Case T-59/02

Archer Daniels Midland Co.

v

Commission of the European Communities

(Competition — Cartels — Citric acid — Article 81 EC — Fine — Article 15(2) of Regulation No 17 — Guidelines on the method of setting fines — Leniency Notice — Principles of legal certainty and non-retroactivity — Principle of proportionality — Equal treatment — Duty to state reasons — Rights of the defence)

Judgment of the Court of First Instance (Third Chamber), 27 September 2006 II - 3642

Summary of the Judgment

1. *Community law — General principles of law — Non-retroactivity of penal provisions (Council Regulation No 17, Art. 15; Commission Notices 96/C 207/04 and 98/C 9/03)*

2. *Competition — Fines — Guidelines on the method of setting fines*
(Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03)

3. *Competition — Fines — Community penalties and penalties imposed in a Member State or a non-member State for infringement of national competition law*
(Council Regulation No 17, Art. 15)

4. *Competition — Fines — Amount — Determination*
(Arts 81(1) EC and 82 EC; EEA Agreement, Art. 53(1); Council Regulation No 17, Art. 15(2))

5. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement*
(Council Regulation No 17, Art. 15(2))

6. *Competition — Fines — Amount — Determination — Deterrent effect of the fine*
(Art. 81 EC; Council Regulation No 17, Art. 15)

7. *Competition — Fines — Amount — Determination — Criteria — Actual impact on the market*
(Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03, Section 1A, first para.)

8. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement*
(Council Regulation No 17, Art. 15(2))

9. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Attenuating circumstances*
(Council Regulation No 17, Art. 15)

10. *Competition — Administrative procedure — Observance of the rights of the defence*
(Arts 81 EC and 82 EC; Council Regulation No 17, Art. 11)

11. Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Aggravating circumstances

(Council Regulation No 17, Art. 15; Commission Notice 98/C 9/03, Section 2)

12. Competition — Fines — Amount — Determination

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

13. Competition — Community rules — Infringements — Fines — Amount — Determination

(Art. 81 EC; Council Regulation No 17)

14. Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Attenuating circumstances

(Art. 81(1) EC; Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03, Section 3, third indent)

15. Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Attenuating circumstances

(Art. 81(1) EC; Council Regulation No 17, Art. 15)

16. Competition — Fines — Amount — Determination

(Council Regulation No 17, Art. 15; Commission Notice 96/C 207/04, Sections B, C and D)

17. Competition — Administrative procedure — Statement of objections — Necessary content

(Council Regulation No 17, Art. 19(1))

18. Competition — Administrative procedure — Statement of objections — Necessary content

(Council Regulation No 17, Art. 19(1))

19. Competition — Fines — Amount — Discretion of the Commission — Judicial review

(Art. 229 EC)

1. The principle of non-retroactivity of criminal laws, enshrined in Article 7 of the European Convention on Human Rights as a fundamental right, constitutes a general principle of Community law which must be observed when fines are imposed for infringement of the competition rules. That principle

requires that the penalties imposed correspond with those fixed at the time when the infringement was committed.

The adoption of guidelines capable of modifying the general competition policy of the Commission as regards fines may, in principle, fall within the scope of the principle of non-retroactivity.

First, the Guidelines are capable of producing legal effects. Those effects stem not from any attribute of the Guidelines as rules of law in themselves, but from their adoption and publication by the Commission. By adopting and publishing the Guidelines, and indeed the Leniency Notice, the Commission imposes a limit on its own discretion; it cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations and legal certainty.

Second, as an instrument of competition policy, the Guidelines fall within the scope of the principle of non-retroactivity, just like a new interpretation by the courts of a rule establishing an offence, in conformity with the case-law of the European Court of Human Rights on Article 7(1) of the European Convention on Human Rights which holds that that provision precludes the retroactive application of a new interpretation of a rule establishing an offence. According to that case-law, that is the case in particular where there is an interpretation by the courts which produces a result which was not reasonably foreseeable at the time when the offence was committed, having regard notably to the interpretation of the rule applied in the case-law at the material time. It follows however from that same case-law that the scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it covers and the number and status of those to whom it is addressed. Thus, a law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. More specifically, this is true particularly in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such an activity entails.

