

Case T-322/01

Roquette Frères SA

v

Commission of the European Communities

(Competition — Agreements, decisions and concerted practices — Sodium gluconate — Article 81 EC — Fine — Article 15(2) of Regulation No 17 — Guidelines on the method of setting fines — Leniency Notice — Principle of proportionality — Equal treatment — Ne bis in idem principle)

Judgment of the Court of First Instance (Third Chamber), 27 September 2006 II - 3145

Summary of the Judgment

1. Competition — Fines — Amount — Determination — Criteria — Actual impact on the market

(Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03, Section 1A, first para.)

2. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement*
(Council Regulation No 17, Art. 15)
3. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement*
(Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03)
4. *Competition — Agreements, decisions and concerted practices — Adverse effect on competition — Criteria for assessment*
(Art. 81(1) EC)
5. *Procedure — Application initiating proceedings — Formal requirements*
(Rules of Procedure of the Court of First Instance, Art. 44(1)(c))
6. *Competition — Fines — Amount — Determination*
(Council Regulation No 17, Art. 15(2); Commission Notice 96/C 207/04)
7. *Competition — Fines — Amount — Determination — Non-imposition or reduction of the fine in return for cooperation of the undertaking concerned*
(Council Regulation No 17, Art. 15(2); Commission Notice 96/C 207/04, Sections B(b) and C)
8. *Competition — Fines — Community penalties and penalties imposed in a Member State or a non-member State for infringement of national competition law*
(Council Regulation No 17, Art. 15)
9. *Competition — Fines — Amount — Determination — Criteria — Turnover of the offending undertaking*
(Council Regulation No 17)
10. *Competition — Fines — Amount — Determination*
(Art. 81(1) EC; Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03, Section 1A)

*11. Procedure — Request that the oral procedure be reopened
(Rules of Procedure of the Court of First Instance, Art. 62)*

*12. Competition — Fines — Amount — Discretion of the Commission — Unlimited jurisdiction
of the Court of First Instance
(Art. 229 EC; Council Regulation No 17, Art. 17)*

1. Pursuant to the first paragraph of Section 1A of 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, when calculating the fine on the basis of the gravity of the infringement, the Commission is to take account *inter alia* of the actual impact of the infringement on the market, where this can be measured. That measurable impact of the cartel must be regarded as having been sufficiently demonstrated where the Commission is able to provide specific and credible *indicia* showing with reasonable probability that the cartel had an impact on the market.

because of the price cartel, the parties specifically waived their freedom to compete with one another on prices. Thus, the assessment of the influence of factors other than that voluntary decision of the parties to the cartel not to compete with one another is necessarily based on reasonable probability, which is not precisely quantifiable.

Consideration of the impact of a cartel on the market necessarily involves recourse to assumptions. In this respect, the Commission must in particular consider what the price of the relevant product would have been in the absence of a cartel. When examining the causes of actual price developments, it is hazardous to speculate on the part played by each of those causes. Account must be taken of the objective fact that,

Therefore, unless the criterion contained in Section 1A is to be deprived of its effectiveness, the Commission cannot be criticised for referring to the actual impact of a cartel designed to restrict competition, such as a price fixing cartel or quota agreement, on the relevant market, without quantifying that impact or providing any assessment in figures in that respect.

(see paras 71-75)

2. When measures are taken to punish prohibited cartels, the actual conduct which an undertaking claims to have adopted is irrelevant for the purposes of evaluating the cartel's impact on the market, since the effects to be taken into account are those resulting from the infringement as a whole, in which it participated.

Equally, there is not necessarily a correlation between the impact of a cartel and its duration. Accordingly, it is perfectly possible that, where the effect of a cartel is non-existent for a long period but devastating for a short period, the effect of that cartel is as significant as that of a cartel which has some effect for its entire duration. Consequently, even if it is proven that the cartel has no effect or only a limited effect for certain periods, that does not necessarily prove a lesser effect than that of a cartel considered over its entire duration.

(see paras 89, 90, 121, 128, 141, 179)

3. Under Article 15(2) of Regulation No 17, the amount of the fine is to be determined on the basis of the gravity of the infringement and of its duration. In addition, under the Guidelines on the method of setting fines imposed pur-

suant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, the Commission determines the starting amount according to the gravity of the infringement, taking account of its nature, its actual impact on the market and the size of the geographic market.

That legal framework does not therefore, as such, require the Commission to take account of the small size of the product market.

However, in assessing the gravity of an infringement, the Commission must have regard to a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case. Those factors evidencing the gravity of an infringement may possibly include, where appropriate, the value of the product in respect of which the infringement was committed, the size of the market for the product in question and buyer power.

Consequently, although market size may constitute a factor to be taken into

account in establishing the gravity of the infringement, its importance varies according to the particular circumstances of the infringement concerned.

an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself, so as to guarantee legal certainty and sound administration of justice.

(see paras 147-150)

4. For the purpose of examining the application of Article 81(1) EC to an agreement or concerted practice, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition within the common market.

