JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

29 November 2005 *

In Case T-33/02,

Britannia Alloys & Chemicals Ltd, established in Gravesend (United Kingdom), represented by S. Mobley, H. Bardell and M. Commons, Solicitors,

applicant,

v

Commission of the European Communities, represented by R. Wainwright and F. Castillo de la Torre, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for partial annulment of Commission Decision 2003/437/EC relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.027 — Zinc phosphate) (OJ 2003 L 153, p. 1) and, in the alternative, for reduction of the amount of the fine imposed on the applicant,

* Language of the case: English.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of P. Lindh, President, R. García-Valdecasas and J.D. Cooke, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 1 July 2004,

gives the following

Judgment

Facts

1 Britannia Alloys and Chemicals Limited ('the applicant' or 'Britannia'), a company incorporated under English law, is a subsidiary of M.I.M. Holdings Limited ('MIM'), an Australian company. In October 1993, Pasminco Europe (ISC Alloys) Limited sold its zinc business to MIM, which transferred it to Britannia. That undertaking produced and sold zinc products, including zinc phosphate. In March 1997, Trident

Alloys Limited ('Trident'), an independent company formed by Britannia's management, acquired Britannia's zinc business for GBP 14 359 072. Britannia is still in existence as a subsidiary of MIM, but is a non-trading company and therefore has no turnover.

2 Although they may have slightly differing chemical formulae, zinc orthophosphates form a homogeneous chemical product, generically referred to as 'zinc phosphate'. Zinc phosphate, which is derived from zinc oxide and phosphoric acid, is widely used as an anti-corrosion mineral pigment in the paint industry. It is marketed either as standard zinc phosphate or as modified (or activated) zinc phosphate.

3 In 2001, virtually all of the world zinc production was controlled by the following five European producers: Dr Hans Heubach GmbH & Co. KG ('Heubach'), James M. Brown Limited ('James Brown'), Société Nouvelle des Couleurs Zinciques SA ('SNCZ'), Trident (formerly Britannia) and Union Pigments AS (formerly Waardals AS) ('Union Pigments').

4 On 13 and 14 May 1998, the Commission carried out simultaneous and unannounced investigations under Article 14(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), at the premises of Heubach, SNCZ and Trident. From 13 to 15 May 1998, acting at the request of the Commission under Article 8(3) of Protocol 23 to the Agreement on the European Economic Area (EEA), the Surveillance Authority of the European Free Trade Association (EFTA) carried out simultaneous and unannounced investigations at the premises of Union Pigments under Article 14(2) of Chapter II of Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice.

5 On 11 December 2001, the Commission adopted Decision 2003/437/EC relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.027 — Zinc phosphate) (OJ 2003 L 153, p. 1). The decision which is the subject of the present judgment is the one notified to the undertakings concerned, and which is annexed to the application (hereinafter 'the contested decision'). That decision differs in certain respects from the one published in the *Official Journal of the European Union.*

6 In the contested decision, the Commission states that a cartel, consisting of Britannia (Trident as from 15 March 1997), Heubach, James Brown, SNCZ and Union Pigments, existed between 24 March 1994 and 13 May 1998. The cartel was limited to standard zinc phosphate. The members of the cartel first adopted a market sharing agreement with sales quotas for the producers. Subsequently, they agreed on 'bottom' or 'recommended' prices at each meeting, which they generally followed. There was also a certain amount of customer allocation.

7 The operative part of the contested decision reads as follows:

'*Article 1*

Britannia ..., Heubach ..., James ... Brown ..., [SNCZ], Trident ... and [Union Pigments] have infringed the provisions of Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement by participating in continuing agreement and/or concerted practice in the zinc phosphate sector.

The duration of the infringement was as follows:

...

(b) in the case of Britannia ...: from 24 March 1994 until 15 March 1997;

...

Article 3

For the infringement referred to in Article 1, the following fines are imposed:

(a) Britannia ... EUR 3.37 million,

(b) ... Heubach ...: EUR 3.78 million,

(c) ... James ... Brown ...: EUR 940 000,

(d) ... [SNCZ]: EUR 1.53 million,

(e) ... Trident ...: EUR 1.98 million,

(f) [Union Pigments] ...: EUR 350 000.

...'