In order to ensure that the principle of non-retroactivity is observed, it is necessary to ascertain whether the modifica-

tion, which consisted in the adoption 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, was reasonably foreseeable at the time when the infringements at issue were committed. In that regard, the main innovation in the Guidelines consisted in taking as a starting point for the calculation a basic amount, determined on the basis of brackets laid down for that purpose by the Guidelines; those brackets reflect the various degrees of gravity of infringements but, as such, bear no relation to the relevant turnover. The essential feature of that method is thus that fines are determined on a tariff basis, albeit one that is relative and flexible.

Next, the fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17 if that is necessary to ensure the implementation of Community competition policy: on the contrary, the proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy.

It follows that undertakings involved in an administrative procedure in which fines may be imposed cannot acquire a legitimate expectation that the Commission will not exceed the level of fines previously imposed or in a method of calculating the fines.

Consequently, those undertakings must take account of the possibility that the Commission may decide at any time to raise the level of the fines by reference to that applied in the past. That is true not only where the Commission raises the level of the amount of fines in imposing fines in individual decisions but also if that increase takes effect by the application, in particular cases, of rules of conduct of general application, such as the Guidelines.

(see paras 41-49, 409)

2. The application by the Commission of the method set out 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 in calculating the fine imposed on an undertaking does not constitute discriminatory treatment by comparison with undertakings which infringed the

Community competition rules at the same time but, for reasons pertaining to the time when the infringement was discovered or to the conduct of the administrative procedure initiated against them, were sanctioned before the adoption and publication of the Guidelines.

(see para. 53)

3. The principle of *ne bis in idem* prohibits the same person from being sanctioned more than once for the same unlawful conduct in order to protect one and the same legal interest. The application of that principle is subject to three cumulative conditions: the identity of the facts, the unity of offender and the unity of legal interest protected.

Therefore, an undertaking may be made the defendant to two parallel sets of proceedings concerning the same infringement and, thus, incur concurrent sanctions, one imposed by the competent authority of the Member State in question, the other a Community sanction, to the extent that the two sets of proceedings pursue different ends and that the legal rules infringed are not the same.

It follows that the principle of *ne bis in idem* cannot, a fortiori, apply in a case where the procedures conducted and penalties imposed by the Commission on the one hand and the authorities of non-member States on the other clearly pursue different ends. The aim of the first is to preserve undistorted competition within the European Union and the European Economic Area, whereas the aim of the second is to protect the markets of non-member States. The condition of the unity of the legal interest protected, which is necessary for the principle of *ne bis in idem* to apply, is in that case not fulfilled.

(see paras 61-63)

4. The Commission's power to impose fines on undertakings which intentionally or negligently commit an infringement of Article 81(1) EC or Article 82 EC is one of the means conferred on the Commission in order to enable it to carry out the task of supervision entrusted to it by Community law. That task encompasses the duty to pursue a general policy to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles.

It follows that the Commission has the power to decide the level of fines in

order to reinforce their deterrent effect when infringements of a particular type, although established as being unlawful at the outset of Community competition policy, are still relatively frequent on account of the profit that certain of the undertakings concerned are able to derive from them.

The objective of deterrence pursued by the Commission relates to the conduct of undertakings within the Community or the European Economic Area (EEA). Consequently, the deterrent effect of a fine imposed on an undertaking for infringement of the Community competition rules cannot be assessed by reference solely to the particular situation of that undertaking or by reference to whether it has complied with the competition rules in non-member States outside the EEA.

(see paras 70-72)

Furthermore, the criteria for assessing the gravity of an infringement may include the volume and value of the goods in respect of which the infringement was committed and the size and economic power of the undertaking and, consequently, the influence which it was able to exert on the relevant market. It follows that, on the one hand, it is permissible, for the purpose of fixing a fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the market share of the undertakings concerned on the relevant market, which gives an indication of the scale of the infringement. On the other hand, it follows that it is important not to confer on one or other of those figures an importance which is disproportionate in relation to other factors and the fixing of an appropriate fine cannot therefore be the result of a simple calculation based on total turnover.

