Case T-15/02

BASF AG

v

Commission of the European Communities

(Competition — Cartels in the vitamin products sector — Rights of the defence — Guidelines on the method of setting fines — Determination of the starting amount of the fine — Deterrent effect — Aggravating circumstances — Role of leader or instigator — Cooperation during the administrative procedure — Professional secrecy and principle of sound administration)

Judgment of the Court of First Instance (Fourth Chamber), 15 March 2006 II - 516

Summary of the Judgment

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   (Council Regulation No 17, Art. 19(1); Commission Regulation No 2842/98, Arts 2 and 3)

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

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

24. *Competition — Fines — Amount — Determination — Criteria — Taking into account of the undertaking's cooperation with the Commission*

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

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(Council Regulation No 17, Art. 15(2); Commission communications 96/C 207/04, Title B, and 98/C 9/03, point 2)

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27. *Competition — Fines — Judicial review*

(Arts 81 EC and 229 EC; EEA Agreement, Art. 53(1); Council Regulation No 17, Art. 17)

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(Council Regulation No 17, Art. 17; Commission communications 96/C 207/04 and 98/C 9/03, point 3)

29. *Competition — Administrative procedure — Professional secrecy*

(Art. 287 EC; Council Regulation No 17, Art. 20(2))

1. In application of the competition rules, 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 condition that the statement of objections can fulfil its function under the Community regulations of giving undertakings all the information necessary to enable them to defend themselves properly, before the Commission adopts a final decision. That function does not vary according to the specific situation of the undertaking to which it is addressed and the extent to which it cooperates with the Commission. That requirement is satisfied if the decision does not allege that the persons concerned have committed infringements other than those referred to in the statement of objections and takes into consideration only facts on which they have had the opportunity of making known their views.

With regard to exercise of the rights of the defence in respect of the imposition of fines, provided 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 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 concerned are guaranteed before the Commission through the opportunity to make submissions on the duration, the gravity and the anti-competitive nature of the alleged acts.

The Commission is not bound to mention in the statement of objections the possibility of a change in its policy as regards the general level of fines, a possibility which depends on general considerations of competition policy having no direct relationship with the particular circumstances of the case in question, nor the extent of any increase in the fine in order to ensure that it will act as a deterrent, as the Commission is not required, once it has indicated the main factual and legal criteria on which it will base its calculation of the amount of the fines, to specify the way in which it will use each of those elements in order to determine their level. To give indications as regards the level of the fines envisaged, before the undertakings have been invited to submit their observations on the allegations against them, would be to anticipate the Commission's decision and would thus be inappropriate.

(see paras 46-49, 58, 59, 62)

2. Although the Commission has a discretion when determining the amount of each fine and is not required to apply a precise mathematical formula, it may not depart from the rules which it has imposed on itself. Since the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty are an instrument intended to define, while complying with higher-ranking law, the criteria which the Commission proposes to apply in the exercise of its discretion when determining fines, the Commission must in fact take account of the Guidelines when determining fines, in particular the elements which are mandatory under the Guidelines.

(see para. 119)

3. In the case of a decision imposing fines on several undertakings for an infringement of the Community competition rules, the scope of the obligation to state

reasons must be established, inter alia, in the light of the fact that the gravity of infringements must be determined by reference to numerous factors including, in particular, the specific circumstances of the case, its context and the deterrent element of the fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up. The requirement to state reasons is thus satisfied where the Commission sets out in its decision the factors which enabled it to measure the gravity and duration of the infringement and it is not required to set out a more detailed account or the figures relating to the method of calculating the fine. However, it is desirable that the Commission indicate the figures which influenced the exercise of its discretion when setting the fines, especially in regard to the desired deterrent effect.

(see paras 133-135)

(see paras 131, 206, 213, 214)

4. 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 take, as a starting point for calculation of a fine, an amount determined on the basis of brackets of figures reflecting the various degrees of gravity of the infringements and which, 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. Thus, where the Commission finds in one and the same decision that several infringements have been committed, that method does not require — but does not preclude — that the size of the affected market be taken into account for the purposes of determining the starting amounts for each infringement and still less does it require the Commission to set those starting amounts according to a fixed percentage of the total turnover on the market.

