

The Aragonesas case

Further scrutiny of evidence in cartel decisions

by **Marc Reysen***

The 25 October judgment in *Aragonesas Industrias y Energía v Commission* has given the General Court (the Court) another opportunity to review the quality of the Commission's output. The case concerned AIE's part in the sodium chlorite cartel, which involved the allocation of sales volumes, the fixing of prices and the exchange of commercially sensitive information. The Commission concluded that AIE had participated in the cartel from 16 December 1996 to 9 February 2000. AIE brought an action for annulment. Acknowledging its participation in a single illegal meeting (on 28 January 1998), it disputed participating in any other illegal activity and argued that the Commission had not adequately proved its further involvement in the cartel.

The judgment

The Court first summarised the evidentiary requirements in cartel cases. It confirmed that the authority must "adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement". Applying the presumption of innocence, the benefit of any doubt must be given to the undertakings allegedly involved in illegal activities. Evidence relied on by the Commission must be "sufficiently precise and consistent ... to support the firm conviction" that illegal activity has occurred. However, these requirements need not be fulfilled by every item of evidence and in relation to every aspect of the infringement. It is sufficient that "the body of evidence relied on by the Commission, viewed as a whole, meets that requirement".

In cartel matters, only "fragmentary and sporadic items of evidence" may be available; these can be supplemented by inferences to reconstruct the relevant circumstances. The Commission may also rely on statements made by other undertakings. However, where such statements are disputed, they must be supported by other evidence. The required degree of corroboration depends on the reliability of the relevant statement.

Reliability is the sole criterion for assessing the probative value of a piece of evidence. Account should be taken of the identities of its author and addressee, the circumstances of its creation, and "whether it appears sound and reliable". In particular, a statement is of "great probative value" if it is reliable and made by a direct witness (in writing and after mature reflection) on behalf of an undertaking. This is especially true if the statement is made by a person under a professional obligation to act in the interest of the

undertaking, and it goes against that person's own interest. While some caution may be required when it comes to statements made by participants in illegal behaviour, the availability of leniency does not necessarily create an incentive to provide distorted evidence. The dire consequences of providing distorted evidence and the need to corroborate the statement should be taken into account when assessing its probative value.

Analysing the decision to assess whether these requirements had been met, the Court decided that they had been satisfied as regards the meeting in January 1998. Beyond that, though, the Court said that "most of the evidence adduced by the Commission in its decision [was] unreliable and excessively sporadic and fragmented". It concluded that "taken as a whole, the evidence adduced is not sufficiently precise and conclusive and does not found a firm conviction that Aragonesas participated in the infringement throughout the period in question". The Court therefore annulled the decision to the extent that it found AIE to have participated in the cartel beyond 1998, and the setting of the fine.

Comment

The judgment again sees the Court closely following established precedent. Some doubts may exist regarding the evaluation of leniency statements. However, the decision provides a handy summary of the state of the law regarding evidentiary requirements. It is also valuable in that it confirms the Court's willingness to scrutinise Commission decisions closely to see whether they do fulfil evidentiary requirements.

In the present case, the General Court spent roughly 40 pages in doing just that: identifying the evidence the Commission actually relied on (which was difficult enough); assessing the probative value of individual pieces of evidence; and assessing whether the body of evidence relied on by the Commission was sufficiently precise and consistent. The General Court should be commended for making such a thorough effort to assess the evidence that was used and its value. It is hoped that the Commission – with the improved internal procedures recently introduced – will show the same rigour when it comes to deciding future cases.

References

Case T-348/08 re *Aragonesas Industrias y Energía, SAU v European Commission*

* *Marc Reysen is a partner in O'Melveny & Myers LLP (Brussels)*