(see paras 98, 99)

5. The gravity of infringements of the competition rules has to be determined by reference to numerous factors, such as the particular circumstances of the case and its context; moreover, there is no binding or exhaustive list of the criteria which must be applied.

6. Deterrence is one of the main considerations which must guide the Commission when setting fines imposed for an infringement of the Community competition rules.

If the fine were set at a level which merely negated the profits of the cartel, it would not be a deterrent. It is reasonable to assume that when making financial calculations and management decisions, undertakings take account rationally not only of the level of fines that they risk incurring in the event of an infringement but also the likelihood of the cartel being detected. In addition, if the purpose of the fine were to be confined merely to negating the expected profit or advantage, insufficient account would be taken of the fact that the conduct in question constitutes an infringement of Article 81(1) EC. To regard the fine merely as compensating for the damage incurred would be to overlook not only the deterrent effect, which can relate only to future conduct, but also the punitive nature of such a measure in relation to the actual infringement committed.

Similarly, in the case of an undertaking which is active on a large number of markets and has a particularly large financial capacity, to take into account turnover on the relevant market cannot suffice to ensure that the fine has deterrent effect. The larger an undertaking is and the more overall resources it has at its disposal which enable it to act independently on the market, the more it must be aware of the importance of its role as regards the smooth functioning of competition on the market. Consequently, the factual circumstances, and in particular the overall turnover, relating to the economic power of an undertaking which has been found guilty of an infringement must be taken into account when considering the gravity of the infringement.

(see paras 129-131)

7. According to Section 1A, first paragraph, 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, the Commission is to take account, inter alia, of the actual impact of the infringement on the market, where this can be measured, when calculating the fine on the basis of the gravity of the infringement. That measurable impact of the cartel must be regarded as having been sufficiently demonstrated if the Commission is able to provide specific and credible evidence indicating with reasonable probability that the cartel had an impact on the market.

Consideration of the impact of a cartel on the market necessarily involves recourse to assumptions. In this respect, the Commission must in particular consider what the price of the relevant product would have been in the absence of a cartel. When examining the causes of actual price developments, it is

hazardous to speculate on the part played by each of those causes. Account must be taken of the objective fact that, because of the price cartel, the parties specifically waived their freedom to compete with one another on prices. Thus, the assessment of the influence of factors other than that voluntary decision of the parties to the cartel not to compete with one another is necessarily based on reasonable probability, which is not precisely quantifiable.

Therefore, unless the criterion of Section 1A, first paragraph, is to be deprived of its effectiveness, the Commission cannot be criticised for referring to the actual impact on the market of a cartel having an anti-competitive object, such as a price or sales quota cartel, even though it does not quantify that impact or provide any assessment in figures in this respect.

(see paras 157-161)

8. When determining the gravity of an infringement of competition law, particular account should be taken of the legislative background and economic context of the conduct complained of. In this respect, in order to assess the actual effect of an infringement on the market the Commission must take as a reference the competition that would normally exist if there were no infringement.

It follows, first, that in the case of price agreements the Commission must find — with a reasonable degree of probability — that the agreements have in fact enabled the parties concerned to achieve a higher level of price than that which would have prevailed had there been no cartel. Second, it follows that, in making its assessment, the Commission must take into account all the objective conditions in the relevant market and have regard to the economic context and, if appropriate, also the legislative background. Account should be taken of the existence of any 'objective economic factors' which indicate that, had there been a 'free play of competition', prices would not have developed in the same way as the prices which were actually charged.

(see paras 181, 182)

9. The fact that the parties to a cartel did not comply with their agreement and did not entirely implement the agreed prices does not mean that, in so doing, they applied the prices that they would have charged in the absence of a cartel and does not therefore constitute a factor which should be taken into account as an attenuating circumstance. An under-

taking which despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit.

(see para. 189)

Where the Commission, when freely assessing the evidence in its possession, relies on a statement made in a context different from that of the procedure initiated before it, and where that statement potentially contains information that the undertaking concerned would have been entitled to refuse to provide to it if the Commission had put questions to that undertaking on the same subject, it is required to guarantee to the undertaking concerned procedural rights equivalent to those conferred on the undertaking to which it puts questions.

