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Case comment Solvay C-57/01 Top Slices Rebates

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**EU COMPETITION LAW CASE LAW DEVELOPMENT
2010 – PART II: CASE REPORTS**

- 45 -

ABUSE OF DOMINANCE

JUDGMENT OF THE GENERAL COURT

CASE T-57/01 106

SOLVAY SA v EUROPEAN COMMISSION

17 DECEMBER 2010

by Emanuela Matei

ABSTRACT

The case concerns top-slices rebates, as abusive practices under 102(2)(b) and 102(2)(c) TFEU. The judgment is in line with the previous case-law, reinforcing that a dominant undertaking has a special responsibility not to eliminate the residual competition. Solvay's arguments that support the pleas on the absence of a dominant position and of an abuse and concern the structure of its production costs are rejected by the Court. As to the procedural part, the absence of repeated infringements is established by the Court in its finding that collusion and abuse of dominance are not similar types of infringements.

**(SODA ASH ABUSE, TOP-SLICES REBATES, PRESUMPTIONS OF ILLEGALITY,
ESSENTIAL RAW MATERIAL, MATURE INDUSTRIES, STRUCTURE OF PRODUCTION
COSTS)**

1. FACTS AND BACKGROUND

Soda ash is an essential raw material in the glassmaking process. This material plays an essential role in reducing furnace temperatures by many hundreds of degrees. Glassmaking would not be viable without it.

Solvay SA Belgium operates in the soda-ash sector through marketing outlets in nine countries. In 1988, Solvay held 52.5% of the soda ash market in Germany, 96.9% in Austria, 82% in Belgium, 99.6% in Spain, 54.9% in France, 95% in Italy, 14.7% in Netherlands, 100% in Portugal and 76.1% in Switzerland. Solvay rivals are well-known powerful players: ICI, Rhône Poulenc, Akzo and BASF.

1.1. PROCEDURAL BACKGROUND

In 1990 the Commission issued a decision finding that Solvay had abused its dominant position on the soda-ash market¹⁰⁷ in the Continental Europe during the period 1982-1990. This decision was annulled on procedural grounds in 1995.¹⁰⁸ In 2000 the Commission readopted it.¹⁰⁹

In the present case, Solvay brought an application on annulment against the readopted decision, containing two claims. The first one seeks annulment of the decision and the second seeks the annulment or reduction of the fine.

2. REASONING AND RULING

2.1. FINE ANNULMENT OR REDUCTION

The incorrect assessment of the gravity of infringement has been established by the Court. The applicant refers to the Guidelines¹¹⁰ and states that the nature of the restriction of competition should be considered. The Court finds that collusion and abuse of dominance are different types of infringement and that is why there is no repeated infringement in this case and consequently no aggravating circumstances. The fine has been reduced from 20 to 19 million €. ¹¹¹

¹⁰⁷ *IV/33 133-C: Soda ash Solvay - OJ L 152, 15.6.1991, p. 21–39*

¹⁰⁸ *Solvay SA v Commission of the European Communities Case T-32/91 ECR 1995 Page II-01825*

¹⁰⁹ 2003/6/EC: Commission Decision of 13 December 2000 (COMP/33.133-C: Soda ash — Solvay) (notified under document number C(2000) 3795)

¹¹⁰ Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17- *OJ C 9, 14.1.1998, p. 3–5*

¹¹¹ T-57/01 - Solvay v Commission - Paras 507-512

2.2. RIGHT OF DEFENCE

The decision ordering the investigation referred only to Article 101 TFEU. On this motive, Solvay asserts that the documents were seized in breach of the procedural rules. The Commission became aware of the infringement of Article 102 TFEU during this investigation. Solvay admits that the Commission was entitled to open an investigation under Article 102 TFEU, though contested the right to use the seized documents in order to ascertain the existence of an infringement according to Article 102 TFEU. The Court finds that since a part of the facts supporting the investigation according to Article 101 TFEU are the same as the ones supporting the objections of abuse of a dominant position, the Commission is entitled to use the seized documents.¹¹² No breach of the right of defence could be established.

2.3. SUBSTANTIVE ISSUES OF COMPETITION LAW

2.3.1. Geographic Market definition

The geographic definition of the market is the Continental Europe according to the Commission. Solvay contested this definition and asserts that the correct definition should also include UK and Ireland. The Court reminds that the correct definition should refer to the geographic area where the undertaking maybe able to hinder the effective competition.¹¹³ In the structure of Article 102 TFEU, the geographic market can be defined as the territory in which all traders operate under the same conditions of competition in so far as the relevant products are concerned. It is not at all necessary for the objective conditions of competition between traders to be perfectly homogeneous. It is sufficient if they are the same or sufficiently homogeneous.¹¹⁴ Solvay is dominant in each and every state, excluding UK and Ireland. On this ground, the Court maintains the definition of the market to Union excluding UK and Ireland.¹¹⁵