5. The Commission is not required, when assessing fines for infringing Community competition law, 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. The gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the deterrent element of the fines. Thus, the Commission, for the purpose of setting

the fine, may indeed have regard to the turnover accounted for by the goods in respect of which the infringement was committed as a factor for assessing the gravity of the infringement, but it is important not to confer on that figure an importance which is disproportionate in relation to the other factors and the fixing of the fine cannot be the result of a simple calculation based on that figure.

Moreover, 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 do not provide that the fines are to be calculated according to the relevant worldwide turnover in the product, they do not preclude such turnover from being taken into account in determining the amount of the fine in order to comply with the general principles of Community law and where circumstances demand it. Furthermore, the Guidelines state that the principle of equal punishment for the same conduct may, if the circumstances so warrant, lead to different fines being imposed on the undertakings concerned without this differentiation being governed by arithmetical calculation.

Nor do the principles of proportionality and equal treatment dictate that the starting amount of the fine should represent the same percentage of individual turnover for all the different members of a cartel.

(see paras 139, 145-149)

6. As regards fixing the amount of fines on the various members of a cartel, the method of dividing members into several categories, which has the consequence that a flat-rate starting amount is fixed for all the undertakings in the same category, even though it ignores the differences in size between undertakings in the same category, cannot be condemned. However, that division into categories must comply with the principle of equal treatment, which prohibits similar situations from being treated differently and different situations from being treated in the same way, unless such treatment is objectively justified. Furthermore, the amount of the fine must at least be proportionate in relation to the factors taken into account in the assessment of the gravity of the infringement.

In order to ascertain whether a division of members of a cartel into categories is in keeping with the principles of equal treatment and proportionality, the Court, as part of its review of the

lawfulness of the exercise of the Commission's discretion in the matter, must none the less confine itself to checking that the division is coherent and objectively justified and not immediately substitute its own assessment for that of the Commission.

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

(see paras 150, 156, 157, 159)

7. The Commission enjoys a discretion enabling it to take account or not to take account of certain factors when determining the amount of the fines for infringing the competition rules which it intends imposing, having regard, in particular, to the circumstances of the case. In view of the terms of the sixth paragraph of Section 1 A 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 referred to above, it must be considered that in the case of infringements involving several undertakings the Commission retains a degree of discretion concerning the appropriateness of weighting fines according to the size of each undertaking. It follows from the use of the expression 'in some cases' and the word 'particularly' in the sixth paragraph of Section 1 A of the Guidelines that a weighting according to the individual sizes of the undertakings is not a systematic stage in a calculation which the Commission has imposed on itself but falls within the scope of the flexibility which it has granted itself in cases where it is called for.

The Commission does not exceed the limits of its discretion, where, when setting the starting amounts of fines for an infringement committed by the only two operators on the market, it does not differentiate between its treatment of those operators despite the difference in their turnovers on that market and in their market shares, since, in such a market, a cartel can exist only if both operators participate, the participation of the second operator in terms of market shares being as essential for the very existence of the cartel as that of the first operator, and, in the case in point, the operators in question are two large producers.

(see paras 180-182)

8. The object of the penalties for infringing the competition rules laid down by Article 15 of Regulation No 17 is to suppress illegal activities and to prevent any recurrence. As deterrence is an objective of fines for infringing the competition rules, the need to ensure it is a general requirement which must be a reference point for the Commission throughout the calculation of the fines and does not necessarily require that there be a specific step in that calculation in which an overall assessment is made of all relevant circumstances for the purposes of attaining that objective.

(see paras 218-220, 226, 238)

9. When setting the fine for infringing the competition rules to be imposed under Article 15 of Regulation No 17, the size and economic power of an undertaking are relevant criteria in order to ensure the deterrent effect of the fines. A large undertaking, owing to its considerable financial resources by comparison with those of the other members of a cartel, can more readily raise the necessary funds to pay its fine, which, if the fine is to have a sufficiently deterrent effect, justifies the imposition, in particular by the application of a multiplier, of a fine proportionately higher than that imposed in respect of the same infringement committed by an undertaking without such resources.

