Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02

Bolloré SA and Others

v

Commission of the European Communities

(Competition — Cartels — Carbonless paper — Guidelines on the method of setting fines — Duration of the infringement — Gravity of the infringement — Increase for deterrence — Aggravating circumstances — Mitigating circumstances — Leniency Notice)

Judgment of the Court of First Instance (Fifth Chamber), 26 April 2007 . . . II - 965

Summary of the Judgment

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

22. Competition — Fines — Amount — Determination

(Art. 81(1) EC; Council Regulation No 17, Art. 15(2); Commission Notices 96/C 207/04 and 98/C 9/03)

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26. Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Mitigating circumstances

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

27. Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Mitigating circumstances

(Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03, point 3, third dash)

28. Competition — Fines — Amount — Determination — Waiver or reduction of the fine for cooperation of the undertaking concerned

(Council Regulation No 17, Art. 15(2); Commission Notice 96/C 207/04)

29. *Competition — Fines — Amount — Determination — Criteria — Reduction in the amount of the fine in exchange for cooperation by the undertaking accused of the infringement*
(Council Regulation No 17, Arts 11(4) and (5) and 15(2); Commission Notice 96/C 207/04, Title D, point 2)

30. *Procedure — Measures of inquiry — Request for production of documents*
(Rules of Procedure of the Court of First Instance, Arts 65 and 66(1))

1. During a procedure under the Community competition rules, in order to allow the undertakings in question to defend themselves effectively against the objections raised against them in the statement of objections, the Commission has an obligation to make available to them the entire investigation file, except for documents containing business secrets of other undertakings, other confidential information and internal documents of the Commission.

In addition, the right of undertakings and associations of undertakings to the protection of their business secrets must be weighed against the safeguarding of the right of access to the entire investigation file.

Therefore, if the Commission takes the view that certain documents in its investigation file contain business secrets or other confidential information, it should prepare non-confidential versions of those documents or have them prepared by the undertakings or associations of undertakings providing the documents in question. If the preparation of non-confidential versions of all the documents proves difficult, it should send the parties concerned a sufficiently precise list of the documents posing problems so as to enable them to ascertain whether it is appropriate to seek access to specific documents.

(see paras 45, 46)

2. Since documents that have not been communicated to the parties concerned during the administrative procedure are not admissible evidence, it will be necessary, if it should prove that the Commission relied in the final decision on documents that were not in the

investigation file and were not communicated to the applicants, to exclude those documents as evidence.

It follows that, if the Commission intends 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 establish the existence of an infringement in a proceeding under Article 81(1) EC, the other parties involved in that proceeding must be able to comment on such evidence.

(see paras 56, 57)

3. 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 and associations of undertakings all the information necessary to enable them properly to defend themselves, before the Commission adopts a final decision.

That requirement is not complied with where the decision attributes liability for the infringement to a parent company by reason, first, of its subsidiary's participation in the cartel, and, secondly, of the parent company's direct involvement in the cartel activities, while the statement of objections does not enable the parent company to acquaint itself with the objection based on its direct involvement in the infringement, or even with the facts finally established in the decision in support of that objection.

However, even if the Commission decision contains new allegations of fact or law on which the undertakings concerned have not been given the opportunity to comment, the defect will only entail the annulment of the decision in that respect if the allegations concerned cannot be substantiated to the requisite legal standard on the basis of other evidence in the decision on which the undertakings concerned were given the opportunity to comment.

Moreover, in so far as certain grounds of the decision in themselves provide a

sufficient legal basis for that decision, any errors in other grounds of the decision have no effect in any event on its operative part.

(see paras 67, 71, 77, 79-81)

4. Even if the Commission does not constitute a 'tribunal' within the meaning of Article 6 of the European Convention on Human Rights and even if the fines imposed by the Commission for breach of competition law are not of a criminal law nature, the Commission is bound to observe the general principles of Community law in the course of the administrative procedure.

However, first, although the Commission may hear natural or legal persons where it deems it necessary to do so, it is not entitled to call witnesses to testify against the undertaking concerned without their agreement, and, secondly, the fact that the provisions of Community competition law do not place the Commission under an obligation to call witnesses whom the undertaking concerned wishes to give evidence on its behalf is not contrary to those principles.