8 In calculating the fines, the Commission applied the method set out in the 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 (OJ 1998 C 9, p. 3, 'the Guidelines') and the Commission Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4, 'the Leniency Notice').

9 The Commission found first that the appropriate basic amount of fine for the applicant was EUR 3.75 million (recital 313 to the contested decision). Next, it referred to the limit which, under Article 15(2) of Regulation No 17, the fine to be imposed on each of the undertakings concerned may not exceed. In fixing the upper limit of 10% of turnover achieved in the previous financial year laid down by that provision, the Commission, in the case of the applicant, 'took into account its global turnover for the business year ending 30 June 1996, which is the last available figure reflecting an entire year of normal economic activity' (recital 345, footnote 196). As that turnover was EUR 55.7 million (recital 50), the upper limit of the fine was set at about EUR 5.5 million. As the amount of the fine before application of the Leniency Notice was below that upper limit, the Commission did not reduce it on that basis.

10 Finally, the Commission granted the applicant a reduction of 10% under the Leniency Notice (recital 366). The final amount of the fine imposed on the applicant was thus EUR 3.37 million (recital 370).

Procedure and forms of order sought by the parties

11 By application lodged at the Registry of the Court of First Instance on 21 February 2002, the applicant brought the present action.

12 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure and, by way of measure of organisation of procedure, asked the Commission to reply in writing to a question concerning definition of the market and to provide the full version of Trident's statement of 23 April 1999 concerning the cartel. The Commission complied within the time-limit set.

13 The parties presented oral argument and answered questions put to them by the Court at the hearing on 1 July 2004.

14 The applicant claims that the Court of First Instance should:

— annul Article 3 of the contested decision in so far as it applies to the applicant;

— in the alternative, amend Article 3 of the contested decision so as to substantially reduce the fine imposed on the applicant;

— order the Commission to pay the costs.

15 The Commission contends that the Court of First Instance should:

— dismiss the application;

— order the applicant to pay the costs.

Law

16 The applicant puts forward a single plea. It comprises three parts, in which the applicant claims that, by using its turnover for the business year ending on 30 June 1996 when calculating the upper limit of 10% of turnover, the Commission infringed:

— Article 15(2) of Regulation No 17 and the principle of proportionality;

— the principle of equal treatment;

— the principle of legal certainty.

The first part of the plea: infringement of Article 15(2) of Regulation No 17 and breach of the principle of proportionality

Arguments of the parties

17 The applicant claims that the Commission infringed Article 15(2) of Regulation No 17 in that, when calculating the 10% maximum limit for turnover, it took account of its turnover in a business year other than that preceding the contested decision.

18 In the applicant's submission, that provision gives the Commission two options in setting the fine to be imposed on an undertaking. The Commission can either impose a fine of between EUR 1 000 and EUR 1 million or a fine in excess of EUR 1 million, provided that the final amount of that fine does not exceed 10% of the undertaking's turnover in its 'preceding business year', namely, the business year preceding the date of the decision imposing a fine. The applicant claims that the wording of Article 15(2) of Regulation No 17 states clearly and unambiguously that the Commission must refer to the preceding business year in determining the upper limit of 10% of turnover. The Commission has no discretion to use another business year in fixing that upper limit. The applicant adds that, where the turnover of the undertaking concerned does not exceed EUR 10 million, the Commission cannot impose a fine of more than EUR 1 million under the second part of Article 15(2), as such a fine would of necessity exceed the 10% limit.

19 The applicant maintains that in the present case the Commission was wrong to use its turnover for the business year ending 30 June 1996 for the purpose of calculating

the upper limit of 10% of turnover applicable to its fine (recital 345 to the contested decision and footnote 196). As the contested decision was dated 11 December 2001, the preceding business year which ought to have been used in order to determine that limit, was that ending on 30 June 2001. The applicant maintains that as it was a non-trading company at that time its turnover was nil. It considers that the Commission was not entitled to impose a fine of more than EUR 1 million on the applicant under the second part of Article 15(2) of Regulation No 17. It should have applied the first part of that provision and imposed a fine of between EUR 1 000 and EUR 1 million. The applicant claims that the fact that its turnover for the preceding business year was nil does not alter the fact that the Commission must refer to that business year when determining the 10% upper limit. If the Commission had decided to impose a fine of EUR 1 million, it should have reduced that fine by the percentage it considered appropriate under the Leniency Notice, namely 10%, leading to a fine of EUR 900 000.