2.3.2. The existence of a dominant position

The applicant contests the existence of a dominant position. This assertion is supported by several arguments. The production capacities are limited and comparable with the ones of the competitors on national markets. The producers from Eastern Europe and US are not subject to antidumping duties and can compete freely in Western Europe. The soda ash faced competition from its substitutes, caustic soda and cullet. The Commission analysis is

¹¹² T-57/01 - Solvay v Commission - Paras 218-230

¹¹³ Case C-7/97 *Bronner* [1998] ECR I-7791, paragraph 32

¹¹⁴ Case 27/76 *United Brands and United Brands Continentaal v Commission* [1978] ECR 207, paragraphs 44 and 53

¹¹⁵ T-57/01 - Solvay v Commission - Paras 247-260

incorrect, according to the applicant, because it does not consider the impact of the countervailing power of customers.

The Court rejects all these arguments and in line with the consistent case-law observes that the dominant position referred to in Article 102 TFEU relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.¹¹⁶ Unlike a monopoly or quasi-monopoly situation, such a position does not preclude competition but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it and without suffering any adverse effects as a result of its attitude.¹¹⁷ A market share of 70 to 80% constitutes in itself a clear indication of the existence of a dominant position.¹¹⁸

Likewise, according to the case-law of the Court of Justice, a market share of 50% constitutes in itself, save in exceptional circumstances, evidence of the existence of a dominant position.¹¹⁹ The substitutability of the demand of soda ash for caustic soda and cullet was analysed by the Commission who found no significant constraints. The possible constraint exercised by the countervailing power of buyers is only briefly discussed. The Court observes that the main buyer represents only 16% of Solvay's sales in Europe and concludes that no significant constraints exist and therefore Solvay holds a dominant position.¹²⁰

2.3.3. The establishment of the abuse of dominance

The alleged abusive practices refer to a system of loyalty rebates and discounts to its major customers by reference to marginal tonnage, contractual arrangements tending to ensure an effective exclusivity of supply for Solvay and other tying devices.

- *Rebates on marginal tonnage*¹²¹

The applicant claims that it has not established a general policy of fidelity rebates. The economical justification of the rebates was to pay for the economic benefit resulted from the

¹¹⁶ *United Brands and United Brands Continentaal v Commission*, Case 27/76, paragraph 65, and *Microsoft v Commission*, Case T-201/04, paragraph 229

¹¹⁷ Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 39

¹¹⁸ Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, paragraph 92

¹¹⁹ Case C-62/86 *Akzo v Commission* [1991] ECR I-3359, paragraph 60

¹²⁰ T-57/01 - *Solvay v Commission* - Paras 275-305

¹²¹ T-57/01 - *Solvay v Commission* - Paras 314-341

use of the production capacity. Variable costs represent a small share of the total costs and the fixed costs are covered by the fixed quantities that are negotiated in the beginning of every year. That is why the applicant had greater latitude to reduce the price for additional quantities ordered by its customers.

The Court holds that rebates applied by a dominant undertaking and that depend on a purchasing target are contrary to Article 102 TFEU.¹²² In determining whether a quantity rebate system is abusive, it will therefore be necessary to consider all the circumstances, and to investigate whether, in providing an advantage not based on any economic service justifying it, the rebates tend to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition.¹²³

Furthermore, in accordance with *Michelin*¹²⁴, the applicant must show that its rebate system was based on objective economic justification otherwise there is an assumption that the intention is to tie in the customers and by this foreclose the market. Based on this presumption, the Court establishes the abuse related to rebates on marginal tonnage.

- *Group rebate granted to Saint-Gobain*¹²⁵

Saint-Gobain enjoyed an additional rebate of 1, 5% on all the purchases in Europe. The applicant further observes that the very moderate amount of the rebate made it possible to avoid any anti-competitive effect. The Court holds that even if the amount of a fidelity rebate is moderate, it still has an impact on the conditions of competition.

- *Exclusivity agreements*¹²⁶

The Commission mentioned the existence of explicit exclusivity and de facto exclusivity. Regarding de facto exclusivity, the Commission decision¹²⁷ stated that, in cases other than the express exclusivity agreements, the contractual tonnage stipulated in the main *evergreen* contract, which required two years' notice of termination, corresponded to the customer's total requirements, but allowed for a margin, usually 15%, up or down, and that the customer indicated to the applicant at the beginning of each year what its exact requirements would be within that range.

¹²² Case T-203/01, *Michelin v Commission*, paragraph 57

¹²³ Case 85/76, *Hoffmann-La Roche v Commission*, paragraph 90, and Case T-203/01, *Michelin v Commission*, para 60

¹²⁴ Case T-203/01, *Michelin v Commission*, paragraphs 107 to 109

¹²⁵ T-57/01 - *Solvay v Commission* - Paras 348-359

¹²⁶ T-57/01 - *Solvay v Commission* - Paras 365-383

¹²⁷ Recital 171

The applicant observes that there is no evidence in the file to show that it imposed the quantities to be supplied specified in the contract by satisfying itself in advance that they were approximately equal to the customer's total requirements. Furthermore, the determination of those quantities was entirely proper, given the customers' lack of storage capacity and the need for regular and consistent supplies of soda ash. The Court accepts the Commission's arguments as factually correct and establishes the existence of a de facto exclusivity.

