

Case T-43/02

Jungbunzlauer AG

v

Commission of the European Communities

(Competition — Agreements, decisions and concerted practices — Citric acid — Article 81 EC — Fine — Article 15(2) of Regulation No 17 — Attributability of conduct to a subsidiary — Principle of legality of penalties — Guidelines on the method of setting fines — Principle of proportionality — Ne bis in idem principle — Right of access to the file)

Judgment of the Court of First Instance (Third Chamber), 27 September 2006 II - 3448

Summary of the Judgment

1. *Community law — General principles of law — Legal certainty*
2. *Competition — Fines — Amount — Determination*
(Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03)

3. *Competition — Community rules — Infringements — Attribution*
(Art. 81(1) EC)
4. *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.)
5. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement*
(Council Regulation No 17, Art. 15)
6. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement*
(Council Regulation No 17, Art. 15(2))
7. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement*
(Council Regulation No 17, Art. 15(2))
8. *Competition — Fines — Amount — Determination*
(Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03)
9. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement*
(Council Regulation No 17, Art. 15(2))
10. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Attenuating circumstances*
(Council Regulation No 17, Art. 15; Commission Notice 98/C 9/03, Section 3)
11. *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)

12. *Competition — Fines — Amount — Community penalties and penalties imposed in a Member State or non-member country for breach of national competition law*
(Council Regulation No 17, Art. 15)
13. *Competition — Fines — Amount — Determination*
(Art. 81(1) EC and 82 EC; EEA Agreement, Art. 53(1); Council Regulation No 17, Art. 15(2))
14. *Competition — Administrative procedure — Observance of the rights of the defence — Access to the file*
(Art. 81(1) EC; Council Regulation No 17, Art. 19(1))
15. *Competition — Fines — Amount — Discretion of the Commission — Judicial review*
(Art. 229 EC)

1. The principle of legality is a corollary to the principle of legal certainty, which is a general principle of Community law which requires, in particular, that where a Community rule imposes or permits the imposition of penalties, that rule must be clear and precise, so that the persons concerned may be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.

nature as well as specific administrative instruments imposing or permitting the imposition of administrative penalties. It applies not only to provisions establishing the elements which constitute an offence, but also to those specifying the consequences arising from an offence.

That principle, which forms part of the general principles of Community law underlying the constitutional traditions common to the member States and which has been enshrined in various international treaties, in particular Article 7 of the European Convention on Human Rights in relation to criminal offences and penalties, must be observed in relation to provisions of a criminal

In that regard, it follows from Article 7(1) of that convention that the law must clearly define crimes and the relevant penalties. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the

courts' interpretation, what acts and omissions will make him criminally liable.

actual wording of the law, the European Court of Human Rights takes account of the settled and published case-law when deciding whether the concepts used are definite or not. Furthermore, taking account of the constitutional traditions common to the Member States does not justify the Court of First Instance giving a different interpretation of the principle of legality, which is a general principle of Community law.

It is clear from the case-law of the European Court of Human Rights that Article 7(1) of the convention does not require the terms of the provisions by virtue of which those fines are imposed to be so precise that the potential consequences of an infringement of those provisions should be foreseeable with absolute certainty. According to that case-law, the existence of vague terms in a provision does not necessarily entail a violation of Article 7. Accordingly, the concept of law used in Article 7 is the same as that found in other articles of the convention. In addition, the wording of many statutes is not absolutely precise and, because of the need to avoid excessive rigidity and to keep pace with changing circumstances, many laws are inevitably couched in terms which, to a greater or lesser degree are vague and their interpretation and application depend on practice. However, every law presupposes qualitative conditions, including, *inter alia*, those of accessibility and foreseeability. The fact that a law confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference. Finally, in addition to the

(see paras 71-73, 75-81)

2. In competition matters, the fact that undertakings are not in a position to know in advance the exact level of the fines that the Commission will choose in each individual case is not such as to establish that Article 15(2) of Regulation No 17 is contrary to the principle of legality.