20 It is clear from the case-law that 'preceding business year' within the meaning of Article 15(2) of Regulation No 17 refers to the last full business year of the undertaking concerned (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 5009). Since the Guidelines use the term 'accounting year' synonymously with 'business year' (paragraph 5(a)), the natural meaning of the term 'last full business year' used by the Court of First Instance in *Cimenteries CBR and Others* v *Commission* is the last full financial year for accounting purposes.

21 In its reply, the applicant disputes the Commission's contention that the Court of First Instance should not restrict itself to a literal interpretation of Article 15(2) of Regulation No 17 but should also resort to historical and teleological methods of

interpretation. It is settled case-law that the literal interpretation method should be used where the text of a provision is clear and unambiguous and clearly covers the situation in question (Case C-245/97 *Germany* v *Commission* [2000] ECR I-11261, paragraph 72, Case C-133/00 *Bowden and Others* [2001] ECR I-7031, paragraphs 38 to 44; Opinion of Advocate General Mayras in Case 67/79 *Fellinger* [1980] ECR 535, at 547). In the present case, according to the applicant, the Commission itself accepts that Article 15(2) of Regulation No 17 is clear when it states in its defence that '[l]ogically, the reference to the preceding business year would seem to refer to the year preceding the adoption of the decision imposing a fine'.

22 Moreover, a literal interpretation of Article 15(2) of Regulation No 17 conforms with the objectives pursued by the Community legislature. The reference in Article 15(2) to the preceding business year rather than, for example, to the turnover of the last year of the infringement shows that the legislature wished to gauge the likely impact on the undertaking and thus the proportionality of the fine in the light of the financial standing of the undertaking when the fine is imposed. According to the applicant, Article 15(2) of Regulation No 17 precisely targets cases such as this one, where the undertaking responsible for the infringement continues to exist but has considerably less economic power than it had at the time of the infringement and should therefore not be subject to an excessive and disproportionate fine.

23 The applicant criticises the Commission's argument that its interpretation of Article 15(2) of Regulation No 17 is necessary in order to ensure appropriate deterrence. First, it disputes that that provision is based on the assumption that an undertaking's turnover for the business year preceding a decision adequately reflects its turnover when the infringement was committed. The applicant considers that there are no grounds for asserting that the legislature made any such assumption and that the choice of the preceding business year rather than, for example, the turnover of the

last year of the infringement shows that the aim is to gauge the likely impact on the undertaking and thus the proportionality of the fine in the light of the financial standing of the undertaking at the time the fine is imposed. Also, as regards the Commission's argument that a fine of EUR 1 million is too low, the applicant states that such an amount was considered to have a sufficiently deterrent effect in its Decision 1999/271/EC of 9 December 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.466 — Greek Ferries) (OJ 1999 L 109, p. 24, 'the Greek Ferries decision'). Moreover, the applicant considers that the Commission's argument concerning the risk of an undertaking diverting turnover in order to avoid the imposition of a higher fine is not relevant in the present case because it has not been suggested that the applicant acted in that way. The applicant submits that the Court should restrict its examination to the facts of this case as set out in the documents before it.

24 The applicant disputes the Commission's contention that it interpreted Article 15(2) of Regulation No 17 in order to ensure its effectiveness in accordance with the case-law. It considers to be irrelevant the case-law cited by the Commission to the effect that, where it is necessary to impose a fine on an association of undertakings or on an undertaking acting on behalf of its members, the 10% limit should be calculated in relation to the total turnover of the members. The meaning attributed in that case-law to the term 'turnover' is relevant only in the context of those cases.

25 The Commission's previous practice has been to respect the principle that setting the basic amount of the fine and applying the 10% upper limit are two separate stages in determining the fine and has not considered it necessary to apply that limit to the year which is the closest possible to that in which the undertaking committed the infringement, in circumstances where there is a significant difference between the undertaking's turnover in the preceding business year and its size at the time of

the infringement. Thus, in its Decision 2002/271/EC of 18 July 2001 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (Case COMP/E-1/36.490 — Graphite Electrodes) (OJ 2001 L 100, p. 1), the Commission set the basic amount of the fine by reference to the turnover of UCAR International, that is to say EUR 1 022 million, in 1998, the year before the infringement ended. Despite the fact that UCAR's turnover in 2000, the year preceding the adoption of the decision, was EUR 181 million less than its turnover in 1998, the Commission applied the 10% limit to the 2000 turnover.

