

Case T-52/02

Société nouvelle des couleurs zinciques SA (SNCZ)

v

Commission of the European Communities

(Competition — Article 81 EC — Cartel — Zinc phosphate market — Fine — Article 15(2) of Regulation No 17 — Principles of proportionality and equal treatment — Action for annulment)

Judgment of the Court of First Instance (Fifth Chamber), 29 November 2005 II - 5013

Summary of the Judgment

1. *Competition — Fines — Amount — Determination — Maximum amount — Calculation — Distinction between the final amount and the intermediate amount of the fine — Consequences*
(Council Regulation No 17, Art. 15(2))

2. *Competition — Fines — Amount — Determination — Criteria — Reduction in the amount of the fine in exchange for the cooperation of the undertaking involved with the Commission — Reduction of the amount as a result of the application of the ceiling on the amount of fines*
(Council Regulation No 17, Art. 15(2); Commission Communication 96/C 207/04)
3. *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)
4. *Competition — Fines — Amount — Determination — Effective capacity to cause significant damage to competition on the market concerned — Relevance of the market share of the undertaking concerned*
(Council Regulation No 17, Art. 15(2))
5. *Fines — Amount — Determination — Division of undertakings concerned into categories having the same starting point — Conditions*
(Council Regulation No 17, Art. 15(2))
6. *Competition — Fines — Amount — Determination — Need to take account of the turnovers of the undertakings concerned and to ensure that fines are proportional to those turnovers — None*
(Council Regulation No 17, Art. 15(2))
7. *Competition — Community rules — Infringements — Committed deliberately — Concept*
(Council Regulation No 17, Art. 15)
8. *Competition — Fines — Amount — Determination — Criteria — Commission taking action for the first time in a particular sector — Undertakings concerned small and medium-sized enterprises — Not exempt*
(Council Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03)

9. *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.)

10. *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))

11. *Competition — Fines — Amount — Determination — Division of undertakings concerned into categories having the same starting point — Placing an undertaking in a group with other undertakings which have higher turnovers — Infringement of the principles of proportionality and equal treatment — None — Conditions*

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

1. By providing that the Commission may impose fines of a sum not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement, Article 15 (2) of Regulation No 17 requires that the fine ultimately imposed on an undertaking be reduced in the event that its amount exceeds 10% of its turnover, regardless of the intermediate calculation operations designed to take account of the duration and gravity of the infringement. It follows that the maximum limit of 10% laid down by that provision applies only to the amount of the fine ultimately imposed by the Commission and not to intermediate calculation operations, including the

fixing of a starting point for that calculation.

Moreover, if in its calculation the Commission uses an intermediate amount, including a starting point, which exceeds the upper limit of 10% of the turnover of the undertaking concerned, the fact that certain factors taken into consideration in the calculation, such as the duration of the infringement, do not affect the final amount of the fine is not open to

criticism inasmuch as it follows from the prohibition laid down in Article 15(2) of Regulation No 17 of exceeding the maximum limit of 10% of the turnover of the undertaking concerned.

reduced to 10% in any event, with or without the undertaking's cooperation.

(see para. 41)

(see paras 38-40)

3. 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 account, where the circumstances so require, the particular circumstances in which small and medium-sized enterprises find themselves.

(see para. 42)

2. The Commission's approach in setting the amount of fines in competition matters, in which the cooperation factor is taken into consideration after application of the ceiling of 10% of the turnover of the undertaking concerned, as laid down in Article 15(2) of Regulation No 17, and therefore has a direct impact on the amount of the fine, ensures that the Leniency Notice concerning cartel cases is fully effective: if the basic amount was significantly in excess of the 10% limit before the application of the Leniency Notice and that limit could not be applied immediately, the incentive for the undertaking concerned to cooperate with the Commission would be much less, since the final fine would be