In order to avoid excessive prescriptive rigidity and to enable a rule of law to be adapted to the circumstances, a certain degree of unforeseeability as to the penalty which may be imposed for a given offence must be permitted. A fine subject to sufficiently circumscribed

variation between the minimum and the maximum amounts which may be imposed for a given offence may therefore render the penalty more effective both from the viewpoint of its application and its deterrent effect.

In that regard, the Commission does not have an unlimited and excessive power of assessment with regard to setting fines for infringement of the competition rules, since it must adhere to the ceiling fixed by reference to the turnover of the undertaking concerned. In particular, the ceiling of 10% of the turnover of the undertaking concerned is reasonable, having regard to the interests defended by the Commission where infringements such as cartels occur. Furthermore, the question whether fines on the basis of Article 15(2) of Regulation No 17 are reasonable should not be considered in absolute terms, but in relative terms, that is to say, by reference to the offender's turnover.

Similarly, the Commission must observe the general principles of law, particularly the principles of equal treatment and

proportionality, as well as the criteria and the method of calculation to be used by it when setting fines.

In addition, on the basis of the criteria specified in Article 15(2) of Regulation No 17, the Commission has itself developed a decision-making practice which is public knowledge and is accessible. While it is true that the Commission's previous decision-making practice is not binding as such on the Commission when determining the amount of a fine, nevertheless, by virtue of the principle of equal treatment, which is a general principle of law which must be observed by the Commission, the Commission cannot treat comparable situations differently or different situations in the same way, unless such treatment is objectively justified.

In addition, with a view to transparency and to increase legal certainty for the undertakings concerned, the Commission has published guidelines setting out the calculation method which it imposes on itself in each particular case.

In accordance with Article 253 EC, the Commission must state the reasons, particularly with regard to the amount

of the fine and the method of calculation. The statement of reasons must show the Commission's reasoning clearly and unequivocally so that those concerned can know the justification for the measure taken in order to decide whether it would be expedient to refer the matter to a Community court and, as the case may be, so that the Court can exercise its power of review.

that the former company continues to exist as a legal entity does not exclude the possibility that, with reference to Community competition law, the latter becomes responsible for the acts of the former.

(see paras 122, 132)

(see paras 82-91)

3. In prohibiting undertakings, *inter alia*, from entering into agreements or participating in concerted practices which may affect trade between member States and have as their object or effect the prevention, restriction or distortion of competition within the common market, Article 81(1) EC is aimed at economic units made up of a combination of personal and physical elements which can contribute to the commission of an infringement of the kind referred to in that provision.

Where, between the time of the infringement and the time the undertaking in question must answer for it, the company responsible for the group's activities transfers its activities to another member of the group, the fact

4. Pursuant to the first paragraph of Section 1A 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, when calculating a fine according to the gravity of the infringement, the Commission is to take account of its actual impact on the market, where this can be measured. The measurable impact of the cartel on the market must be regarded as sufficiently demonstrated if the Commission is able to provide specific and credible *indicia* showing, with reasonable probability, that the cartel had an impact on the market.

The examination of the impact of a cartel on the market necessarily entails making assumptions. In that context, the Commission must, in particular, consider what the price of the product would have been without the cartel. When examining the causes of actual price movements, it is hazardous to

speculate as to the respective contribution of each cause. Account must be taken of the objective fact that, because of the price cartel, the parties have precisely surrendered their freedom to compete by means of prices. Therefore an assessment of the influence of factors other than the voluntary surrender of that freedom by the parties to the cartel is necessarily based on reasonable probabilities which cannot be quantified exactly.

proof that it has when it must show the existence as such of an infringement in the case of a cartel. For the purpose of taking account of the actual effects of the cartel on the market, it is sufficient, according to that judgment, if the Commission 'provides good reasons for taking them into account'.

