



Press and Information

Court of Justice of the European Union

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Judgments in Cases C-272/09 P

KME Germany AG and Others, C-386/10 P Chalkor AE Epexergasias Metallon and C-389/10 P KME Germany AG and Others v Commission

The Court of Justice upholds the judgments of the General Court and the Commission's decisions relating to the two cartels in the copper industrial and copper plumbing tubes sectors

The review carried out by the General Court in respect of Commission decisions imposing fines in competition matters is not contrary to the principle of effective judicial protection laid down by the Charter of Fundamental Rights of the European Union

By decision of 16 December 2003¹, the Commission found that there was a cartel in the copper industrial tubes sector (used mainly in the air-conditioning and refrigeration industry). The companies fined included certain companies belonging to the KME group – KME Germany, KME France and KME Italy – which were fined, jointly and severally, a total of €39.81 million.

By decision of 3 September 2004², the Commission found that a number of companies, including the KME group and Greek company Chalkor, had participated in a cartel on the market for copper plumbing tubes (used for water, gas and oil installations). The Commission fined Chalkor €9.16 million. The KME group companies were fined, jointly and severally, a total of €67.08 million.

By separate actions, the companies applied to the General Court for annulment of the decisions or reduction of the fines imposed on them.

As regards the cartel on the industrial tubes market, the General Court had, in its judgment of 6 May 2009³, rejected all of the arguments put forward by the KME group companies concerning the determination of the amount of the fine imposed. As regards the cartel in the copper plumbing tubes sector, the General Court, in its judgment of 19 May 2010⁴, decided to dismiss the action brought by the same companies. In both judgments, the General Court held, inter alia, that the Commission had taken sufficient account of the actual impact of the cartel on the market for the purpose of calculating the starting amount of the fine. In addition, the Commission had correctly assessed the size of the sector affected and had not erred in law in increasing the amount of the fine by reason of the duration of the infringement or in refusing to take account of certain attenuating circumstances.

By another judgment delivered on 19 May 2010,⁵ the General Court decided that, in the case of Chalkor, which had taken part in only one of the three branches of the cartel⁶, the Commission had not examined the question whether an offender who participates in one part of a cartel commits a less serious infringement than an offender who, in the context of the same infringement,

¹ Commission Decision C(2003) 4820 final of 16 December 2003 relating to a proceeding pursuant to Article [81 EC] and Article 53 of the EEA Agreement (Case COMP/E-1/38.420 – Industrial tubes (OJ 2004 L 125, p. 50).

² Commission Decision C(2004) 2826 of 3 September 2004 relating to a proceeding pursuant to Article [81 EC] and Article 53 of the EEA Agreement (Case COMP/E-1/38.069 – Copper plumbing tubes (OJ 2006 L 192, p. 21).

³ Case [T-127/04 KME Germany and Others v Commission](#), see also Press Release [43/09](#).

⁴ Case [T-25/05 KME Germany and Others v Commission](#), see also Press Release [46/10](#).

⁵ Case [T-21/05 Chalkor v Commission](#), see also Press Release [46/10](#).

⁶ The Commission found that the relevant infringement had manifested itself in three separate forms. The first branch of the cartel consisted in the arrangements entered into between 'the SANCO producers' of a certain type of plain copper plumbing tube. The second branch comprised the arrangements concluded between the 'WICU and Cuprotherm producers' of plastic-coated copper plumbing tubes. Finally, the third branch of the cartel involved the arrangements entered into within a wider group of plain copper plumbing tube producers ('the broader European arrangements').

participates in every branch of the cartel. As a result, the General Court reduced the original fine of €9.16 million by 10%, thus setting a fine of €8.25 million.

The KME group and Chalkor lodged separate appeals before the Court of Justice, by which they sought to have the judgments of the General Court set aside and the Commission's decisions annulled.

In its three judgments delivered today, the Court of Justice rejects all of the arguments put forward by the companies.

The companies submit, inter alia, that the General Court infringed the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)⁷ and EU law⁸ – in particular their fundamental right to an effective judicial remedy as laid down in the Charter of Fundamental Rights of the European Union⁹ – by failing to carry out an adequate review of the Commission's decision and deferring, to an excessive and unreasonable extent, to the Commission's discretion. Chalkor, specifically, maintains that competition proceedings before the Commission are criminal proceedings within the meaning of the ECHR, and that, since the Commission is not an independent and impartial tribunal within the meaning of the ECHR, the General Court is required to carry out a review as regards both matters of fact and law.

Referring solely to the Charter, the Court of Justice observes that the judicial review of decisions imposing fines in matters of competition law entails a review of legality and, moreover, unlimited jurisdiction.

As regards the review of legality, the Court of Justice has, in previous decisions, held that although the Commission has a margin of discretion in areas giving rise to complex economic assessments, that none the less does not mean that the Courts of the European Union must refrain from reviewing the Commission's interpretation of information of an economic nature. They must carry out that review on the basis of the evidence adduced by the applicant. In that context, the Court of Justice finds that the Courts of the European Union cannot use the Commission's margin of discretion – either as regards the choice of factors taken into account in the Commission's assessment of the criteria to which regard is to be had in fixing the amount of a fine, or as regards the assessment of those factors – as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.

As regards the unlimited jurisdiction in relation to the amount of fines, the Court states that that jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the pecuniary penalty imposed. However, the Court points out that the exercise of unlimited jurisdiction does mean that the Courts are obliged to carry out a review of the whole of the contested decision of their own motion, which would involve a new and comprehensive investigation of the file.

The Court holds that the Courts of the European Union must carry out a review of both the law and the facts, that they have the power to assess the evidence, to annul the Commission's decision and to alter the amount of a fine. Therefore, the judicial review provided for by EU law is not contrary to the requirements of the principle of effective judicial protection set out in the Charter. Moreover, the General Court, in this instance, carried out the full and unrestricted review, in law and in fact, required of it.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the

⁷ Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁸ The parties rely in particular on Article 47 of the Charter of Fundamental Rights of the European Union and on Article 263 TFEU.

⁹ Article 47 of the Charter of Fundamental Rights of the European Union.

appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

Unofficial document for media use, not binding on the Court of Justice.

The full text of the judgments ([C-272/09](#), [C-386/10](#) and [C-389/10](#)) is published on the CURIA website on the day of delivery.

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