4. In analysing, for the purposes of setting the amount of the fine sanctioning an infringement of Community competition rules, the effective economic capacity of the offenders to cause significant damage to competition, which involves an assessment of the actual importance of those undertakings in the market affected, that is to say, their influence on the market, their total turnover gives only an incomplete picture. The possibility cannot be ruled out that a powerful undertaking with many different activities may have only a limited presence in a specific product market. Similarly, the possibility cannot be ruled out that an

undertaking occupying an important position in a geographical market outside the Community occupies only a weak position in the Community or European Economic Area market. In such circumstances, the mere fact that the undertaking concerned has a high total turnover does not necessarily mean that it has a decisive influence on the market affected. That is why, although an undertaking's market shares cannot be a decisive factor in concluding that an undertaking belongs to a powerful economic entity, they are nevertheless relevant in determining the influence which it may exert on the market.

calculation of the fine is not required to follow a simple mathematical formula, the amount of fines must, at least, be proportionate in relation to the factors taken into account in assessing the gravity of the infringement.

When the Commission divides the undertakings concerned into groups for the purposes of setting the amount of the fines, so that undertakings belonging to the same group have a single starting point assigned to them, the thresholds for each of the groups thus identified must be coherent and objectively justified.

(see para. 65)

(see paras 67-68)

5. Section 1A, sixth paragraph, 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 indicates that a 'considerable' disparity in the size of undertakings committing an infringement of the same kind is, in particular, such as to render differentiation necessary in the appraisal of the gravity of the infringement. Moreover, whilst the Commission has a margin of discretion in determining the amount of fines and although the
6. When setting the amount of fines in competition matters, the Commission is not obliged to calculate the fine by reference to amounts based on the turnover of the undertakings concerned, nor is it required to ensure, where fines are imposed on several undertakings involved in the same infringement, that the final amount of the fines produced by the calculation for the undertakings

concerned, reflects any distinction between them regarding their total turnover or their turnover in the relevant product market.

Those principles apply even if the undertakings are in the same situation as regards the gravity and the duration of the infringement.

(see paras 73-75)

7. For an infringement of Community competition rules to be regarded as having been committed deliberately, it is not necessary for the undertaking to have been aware that it was infringing those rules: it is sufficient that it could not have been unaware that the object of its conduct was the restriction of competition.

In that connection, Article 15(2) of Regulation No 17 likewise does not require that, where fines are imposed on several undertakings involved in the same infringement, the fine imposed on a small or medium-sized undertaking must not be greater, as a percentage of turnover, than those imposed on the larger undertakings. It is clear from that provision that, both for small or medium-sized undertakings and for larger undertakings, account must be taken, in determining the amount of the fine, of the gravity and duration of the infringement. Where the Commission imposes on undertakings involved in a single infringement fines which are justified, for each of them, by reference to the gravity and duration of the infringement, it cannot be criticised on the ground that, for some of them, the amount of the fine is greater, by reference to turnover, than that imposed on other undertakings.

The Commission is therefore entitled, in setting the amount of the fine, not to take account of the fact that the undertaking concerned has no legal department.

(see paras 82-83)

8. The Commission is not required to moderate the fines it imposes in competition matters when taking action for the first time in a particular sector and there

is nothing to compel it to moderate fines where the undertakings concerned are small and medium-sized enterprises. The size of the undertaking is taken into consideration by virtue of the upper limit laid down in Article 15(2) of Regulation No 17 and the provisions 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. Apart from those considerations concerning size, there is no reason to treat small and medium-sized enterprises differently from other undertakings. The fact that the undertakings concerned are small and medium-sized enterprises does not exempt them from their duty to comply with the competition rules.

(see para. 84)

to take into consideration any lack of benefit from the infringement.

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

(see paras 89-91)

9. Whilst 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, including the profit that it was able to derive from those practices, the fact that an undertaking did not benefit from an infringement cannot preclude the imposition of a fine since otherwise it would cease to have a deterrent effect. It follows that the Commission is not required, in fixing the amount of fines,

10. 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 one 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. 99)

guaranteeing a sufficient deterrent effect, the Commission places an undertaking in a group with other undertakings which have higher turnovers and for all of them to be given the same starting point if they have turnovers in the relevant market and market shares which are very similar and if, in the specific case, the difference between the size of the undertaking concerned and that of the other undertakings involved is not so great that it should have been placed in a different group.

11. The principles of proportionality and equal treatment are not infringed by the fact that, in order to take account of the economic capacity of the undertakings concerned and to fix the fines at a level

(see paras 69, 111-112)