

Case T-62/02

Union Pigments AS

v

Commission of the European Communities

(Competition — Article 81 EC — Cartel — Zinc phosphate market — Fine — Article 15(2) of Regulation No 17 — Gravity and duration of the infringement — Principles of proportionality and equal treatment — Action for annulment)

Judgment of the Court of First Instance (Fifth Chamber), 29 November 2005 II - 5066

Summary of the Judgment

- 1. Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Burden of proving the infringement and its duration on the Commission — Undertaking withdrawing temporarily from a cartel in order to exploit it for its own benefit — Withdrawal ineffective
(Art. 81(1) EC)*

2. *Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Participation allegedly under constraint — Matter not providing a justification for an undertaking which did not make use of the possibility of lodging a complaint with the competent authorities*
(Art. 81(1) EC; Council Regulation No 17, Art. 3)

3. *Competition — Agreements, decisions and concerted practices — Imputation to an undertaking — Responsibility for conduct of other undertakings in the context of the same infringement — Lawfulness — Criteria*
(Art. 81(1) EC)

4. *Competition — Fines — Amount — Determination — Criteria — Seriousness of the infringements — Attenuating circumstances — Termination of the infringement after the Commission's intervention — Assessment on a case-by-case basis*
(Council Regulation No 17, Art. 15(2))

5. *Competition — Fines — Amount — Determination — Criteria — Seriousness of the infringements — Account to be taken of the effects of the whole of the infringement*
(Council Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03, Section 1 A)

6. *Competition — Fines — Amount — Determination — Criteria — Seriousness of the infringements — Principle of the individualisation of sanctions — Rules for taking account of aggravating or attenuating circumstances*
(Council Regulation No 17, Art. 15)

7. *Competition — Fines — Amount — Determination — Criteria — Seriousness of the infringements — Attenuating circumstances — Passive or 'follow-my-leader' role of the undertaking*
(Council Regulation No 17, Art. 15; Commission Communication 98/C 9/03, Sections 2 and 3)

8. *Competition — Fines — Amount — Determination — Criteria — Seriousness of the infringements — Attenuating circumstances — Conduct deviating from that agreed within the cartel — Assessment*
(Council Regulation No 17, Art. 15)

9. *Competition — Fines — Amount — Determination — Effective capacity to cause significant damage to competition on the market concerned — Relevance of the market share of the undertaking concerned*
(Council Regulation No 17, Art. 15(2))
10. *Competition — Fines — Amount — Determination — Division of undertakings concerned into categories having the same starting point — Conditions*
(Council Regulation No 17, Art. 15(2))
11. *Competition — Fines — Amount — Determination — Need to take account of the turnovers of the undertakings concerned and to ensure that the fines are in proportion to those turnovers — None*
(Council Regulation No 17, Art. 15(2))
12. *Competition — Fines — Amount — Limit fixed by Article 15(2) of Regulation No 17 — Detailed rules of application*
(Council Regulation No 17, Art. 15(2))
13. *Competition — Fines — Amount — Determination — Criteria — Deterrent effect on both the undertaking in breach and third parties — Imposition of a symbolic fine in the light of the intention of the undertaking concerned, before the adoption of the decision penalising it, to comply with the competition rules — Excluded*
(Arts 81 EC and 82 EC; Council Regulation No 17, Art. 15(2))
14. *Competition — Fines — Amount — Determination — Criteria — Obligation to take account of the financial situation of the undertaking concerned — None — Undertaking's real ability to pay in a specific social context — Taking such difficulties into consideration — Setting the fine at an amount which brings about the insolvency or liquidation of the undertaking concerned as a consequence of the fine — Not prohibited in principle*
(Council Regulation No 17, Art. 15; Commission Communication 98/C 9/03, Section 5(b))

1. In the application of Article 81(1) EC, it is incumbent on the Commission to prove not only the existence of an agreement but also its duration.

