ORDER OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
25 February 2003 *

In Case T-15/02,

BASF AG, established in Ludwigshafen (Germany), represented by N. Levy and J. Temple Lang, Solicitors, R. O'Donoghue, Barrister, and C. Feddersen, lawyer,

applicant,

v

Commission of the European Communities, represented by R. Wainwright and L. Pignataro-Nolin, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

APPLICATION for annulment or reduction of the fine imposed on the applicant by Article 3(b) of the Commission Decision of 21 November 2001 relating to a proceeding pursuant to Article 81 EC and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 — Vitamins) (OJ 2003 L 6, p. 1),

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

composed of: V. Tiili, President, P. Mengozzi and M. Vilaras, Judges,

Registrar: H. Jung,

makes the following

Order

Background to the case

1 By Decision 2003/2/EC of 21 November 2001 relating to a proceeding pursuant to Article 81 EC and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 — Vitamins) (OJ 2003 L 6, p. 1, hereinafter 'the Decision'), the Commission found that a number of undertakings had infringed Article 81(1) EC and Article 53 of the Agreement on the European Economic Area (EEA) by participating in a series of separate agreements affecting 12

different markets for vitamin products. Those undertakings included, notably, BASF AG ('the applicant') and Aventis SA, established in Schiltigheim (France). More particularly, the applicant was held responsible for infringements on the markets for vitamins A, E, B1, B2, B5, C, D3, H, beta-carotene and carotinoids (Article 1(b) of the Decision) and Aventis for infringements on the markets for vitamins A, E and D3 (Article 1(c) of the Decision).

2 For its participation in the agreements affecting the markets for vitamins A, E, B2, B5, C, D3, beta-carotene and carotinoids, the applicant was given a fine for each infringement, amounting to a total of EUR 296.16 million (Article 3(b) of the Decision). A fine of EUR 5.04 million was imposed on Aventis for its participation in the agreement relating to the market for vitamin D3 (Article 3(c) of the Decision).

3 The Commission arrived at those amounts by applying, in turn, the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3, 'the Guidelines') and its notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4, 'the leniency notice').

4 In applying the Guidelines, the Commission considered, in particular, that the applicant and F. Hoffmann-La Roche AG ('Roche') had played the role of joint leaders and instigators in the markets for vitamins A, E, B2, B5, C, D3, beta-carotene and carotinoids. On the basis of that aggravating circumstance, the basic amount of the fines to be imposed on the applicant was therefore increased by 35% (recitals 712 to 718 of the Decision).

5 The Commission further considered that Aventis was entitled to a 50% reduction of the basic amount of the fine to be imposed on it in respect of the cartel relating to vitamin D3, owing to the passive role which it had played in that cartel (recitals 724 and 725 of the Decision).

6 In applying the leniency notice, the Commission considered that Aventis was the first undertaking to have adduced decisive evidence on the existence of the cartels relating to vitamins A and E and that it also fulfilled all the other conditions set out in section B of that notice. Aventis was therefore granted a 100% reduction of the fine that would otherwise have been imposed on it for its participation in those cartels (recitals 741 and 742 of the Decision).

7 On the other hand, owing to its role as leader and instigator in the cartels relating to vitamins A, E, B2, B5, C, D3, beta-carotene and carotinoids, the applicant was denied the benefits of sections B and C of the leniency notice, even though the Commission acknowledged that it and Roche had been the first to adduce decisive evidence of the cartels relating to vitamins B2, B5, C, D3, beta-carotene and carotinoids (recitals 743 to 745 of the Decision).

8 Last, the Commission recognised that all the undertakings penalised in the Decision fulfilled the conditions necessary to obtain a reduction of the fine under section D of the leniency notice. The Commission thus granted the applicant and Aventis a reduction of 50% and 10% respectively of the fines that would have been imposed if they had not cooperated (recitals 761 and 767 of the Decision).