(see para. 161)

Consequently, if the criterion in the first paragraph of Section 1A of the Guidelines is not to be rendered practically ineffective, the Commission cannot be criticised for relying on the actual impact on the market of a cartel with an anti-competitive object, such as a cartel fixing prices or quotas, without quantifying that impact or without providing an assessment with supporting figures.

6. In determining the gravity of the infringement, regard must be had to the legislative background and economic context of the conduct to which exception is taken. In that respect, in order to assess the actual impact of an infringement on the market, the Commission must refer to the competition which would normally have existed without the infringement.

(see paras 151-155)

5. In competition matters, the burden of proving the existence of effects of the infringement on the market in question, which is borne by the Commission when it takes them into account for calculating the fine by reference to the gravity of the offence, is lighter than the burden of

On the one hand, it follows that, in the case of price cartels, it must be found — with a reasonable degree of probability — that the agreements actually enabled the parties concerned to reach a price level higher than that which would have prevailed without the cartel. On the other hand, it follows that, in making its assessment, the Commission must take into account all the objective conditions of the market concerned,

having regard to the economic context and, if necessary, the legislative background. Where appropriate, account must be taken, where appropriate, of 'objective economic factors' showing that, given the 'free play of competition', the level of prices would not have moved in the same way as that of the prices applied.

undertaking and of its economic power, and to the market share of the undertakings concerned on the market at issue, which gives an indication of the scale of the infringement. On the other hand, it is important not to confer on one or other of those figures an importance which is disproportionate in relation to other factors and that the fixing of an appropriate fine cannot be the result of a simple calculation based on overall turnover.

(see paras 177-179)

7. 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, without there being a binding or exhaustive list of the criteria which must be applied.

(see paras 213, 214, 227)

Likewise, the criteria for assessing the gravity of an infringement may, depending on the circumstances, include the volume and value of the goods in respect of which the infringement was committed, the size and economic power of the undertaking and, consequently, the influence which it was able to exert on the market. It follows that, on the one hand, it is permissible, for the purpose of fixing a fine, to have regard both to the overall turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the

8. As regards setting the amount of the fines to be imposed on the various undertakings which participated in the same infringement of the competition rules, it is open to the Commission, in accordance with 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, not to set fines by reference to the turnover of each of the undertakings concerned in the relevant market, but to apply, as the starting point of its calculation for each undertaking, an absolute figure fixed according to the actual nature of the infringement, that

figure then being adjusted for each undertaking on the basis of several factors.

(see para. 223)

9. The principle of proportionality requires that the measures adopted by Community institutions must not exceed what is appropriate and necessary for attaining the objective pursued.

In relation to the calculation of fines, the gravity of infringements has to be determined by reference to numerous factors and it is important not to confer on one or other of those figures an importance which is disproportionate in relation to other factors.

The principle of proportionality in this context requires the Commission to set the fine proportionately to the factors taken into account to assess the gravity of the infringement and also to apply those factors in a way which is consistent and objectively justified.

(see paras 226-228)

10. At the third indent of Section 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, it is stated that the basic amount will be reduced where there are extenuating circumstances such as an 'exclusively passive or "follow-my-leader" role in the infringement'.

The factors likely to reveal the passive role of an undertaking within a cartel include the significantly more sporadic nature of its participation in the meetings by comparison with the other members of the cartel and also its belated entry to the market where the infringement occurred, irrespective of the duration of its participation in the infringement and also the existence of express declarations to that effect made by representatives of other undertakings which participated in the infringement. In addition, 'an exclusively passive role' of a member of a cartel implies that it adopts a 'low profile,' that is to say, it does not actively participate in the making of the anti-competitive agreement or agreements.