With regard to an undertaking which had withdrawn temporarily from a cartel, it may be concluded that the undertaking participated in the cartel,

without any real interruption, once it did not withdraw from the cartel in order to report it to the Commission or even to resume fair and independent competitive conduct in the relevant market but rather endeavoured to use its purported withdrawal in order the better to exploit the cartel for its own benefit.

may also be responsible for the conduct of other undertakings in the course of the same infringement throughout the period of its participation where it is proved that the undertaking in question was aware of, or might reasonably have foreseen, the unlawful conduct of the other participants, and was prepared to accept the risk.

(see paras 36, 38, 42)

2. An undertaking which participates with others in anti-competitive conduct cannot rely on the fact that it participates in the cartel under constraint from the other participants because it could have reported the pressure brought to bear on it to the competent authorities and made a complaint to the Commission under Article 3 of Regulation No 17 rather than participate in the activities in question.

(see para. 87)

(see para. 63)

3. An undertaking that has by its own conduct participated in a multiple infringement of Community competition rules, within the definition of an agreement or concerted practice having an anti-competitive object under Article 81 (1) EC, and which was designed to help bring about the infringement as a whole,
4. Section 3, third indent, of the Guidelines adopted by the Commission on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty provides for reduction of the basic amount in the event of termination of the infringement as soon as the Commission intervenes. The Commission cannot however be required to consider, as a general rule, that termination of an infringement constitutes an attenuating circumstance. An undertaking's reaction to the opening of an investigation into

its activities can be viewed only in the particular context of the case.

by several undertakings, the effects to be taken into account in setting the general level of fines are not those resulting from the actual conduct which an undertaking claims to have adopted, but those resulting from the whole of the infringement in which it participated.

(see para. 92)

(see paras 103-104, 106)

5. In Section 1 A of the Guidelines adopted by the Commission on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, the Commission committed itself explicitly to taking account, in assessing the gravity of infringements, not of only their nature and of the size of the relevant geographic market but also of their actual impact on the market, where this can be measured. It is apparent that whilst the gravity of the infringement is initially assessed on the basis of the particular characteristics of the infringement, such as its nature and impact on the market, that assessment is subsequently adjusted according to the individual circumstances of the undertaking, so that the Commission takes into consideration, besides the size and capacities of the undertakings, both aggravating and attenuating circumstances, as the case may be.

6. Where an infringement of Community competition rules has been committed by several undertakings, the relative gravity of the participation of each of them must be examined in order to determine whether there are any aggravating or attenuating circumstances relating to them. That conclusion follows logically from the principle that penalties must fit the offence, so that an undertaking may be penalised only for acts imputed to it individually, a principle applying in any administrative procedure that may lead to the imposition of sanctions under Community competition law. Thus, Sections 2 and 3 of the Guidelines adopted by the Commission on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty provide for adjustment of the basic amount of the fine by reference to certain aggravating and attenuating circumstances, which are peculiar to each undertaking concerned.

Where an infringement of Community competition rules has been committed

A participant in an infringement cannot allege an attenuating circumstance deriving from the conduct of the other participants in the infringement, such as, for example, the fact that the other cartel members became involved in the cartel earlier, or more deeply. That might well constitute an aggravating circumstance in relation to those undertakings but not an attenuating circumstance in favour of other participants in the infringement.

market where the infringement occurred, regardless of the duration of its participation in the infringement, or again the existence of express statements to that effect emanating from representatives of other undertakings which participated in the infringement.

(see para. 126)

(see paras 118-120, 125)

7. An exclusively passive or 'follow-my-leader' role in an infringement of competition rules can, where it is established, amount to an attenuating circumstance within the meaning of the first indent of Section 3 of the Guidelines adopted by the Commission on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty. A passive role implies that the undertaking will adopt a 'low profile', that is to say, not actively participate in the making of any anti-competitive agreements. Amongst the circumstances that may indicate the adoption by an undertaking of a passive role within a cartel is where the undertaking's participation in cartel meetings is significantly more sporadic than that of the 'ordinary' members of the cartel, and likewise its belated entry to the

8. The fact that an undertaking proven to have participated in collusion on prices with its competitors did not behave on the market in the manner agreed with those competitors is not necessarily a matter which must be taken into account as an attenuating circumstance in setting the fine to be imposed. An undertaking which, despite colluding with its competitors, follows a policy that departs from that agreed on, may simply be trying to exploit the cartel for its own benefit.