The Commission's application, for the purposes of deterrence, of a multiplier intended to reflect the size and overall resources of the undertakings is not precluded by the fact that the Guidelines do not expressly provide for it. The taking into account of the size and overall resources of the undertakings may contribute to satisfying the need to set the fine at a level which ensures that it has a sufficiently deterrent effect as referred to in Section 1 A, fourth paragraph, of the Guidelines, either by directly fixing a starting amount that takes account, inter alia, of those factors or by applying to the starting amount set on the basis of other factors (such as the nature of the infringement or the impact of the individual offending conduct) an adjustment intended to reflect the size and overall resources of the undertakings. That second method not only does not contradict the Guidelines, but even increases the transparency of the Commission's calculation as compared with the first method.

(see paras 235, 253)

10. There is nothing 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 to preclude, in the case of 'very serious' infringements of the competition rules, an increase of 100% of the starting amount in order to ensure the deterrent effect of the fines.

As regards specifically those infringements, the Guidelines merely state that the likely fines are 'above EUR 20 million'. The only limits referred to in the Guidelines which apply in the case of such infringements are the general limit of 10% of overall turnover set by Article 15(2) of Regulation No 17 and the limits relating to the additional amount which may be imposed in respect of the duration of the infringement (see Section 1 B, first paragraph, second and third indents of the Guidelines). Consequently, the Guidelines cannot give rise to a legitimate expectation as to the level of the starting amount, of amounts added to it for reasons other than the duration of the infringement and, thus, of the final figure for fines to be imposed in respect of very serious infringements. The same applies to the proportion of the final figure represented by an additional amount imposed in the course of the calculation.

(see paras 249, 251, 252)

11. The fact that an undertaking that has been fined for infringing the competition rules has adopted internal measures after the infringements had come to an end in order to prevent any repetition on its part does not oblige the Commission to apply factors which reduce the fine. Whilst it is important that an undertaking takes measures to prevent further infringements of Community competition law from being committed in the future by its staff, that does not alter the fact that the infringement was committed. Merely because in certain previous decisions the Commission took account of a compliance programme as an attenuating circumstance does not mean that it is under a duty to do so in each case which comes before it.

(see paras 266, 267)

12. In assessing the need for deterrence in the case of an undertaking which should

be penalised for an infringement of the Community competition rules, the Commission is not required to take account of judgments in non-member countries in respect of the same collusive arrangements. The objective of deterrence, which the Commission is entitled to pursue when setting fines, is to ensure that undertakings comply with the competition rules laid down in the Treaty when conducting their business within the Community or the European Economic Area (EEA). It follows that the deterrent effect of a fine imposed for infringement of the Community competition rules cannot be determined by reference solely to the particular situation of the undertaking sanctioned or by reference to whether it has complied with the competition rules in non-member countries outside the EEA.

(see para. 269)

13. Where an infringement of the competition rules has been committed by several undertakings, it is appropriate, in setting the fines, to consider the relative gravity of the participation of each of them, which implies, in particular, establishing their respective roles in the infringement during the period of their participation in it. 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. In accordance with those principles, Section 2 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 lays down, under the heading of aggravating circumstances, a non-exhaustive list of circumstances which can result in an increase in the basic amount of the fine and include in particular 'the role of leader in or instigator of the infringement'.

(see paras 280-282)

14. It is clear from the wording of Section 2, third indent, 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 that, when examining the role of an undertaking in an infringement of the competition rules, it is necessary to distinguish between the concepts of leader in and instigator of an infringement and to carry out two separate analyses to check whether that under-

taking was one or the other. Whereas instigation is concerned with the establishment or enlargement of a cartel, leadership is concerned with its operation.

(see para. 316)

15. In order to be classified as an instigator of a cartel, an undertaking must have persuaded or encouraged other undertakings to establish the cartel or to join it. By contrast, it is not sufficient merely to have been a founding member of the cartel. Thus, for example, in a cartel created by two undertakings only, it would not be justified automatically to classify those undertakings as instigators. That classification should be reserved to the undertaking which has taken the initiative, if such be the case, for example by suggesting to the other an opportunity for collusion or by attempting to persuade it to do so.