9 Aventis has not appealed against the Decision.

Procedure

10 By application lodged at the Registry of the Court of First Instance on 31 January 2002, the applicant brought an action whereby it requested the Court of First Instance to annul or substantially reduce the fine imposed on it in Article 3(b) of the Decision and to order the Commission to pay the costs (hereinafter 'the main action').

11 The Commission contended that the application should be dismissed and that the applicant should be ordered to pay the costs.

12 By application lodged at the Registry of the Court of First Instance on 24 June 2002, Aventis, represented by B. Amory and F. Marchini Camia, lawyers, sought leave to intervene in the main action in support of the form of order sought by the defendant.

13 The application to intervene was served on the parties, in accordance with the first subparagraph of Article 116(1) of the Rules of Procedure of the Court of First Instance.

14 By document lodged at the Registry of the Court of First Instance on 4 September 2002, the defendant stated that it had no observations to make on the application to intervene.

15 By document lodged at the Registry of the Court of First Instance on 5 September 2002, the applicant requested the Court to dismiss Aventis's application to intervene and to order it to pay the costs and other expenses which the applicant had incurred in submitting observations on the application to intervene.

16 Pursuant to the third subparagraph of Article 116(1) of the Rules of Procedure, the President of the Fourth Chamber referred the application to intervene to the Chamber.

Arguments of the parties

17 In support of its application to intervene, Aventis states, first of all, that it is one of the addressees of the Decision. It was the first undertaking to inform the Commission voluntarily of the existence of the vitamin A and E cartels and to adduce decisive evidence of their existence. By virtue of that cooperation, it was granted total immunity from fines for its participation in those cartels, under section B of the leniency notice. Furthermore, in respect of its participation in the vitamin D3 cartel, it was granted a reduction of its fine on account of the passive role which it played in that cartel, in accordance with the Guidelines.

18 Second, Aventis observes that the applicant claims in its application that it fulfilled all the conditions for a reduction in the amount of the fine provided for in section B of the leniency notice, notably that it informed the Commission about a secret cartel before the Commission had undertaken an investigation and when it did not already have sufficient information to prove the existence of the cartel in question, and that it was the first to adduce decisive evidence of the cartel's existence.

19 Third, Aventis states that the applicant, in its application, disputes the role of joint leader and instigator of the alleged cartel ascribed to it in the Decision. Aventis states that it has been informed that the applicant, in its application, also disputes the Commission's finding that Aventis did not act as leader in the cartels in question.

20 Aventis refutes the applicant's allegations and claims, first, that it, and not the applicant, fulfilled the two conditions mentioned at paragraph 18 above and, second, that it cannot be held to have played the role of leader in the cartels in question.

21 It considers, accordingly, that it has a direct, existing interest in the result of the present case. Since the applicant is seeking a declaration that the Commission incorrectly applied the leniency notice and since, should the Commission's findings on those points be rejected, that would mean that Aventis did not fulfil the conditions which led to its being granted immunity and a reduction of the fine in the Decision, its legal and economic position would be directly affected by the operative part of the judgment which the Court of First Instance is required to deliver.

22 In its observations on the application to intervene, the applicant expresses doubts as to the fact that Aventis may be recognised as having an interest in the result of the case within the meaning of Article 37 of the EC Statute and Article 115 of the Rules of Procedure of the Court of First Instance, as interpreted by the case-law. The operative part of the future judgment, in the form sought by the applicant, cannot directly affect the applicant for leave to intervene, since the Court cannot, within the context of the main action, make findings affecting the operative part of the Commission Decision in so far as it concerns Aventis.

23 The applicant further states that, in any event, intervention on Aventis's part would not shed any light on the questions raised in its action. First, Aventis is not in a position to make any useful contribution to the proceedings as regards the question whether, as the applicant maintains, it was indeed during a meeting held on 17 May 1999 between it and the Commission that decisive evidence of the existence of cartels in the vitamin sector was first adduced. Second, the applicant observes that the applicant for leave to intervene has misunderstood the complaints raised in the action relating to the role of leader of the cartels, and emphasises that nowhere in its application has it suggested that Aventis played a role of leader within one of the cartels in question.