(see para. 130)

9. In an analysis, carried out for the purpose of setting the amount of a fine for infringement of Community competition rules, of the effective economic

capacity of the offenders to cause significant damage to competition, which involves an assessment of the real importance of those undertakings in the market affected, that is to say their influence on the market, the total turnover is an imprecise guide. It is of course possible for a powerful undertaking with a multitude of different activities to have only an incidental presence in a specific product market. Similarly, an undertaking with a strong position in a geographical market outside the Community may have only a weak position in the Community or European Economic Area market. In such cases, the mere fact that the undertaking in question has a high total turnover does not necessarily mean that it has a decisive influence in the market affected. That is why, although an undertaking's market share cannot be a decisive factor in concluding that an undertaking belongs to a powerful economic entity, it is nevertheless relevant in determining the influence which it may exert in the market.

finer for infringement of Community competition rules in such a way that undertakings in the same group are allocated the same starting point, the division into categories must be compatible with the principle of equal treatment whereby comparable situations must not be treated differently and different situations must not be treated in the same way, unless such difference in treatment is objectively justified. Following the same approach, the Guidelines adopted by the Commission on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty provide, in Section 1A, sixth paragraph, that a 'considerable' disparity between the sizes of the undertakings committing infringements of the same type is, in particular, capable of justifying differentiation in assessing the gravity of the infringement. Moreover, the amount of the fines must, at least, be proportionate in relation to the factors that entered into the assessment of the seriousness of the infringement.

(see para. 152)

Consequently, where the Commission carries out such a division, the thresholds for each of the groups thus identified must be coherent and objectively justified.

10. Where the Commission divides the undertakings concerned into groups for the purpose of setting the amount of the

(see paras 154-156)

11. When setting the amount of fines in competition matters, the Commission is not required to calculate the amount of a fine by reference to amounts based on the turnovers of the undertakings concerned. Moreover, it is not required to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines resulting from its calculations for the undertakings concerned reflect any distinction between them in terms of their overall turnover or their turnover in the relevant product market.
- (see para. 159)
12. The maximum limit imposed by Article 15(2) of Regulation No 17, whereby the fine finally imposed on an undertaking for infringement of the Community competition rules must be reduced if it exceeds 10% of its turnover, regardless of the intermediate calculation operations designed to take account of the gravity and duration of the infringement, does not prevent the Commission from referring, during its calculation, to an intermediate amount exceeding 10% of the turnover of the undertaking concerned, provided that the fine eventually imposed on the undertaking does not exceed that maximum limit.
- (see para. 161)
13. The fact that an undertaking intended to comply with the competition rules before the adoption of the contested decision imposing a fine on it does not constitute a sufficient reason for the Commission to confine itself to imposing a symbolic fine. The deterrence of third parties, and not only of the undertaking concerned, is an important aim of Article 15(2) of Regulation No 17.
- (see para. 174)
14. The Commission is not required when determining a fine imposed in respect of an infringement of Community competition rules to take account of an undertaking's financial losses since recognition of such an obligation would have the effect of conferring an unfair competitive advantage on the undertakings least well adapted to the conditions of the market. That is not called in question by Section 5(b) of the Commission's Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of

the ECSC Treaty, which states that an undertaking's real ability to pay must be taken into consideration. That ability applies only in a 'specific social context' consisting of the consequences which payment of the fine would have, in particular, by leading to an increase in unemployment or deterioration in the economic sectors upstream and downstream of the undertaking concerned.

brings about the insolvency or liquidation of a given undertaking is not as such prohibited by Community law. Although the liquidation of an undertaking in its existing legal form may adversely affect the financial interests of the owners, investors or shareholders, it does not mean that the personal, tangible and intangible elements represented by the undertaking would also lose their value.

Furthermore, the fact that a measure adopted by a Community authority

(see paras 175-177)