It therefore does not suffice for the undertaking concerned, during certain periods of the cartel or in respect of certain agreements of the cartel, to have

adopted a 'low profile'. In that respect, convening meetings, proposing an agenda and distributing preparatory documents for meetings are incompatible with a passive role of follow-my-leader adopting a low profile. Such initiatives show favourable and active attitude of the undertaking concerned to the constitution, continuation and control of the cartel.

extenuating circumstance. An undertaking which, despite colluding with its competitors, follows a more or less independent policy in the market may simply be trying to exploit the cartel for its own benefit.

(see paras 251, 252, 254, 255, 257, 267-269)

At the second indent of Section 3 of the Guidelines, it is stated that the fine will be reduced where there are extenuating circumstances in the case of non-implementation in practice of the agreements. For that purpose, it is necessary to check whether the circumstances referred to by the undertaking are to establish that, during the period in which it was a party to the offending agreements, it actually declined to apply them by adopting competitive conduct on the market.

11. 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.

However, when the amount of a fine to be imposed is being determined, the fact that an undertaking proven to have participated in collusion on prices with its competitors did not behave on the market in the manner agreed with those competitors is not necessarily a matter which must be taken into account as an

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 by the authorities of a non-member State 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 market of a non-member State. The condition of the unity of the legal interest protected, which is necessary for the principle of *ne bis in idem* to apply, is not fulfilled in such a case.

(see paras 285-287)

Member State and, consequently, have been committed on Community territory.

However, the obligation to take account of the principle of natural justice follows, on the one and, from the close interdependence of the national markets of the Member States of the common market and, on the other, from the special system of the sharing of jurisdiction between the Community and the Member States with regard to cartels in the same territory.

(see paras 290, 291)

12. The possibility of concurrent sanctions, one Community, the other national, resulting from two parallel procedures pursuing different ends, the acceptability thereof deriving from the special system of sharing jurisdiction between the Community and the Member States with regard to cartels is subject to the principle of natural justice. This means that, when setting fines under Article 15 of Regulation No 17, the Commission must take account of penalties which have already been borne by the same undertaking for the same conduct, where they have been imposed for infringements of the cartel law of a

13. 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 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 practice, are still relatively frequent on account of the profit that certain of the undertakings concerned are able to derive from them.

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

(see paras 297, 298, 300)

14. If the Commission wishes to rely on a passage in a reply to a statement of objections or on a document annexed to such a reply in order to prove the existence of an infringement in a proceeding under Article 81(1) EC, the other parties involved in that proceeding must be placed in a position in which they can express their views on such evidence. In such circumstances the

passage in question from a reply to the statement of objections or the document annexed thereto constitutes incriminating evidence against the various parties alleged to have participated in the infringement.

It is for the undertaking concerned to show that the result at which the Commission arrived in its decision would have been different if a document which was not communicated to that undertaking and on which the Commission relied to make a finding of infringement against it had to be disallowed as evidence.

With regard to the non-disclosure of an exculpatory document, the undertaking concerned must only establish that its non-disclosure was able to influence, to its disadvantage, the course of the proceedings and the content of the decision of the Commission. It is sufficient for the undertaking to show that it would have been able to use the exculpatory document in its defence, in the sense that, had it been able to rely on it during the administrative procedure, it would have been able to put forward evidence which did not agree with the findings made by the Commission at that stage and would therefore have been able to have some influence on the Commission's assessment in any decision it adopted, at least as regards the gravity and duration of the conduct of which it was accused and, accordingly,

the level of the fine. In that context, the possibility that a document which was not disclosed might have influenced the course of the proceedings and the content of the Commission's decision can be established only if a provisional examination of certain evidence shows that the documents not disclosed might — in the light of that evidence — have had a significance which ought not to have been disregarded.

(see paras 343, 344, 351)

15. Where examination of the pleas raised by an undertaking against the legality of a Commission decision imposing on it a fine for breach of the Community competition rules has not brought any illegality to light, there are no grounds for the Court to exercise its unlimited jurisdiction in order to reduce the fine.

(see para. 386)