

Case T-64/02

Dr. Hans Heubach GmbH & Co. KG

v

Commission of the European Communities

(Competition — Article 81 EC — Cartel — Zinc phosphate market — Fine — Guidelines on the method of setting fines — Action for annulment — Objection of illegality — Article 15(2) of Regulation No 17 — Gravity of the infringement — Principles of proportionality and equal treatment — Statement of reasons)

Judgment of the Court of First Instance (Fifth Chamber), 29 November 2005 II - 5146

Summary of the Judgment

1. *Objection of illegality — Scope — Measures the illegality of which may be pleaded — Guidelines adopted by the Commission on the method of setting fines imposed for infringements of the competition rules — Included*
(Art. 241 EC; Commission Communication 98/C 9/03)

2. *Competition — Fines — Amount — Determination — Guidelines adopted by the Commission — Possibility of taking into consideration the particular circumstances of small and medium-sized enterprises*
(Council Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03)
3. *Competition — Fines — Amount — Determination — Criteria — Seriousness and duration of the infringements — Distinction*
(Council Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03)
4. *Competition — Fines — Amount — Determination — Criteria — Seriousness of the infringements — Horizontal cartel concerning prices, quotas and the allocation of customers — Very serious infringement — No circumstances excluding that classification*
(Art. 81(1) EC; Commission Communication 98/C 9/03)
5. *Competition — Agreements, decisions and concerted practices — Definition of the market — Subject-matter — Determination of the effect on trade between Member States*
(Art. 81 CE)
6. *Competition — Fines — Amount — Determination — Criteria — Seriousness of the infringements — Account to be taken of the effects of the whole of the infringement — Determination whether aggravating or attenuating circumstances exist in relation to each of the participants considered individually*
(Council Regulation No 17, Art. 15(2))
7. *Competition — Fines — Amount — Determination — Criteria — Seriousness of the infringements — Attenuating circumstances — Poor financial state of the sector in question — Not included*
(Council Regulation No 17, Art. 15(2))
8. *Competition — Fines — Amount — Determination — Criteria — Overall turnover of the undertaking concerned — Turnover corresponding to the goods covered by the infringement — Both to be taken into consideration — Limits*
(Council Regulation No 17, Art. 15(2))

9. *Competition — Fines — Amount — Determination — Criteria — Not required to take account of the financial situation of the undertaking concerned — Undertaking's real ability to pay in a specific social context — Taking such difficulties into consideration — Setting the fine at an amount that 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))

10. *Competition — Fines — Amount — Determination — Criteria — Deterrent effect on both the undertaking in breach and third parties*
(Arts 81 EC and 82 EC; Council Regulation No 17, Art. 15(2))

11. *Competition — Fines — Imposition — Requirement that the undertaking benefited from the infringement — None — Determination — Criteria — Seriousness of the infringements — Attenuating circumstances — Absence of benefit — Not included*
(Council Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03, Section 2, first para.)

12. *Competition — Fines — Amount — Determination — Maximum amount — Calculation — Turnover to be taken into consideration — Total turnover — Account not taken of turnover in the product which was the subject of the restrictive practice — Breach of the principle of equal treatment — None*
(Council Regulation No 17, Art. 15(2))

13. *Community law — General principles of law — Non-retroactivity of penal provisions — Scope — Competition — Administrative procedure — Scope of the principle — Increase in the level of fines in individual or general decisions — Foreseeable for undertakings concerned — Lawfulness*
(European Convention for the Protection of Human Rights, Art. 7; Council Regulation No 17, Art. 15(2) and (4); Commission Communication 98/C 9/03)

14. *Competition — Fines — Decision imposing fines — Obligation to state reasons — Scope — Indication of the factors which led the Commission to assess the gravity and duration of the infringement — Sufficient indication*
(Art. 253 EC)

1. Although 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 are not the legal basis of the decision imposing a fine on a trader, that being Regulation No 17, they determine, generally and abstractly, the method which the Commission has bound itself to use in setting the amount of fines. In view of the legal effects which may derive from rules of conduct such as the Guidelines and the fact that they include provisions of general application which were applied by the Commission in the contested decision, a direct link exists between that decision and the Guidelines, with the result that they may form the subject-matter of an objection of illegality.

(see para. 35)
2. 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 enable the Commission to take into consideration, where the circumstances so require, the particular circumstances of small and medium-sized enterprises.

(see para. 39)
3. Article 15(2) of Regulation No 17 expressly provides that, for the purposes of determining the amount of the fine, regard is to be had 'both to the gravity and to the duration of the infringement'. In the light of that provision, even on the assumption that certain infringements are conceived as long-term arrangements, the Commission cannot be prohibited from taking their actual duration in each particular case into account. Thus, the harmful effect of cartels which, in spite of their planned longevity, are detected by the Commission or reported by a participant after having actually been in operation for a short time, is necessarily less than in a situation where they have been in operation for a long period. Consequently, a distinction must always be drawn between the duration of an infringement and its gravity as resulting from its particular nature.

(see para. 45)

4. In the context of setting the amount of fines for the infringement of Community competition rules, the gravity of an infringement is to be appraised by taking into account in particular the nature of the restrictions on competition. In that connection, the Commission was right to classify as very serious, having regard to its nature, a horizontal cartel that fixed prices and established quotas at European level and that allocated at least one customer.

an association of undertakings or the concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market.