26 The applicant also claims that, by referring to a business year other than the preceding business year for the purposes of calculating the upper limit of 10% of turnover, the Commission failed to have regard to its financial standing when the contested decision was adopted and thus breached the principle of proportionality. That principle requires that any action taken by the Commission should not go beyond what is necessary to achieve a legitimate objective (Case 181/84 *Man (Sugar)* [1985] ECR 2889, paragraph 20). The Commission's decision in the present case to apply the 10% limit to one of the applicant's business years which bears no relation to its financial standing, measured by its level of turnover, at the time of the contested decision means that the fine imposed on the applicant does not reflect its economic power and is therefore not proportionate. The applicant points out that it had no turnover when the decision was adopted and that, in addition, the fine in question is substantially larger than its total current assets of approximately EUR 1.9 million, according to its audited annual accounts for the financial year ending on 30 June 2001.

27 As a preliminary point, the Commission states that the applicant was liable for the infringement in question and that when the contested decision was adopted it was still in existence. It was therefore necessary to impose a fine on the applicant (recitals 242 to 250 to the contested decision) (Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraph 236).

28 The Commission accepts that, logically, the reference to the preceding business year in Article 15(2) of Regulation No 17 'would seem to refer to the year preceding the adoption of the decision imposing a fine'. However, it considers that, where the turnover for the preceding business year gives a totally distorted picture of the size of the undertaking concerned, it is allowed to take into account the turnover of a year before the preceding year.

29 The Commission disputes the applicant's absolutely literal interpretation of Article 15(2) of Regulation No 17. It is clear from the case-law that, even if the wording of a provision seems to be clear, it is still necessary to refer to the spirit, general scheme, and context of the provision (Case 26/62 *Van Gend en Loos* [1963] ECR 1 and Case 6/72 *Europemballage Corporation and Continental Can* v *Commission* [1973] ECR 215).

30 In the present case, where the turnover was nil, the Commission considers that in order to assess the size and economic power of the undertaking it was entitled to take into account either the turnover of the group to which the undertaking belongs or the turnover of the last year of normal economic activity. Since the regulation refers to the 'undertaking concerned' the Commission has normally considered that the second option was the one to take. Both options may entail a certain deviation from the wording of Regulation No 17, but such deviations have been accepted in the past by the Community judicature and the second option is likely to be more favourable to the undertaking concerned.

31 The Commission then puts forward several arguments to justify its interpretation of Article 15(2) of Regulation No 17. In particular, it submits that its interpretation is

necessary to ensure that the fine has the appropriate deterrent effect. When an undertaking continues to trade until the final decision is adopted, Regulation No 17 assumes, and so does the Commission, that the preceding business year will appropriately reflect the order of magnitude of the turnover of the undertaking at the time the infringement was committed. The applicant's interpretation would nullify the objective of appropriate deterrence and, therefore, the possibility of imposing fines would be rendered totally ineffective.

32 Also, the Commission considers that its interpretation of Article 15(2) of Regulation No 17 is entirely in accordance with the case-law. First, the Community judicature has interpreted Regulation No 17 in such a way as to ensure its effectiveness. Second, the link between that provision and the assessment of the real size of the undertaking at the time of the infringement is confirmed by case-law (see for example Case C-298/98 P *Finnboard* v *Commission* [2000] ECR I-10157, paragraph 66; Case T-338/94 *Finnboard* v *Commission* [1998] ECR II-1617, paragraph 282; and Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraphs 136 and 137).

Findings of the Court

33 The Court notes at the outset that the applicant does not deny its participation in the cartel or infringement of Article 81 EC or challenge the Commission's assessment of the gravity and duration of the infringement. It seeks only to have the fine cancelled or reduced on the ground that the Commission infringed Article 15(2) of Regulation No 17 by imposing on it a fine above the maximum threshold there laid down of 10% of the turnover achieved in the preceding business year.

34 Under Article 15(2) of Regulation No 17, the Commission may impose on undertakings 'fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement ...'.