(see paras 86, 87)

5. Where the Community institutions have a power of appraisal in order to be able to fulfil their tasks, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance; those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case.

(see para. 92)

6. The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent company, especially where the subsidiary does not independently decide its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.

In that regard, although the evidence relating to the 100% shareholding in its subsidiary provides a strong indication that the parent is able to exercise a decisive influence over the subsidiary's conduct on the market, this is not in itself sufficient to attribute liability to the parent for the conduct of its subsidiary. Something more than the extent of the shareholding must be shown, but this may be in the form of indicia. It need not necessarily take the form of evidence of instructions given by the parent company to its subsidiary to participate in the anti-competitive conduct.

(see paras 131, 132)

7. An admission by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence.

Moreover, statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence.

(see paras 166, 167)

8. It is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs.

The reasoning underpinning this principle is that, having participated in such a meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it.

In addition, the fact that an undertaking does not act on the outcome of such a meeting is not such as to relieve it of responsibility for its participation in a cartel, unless it has publicly distanced itself from what was agreed in the meeting.

Where such a system of meetings is part of a series of efforts made by the undertakings in question in pursuit of a single economic aim, namely to distort the normal movement of prices on the market concerned, it would be artificial to split up such conduct, characterised by a single purpose, by treating it as consisting of several separate infringements.

(see paras 188, 189, 196, 312, 360, 424)

9. An undertaking which has participated in a multiform infringement of the Community competition rules by its own conduct, which met the definition of an agreement or concerted practice having an anti-competitive object within the meaning of Article 81(1) EC and was intended to help bring about the infringement as a whole, may also be responsible for the conduct of other undertakings followed in the context of the same infringement throughout the period of its participation in the infringement, where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct, and was prepared to accept the risk.

The mere fact that there is identity of object between an agreement in which an undertaking participated and a global cartel does not suffice to render that undertaking responsible for the global cartel. It is only if the undertaking knew or should have known when it participated in the agreement that in doing so it was joining in the global cartel that its participation in the agreement concerned can constitute the expression of its accession to that global cartel.

(see paras 207, 209, 236)

10. In relation to adducing evidence of an infringement of Article 81(1) EC, it is incumbent on the Commission to prove the infringements which it has found and to adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement.

The Commission has to provide sufficiently precise and consistent evidence

to give grounds for a firm conviction that the alleged infringement took place. However, it is important to emphasise that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement; it is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement.

(see paras 256-258)

11. The requirement that every economic operator determine its own policy, which is inherent in the Treaty provisions on competition, strictly precludes any direct or indirect contact between such operators, whose object or effect is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which one has decided to adopt or contemplates adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question. In that regard, subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in collusion and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market.

(see para. 291)

12. The fact that the Commission in the past imposed fines of a certain level for particular types of infringement does not mean that it is stopped from raising that level within the limits indicated in Regulation No 17, if that is necessary to ensure the implementation of Community competition policy.

The proper application of the Community competition rules requires that the Commission be able at any time to adjust the level of fines to the needs of that policy.

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.

(see paras 376, 377)

13. Where it has indicated the elements of fact and of law on which it will base its calculation of the fines, the Commission is under no obligation to explain in the statement of objections the way in which it would use each of those elements in determining the level of the fine. To give indications of the level of the contemplated fines, when the undertakings have not been in a position to put forward their observations on the objections held against them, would in effect inappropriately anticipate the Commission's decision.

The Commission is not therefore bound to inform the undertakings concerned, during the administrative procedure that it intended to use a new method to calculate the amount of the fines.

(see paras 392, 403)

14. 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.

It follows that, so far as concerns the determination of the amount of the fines imposed for breach of the competition rules, the rights of defence of the undertakings concerned are guaranteed before the Commission by virtue of the fact that they have the opportunity to make their submissions on the duration, the gravity and the anti-competitive nature of the matters of which they are accused. Moreover, the undertakings have an additional guarantee, as regards the setting of that amount, in that the Court of First Instance has unlimited jurisdiction and may in particular cancel or reduce the fine pursuant to Article 17 of Regulation No 17.

(see paras 397, 398)

15. Whilst the fact that an undertaking has not taken part in all aspects of a cartel is

not material to the establishment of the existence of the infringement, such a factor must be taken into consideration when the gravity of the infringement is assessed and if and when the fine is determined.