(see paras 321, 456)

16. In the context of an action brought against a Commission decision imposing a fine for infringing the competition rules, a finding of illegality of the Commission's assessment of the aggravating circumstances that led to an increase in the fine above the basic amount enables the Court to exercise its unlimited jurisdiction to confirm, set aside or adjust that increase in the fine in the light of all the relevant circumstances of the case.

(see paras 303, 338, 394)

17. As regards classification as a leader in an infringement of the competition rules, the fact that the price increases in a cartel were decided jointly at meetings between the cartel members, including their amount, timing and the mechanism by which they would be implemented, does not remove the special responsibility assumed by a particular undertaking when it decides to be the first in fact to implement the agreed increase. By taking such an initiative, without being under a specific and individual obligation to do so pursuant to the agreement to increase prices entered into at a cartel meeting, the undertaking voluntarily gives a major boost to the performance of that agreement by ensuring that, instead of remaining unimplemented, it has an effect on the market.

On the other hand, the mere fact that a member of a cartel is the first to announce a new price or a price increase cannot be regarded as indicating that it was a leader of the cartel where the circumstances of the case show that the price or increase in question was fixed in advance by agreement with the other cartel members and those members also agreed which of them would be the first to announce it, since the designation of that member shows that the fact of being the first to announce the price or the increase is merely a step performed strictly in accordance with an agreed predefined plan and not a voluntary initiative propelling the cartel.

(see paras 348, 427)

18. The fact that an undertaking exerts pressure and even dictates the behaviour of the other members of the cartel is not a precondition for that undertaking to be described as a leader in the cartel. It is sufficient that the undertaking was a significant driving force for the cartel, which may be inferred in particular from the fact that it took upon itself responsibility for developing and suggesting the conduct to be adopted by the members of the cartel, even if it was not necessarily in a position to impose it upon them.

(see para. 374)

19. The alignment of interests, objectives and positions adopted within a wider cartel by a group of undertakings does not necessarily mean that the members of that group are to be classified as leaders or that such a classification, applied for other reasons to one of them, is to be extended to all the others.

(see para. 402)

20. Where several undertakings have jointly committed several infringements of the competition rules, the fact that meetings relating to one cartel might have taken place at the same time as meetings relating to another cartel and followed essentially the same scheme does not make it possible to answer the question as to which undertaking was in fact a leader in each of those cartels. Thus it cannot be presumed from those similarities between the two cartels under consideration that the undertaking which played the role of leader in one of those cartels also played such a role in the other.

(see para. 459)

21. In a long-term infringement the members of the cartel may, at various times, take turns in exercising leadership, so that it cannot be ruled out that each may have the aggravating circumstance of leader applied to them.

(see para. 460)

22. The Commission notice on the non-imposition or reduction of fines in cartel cases creates legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission. In view of the legitimate expectation which undertakings intending to cooperate with the Commission are able to derive from the notice, the Commission must therefore adhere to the notice when, for the purposes of determining the fine to be imposed on an undertaking, it assesses its cooperation.

(see para. 488)

23. The grant of total immunity or a reduction of the fine under Section B of the notice on the non-imposition or reduction of fines in cartel cases requires in particular that the undertaking concerned be the first to adduce decisive evidence of the existence of the cartel.

Although such evidence need not be sufficient in itself to establish the cartel's existence, it must none the less be decisive for that purpose. It must therefore not be simply an indication as to the direction which the Commission's investigation should take but must be material which may be used directly as the principal evidence supporting a decision finding an infringement. That evidence must also in fact be adduced to the Commission, and a mere offer or indication of the source from which it may be obtained does not suffice.

A classification as decisive evidence cannot apply to evidence which places the Commission in a position to formulate requests for information, and even to order investigations, but leaves the Commission with almost the entire task of reconstructing and proving the facts, notwithstanding the adducing undertaking's admission of its responsibility, or to an undertaking's offer to make its employees available to give evidence to the Commission; nor does

that offer have to be accepted by the Commission and it may request the undertaking to collect the information from its employees and submit it to the Commission in writing so as not to add unnecessarily to its workload.