35 According to the case-law, the 10% limit laid down by Article 15(2) of Regulation No 17 seeks to prevent fines from being disproportionate in relation to the size of the undertaking and in particular it seeks to avoid the imposition of fines which it is foreseeable that the undertakings will not be able to pay. Since only the total turnover can effectively give an approximate indication of that size, the aforementioned percentage must be understood as referring to the total turnover (Case 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 119).

36 The Court would also point out that the purpose of Article 15(2) of Regulation No 17 is to give the Commission the power to impose fines on undertakings to enable it to carry out the task of supervision conferred on it by Community law (*Musique diffusion française and Others* v *Commission*, cited in paragraph 35 above, paragraph 105, and Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 105). That task includes the task of investigating and punishing individual infringements and also the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles. It follows that the Commission must ensure that the fines have a deterrent effect (see, to that effect, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraphs 105 and 106).

37 It is also clear from the case-law, and not denied by the parties, that pursuant to Article 15(2) 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 (*Cimenteries CBR and Others* v *Commission*, cited in

paragraph 20 above, paragraph 5009; Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraph 85).

38 It is however clear, both from the objectives of the system of which that provision forms part (see paragraphs 35 and 36 above) and from the case-law cited in paragraph 37 above, 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.

39 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 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.

40 It is not, therefore, a simple question of choosing between a maximum fine of EUR 1 million and an upper limit fixed by reference only to the turnover for the business year preceding the adoption of the decision.

41 In the present case, as the contested decision is dated 11 December 2001, the preceding business year was the year from 1 July 2000 to 30 June 2001. However, the applicant had transferred its business in the zinc sector in 1997 and then ceased

trading (see paragraph 1 above). More particularly, it carried on no business in the period from 1 July 2000 to 30 June 2001 and therefore had no turnover in that period.

42 Consequently, when the contested decision was adopted, the Commission did not have at its disposal a figure for the applicant's turnover representing economic activity carried on by it during the preceding business year. The Court does not consider that situation to be fundamentally different from those mentioned in paragraph 39 above. If an undertaking has not carried on any economic activity during the preceding business year, the turnover for that period gives no indication of its standing, contrary to the requirements of the case-law (see paragraph 35 above) and therefore cannot serve as a basis for determining the upper limit provided for in Article 15(2) of Regulation No 17.

43 As regards the applicant's argument that the purpose of that limit is to evaluate the probable impact of the fine on the undertaking, having regard to its size when the fine is imposed, and that the Commission breached the principle of proportionality (see paragraphs 22 and 26 above), it must be borne in mind that the aim of imposing that upper limit is to ensure that fines are not disproportionate to the size of the undertaking and, in particular, to avoid a situation in which the undertakings concerned are unable to pay the fines imposed (see paragraph 35 above). The application of the limit of 10% to achieve that aim presupposes that the undertaking concerned is engaged in a commercial activity on the date when the fine is imposed. However, in this case, a commercial decision was taken in 1997 that the applicant's zinc business should be transferred to Trident, that the applicant should cease trading in the market in question and that the proceeds of the transfer should be distributed without any new commercial activity being embarked upon. As the applicant had realised the value of its commercial activity by means of that transfer, it did not plead inability to pay the fine on the ground that it had no current commercial activity (see paragraph 1 above). In those circumstances, the Court considers that it was not disproportionate to determine the upper limit of the fine by reference to the standing of the applicant before the transfer of its commercial operations.

44 The applicant's argument to the effect that it is clear, according to its interpretation of Article 15(2) of Regulation No 17, that the Commission is still in a position to impose a fine of EUR 1 million, an amount which the latter moreover considered to have a sufficient deterrent effect, cannot be accepted. The mere fact that the Commission may have taken the view, in earlier decisions and, moreover, in circumstances different from those of this case, that a fine of EUR 1 million had a sufficient deterrent effect does not mean that it is obliged to make the same assessment in its subsequent decisions. In addition, the Guidelines indicate that possible fines for 'very serious' infringements may exceed EUR 20 million and the applicant does not deny that the infringement at issue in the present case is 'very serious'. The Commission was therefore entitled to consider that a fine of EUR 1 million was not sufficient.

45 It follows that the Commission was not obliged, in setting the 10% limit provided for by Article 15(2) Regulation No 17, to refer to the applicant's nil turnover for the business year ending on 30 June 2001.