10. There is no provision that prevents the Commission from relying, as evidence that could be used to find that there has been a breach of Articles 81 EC and 82 EC and to set a fine, on a document which was established in the context of a procedure which was not conducted by the Commission itself.

However, it is acknowledged that one of the general principles of Community law, of which fundamental rights are an integral part and in the light of which all Community laws must be interpreted, is the right of undertakings not to be compelled by the Commission, under Article 11 of Regulation No 17, to admit their participation in an infringement. The protection of that right means that, in the event of a dispute as to the scope of a question, it must be determined whether an answer from the undertaking to which the question is addressed would in fact be equivalent to the admission of an infringement, such as to undermine the rights of the defence.

Compliance with those procedural safeguards entails, in such a context, the need for the Commission to carry out an examination automatically if, prima facie, there is serious doubt as to whether the procedural rights of the parties concerned were complied with in the procedure during which they provided such statements. If there is no such serious doubt, the procedural rights of the parties concerned must be deemed to have been adequately safeguarded if, in the statement of objections, the Commission clearly indicates, if necessary by annexing the relevant documents to it, that it intends to rely on the statements in question. In this way, the Commission makes it possible for the parties concerned to comment not only on the content of those statements,

but also on any irregularities or special circumstances concerning their composition or submission to the Commission.

(see paras 261-265)

11. Where an infringement of the competition rules has been committed by several undertakings, it is appropriate, when setting the amount of the fines, to consider the relative gravity of the participation of each of them, which implies in particular that the roles played by each of them in the infringement for the duration of their participation in it should be established.

(see para. 312)

It follows, in particular, that the role of 'ringleader' played by one or more undertakings in a cartel must be taken into account in setting the fine, in so far as undertakings which have played such a role must therefore bear a special responsibility by comparison with other undertakings.

(see paras 296, 297)

12. The Commission has a discretion when setting the amount of the fine for infringement of the competition rules. The fact that in the past the Commission imposed a particular rate of increase in the amount of fines where there were aggravating circumstances does not mean that it is estopped from raising those rates, within the limits set out in Regulation No 17 and 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, if that is necessary in order to ensure the implementation of Community competition policy.

13. When applying Article 15(2) of Regulation No 17 to each individual case, that is to say when it imposes fines for infringement of the Treaty's competition rules, the Commission must observe general principles of law, which include the principle of equal treatment as interpreted by the Community courts. An undertaking may however contest the amount of the fine imposed on it by pleading infringement of that principle only if it demonstrates that the facts of the cases in the decisions to which it

refers, such as markets, products, the countries, the undertakings and periods concerned, are comparable to those of the present case.

(see paras 315, 316)

14. In assessing the gravity of an infringement of the competition rules for the purpose of fixing the amount of the fine, the Commission must take into consideration not only the particular circumstances of the case but also the context in which the infringement occurs and must ensure that its action has the necessary deterrent effect. Only by taking into account those factors is it possible to ensure that the action taken by the Commission for the purpose of maintaining undistorted competition on the common market is fully effective.

A purely literal analysis of the third indent of paragraph 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 could give the impression that the mere fact that an offender terminates an infringement as soon as the Commission intervenes constitutes, generally and without reserve, an attenuating circumstance. However, such an interpretation would reduce the effectiveness of the provisions for maintaining effective competition, as it would weaken both the penalty which could be imposed for an infringement of Article 81 EC and the deterrent effect of such a penalty.

Unlike other attenuating circumstances, the fact of terminating an infringement as soon as the Commission intervenes is not inherent in any particular individual characteristic of the offending party itself or the specific facts of the particular case, since it results mainly from the — external — intervention of the Commission. Thus, termination of an infringement only after the Commission has intervened should not be rewarded in the same way as an independent initiative of the offending party, and merely constitutes an appropriate and normal reaction to that intervention. Moreover, the fact of termination merely marks a return by the offending party to lawful conduct and does not enhance the effectiveness of the actions taken by the Commission. Lastly, the alleged attenuating nature of the fact of termination cannot be justified solely by the incentive to terminate the infringement to which it relates. In this respect, the classification of the continuation of an infringement after the Commission intervenes as an aggravating circumstance already rightly constitutes an incentive to terminate the infringement, which does not reduce the penalty or its deterrent effect.