Findings of the Court

24 The application to intervene was submitted in accordance with Article 115 of the Rules of Procedure.

25 Under the second paragraph of Article 37 of the Statute, which, pursuant to the first paragraph of Article 46 of the Statute, is applicable to the procedure before the Court of First Instance, any person establishing an interest in the result of a

case, with the exception of cases between Member States, between institutions of the Community or between Member States and institutions of the Community, is entitled to intervene. An application to intervene is to be limited to supporting the form of order sought by one of the parties.

26 It has consistently been held that the concept of an interest in the result of the case, within the meaning of that provision, must be defined in the light of the precise subject-matter of the dispute and be understood as meaning a direct, existing interest in the ruling on the forms of order sought and not as an interest in relation to the pleas in law put forward. The expression 'solution' is to be understood as meaning the operative part of the final judgment which the parties ask the Court to deliver. It is necessary, in particular, to ascertain whether the intervener is directly affected by the contested decision and whether his interest in the result of the case is established (orders of the Court of Justice in Case 111/63 *Lemmerz-Werke* v *High Authority* [1965] ECR 677 and Joined Cases 116/77, 124/77 and 143/77 *Amylum and Others* v *Council and Commission* [1978] ECR 893, paragraphs 7 and 9; order of the President of the Court of Justice in Joined Cases C-151/97 P(I) and C-157/97 P(I) *National Power and PowerGen* [1997] ECR I-3491, paragraphs 51 to 53 and 57; order of the President of the Second Chamber of the Court of First Instance in Case T-191/96 *CAS Succhi di Frutta* v *Commission* [1998] ECR II-573, paragraph 28; and order of the President of the First Chamber of the Court of First Instance in Case T-138/98 *ACAV and Others* v *Council* [1999] ECR II-1797, paragraph 14).

27 It is also settled case-law that it is necessary to distinguish between prospective interveners establishing a direct interest in the ruling on the specific act whose annulment is sought and those who can establish only an indirect interest in the result of the case by reason of similarities between their situation and that of one of the parties (orders of the Court of Justice in Case C-76/93 P *Scaramuzza* v *Commission* [1993] ECR I-5715, paragraph 11, and I-5721, paragraph 11; order of the Court of First Instance in Joined Cases T-97/92 and T-111/92 *Rijnoudt and Hocken* v *Commission* [1993] ECR II-587, paragraph 22, and T-87/92 *Kruidvat* v *Commission* [1993] ECR II-1375, paragraph 12; and *CAS Succhi di Frutta* v *Commission*, cited above, paragraph 28).

28 In the present case, first, Aventis's allegation that the action seeks to challenge the Commission's finding that it did not play a leading role in the cartels is factually incorrect. In its action, the applicant claims that the Commission erred in attributing to it the role of leader and instigator as regards the cartels relating to vitamins A, E, B5, C, D3, beta-carotene and carotinoids. It states that its conduct was no more serious than that of the other participants in the cartels in question, who were not described as leaders or instigators. As regards, more particularly, the cartels relating to vitamins A and E, far from maintaining that Aventis should have been regarded as the leader of those cartels, the applicant merely states that the Commission should have found, as it 'correctly' did in Aventis's case, that it was also a mere participant and not a leader in those cartels (paragraphs 129 to 131 of the application).

29 Moreover, the applicant claims in its application that the Commission incorrectly precluded the application in its case of section B of the leniency notice, since it fulfilled all the conditions laid down to that end. In particular, it and Roche were the first to provide the Commission with decisive evidence of the existence of all the cartels in question, including those relating to vitamins A and E for which Aventis was granted the benefit of section B of the leniency notice.

30 It is therefore necessary, second, to ascertain whether the interest which the applicant for leave to intervene claims to have in the rejection of the applicant's claims challenging the Commission's assessment concerning the first undertaking to have adduced decisive evidence of the infringements constitutes an interest in the result of the case within the meaning of the case-law referred to at paragraphs 26 and 27 above.