46 It is next necessary to consider whether the Commission was entitled, as it did in the contested decision, to use the applicant's turnover for the business year ending on 30 June 1996 and thus to disregard more recent business years.

47 In the contested decision, the Commission states that, in setting the 10% upper limit, it took into account the applicant's global turnover for the business year ending on 30 June 1996, which was 'the last available figure reflecting an entire year of normal economic activity' (see paragraph 9 above). The applicant's turnover for the business year ending on 30 June 1996 was EUR 55.7 million. It is clear from the documents before the Court, as was confirmed by the parties at the hearing, that the applicant carried on its normal activities until March 1997, at which time it transferred its zinc business to Trident (see paragraph 1 above). Moreover, it is apparent from the applicant's accounts for the business year ending on 30 June 1997

that, following that transfer, the applicant carried on a lower level of commercial activity, purchasing zinc from a supplier under a pre-existing agreement and reselling it at cost price to Trident. Thus, the applicant's turnover for the business year ending on 30 June 1997 was GBP 34.8 million. During the following year, it ceased that residual activity, so that, for the business year ending on 30 June 1998, it achieved a turnover of only GBP 7.3 million. It had no turnover in subsequent business years.

48 As stated in paragraph 38 above, in determining the upper limit provided for in Article 15(2) of Regulation No 17, the Commission must have at its disposal a turnover representing a full 12-month period of normal economic activity.

49 The Court would point out that, even in a year of normal business activity, the turnover of an undertaking may fall significantly, or indeed substantially, as compared with previous years, for various reasons, such as a difficult economic context, a crisis in the sector concerned, an accident or a strike. However, as long as an undertaking has in fact achieved a turnover during a complete year in which economic activities, albeit on a reduced scale, have been carried on, the Commission must take the undertaking as it stands when setting the upper limit provided for in Article 15(2) of Regulation No 17. Accordingly, 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 Court considers that the Commission is obliged to fix the maximum limit of the fine by reference to the most recent turnover corresponding to a complete year of economic activity.

50 In that connection, the Court considers that, in the applicant's case, the business year ending on 30 June 1996 is the last 'full' business year within the meaning of the judgment in *Cimenteries CBR and Others* v *Commission* (cited in paragraph 20

above), paragraph 5009. The applicant carried on its normal activities for only nine months of the business year ending on 30 June 1997 until the transfer to Trident in March 1997. As from the end of March 1997, the applicant was in the process of running down its commercial activities. In so far as it continued to carry on business during the last quarter of 1997, it confined that business to the purchase of zinc under a pre-existing agreement and its resale at cost price. The applicant's last-mentioned business cannot be regarded as a normal economic activity in that, as a result of its agreement for the transfer of its zinc business, the applicant acted as a conduit between the supplier and Trident. Those activities must therefore be regarded, as from March 1997, as forming part of financial arrangements for the transfer of the zinc business.

51 It follows that the business year ending on 30 June 1996 was the last full business year preceding the contested decision within the meaning of Article 15(2) of Regulation No 17 and that therefore the Commission did not infringe that provision by setting the upper limit by reference to that year.

52 As regards the applicant's argument alleging breach of the principle of proportionality, it must be rejected for the reasons given in paragraph 43 above.

The second part of the plea: breach of the principle of equal treatment

Arguments of the parties

53 The applicant submits two arguments in support of the second part of the plea, alleging infringement of the principle of equal treatment.

54 First, it argues that, by referring to a business year other than the preceding business year for the purposes of calculating the 10% upper limit, the Commission departed from its previous practice and thus infringed the general principle of equal treatment. According to the applicant, in the past the Commission has always used the preceding business year for the purposes of that calculation. In particular, where the undertaking involved had sold the relevant business to another entity during the period of the infringement, the Commission did not apply the upper limit to the turnover for a year in which the business involved was being carried on by the undertaking concerned but took into account that undertaking's turnover in the business year preceding its decision (Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — Polypropylene) (OJ 1986 L 230, p. 1) and Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865 — PVC) (OJ 1994 L 239, p. 14)). The applicant considers that the Commission correctly decided that it had no discretion to apply the upper limit of 10% of turnover in relation to any business year other than that preceding the contested decision.