- *Discriminatory nature of the impugned practices*¹²⁸

According to case-law, an undertaking occupying a dominant position is entitled to offer its customers quantity discounts linked solely to the volume of purchases made from it. However, the rules for calculating such discounts must not result in dissimilar conditions being applied to equivalent transactions with other trading parties within the meaning of subparagraph (c) of the second paragraph of Article 102 TFEU.

As a result of the thresholds of the various discount bands, and the levels of discount offered, discounts (or additional discounts) are enjoyed by only some trading parties, giving them an economic advantage which is not justified by the volume of business they bring or by any economies of scale they allow the supplier to make compared with their competitors, a system of quantity discounts leads to the application of dissimilar conditions to equivalent transactions.

The rebates on marginal tonnage, the special group rebate, the exclusive agreements and the discriminatory practices, constitute each and every of them forms of abuse being sanctionable in conformity with Article 102 TFEU. The Court supports the Commission's findings in this matter.

The Court entirely rejected the first claim, but in relation to the second claim, it found that the Commission incorrectly applied the aggravating circumstance of a repeated infringement committed by the applicant and consequently, reduced the fine.¹²⁹

3. COMMENT

The argument related to the countervailing power of the customers is briefly discussed by the Court. The Court finds that the biggest customer, Saint-Gobain represents 14 % of Solvay's production and 16 % of Solvay's sales in Europe and based on this concludes that neither Saint-Gobain nor other customers are able to offset Solvay's market power. The first indicator

¹²⁸ T-57/01 - Solvay v Commission - Paras 396-402

¹²⁹ Case C-109/10 P- 2010 Solvay brings an appeal against the judgement delivered by the General Court.

of buying power is indeed the market share in the purchasing market, but there are other indicators that must be considered as well, such as own brands, wide geographic spread of the outlets and the image amongst final consumers.¹³⁰

It's nevertheless true that the countervailing buyer power may also have negative effects on competition, in the case of vertical collective dominance, where the customers do not counterbalance the supplier's power, but instead they choose to coordinate their market behaviour and adopt a common commercial strategy.¹³¹ The interdependency between the supplier of soda ash and the glass producers may be supported by a technological lead,¹³² but also by economical factors, such as the production capacities limitation and the structure of the costs in the soda ash market, i.e. a negligible proportion of variable costs in total production costs. On the one hand, there is no real substitute for soda-ash and this raw material is indispensable in the glass industry. On the other hand, the soda ash supplier is also dependent on the glass producers in order to be able to cover the huge fixed costs involved by the soda-ash production.

The impact of the strategic conduct adopted by European Owens Corning Fiberglas¹³³, Flachglas Wernberg member of the Pilkington Group, AGC- Glass Europe (Glaverbel)¹³⁴ and Saint-Gobain, as buyers on the soda ash market, cannot be simply ignored. In my opinion the analysis of the countervailing power provided in this case is incomplete. On this ground, the existence of a single dominant position on the soda-ash market is questionable.



¹³⁰ The market position of the parties' customers provides an indication of whether or not one or more of those customers possess buyer power. The first indicator of buyer power is the market share of the customer on the purchase market. That share reflects the importance of its demand for possible suppliers. Other indicators focus on the position of the customer on its resale market, including characteristics such as a wide geographic spread of its outlets, own brands including private labels and its brand image amongst final consumers. In some circumstances, buyer power may prevent the parties from exercising market power and thereby solve a competition problem that would otherwise have existed. (Guidelines on Vertical Restraints, 2010/C 130/01 , para 116)

¹³¹ *Case C-393/92 Almelo [1994] ECR I-1477, paragraph 42; Joined Cases C-395/96 P and C-396/96 P Compagnie Maritime Belge Transports and Others v Commission [2000] ECR I-1365, paragraph 36; and Joined Cases T-24/93 to T-26/93 and T-28/93 Compagnie Maritime Belge Transports and Others v Commission [1996] ECR II-1201, paragraphs 62 to 68.*

¹³² Joined cases T-68/89, T-77/89 and T-78/89-Società Italiana Vetro- para 358

¹³³ Owens Corning is a \$6 billion global, industry leader with 16,500 employees around the world and with manufacturing, sales and research facilities including joint venture and licensee relationships in more than 30 countries on six continents. <http://www.owenscorning.com/>

¹³⁴ Based in Brussels, AGC Glass Europe produces and processes flat glass for the construction industry (external glazing and indoor decorative glass), the automotive industry, the solar industry, and specialist industries. It is the European branch of AGC Glass, the world's largest producer of flat glass. <http://www.agc-glass.eu/English/Homepage/About-us/page.aspx/884>