(see para. 429)

16. In setting the amount of the fines for breach of the Community competition rules, the gravity of an infringement is to be appraised by taking into account in particular the nature of the restrictions on competition.

Infringements involving price-fixing and market-sharing must be treated as particularly serious since they involve direct interference with the essential parameters of competition on the market in question.

However, the classification of an infringement as very serious is not conditional on a partitioning of the markets. On the contrary, horizontal agreements relating to price cartels or market-sharing quotas are presumed to jeopardise the proper functioning of the internal market, and other practices likely to have the same effect may also be classified as very serious infringements.

It does not follow from that case-law or from 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 that the classification of an infringement as very serious presupposes that several of those practices must be present. A horizontal pricing agreement may in itself constitute such an infringement if it undermines the proper functioning of the market. It is established that in the present case the undertakings concerned agreed on prices and its effect was to undermine the proper functioning of the market.

Moreover, it does not follow either from the case-law or from the Guidelines that, in order to be classified as a very serious infringement, the cartel must include particular institutional structures.

(see paras 434-437, 441)

17. According to 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 assessing the gravity of the

infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market. The Guidelines thus do not directly link the gravity of the infringement to its impact. Actual impact is one factor among others and should not even be taken into account where it cannot be measured.

(see para. 447)

18. The mere fact that the market in question was in decline and that certain undertakings were suffering losses cannot preclude the setting up of a cartel or the application of Article 81 EC. Furthermore, the poor market conditions do not mean that the cartel had no impact. Agreed price increases may make it possible to control or limit the decrease in prices, thereby distorting competition.

Moreover, when imposing a penalty for breach of the Community competition rules, the Commission is not required to regard the poor financial state of the sector in question as an attenuating circumstance; just because in earlier cases the Commission has taken the economic sector into account as an attenuating circumstance it does not necessarily have to continue to observe that practice. As a general rule, cartels come into being when a sector encounters problems.

(see paras 462, 663)

19. 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 undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, 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 that the fixing of an appropriate fine cannot be the result of a simple calculation based on overall turnover.

(see para. 468)

20. The Commission is not required, when assessing fines in accordance with the gravity and duration of the infringement in question, to calculate the fines on the basis of the turnover of the undertakings concerned, or to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines resulting from its calculations for the undertakings concerned reflect any distinction between them in terms of their overall turnover or their turnover in the relevant product market.

(see para. 484)

21. Where the Commission divides the undertakings concerned into categories for the purpose of setting the amount of the fines, the thresholds for each of the categories thus identified must be coherent and objectively justified. Since they are such as to indicate the importance of the undertaking, the product's turnover in the European Economic Area and the market shares can be taken into account by the Commission in that connection.

Recourse to market shares among other factors in order to differentiate between the undertakings would be contrary to the principle of equal treatment if it did not apply to all the undertakings concerned.

(see paras 504, 507, 511)

22. The taking into account of the deterrent effect of the fines imposed for breach of the Community competition rules when setting the starting amount forms an integral part of weighting the fines to reflect the gravity of the infringement.

The Commission may impose a heavier fine on an undertaking which occupies a decisive position within the market and where the impact of its actions on the market is more significant than that of the actions of other undertakings committing the same infringement. Calculating the amount of the fine in such a way satisfies, inter alia, the requirement that it be sufficiently dissuasive.

The increase of fines imposed for breach of the competition rules for deterrence is not incompatible with the application of the Notice on the non-imposition or

reduction of fines, since those two elements are manifestly different and the simultaneous application of those two elements cannot be held to be contradictory. The increase of the fine for deterrence is part of the phase in which the fine sanctioning the infringement is calculated. Once that amount has been determined, the application of the Leniency Notice is then intended to reward undertakings which have decided to cooperate with the Commission. The fact that an undertaking decides to cooperate with an investigation in order to obtain a reduction of its fine in this context in no way guarantees that it will refrain from committing a similar infringement in the future.

(see paras 526, 540, 541)

23. When setting the amount of the fines for breach of the Community competition rules, the Commission may apply a first increase in the starting amount of the fine on account of the applicant's importance on the market of the product in question, and then a second deterrent multiplier of 2, taking into account all the activities of the undertaking or of the group to which it belongs, in order to take account of its overall resources. Those two increases do not take account of the same factors.