In that regard, it is not the task of the Court to search through all the matters relied on in support of a first plea in order to ascertain whether those matters could also be used in support of a second plea. The fact that the Commission made a special point of attempting, despite the flagrant vagueness of this plea, to identify any of the applicant's arguments relied on in the context of its reasoning relating to the first plea which could, where appropriate, be reiterated in support of the second plea, and to reply to them in that context, does not alter that conclusion. Indeed, such a position of the Commission amounts merely to a hypothesis as to the exact scope of the plea raised by the applicant. It does not serve to determine with certainty the exact scope of the second plea.

(see para. 201)

5. Under Article 44(1)(c) and (d) of the Rules of Procedure of the Court of First Instance, the application must inter alia contain a summary of the pleas in law on which it is based. In addition, irrespective of any question of terminology, that summary must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, even without further information. It is necessary, for

(see paras 208, 209)

6. The Notice on the non-imposition or reduction of fines in cartel cases is an

instance of the exercise of the Commission's discretion and requires only a self-imposed limitation of the Commission's power in accordance with the principle of equal treatment. That notice created legitimate expectations on which enterprises may rely when disclosing the existence of a cartel to the Commission. In the light of the respect for the principle of equal treatment and of the legitimate expectations which undertakings wishing to cooperate with the Commission may derive from that notice, the Commission is therefore obliged to comply with it when assessing the cooperation of an undertaking in the context of the determination of the amount of the fine imposed on it.

of the Notice on the non-imposition or reduction of fines in cartel cases, Section B(b) of that notice, to which Section C refers, requires that the undertaking concerned must be the first to adduce decisive evidence of the cartel's existence. The notice does not provide that, in order to fulfil that condition, the enterprise which discloses the secret cartel to the Commission must furnish it with all the decisive elements required for the formulation of a statement of objections let alone for the adoption of a decision that an infringement has been committed.

(see paras 237-239)

In that respect, neither a draft of a new notice, even if published before the adoption of a decision imposing a fine for infringement of the competition rules, nor a new notice published after the adoption of such a decision, can entail any self-imposed limitation on the exercise of the Commission's discretion in this case.

8. Under the *ne bis in idem* principle, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal interest. The application of that principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected.

(see paras 223, 224)

7. In order to benefit from a substantial reduction of a fine pursuant to Section C

An undertaking may thus properly be the subject of two parallel procedures for the same unlawful conduct and therefore of a twofold penalty, one imposed

by the competent authority of the Member State in question, the other by the Community, in so far as those procedures pursue different ends and there is not identity between the provisions infringed.

rules, an error was made with regard to the level of turnover to take into account, that error must, when made clear, lead to a correction of the amount of the fine, even if the error was attributable to the undertaking.

It follows that the *ne bis in idem* principle cannot, *a fortiori*, apply in a case where the proceedings conducted and penalties imposed by the Commission, on the one hand, and by authorities of third States, on the other, clearly do not pursue the same objectives. Whereas, in the former, it is a question of preserving undistorted competition on the territory of the European Union or in the European Economic Area, the protection sought, in the latter, concerns the market of a third State. The condition of unity of the legal interest protected, which is necessary for the application of the *ne bis in idem* principle, is therefore lacking in that case.

(see para. 293)

10. Where undertakings which have infringed Article 81(1) EC are divided into groups for the purpose of setting the amounts of the fines, the thresholds for each of the groups thus identified must be coherent and objectively justified.

(see para. 295)

(see paras 277-281)

9. If, in determining the amount of the fine to impose on an undertaking which has infringed the Community competition

11. The Court of First Instance is required to accede to a request to reopen the oral procedure for the purpose of taking into account new facts alleged only if the party concerned wishes to place before it facts which may have a decisive influence on the outcome of the case and which it was unable to put forward before the close of the oral procedure.

The adoption, following a decision imposing a penalty on an undertaking which infringed the competition rules, of a decision concerning other undertakings having participated in the infringement cannot constitute a new fact which may have a decisive influence on the legality of the first decision and therefore does not require the reopening of the procedure on that basis.

The legality of a Community measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted. Consequently, elements post-dating the adoption of the Community measure cannot be taken into account in assessing the legality of that measure. Indeed, the legality of a decision must, in principle, be examined on the basis of the elements of fact and of law mentioned by the parties during the administrative procedure and/or set out in that decision. Otherwise, the parallelism between the (earlier) administrative procedure and the (subsequent) judicial review proceedings, which is based on identity of facts and law, would be compromised.

(see paras 323-326)

12. With regard to the determination of the amount of the fines imposed for infringement of the competition rules, the Court may, by virtue of its unlimited jurisdiction, take into consideration additional information which was not mentioned in the contested decision, in the light of the objections raised by the applicant. However, having regard to the principle of legal certainty, that possibility must, in principle, be limited to taking into account information pre-dating the contested decision and which the Commission could have known at the time when it adopted that decision. A different approach would lead the Court to assume the role of the administration in assessing a question which the latter has not yet been required to examine, which would amount to encroaching on its powers and, more generally, to infringing the system of division of powers and the institutional balance between the judiciary and the administration.

(see para. 327)