Case T-329/01

Archer Daniels Midland Co.

v

Commission of the European Communities

(Competition — Cartels — Sodium gluconate — Article 81 EC — Fine — Article 15(2) of Regulation No 17 — Guidelines on the method of setting fines — Leniency Notice — Principle of proportionality — Equal treatment — Non-retroactivity — Duty to state reasons — Rights of the defence)

Judgment of the Court of First Instance (Third Chamber), 27 September 2006 II - 3268

Summary of the Judgment

1. *Community law — General principles of law — Non-retroactivity of penal provisions (Council Regulation No 17, Art. 15; Commission Notice 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 — Amount — Determination — Criteria — Gravity of the infringement*
(Council Regulation No 17, Art. 15(2))

4. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement*
(Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03)

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

6. *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.)

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

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

9. *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)

10. Competition — Fines — Accumulation of Community penalties in respect of separate facts arising out of the same set of agreements

(Council Regulation No 17, Art. 15)

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

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

12. Competition — Fines — Amount — Determination — Non-imposition or reduction of the fine in return for cooperation of the undertaking concerned

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

13. Competition — Fines — Amount — Determination — Criteria — Appraisal of the extent of the cooperation shown by each of the undertakings during the administrative procedure

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

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

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

15. 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, 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 modification, 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.

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.

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.

(see paras 38-46)

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.

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 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.

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.

In any event, the mere fact that the fine imposed on an undertaking exceeds turnover through sales of the product which is the subject of the cartel in the European Economic Area during the period that undertaking participated in the cartel, or even exceeds it significantly, is not sufficient to show that the fine is disproportionate.

(see paras 76, 77, 80)

4. In accordance with Article 15(2) of Regulation No 17, the fine is set on the basis of the gravity and duration of the infringement. Furthermore, 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, the Commission sets the starting amount on the basis of the gravity of the infringement, taking into account the actual nature of the infringement, its actual impact on the market and the scope of the geographic market.

That legal framework does not therefore in itself require the Commission to take account of the small size of the product market.

However, when assessing the gravity of an infringement, the Commission must take account of a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case. Those factors attesting to the gravity of the infringement may, depending on the circumstances, include the size of the relevant product market.

Consequently, although the size of the market may constitute a factor to take into consideration when determining the gravity of the infringement, its significance varies according to the particular circumstances of the case.

(see paras 99-102)

5. 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 of the economic power of an undertaking which has been found guilty of an infringement must be taken into account when setting the amount of the fine in order to ensure that it has deterrent effect.

(see paras 140-142)

6. 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 174-178)

7. 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.

8. In curbing prohibited cartels, the actual conduct which an undertaking claims to have adopted is irrelevant for the purposes of evaluating a cartel's effect on the market, since the effects to be taken into consideration are those arising from the infringement as a whole in which it participated.

(see para. 204)

It follows, first, that particularly in the case of price agreements there must be a finding by the Commission — with a reasonable degree of probability — that such agreements have in fact enabled the undertakings 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 191, 192)

9. 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.

In the case of a particularly serious infringement, whose object is price fixing and market sharing, committed intentionally by the undertakings con-

cerned, its termination cannot be regarded as an attenuating circumstance where it was terminated as a result of the Commission's intervention.

(see paras 276-282)

10. 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.

Thus, where the actions on which two sanctions are based arise out of the same set of agreements but nevertheless differ as regards both their object and their geographical emphasis, that principle does not apply. That is the case where the sanctions relate to cartels concerning different markets. That is also the case of a cartel which also concerns the territory of non-member States since, under the principle of territoriality there is no conflict in the exercise by the Commission and by the competition authorities of those non-member States of their power to impose fines on undertakings which infringe the competition rules of the European Economic Area and of those States.

(see paras 290-292)

11. 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.

Furthermore, although 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 provide that the Commission may find that there were aggravating circumstances in the case of an undertaking which has already committed one or more infringements of the same type, it does not follow that, where the

infringement in question is the first of that type committed by the undertaking in question, it should receive favourable treatment by virtue of an attenuating circumstance.

(see paras 299, 300)

12. In order for an undertaking to be able to benefit from a significant reduction in the fine under Section C of the Notice on the non-imposition or reduction of fines in cartel cases, that notice requires, in Section B(b) thereof, to which Section C refers, that that undertaking be the first to adduce decisive evidence of the cartel's existence. That notice does not provide that, in order to satisfy that condition, an undertaking which informs the Commission about a secret cartel must provide it with all the decisive evidence for preparing the statement of objections or, still less, for adopting a decision establishing an infringement.

(see paras 319-321)

13. 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 338, 339, 341)

14. 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.

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.

(see paras 359, 361, 362)

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.

15. 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 not revealed any illegality, there is no need for the Court of First Instance to make use of its unlimited jurisdiction in order to reduce that fine.

(see para. 382)