31 In that regard, although the Decision is drafted in the form of a single decision, it must be treated as a bundle of individual decisions making a finding or findings of infringement against each of the undertakings to which it is addressed and, where appropriate, imposing one or more fines; moreover, that assessment is substantiated by the wording of its operative part, and in particular by Articles 1 and 3 (see, to that effect, judgment in Case T-227/95 *AssiDomän Kraft Products and Others* v *Commission* [1997] ECR II-1185, paragraphs 56 and 57, set aside on other points by the judgment of the Court of Justice in Case C-310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363).

32 Next, the subject-matter of the main action is solely the annulment or substantial reduction of the total amount of the fines imposed on the applicant by Article 3(b) of the Decision. On the other hand, Article 3(c) of the Decision, which imposes on Aventis a fine of EUR 5.04 million, does not form the subject-matter of the main action, as defined by the forms of order sought by the applicant and the defendant.

33 It is common ground, first, that the applicant for leave to intervene is not concerned by Article 3(b) of the Decision and, second, that Article 3(c) of the Decision, which does concern it, would not be altered in any way by a judgment of the Court annulling or adjusting the fine imposed on the applicant.

34 In those circumstances, the applicant for leave to intervene has an interest in the rejection of the submissions of the applicant in the main action only in so far as the annulment or adjustment of the fine, which would call in question the merits of the findings and evaluations made in the Decision in its regard, might possibly

induce the Commission to revise the scope of Article 3(c) of the Decision, even though that provision did not form the subject-matter of an action and is no longer amenable to appeal.

35 However, the Commission is not entitled to do so. In that regard, according to the case-law, the principle *non bis in idem*, a fundamental principle of Community law which is also enshrined in Article 4(1) of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision (judgment in Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Matschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 59).

36 Thus, the principle *non bis in idem* prohibits a fresh assessment in depth of the alleged commission of an offence which would result in the imposition of either a second penalty, in addition to the first, in the event that liability is established a second time or a first penalty in the event that liability not established by the first decision is established by the second (*Limburgse Vinyl Maatschappij and Others* v *Commission,* cited above, paragraph 61).

37 In any event, even on the assumption that the Commission could, without infringing the principle *non bis in idem,* revise Article 3(c) of the Decision in order to alter it in a way unfavourable to Aventis in the light of the grounds of a judgment of the Court upholding the plea referred to at paragraph 29 above, the interest referred to at paragraph 34 above would not be a direct, existing interest within the meaning of the case-law cited at paragraphs 26 and 27 above but, at the most, an indirect, potential interest. Furthermore, in such a hypothesis, the

applicant for leave to intervene would still be able to rely on its arguments in an action for annulment which it might bring before the Court of First Instance against such an unfavourable Commission decision.

38 In the light of the foregoing considerations, it must be held that the interest in intervening on which Aventis relies cannot be qualified as a direct, existing interest in the result of the case within the meaning of the second paragraph of Article 37 of the Statute. Its application to intervene must therefore be dismissed.

Costs

39 Under Article 87(1) of the Rules of Procedure of the Court of First Instance, the decision as to costs is to be given in the final judgment or in the order which closes the proceedings. Since the present order closes the proceedings so far as Aventis is concerned, the Court must make an order in respect of the costs associated with its application to intervene.

40 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 Aventis has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the applicant in connection with the present intervention proceedings, in accordance with the form of order sought by the applicant. As the Commission has made no application for costs, it must be ordered to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber),

hereby orders:

1. **The application to intervene is dismissed.**

2. **Aventis SA shall pay the applicant's costs relating to the intervention proceedings and bear its own costs.**

3. **The Commission shall bear its own costs relating to the intervention proceedings.**

Luxembourg, 25 February 2003.

H. Jung — Registrar

V. Tiili — President