55 The applicant states that in the Greek Ferries decision, cited in paragraph 23 above, where the turnover of Karageorgis, one of the undertakings concerned, was unavailable for the preceding business year, the Commission relied on the first part of Article 15(2) of Regulation No 17 and fined Karageorgis EUR 1 million. According to the applicant, its situation in the present case is very similar to that of Karageorgis, in that both companies had withdrawn from the market a very long time before the adoption of the Commission decision.

56 Second, the applicant submits that the Commission infringed the principle of equal treatment by not treating it in the same way as Union Pigments and SNCZ in setting the upper limit for the fine even though it was in the same situation as those undertakings. In determining the upper limit for the fines imposed on Union Pigments and SNCZ, the Commission used their turnover for the preceding business year and thus reduced their fines. However, in the applicant's case, the

Commission referred to an earlier business year and so did not reduce its fine. Although the financial standing of Union Pigments and SNCZ, measured by turnover, at the time of adoption of the contested decision was taken into account, it was not in the applicant's case.

57 The Commission rejects the applicant's arguments concerning the alleged breach of the principle of equal treatment.

58 First, it states that there has been no departure from its earlier practice such as to infringe the principle of equal treatment. It admits that for the purpose of calculating the upper limit of 10% it has normally used the turnover of the undertaking concerned in the business year preceding the adoption of its decision. It states that, contrary to the applicant's assertion, the Commission acted in that way not because it considered that it was not entitled to use another business year, but rather because it did not have to address the situation which arose in the present case, in which a cartel member had disposed of all its business whilst remaining legally in existence. The Commission points out in that regard that its previous practice cannot serve as a legal framework for the fines imposed in competition matters, since that framework is defined solely in Regulation No 17 (Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 234).

59 Second, the Commission considers that the applicant's argument that it was treated differently from other undertakings in the same situation is unfounded.

Findings of the Court

60 It is settled case-law that the principle of equal treatment is infringed only where comparable situations are treated differently or different situations are treated in the

same way, unless such difference in treatment is objectively justified (*Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, cited in paragraph 36 above, paragraph 69, and Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 309).

61 The applicant's first argument, namely that the Commission departed from its earlier practice, is unfounded. Its situation is not comparable to that of the undertakings involved in the cases cited in paragraph 54 above because it achieved no turnover in the business year preceding the contested decision. Accordingly, it cannot insist on being treated in the same way as the undertakings in those earlier cases.

62 The applicant's second argument, alleging discrimination as between itself, on the one hand, and, on the other, SNCZ and Union Pigments, must also be rejected. Having regard to the case-law cited in paragraph 60 above, the Court considers that the applicant is clearly in a situation different from that of SNCZ and Union Pigments. The latter, in contrast to the applicant, were still active in the zinc phosphate sector when the contested decision was adopted, so that their turnover during the preceding business year constituted a reliable indicator of their economic standing. As a nil turnover gives a false impression of the applicant's standing, the Commission was entitled to refer to an earlier year and, accordingly, to treat the applicant differently from SNCZ and Union Pigments.

63 In addition, the applicant's argument alleging breach of the principle of equal treatment overlooks the fact that, if the Commission had not used the turnover achieved in an earlier business year, there would have been clear and unjustified discrimination in favour of the applicant, above all as compared with Trident. If the Commission had confined itself to imposing on the applicant a fine of EUR 1 million

for an infringement which had lasted for three years (from 24 March 1994 to 15 March 1997), that fine would have represented only one half of that imposed on Trident, which had purchased the applicant's zinc business and had participated in the infringement as its 'successor' for a period of 14 months (from 15 March 1997 to 13 May 1998).

64 The second part of the sole plea in law must therefore be rejected

The third part of the plea: breach of the principle of legal certainty

65 The applicant claims that, by referring to a business year other than the financial year preceding the decision for the purposes of calculating the upper limit of 10% of turnover, the Commission infringed the principle of legal certainty. That principle requires that undertakings must be able to carry on business under conditions of predictability. Measures which have legal effects must be certain and their application foreseeable. That principle must be particularly strictly observed in relation to measures which have financial consequences, such as the imposition of fines (Case 326/85 *Netherlands* v *Commission* [1987] ECR 5091, paragraph 24). According to the applicant, the principle of legal certainty requires that Article 15(2) of Regulation No 17 be interpreted strictly so that the 10% limit is always applied to the business year immediately preceding the adoption of the decision imposing a fine. To allow the Commission a discretion arbitrarily to apply that limit to previous business years would mean that undertakings would no longer be able to predict the way in which penalties might be imposed on them.

