Joined Cases T-101/05 and T-111/05

BASF AG and UCB SA

v

Commission of the European Communities

(Competition — Agreements, decisions and concerted practices in the vitamin products sector — Choline chloride (vitamin B4) — Decision finding an infringement of Article 81 EC and Article 53 of the Agreement on the European Economic Area — Fines — Deterrence — Repeated infringement — Cooperation during the administrative procedure — Single and continuous infringement)

Judgment of the Court of First Instance (Second Chamber), 12 December 2007 II - 4959

Summary of the Judgment

1. *Competition — Fines — Amount — Determination — Deterrent effect — Account taken of the size of the fined undertaking — Relevance — Obligation to take account of the likelihood of repeat infringement by the fined undertaking and fines already imposed for other anti-competitive activities or in a non-member State — None*

   (Council Regulations Nos 17, Art. 15, and 1/2003, Art. 23; Commission Notice 98/C 9/03, point 1 A)

2. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Aggravating circumstances — Repeated infringement — Meaning — No time-limit — Infringement of the principle of legal certainty — None — Judicial review — Unlimited jurisdiction*

   (Council Regulations Nos 17, Art. 15(2), and 1/2003, Art. 23(2); Commission Notice 98/C 9/03)

3. *Competition — Fines — Amount — Determination — Method of calculation laid down by the guidelines drawn up by the Commission*

   (Council Regulations Nos 17, Art. 15(2), and 1/2003, Art. 23(2); Commission Notice 98/C 9/03)

4. *Competition — Fines — Amount — Determination — Commission notice on the non-imposition or reduction of fines in cartel cases in return for the cooperation of the fined undertakings — Binding upon the Commission*

   (Council Regulations Nos 17, Art. 15(2), and 1/2003, Art. 23(2); Commission Notice 96/C 207/04)

5. *Competition — Fines — Amount — Determination — Criteria — Reduction of the fine for cooperation of the fined undertaking — Conditions*

   (Council Regulations Nos 17, Arts. 11 and 15(2), and 1/2003, Art. 23(2); Commission Notice 96/C 207/04, title D)

6. *Competition — Administrative procedure — Hearings — No minutes or audio recording of a meeting held with an undertaking in the context of the notice on cooperation — Formalities not requested by the undertaking — Infringement of the priniciple of sound administration — None*

   (Rules of Procedure of the Court of First Instance, Art. 65(c); Council Regulations Nos 17, Arts 11 and 15(2), and 1/2003, Art. 23(2); Commission Notice 96/C 207/04)

7. *Competition — Fines — Amount — Determination — Criteria — Mitigating circumstances — Termination of the infringement before the Commission's intervention*

   (Council Regulations Nos 17, Arts 11 and 15(2), and 1/2003, Art. 23(2); Commission Notice 98/C 9/03)

8. *Competition — Agreements, decisions and concerted practices — Not allowed — Infringements — Agreements and concerted practices capable of being treated as constituting a single infringement — Meaning*

   (Art. 81(1) EC; Council Regulations Nos 17, Art. 15(2), and 1/2003, Art. 23(2))

9. *Competition — Fines — Amount — Discretion of the Commission — Judicial review — Unlimited jurisdiction*

   (Art. 229 EC; Council Regulation No 1/2003, Art. 31; Commission Notice 98/C 9/03)

10. *Competition — Fines — Amount — Determination — Guidelines on the method of setting fines for infringements of the competition rules — Duty to apply the 'lex mitior' — None*

    (Council Regulation No 1/2003, Art. 23(2))

1. The Commission does not infringe Regulation No 17 and Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty where, for the purpose of increasing the starting amount the fine in order to give it sufficient deterrent effect, it does not evaluate the likelihood of any repeat infringement by the fined undertaking, but merely takes account of its size, that latter factor being capable of being used as an indication of the influence that it was able to exert on the market.

   Thus, the reality of the infringement committed cannot be affected by measures adopted by the undertaking concerned in order to prevent recurrence, since adoption of a compliance programme does not oblige the Commission to grant a reduction in the fine. That being so, the assertion that, following fines imposed on the undertaking concerned in another market by another Commission decision, that undertaking has no further need of deterrence must be rejected. Nor does the imposition of a fine for other anti-competitive activities affect the reality of the infringement committed or, therefore, require the Commission to grant a reduction under that head.

   The same applies to adverse findings against the undertaking in non-member countries. The objective of deterrence, which the Commission is entitled to pursue when setting fines, is to ensure that undertakings comply with the competition rules laid down in the Treaty when conducting their business within the Community or the European

Economic Area. It follows that the deterrent effect of a fine imposed for infringement of the Community competition rules cannot be determined solely by reference to the individual situation of the undertaking sanctioned or by reference to the question whether it has complied with the competition rules in non-member countries outside the European Economic Area.

(see paras 46, 47, 50, 52, 53)

Commission's task of ensuring compliance with the competition rules. Furthermore, the analysis of the gravity of the infringement must take any repeated infringement into account, and such repeated infringement may justify a significant increase in the basic amount of the fine.

