

## Case T-33/02

**Britannia Alloys & Chemicals Ltd**

**v**

**Commission of the European Communities**

(Competition — Article 81 EC — Cartel — Zinc phosphate market — Fine — Article 15(2) of Regulation No 17 — Relevant turnover — Action for annulment)

Judgment of the Court of First Instance (Fifth Chamber), 29 November 2005 II - 4976

### Summary of the Judgment

*Competition — Fines — Amount — Determination — Maximum amount — Calculation — Turnover for the business year immediately preceding the date on which the fine was imposed — Meaning — Turnover without significance — Use of the turnover for the immediately*

*preceding business year — Lawfulness — Conditions — Infringement of the principle of equal treatment in regard to other undertakings which had committed infringements — None — Infringement of the principle of legal certainty — None*

*(Council Regulation No 17, Art. 15(2))*

In fixing the upper limit of 10% of turnover achieved in the previous financial year for fines imposed in competition matters pursuant to Article 15(2) of Regulation No 17 the 'preceding business year' refers in principle to the last full business year of each of the undertakings concerned at the date of adoption of the contested decision. It is however clear, both from the objectives of the system of which that provision forms part, that the application of the 10% upper limit presupposes, first, that the Commission has at its disposal the turnover for the last business year preceding the date of adoption of the decision and, second, that those data represent a full year of normal economic activity over a period of 12 months.

in accounting practices, an undertaking has, for the preceding business year, produced accounts which relate to a shorter period than 12 months, the Commission is entitled to rely on the turnover achieved in an earlier complete year in order to apply that provision.

Thus, for example, if the business year had ended before the adoption of the decision but the annual accounts of the undertaking in question had not been drawn up or had not been disclosed to the Commission, the latter would have the right, indeed the obligation, to use the turnover achieved in an earlier business year in order to apply Article 15(2) of Regulation No 17. Similarly, if, as a result of a reorganisation or a change

Equally, if an undertaking has not carried on any economic activity during the business year preceding the adoption of the decision, the turnover for that period gives no indication of its standing and therefore cannot serve as a basis for determining the upper limit mentioned above. In such a case, the Commission is obliged to fix the maximum limit of the fine by reference to the most recent turnover corresponding to a complete year in which economic activities, albeit on a reduced scale have been carried on, at least in situations where there is no indication that an undertaking has ceased its commercial activities or has diverted its turnover in order to avoid the imposition of a heavy fine.

The Commission does not infringe the principle of equal treatment by proceeding in that way in regard to one of the undertakings which has participated in a cartel although it based itself, in regard to the other undertakings, which had not ceased their economic activities, on the turnover for the business year immediately preceding the date on which the fine was imposed, inasmuch as the two situations are different.

Nor does the Commission infringe the principle of legal certainty, since it did not exercise an arbitrary power in choosing the business year of reference; it merely referred, in exceptional circumstances, as it is obliged to do, to the last full business year corresponding to a full year of normal economic activity.

(see paras 37-40, 42, 49, 62, 74)