undertaking B, who is the first to conclude that that second application contains evidence justifying immunity.[23] Official AA reaches the same conclusion one week later in regard to undertaking A. In such a hypothetical case the consequence of the application of the 'cognitive' criterion would be to deprive undertaking A of the possibility of benefitting from immunity. This, in my view, demonstrates that such a criterion is not compatible with the purposes of the Leniency Notice or with the principle of legal certainty.

38. In view of all the foregoing considerations, knowledge must be determined in relation to the evidence already in the Commission's possession at the time of the second leniency application. The primary objective of the final paragraph of point 23 of the 2002 Leniency Notice is therefore to establish the sequencing and the indexing of information or evidence made available to the Commission.[24]

3. The reasoning of the General Court in the judgment under appeal

39. In paragraphs 339 to 349 of the judgment under appeal, the General Court based its decision on two main elements. Firstly it referred to recital 592 of the decision at issue, the content of which is not contested and from which it appears that the Commission was indeed in possession of the documents proving the duration of the cartel between 1998 and 2002. The General Court thus took it for granted that recital 592 of the decision at issue, which refers to 38 other recitals, was sufficient to

21 — Normally, personal and guaranteed delivery, such as that achieved by a registered letter with an acknowledgement of receipt, is valid communication. The addressee cannot argue that he has received the letter but was unaware of the contents because he did not open it.

22 — Emphasis added.

23 — I should point out that the 2002 Leniency Notice defines the conditions under which undertakings cooperating with the Commission in the course of an investigation being conducted by the latter into a cartel may be exempted from fines or may be granted reductions in any fine that they would otherwise have had to pay. In the scenario where several applications for leniency have been received in respect of the same alleged infringement, the first application is regarded as an application for immunity and the subsequent applications as applications for a reduction of a fine, unless the first application is rejected. In the present case Repsol and Others were regarded as having applied for a reduction of the fine.

24 — As illustrated by the judgment in *Solvay* v *Commission* (C-110/10 P, EU:C:2011:687), there are also situations in which the Commission loses a portion of the evidence, but that is not the situation in the present case.

reject the claims put forward by Repsol and Others. Secondly, as this fact was established, in the view of the General Court, it assessed the additional value of the matters narrated by Repsol and Others relating to the period in question and concluded that those matters could not be regarded as conferring exceptional added value on their cooperation.

40. In this regard I would point out that in *LG Display and LG Display Taiwan* v *Commission* the Court of Justice noted that 'the General Court stated … [in] the judgment under appeal, in its assessment of the facts against which there is no appeal, there being no claim of any distortion, that "at the time of [the appellants'] statement on 20 July 2006, *the Commission knew, because of the evidence provided* …, that bilateral contacts between certain cartel participants had continued in 2005"'. This finding led the Court of Justice to uphold the judgment of the General Court. [25]

41. Admittedly, in the judgment under appeal the General Court stated in paragraph 341 that 'as it notes in recital 592 of the contested decision, *the Commission already had in its possession*, even before … receiving on 31 March 2004 Repsol's declaration … relevant information …'. It is therefore true that the General Court's examination may seem brief and it might even be argued that the General Court did not determine that, in the present case, the possession of evidence was equivalent to the knowledge of their content.

42. However, given the fact that the so-called 'cognitive' criterion is irrelevant, I am of the opinion that the possession of the evidence is, in this context, tantamount to knowledge of its content. Irrespective of whether that reasoning of the General Court were to be regarded as an establishment of the facts or as a legal classification of the facts, the ineffective nature of the 'cognitive' criterion accordingly leads me to reject the criticisms put forward by Repsol and Others.

43. In those circumstances the elements of the judgment under appeal covered by the second ground of appeal are not vitiated by any error of law, with the result that that ground must be rejected as unfounded.

VI – Conclusion

44. For those reasons, and without prejudice to the examination of the other grounds of appeal, I propose that the Court of Justice reject the second ground of appeal. The costs are reserved.

25 — EU:C:2015:258, paragraph 80.