For a case of repeated infringement to be recognised, it is sufficient that the Commission is dealing with infringements falling under the same provision of the EC Treaty, without it being necessary for them to concern the same product market.

2. Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty are the relevant legal bases on which the Commission may impose fines on undertakings and associations of undertakings for infringements of Articles 81 EC and 82 EC. Under those provisions, in order to determine the amount of the fine, the duration and gravity of the infringement must be taken into consideration. The gravity of the infringement is determined by reference to numerous factors, for which the Commission has a margin of discretion. The fact that aggravating circumstances are taken into account in setting the fine is consistent with the

The fact that Regulation No 17, Regulation No 1/2003 and 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 lay down no maximum period for making a finding of repeated infringement does not breach the principle of legal certainty. The finding and the appraisal of the specific features of a repeated infringement come within the Commission's discretion in relation to the choice of factors to be taken into consideration for the purpose of determining the amount of fines. In that connection, the Commission cannot be bound by any limitation period for such a finding. In that regard, repeated infringement is an important factor

which the Commission is required to appraise, since taking repeated infringement into account is intended to provide undertakings which have shown a propensity to breach the competition rules with an incentive to change their conduct. The Commission may therefore, in each case, take into consideration the indicia which tend to confirm such a propensity, including, for example, the time which has elapsed between the infringements at issue.

(see para. 73)

Where the Community judicature has to rule on the Commission's assessment of repeated infringement, the exercise of its unlimited jurisdiction may justify the production and taking into consideration of additional information which did not have to be referred to as such under the obligation to state reasons laid down in Article 253 EC. It may, therefore, take account of the fact that the undertaking concerned took part in an infringement even if the fact was omitted in the Commission's decision.

(see paras 64-67, 70, 71)

3. Under 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, the percentages corresponding to the increases or reductions applied for aggravating or attenuating circumstances must be applied to the basic amount of the fine, which is determined by reference to the gravity and duration of the infringement.

4. In view of the legitimate expectation which undertakings intending to cooperate with the Commission have been able to derive from its notice on the non-imposition or reduction of fines in cartel cases, the Commission must adhere to it when, for the purposes of determining the fine to be imposed on the undertaking concerned, it assesses its cooperation.

(see para. 89)

5. In order for an undertaking to be able to benefit from a reduction in its fine on

account of its cooperation during the administrative procedure, its conduct must facilitate the Commission's task of establishing and punishing infringements of the competition rules. It does not therefore constitute cooperation falling within the scope of Section D of the notice on the non-imposition or reduction of fines in cartel cases, which concerns for example the sending of information, documents or other evidence which contribute to establishing the existence of the infringement, for an undertaking to supply the Commission, in the context of its investigation of a cartel, with information concerning a proceeding for the infringement of competition rules brought in a non-member State which is not part of the European Economic Area and which was not used by the Commission either directly or indirectly in order to establish the existence of an infringement in that area.

Furthermore, a reduction based on that notice can be justified only where the information provided and, more generally, the conduct of the undertaking concerned might be considered to demonstrate genuine cooperation on its part. It is clear from the very concept of cooperation, as described in the wording of the notice, and in particular in the introduction and at Section D, point 1, that it is only where the conduct of the undertaking concerned shows such a spirit of cooperation that a reduction may be granted on the basis of that notice. The conduct of an undertaking which, even though it was not required to respond to a question put by the Commission, responded in an incomplete and misleading way cannot therefore be considered to reflect such a spirit of cooperation. Nor is that spirit reflected in the conduct of an undertaking which supplies the Commission with documents in response to a request for information pursuant to Article 11 of Regulation No 17, since in that case the undertaking acts by virtue of a legal obligation, even if that information serves to establish, as against the undertaking which supplies it or as against a different undertaking, the existence of anti-competitive conduct.

(see paras 90-92, 108, 111)

6. The Commission cannot be accused of infringing the principle of sound administration through omitting to take minutes or make an audio recording of a meeting held with an undertaking with a view to cooperation capable of being

rewarded in accordance with the notice on the non-imposition or reduction of fines in cartel cases, where that undertaking did not in fact ask the institution to carry out those formalities.

As regards the appraisal as evidence of what was discussed at a meeting of a written statement by a person who took part in it, the Rules of Procedure of the Court of First Instance do not preclude the parties from producing such statements; however, their appraisal is a matter for the Court, which, if the facts described therein are crucial to the outcome of the case, may order, by way of a measure of inquiry, that the author of such a document be heard as a witness.

(see paras 96, 97)

7. Termination of the infringements of the competition rules as soon as the Commission intervened, referred to in the third indent of point 3 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, can logically constitute an attenuating circumstance only if there are reasons to suppose that the undertakings concerned were encouraged to cease their anti-competitive activities by the interventions in question, whereas a case where the infringement has already come to an end before the date on which the Commission first intervenes is not covered by that provision. That latter hypothesis is sufficiently taken into account by the calculation of the duration of the infringement period found.

