

Case T-26/02

Daiichi Pharmaceutical Co. Ltd

v

Commission of the European Communities

(Competition — Cartels in the vitamin products sector — Guidelines on the method of setting fines — Determination of the starting amount of the fine — Attenuating circumstances — Leniency Notice)

Judgment of the Court of First Instance (Fourth Chamber), 15 March 2006 II - 718

Summary of the Judgment

1. *Competition — Fines — Amount — Determination*
(Council Regulation No 17, Art. 15(2); Commission communication 98/C 9/03)
2. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringements*
(Council Regulation No 17, Art. 15(2); Commission communication 98/C 9/03, point 1 A)

3. *Competition — Fines — Amount — Determination*
(Council Regulation No 17, Art. 15(2); Commission communication 98/C 9/03, point 1 A)
4. *Competition — Fines — Amount — Determination — Criteria — Mitigating circumstances*
(Council Regulation No 17, Art. 15(2); Commission communication 98/C 9/03, point 3)
5. *Competition — Fines — Amount — Determination — Commission notice on the non-imposition or reduction of fines in return for the cooperation of the undertakings concerned*
(Council Regulation No 17, Art. 15(2); Commission notice 96/C 207/04)
6. *Competition — Fines — Amount — Determination — Criteria*
(Council Regulation No 17, Art. 15(2); Commission notice 96/C 207/04, Title B(b))

1. Although the Commission has a discretion when determining the amount of each fine imposed on account of an infringement of the Community rules on competition, and is not required to apply a precise mathematical formula, it may not depart from the rules which it has imposed on itself. Since 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 are an instrument intended to define, while complying with higher-ranking law, the criteria which the Commission proposes to apply in the exercise of that discretion, the Commission must in fact take account of the Guidelines when determining fines, in particular the elements which are mandatory under the Guidelines.

(see para. 49)
2. The Commission may, when assessing the gravity of the infringement and setting the starting amount of the fine, base its assessment of the effective economic capacity of offenders against

the rules of competition to cause significant damage to other operators on data relating to turnover and market share in the market concerned, unless there are particular circumstances, such as the characteristics of that market, which are such as appreciably to diminish the significance of those data and to require, for the assessment of the influence of the undertakings on the market, other relevant factors to be taken into account, inter alia, depending on the circumstances, vertical integration and the extent of the product range.

(see paras 61, 63)

3. The method, as regards setting the amount of the fines imposed on various participants in a cartel, of dividing the members thereof into several categories, which has the consequence that a flat-rate starting amount is fixed for all the undertakings in the same category, even though it ignores the differences in size between undertakings in the same category, cannot be criticised. However, that division must comply with the principle of equal treatment, which prohibits similar situations from being treated differently and different situations from being treated in the same way, unless such treatment is objectively justified. Furthermore, the amount of

the fine must at least be proportionate in relation to the factors taken into account in the assessment of the gravity of the infringement.

In order to ascertain whether a division of the members of a cartel into categories is in keeping with the principles of equal treatment and proportionality, the Community judicature, as part of its review of the lawfulness of the exercise of the Commission's discretion in the matter, must none the less confine itself to checking that the division is coherent and objectively justified and not immediately substitute its own assessment for that of the Commission.

In that regard, a division of the members of a cartel into two categories, the major members and the others, is not an unreasonable way of taking account of their relative importance on the market in order to adjust the starting amount, provided that it does not produce a grossly distorted picture of the markets in question.

(see paras 83-85, 87)

4. As it may not depart from the rules which it has imposed on itself, the Commission is required to take into account, as an attenuating circumstance, the breach by an undertaking of the obligations assumed in a cartel, since 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 expressly contemplated that non-implementation in practice of an offending agreement should be taken into account as an attenuating circumstance.

which undertakings may rely when disclosing the existence of a cartel to the Commission. In view of the legitimate expectation which undertakings intending to cooperate with the Commission is able to derive from the notice, the Commission must adhere to the notice when, for the purpose of determining the fine to be imposed on an undertaking, it assesses the applicant's cooperation

(see para. 147)

In that regard, it is necessary to determine whether the undertaking actually avoided implementing the offending agreements by adopting competitive conduct on the market or, at the very least, whether it clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation.

6. The grant of total exemption from, or a reduction in, the fine under Section B or C of the notice on the non-imposition or reduction of fines in cartel cases requires, *inter alia*, that the undertaking concerned should have been the first to adduce decisive evidence of the cartel's existence.

(see paras 105, 106, 113)

5. The Commission notice on the non-imposition or reduction of fines in cartel cases creates legitimate expectations on

In that regard, although such evidence need not be sufficient in itself to establish the cartel's existence, it must none the less be decisive for that purpose. It must therefore not be simply an indication as to the direction which

the Commission's investigation should take but must be material which may be used directly as principal evidence supporting a decision finding an infringement. Furthermore, that material does

not have to concern all the findings of fact in the Commission's decision on the cartel.

(see paras 150, 156, 157, 162)