Thus, if termination of an infringement as soon as the Commission intervenes

were to be recognised as an attenuating circumstance, that would unduly impair the effectiveness of Article 81(1) EC by weakening both the penalty and its deterrent effect. Consequently, the Commission cannot place itself under an obligation to consider the mere fact that the infringement was terminated as soon as it intervened to be an attenuating circumstance. Accordingly, the third indent of paragraph 3 of the Guidelines must be interpreted restrictively so as not to undermine the effectiveness of Article 81(1) EC, and as meaning that solely the particular circumstances of the specific case in which an infringement is actually terminated as soon as the Commission intervenes can warrant that termination being taken into account as an attenuating circumstance.

15. Whilst it is important that an undertaking takes steps to prevent fresh infringements of Community competition law from being committed in the future by members of its staff, the taking of such steps does not alter the fact that an infringement has been committed. The Commission is therefore not required to take a circumstance such as that into account as an attenuating circumstance, especially where the infringement in question amounts to a manifest infringement of Article 81(1) EC.

(see para. 359)

In the case of a particularly serious infringement, whose object is price fixing and market sharing, committed intentionally by the undertakings concerned, its termination cannot be regarded as an attenuating circumstance where it was terminated as a result of the Commission's intervention.

(see paras 334-338, 340, 341)

16. In order to ensure that it does not conflict with the principle of equal treatment, the Notice on the non-imposition or reduction of fines in cartel cases must be applied in such a way that, as regards the reduction of fines, the Commission must treat in the same way undertakings that provide the Commission, at the same stage of the procedure and in similar circumstances, with similar information concerning the conduct imputed to them. The mere fact that one of those undertakings was the first to acknowledge the alleged facts in response to the questions put to them

by the Commission at the same stage of the procedure cannot constitute an objective reason for treating it differently.

However, that applies only in the context of cooperation of undertakings which does not fall within the scope of Sections B and C of the Leniency Notice.

Unlike those sections, Section D does not provide for different treatment for the undertakings concerned on the basis of the order in which they cooperate with the Commission.

(see paras 400, 401, 403)

17. The statement of objections must be couched in terms that, albeit succinct, are sufficiently clear to enable the parties concerned properly to identify the conduct complained of by the Commission. It is only on that basis that the statement of objections can fulfil its function under the Community regulations of giving undertakings all the information necessary to enable them properly to defend themselves, before the Commission adopts a final decision.

(see para. 416)

18. Provided that the Commission indicates expressly in the statement of objections that it will consider whether it is appropriate to impose fines on the undertakings concerned and that it sets out the principal elements of fact and of law that may give rise to a fine, such as the gravity and the duration of the alleged infringement and the fact that it has been committed 'intentionally or negligently', it fulfils its obligation to respect the undertakings' right to be heard. In doing so, it provides them with the necessary elements to defend themselves not only against a finding of infringement but also against the fact of being fined.

Therefore, as regards determining the amount of fines, the rights of defence of the undertakings in question are guaranteed before the Commission through the opportunity to make submissions on the duration, the gravity and the foreseeability of the anti-competitive nature of the infringement. That conclusion is all the more compelling because, by

publishing 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 Commission has informed interested parties in detail of the method for calculating any fine and the manner in which it will take account of those guidelines. It is not called in question by the fact that the guidelines make no express reference to a multiplier, since they state that it is necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators and to set the fine at a level which ensures that it has a sufficiently deterrent effect.

(see paras 434, 435)

19. Where the examination of the pleas raised by an undertaking against the legality of a Commission decision imposing on it a fine for infringement of the Community competition rules has revealed an illegality, it is necessary for the Court of First Instance to consider whether it must, making use of its unlimited jurisdiction, amend the contested decision.

(see para. 443)