(see para. 122)

That classification is called into question neither by the absence of any specific enforcement mechanism in the cartel nor by the fact that quotas were established at European level and there was therefore no sealing off of national markets, nor by the fact that the prices fixed were merely reference prices, nor by the fact that only certain customers were allocated.

6. Where an infringement of Community competition rules has been committed by several undertakings, the effects to be taken into consideration in determining 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 paras 66-67, 70-71, 77, 82, 90)

However, the relative gravity of the participation of each of them must be examined in order to determine whether aggravating or attenuating circumstances exist in relation to them.

5. The Commission has an obligation to define the market in a decision adopted under Article 81 EC where, without such a definition, it is impossible to determine whether the agreement, the decision by

(see paras 127, 132)

7. In determining the seriousness of an infringement concerning cartels, the Commission is not required to regard the poor financial state of the sector in question as an attenuating circumstance. As a general rule, cartels come into being when a sector encounters problems.

(see para. 139)

8. In fixing the amount of a fine imposed for infringement of Community competition rules, disproportionate significance must not be attributed either to the undertaking's total turnover or to turnover in the products covered by the infringement as compared with the other factors of appraisal, and consequently, the fixing of an appropriate fine cannot be the result of a simple calculation based on total turnover, in particular where the goods concerned represent only a small fraction of that turnover.

(see para. 154)

9. The Commission is not required, when determining the amount of the fine

imposed for infringement of Community competition rules, to take into account the poor financial situation of the undertaking concerned, since recognition of such an obligation would be tantamount to giving unjustified competitive advantages to undertakings least well adapted to the market conditions. That conclusion is not called in question by Section 5(b) 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 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 a 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.

Furthermore, the fact that a measure adopted by a Community authority brings about the insolvency or liquidation of a given undertaking is not prohibited as such 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, tan-

gible and intangible elements represented by the undertaking would also lose their value.

since otherwise it would cease to have a deterrent effect. It follows that the Commission is not required, when fixing the amount of fines, to take account of the fact that no benefit was derived from the infringement in question.

(see paras 161-163)

10. The objective of deterrence which the Commission is entitled to pursue when setting fines is intended 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 assessed by reference solely to the particular situation of the undertaking sanctioned.

Although the Commission may, under its 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 (Section 2, first paragraph, fifth indent) and in respect of aggravating circumstances, increase the amount of the fine in order to exceed the amount of the gains improperly made as a result of the infringement, that does not mean however that it is then required to establish, in every case, for the purpose of determining the fine, the financial advantage linked to the infringement found to have been committed. In other words, the absence of such a benefit cannot be regarded as an attenuating circumstance.

(see para. 181)

11. Although the amount of the fine imposed for infringement of Community competition rules must be proportionate to the duration of the infringement and the other factors capable of affecting the assessment of the gravity of the infringement, such as the profit that the undertaking was able to derive from its practices, the fact that an undertaking did not benefit from the infringement cannot preclude the imposition of a fine,

(see paras 184-186)

12. In fixing the amount of fines imposed for infringement of Community competition rules, the upper limit of 10% of the turnover in the preceding business year

of each of the undertakings participating in the infringement, laid down by Article 15(2) of Regulation No 17, is designed to prevent fines from being disproportionate in relation to the size of the undertaking concerned. Since only the total turnover can effectively give an appropriate indication of that size, the aforementioned upper limit must be understood as referring to the total turnover.

Therefore, an undertaking concerned cannot claim to have suffered unequal treatment, having regard to the fines imposed on other undertakings participating in the infringement, from the fact that the Commission, when determining the upper limit of the fine, did not take account of its turnover in the product concerned rather than its total turnover.

(see paras 196, 199)

13. The principle that penal provisions may not have retroactive effect is one that is common to all the legal orders of the Member States and is enshrined in Article 7 of the European Convention on Human Rights and takes its place

among the general principles of law whose observance is ensured by the Community judicature.

Even though it may be apparent from Article 15(4) of Regulation No 17 that Commission decisions imposing fines for infringement of competition law are not of a criminal nature, the Commission is none the less required to observe the general principles of Community law, and in particular the principle of non-retroactivity, in any administrative procedure capable of leading to fines under the Treaty rules on competition.

However, undertakings involved in an administrative procedure which may give rise to a fine must take account of the possibility that the Commission may at any time decide to raise the level of fines above that applied in the past. That applies not only when the Commission raises the level of fines in individual decisions but also where that increase is effected by the application of rules of conduct of general scope such as the Guidelines.

It must be concluded that, because the Commission enjoyed a margin of dis-

cretion in fixing the amount of fines in order to guide the conduct of undertakings towards compliance with the competition rules, the new method of calculating fines embodied 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, even though it may have had an aggravating effect regarding the level of the fines imposed compared to the Commission's previous practice, is not contrary to the principles enshrined in Article 7 of the European Convention on Human Rights as long as it was reasonably foreseeable for undertakings concerned at the time when the infringement in question was committed.

(see paras 205-210)

14. In the case of a decision imposing fines on several undertakings for an infringement of the Community competition rules, the scope of the obligation to state

reasons must be established, inter alia, in the light of the fact that the gravity of infringements must be determined by reference to numerous factors such as, in particular, the particular circumstances of the case, its context and the dissuasive element of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up.

In that respect, the essential procedural requirement to state reasons does not mean that the Commission must set out in its decision the figures showing the method of calculating the fines, but merely that it must indicate the factors which enabled it to determine the gravity of the infringement and its duration.

(see paras 218, 222)