66 The applicant adds that the Commission's interpretation of Article 15(2) of Regulation No 17, to the effect that if the turnover of the undertaking concerned in the business year preceding the decision gives a totally distorted picture of the undertaking at the time of the infringement it may select a year which more or less reflects the undertaking's economic strength at the time of the infringement, leads to an unacceptable level of legal uncertainty where an undertaking experiences a downturn in the business year preceding the decision. It could not determine whether the Commission would take into account the turnover of a year other than the preceding business year, and what year the Commission would consider acceptable. The only way to ensure legal certainty is to take the preceding business year as the reference year for determining the limit in accordance with Article 15(2) of Regulation No 17.

67 The applicant also considers that the fact that it allegedly did not raise that point in its reply to the statement of objections does not mean that it had predicted the Commission's approach. It points out that it stated in its reply to the statement of objections that it could not be held liable for any fine and that the Commission should impose a fine in respect of the entire period of the infringement on its economic successor, Trident. The applicant always considered that if the Commission decided to impose a fine on it the maximum amount would be EUR 1 million, less any deduction for cooperation. Such a fine, for an undertaking with no turnover and minimal assets, like the applicant, could not be described as 'symbolic'. The applicant did not give its views on the interpretation of Article 15(2) of Regulation No 17 in its reply to the statement of objections because it considered that the text of that provision was entirely clear and compelling.

68 The Commission considers that the third part of the plea should be rejected in its entirety. First, it disputes the applicant's argument that Article 15(2) of Regulation No 17 should be interpreted narrowly. Second, it contends that the interpretation of Article 15(2) which it applied was predictable.

Findings of the Court

69 The principle of legal certainty requires that legal rules be clear and precise, and aims to ensure that situations and legal relationships governed by Community law remain foreseeable (Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20, and Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 113).

70 It must be pointed out that the provisions governing the implementation of Article 81 EC, and in particular Regulation No 17 and the Guidelines, enable undertakings to foresee with certainty that a fine will be imposed in the event of infringement of the Community competition rules and that the amount of the fine will be determined on the basis of the gravity and duration of the infringement.

71 Article 15(2) of Regulation No 17 ensures that where the amount of the fine exceeds EUR 1 million, it will not exceed the upper limit of 10% of the turnover achieved by the undertaking concerned in the preceding business year. However, the interpretation and application of that provision depend on the circumstances of each case and, as indicated in paragraph 39 above, on the availability and completeness of the annual accounts recording the turnover concerned.

72 Furthermore, the consequences of applying Article 15(2) of Regulation No 17 must be such that the effectiveness of Regulation No 17 is ensured.

73 In this case, it was perfectly foreseeable that a fine would be imposed on the applicant because it had participated in an infringement which the case-law classifies

as a 'clear infringement ... of the Community competition rules' (see, to that effect, Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 109, and *BPB de Eendracht* v *Commission*, cited in paragraph 60 above, paragraphs 303 and 338). It was also foreseeable that that fine would be determined by reference to the gravity and duration of the infringement and that it would be adjusted to reflect the specific circumstances of the undertaking concerned, including its size, its economic capacity and any aggravating and attenuating circumstances. Conversely, the principle of legal certainty gave the applicant no guarantee that its cessation of commercial activities would result in its escaping a fine.

74 Contrary to the applicant's contention, the Commission has no arbitrary power to apply the 10% upper limit to business years prior to the business year preceding the date of adoption of the decision. The Commission may use such an earlier business year only in exceptional circumstances. Moreover, as stated in paragraph 49 above, it does not, even in such cases, enjoy any great latitude regarding the choice of business year to use in fixing the upper limit of the fine. It is obliged to refer to the last full business year corresponding to a full year of normal economic activity.

75 In those circumstances, the third part of the sole plea, and therefore the entire plea, must be rejected.

76 It follows from all the foregoing that the application must be dismissed in its entirety.

Costs

77 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's

pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 29 November 2005.

E. Coulon P. Lindh

Registrar President