(see paras 535, 536)

24. Where an infringement of the Community 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. 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 for that reason bear a special responsibility by comparison with other undertakings. In accordance with those principles, Section 2 of the Commission 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 sets out, under the heading of 'aggravating circumstances', a non-exhaustive list of circumstances which can give rise to an increase in the basic amount of the fine and

includes in particular the 'role of leader in or instigator of the infringement'.

(see paras 561, 622)

25. Although the circumstances in the list at 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 are certainly among those which may be taken into account by the Commission in a specific case, it is not required to grant a further reduction as a matter of course when an undertaking puts forward evidence of the existence of one of those circumstances. Whether it is appropriate to grant a reduction of the fine on grounds of attenuating circumstances must be determined on the basis of a global assessment which takes account of all the relevant circumstances. In the absence of a mandatory indication in the Guidelines of the attenuating circumstances which may be taken into account, the Commission retained a certain discretion when making a global assessment of the size of any reduction in the fines to reflect attenuating circumstances.

(see paras 602, 624)

26. The existence of threats and pressure brought to bear on an undertaking does nothing to alter the reality and the gravity of an infringement of the competition rules and cannot amount to an attenuating circumstance. An undertaking which participates in anti-competitive activities with others may report the pressure to which it is subject to the competent authorities and lodge a complaint with the Commission under Article 3 of Regulation No 17 rather than participate in the cartel. That is true of all the undertakings which are party to a cartel, and there is no need to distinguish between them by reference to the alleged intensity of the purported pressure.

(see paras 638, 639)

27. Termination of the infringement as soon as the Commission intervenes is one of a number of attenuating circumstances

expressly set out in 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.

None the less, the Commission cannot be required, as a general rule, either to regard a continuation of the infringement as an aggravating circumstance or to regard the termination of an infringement as a mitigating circumstance.

Furthermore, where the date on which the infringement is terminated precedes the first intervention or investigations by the Commission, the application of a reduction would duplicate the taking into account of the duration of the infringements, which, in accordance with the Guidelines, is applied in calculating the fine. Duration is taken into account for the specific purpose of imposing a heavier penalty on undertakings which infringe the competition rules over a prolonged period than on those whose infringements are of short duration. Thus, a reduction in the amount of a fine on the ground that an undertaking terminated its unlawful conduct before the Commission first intervened would have the effect of benefiting for a second time those responsible for infringements of short duration.

(see paras 643-646)

28. It is clear from the express wording of Section B(b) of the Notice on the non-imposition or reduction of fines in cartel cases that the 'first' undertaking does not have to have provided all the evidence demonstrating every detail of the operation of the cartel, provided that it adduces 'some' decisive evidence. In particular, that section does not require that the evidence adduced is sufficient in itself in order to draw up the statement of objections or for the adoption of a final decision establishing the existence of an infringement.

Furthermore, it is clear from the Leniency Notice that being the first undertaking to adduce decisive evidence is what matters for the application of Sections B and C, but not for Section D which makes no reference to and attaches no importance to whether the cooperation of one undertaking preceded that of another.

(see paras 692, 697)

29. A reduction of the fine for cooperation during the administrative procedure is justified only if the conduct of the undertaking concerned enabled the Commission to establish the infringement more easily and, where relevant, bring it to an end.

Admissions made subject to reservations or equivocal statements do not convey real cooperation and are not capable of facilitating the Commission's task, since they require investigation. That is all the more true where those reservations relate to aspects such as the duration of the infringement, sales quotas, market shares or information exchanges.

(see paras 716, 717)

The Commission has a discretion in that regard, as may be seen from the wording of Section D2 of the Notice on the non-imposition or reduction of fines in cartel cases.

30. In proceedings before the Community courts, the internal documents of the Commission relating to a procedure applying the Community competition rules are not revealed to the parties unless the exceptional circumstances of the case concerned so require, on the basis of sound evidence which it is up to them to provide.

Furthermore, and above all, a reduction under the Leniency Notice can be justified only where the information provided and, more generally, the conduct of the undertaking concerned might be considered to demonstrate genuine cooperation on its part.

(see para. 736)