Nor can the dismissal of the employees who played a decisive role in the infringement constitute action that justifies a reduction in the fine. It represents a measure designed to ensure that the undertaking's employees comply with the competition rules, which in any event is an obligation borne by the latter and cannot therefore be regarded as an attenuating circumstance.

(see paras 128, 129)

8. The characterisation of certain unlawful actions as constituting one and the same infringement affects the penalty that may be imposed, since a finding that a

number of infringements exist may entail the imposition of several distinct fines, each time within the limits defined in Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. However, a finding of a number of infringements may be advantageous to those responsible when some of the infringements are time-barred.

In that regard, the concept of single infringement can be applied to the legal characterisation of anti-competitive conduct consisting of agreements, of concerted practices and of decisions of associations of undertakings. The concept of single infringement can also be applied to the personal nature of liability for the infringements of the competition rules. An undertaking which has participated in an infringement by virtue of its own conduct, which met the definition of an agreement or a concerted practice within the meaning of Article 81(1) EC and which was intended to help to bring about the infringement as a whole, may also be responsible for the conduct of other undertakings followed in the context of the same infringement throughout the period of its participation in the infringement. That is the case where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, or that it could reasonably have foreseen that conduct, and that it was prepared to accept the risk. That conclusion has its origin in a widespread conception in the legal orders of the Member States concerning the attribution of responsibility for infringements committed by several perpetrators according to their participation in the infringement as a whole. It is not therefore contrary to the principle that responsibility for such infringements is personal in nature, it does not ignore the individual analysis of the incriminating evidence and it does not breach the rights of defence of the undertakings involved. Thus, a case of infringement of Article 81(1) EC may result from a series of acts or from continuous conduct which forms part of an 'overall plan' because they have the same object of distorting competition within the common market. In such a case, the Commission is entitled to attribute liability for those actions on the basis of participation in the infringement considered as a whole, even if it is established that the undertaking concerned directly participated in only one or some of the constituent elements of the infringement. Likewise, the fact that different undertakings played different roles in the pursuit of a common objective does not mean that there was no identity of anti-competitive object and, accordingly, of infringement, provided that each undertaking contributed, at its own level, to the pursuit of the common objective.

The concept of single objective cannot be determined by a general reference to

the distortion of competition in the market concerned by the infringement, since an impact on competition, whether it is the object or the effect of the conduct in question, constitutes a consubstantial element of any conduct covered by Article 81(1) EC. Such a definition of the concept of a single objective is likely to deprive the concept of a single and continuous infringement of a part of its meaning, since it would have the consequence that different types of conduct which relate to a particular economic sector and are prohibited by Article 81(1) EC would have to be systematically characterised as constituent elements of a single infringement. Thus, for the purposes of characterising various instances of conduct as a single and continuous infringement, it is necessary to establish whether they display a link of complementarity inasmuch as each of them is intended to deal with one or more consequences of the normal pattern of competition and, by interacting, contributes to the realisation of the set of anti-competitive effects intended by those responsible, within the framework of a global plan having a single objective, the various instances of anti-competitive conduct thus being 'closely linked'. In that regard, it will be necessary to take into account any circumstance capable of establishing or casting doubt on that link, such as the period of application, the content (including the methods used) and, correlatively, the objective of the various agreements and concerted practices in question.

Therefore, a worldwide agreement to allocate world markets by the withdrawal of North American producers from the European market in return for the withdrawal of European producers from North American markets, on the one hand, and, on the other hand, a cartel established by European producers after the definitive cessation of the worldwide agreement, concerning the sharing of the market and customers and the fixing of prices throughout the European Economic Area, must be regarded as two separate infringements of Article 81(1) EC and not a single and continuous infringement, given the absence of any temporal overlap in their implementation, the fact that they pursue different objectives and were implemented by dissimilar methods, and in the absence of evidence that the European producers intended to adhere to the global arrangements in order subsequently to divide the EEA market.

(see paras 157-161, 179-181, 199-201, 209)

9. As regards determination of the amount of fines imposed for breach of the competition rules, by virtue of the unlimited jurisdiction conferred on it by Article 31 of Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, the Community judi-

cature is empowered, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed where the question of the amount of the fine is before it. In that context, 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 are without prejudice to the assessment of the fine by the Community judicature when it exercises that unlimited jurisdiction.

(see para. 213)

10. The principle of non-retroactivity does not preclude the application of guidelines which, *ex hypothesi*, have the effect of increasing the level of the fines imposed for infringements committed before they were adopted, on condition that the policy which they implement was reasonably foreseeable at the time when the infringements concerned were committed. Consequently, the fact that the Commission is entitled, albeit conditionally, to apply retroactively, to the detriment of those concerned, rules of conduct designed to produce external effects, such as the Guidelines, means that it is under no obligation to apply the *lex mitior*.

(see paras 233, 234)