The Commission is not under a duty to notify the undertaking of the inadequacy of the information provided and the need to supplement that information, since Section E, paragraph 2, of the notice states that 'only on its adoption of a decision will the Commission determine whether or not the conditions set out in Sections B, C and D are met'.

(see paras 492, 493, 517, 518, 521, 522, 526, 568)

24. For the purpose of the grant of total immunity or a reduction in the fine pursuant to Section B of the notice on the non-imposition or reduction of fines in cartel cases, the decisive evidence of the existence of the cartel may be adduced orally to the Commission by the undertaking concerned. The oral disclosure of information has no major disadvantage from the point of view of legal certainty, since information provided orally to a public administration in a meeting is normally likely to be preserved by sound recording and/or in written minutes.

Although there is no general obligation on the Commission to take minutes of its meetings with individuals or undertakings, the lack of an express provision that minutes be drawn up does not preclude that in a particular case the Commission may be under a duty to make such a record of the statements it receives. Such an obligation may, depending on the circumstances of the particular case, arise directly from the principle of sound administration, which is one of the guarantees conferred by the Community legal order in administrative proceedings. Where an undertaking makes contact with the Commission with a view to cooperating to an extent which may be rewarded under the Leniency Notice and a meeting is organised in that context between the institution and that undertaking, the minutes of such a meeting, recording the essential aspects of the assertions made at that meeting, must be drawn up or, at the very least, a sound recording must be made, pursuant to the principle

of sound administration, if the undertaking in question so requests at the latest at the beginning of the meeting.

(see paras 498-502, 506)

25. The expressions 'leader in or instigator of the infringement' and 'the role of instigator or the determining role' mentioned in Section 2, third indent, 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 and in Section B(e) of the notice on the non-imposition or reduction of fines in cartel cases as aggravating circumstances for the calculation of the fines and as circumstances precluding total immunity or a very substantial reduction, have essentially the same scope.

It follows that where an undertaking is found to have played the role of leader in or instigator of an infringement, it cannot receive immunity or a very substantial reduction of the fine under the Leniency Notice.

(see paras 535, 536, 544, 545)

26. Given the wording of Section B(b) of the notice on the non-imposition or reduction of fines in cartel cases, which seeks to reward with a very substantial reduction in the amount of the fine the one undertaking which was genuinely the first to adduce decisive evidence, it cannot be argued that two undertakings jointly satisfied that condition when they did not supply such evidence on the same date.

(see para. 550)

27. The review which the Court is required to exercise in respect of a Commission decision finding an infringement of Article 81 EC and Article 53 of the Agreement on the European Economic Area and imposing fines is confined to a review of the legality of that decision. It is possible for the Court to exercise its unlimited jurisdiction under Article 229 EC and Article 17 of Regulation No 17

only where it has made a finding of illegality affecting the decision, of which the undertaking concerned has complained in its action, and in order to remedy the consequences which that illegality has for determination of the amount of the fine imposed, by annulling or adjusting that fine if necessary.

It is therefore necessary to reject the request of an applicant to which the Commission has applied the notice on the non-imposition or reduction of fines in cartel cases which asks the Court to assess and reward its cooperation in the investigation without reference to the provisions of that notice, and when the applicant does not claim that those provisions are unlawful.

(see paras 581-583)

28. The possibility of granting, to an undertaking which has cooperated with the Commission during proceedings for infringement of the competition rules, a reduction of the fine outside the framework laid down by the notice on the non-imposition or reduction of fines in cartel cases, as provided for in the sixth 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, necessarily presupposes that the cooperation in question was not capable of reward under that notice and that it was effective, that is to say, that it facilitated the Commission's task of finding and putting an end to infringements of the competition rules.

(see paras 585, 588)

29. In inter partes procedures liable to result in the imposition of a penalty, the nature and amount of the penalty proposed are by their very nature covered by professional secrecy until the penalty has been finally approved and announced. That principle follows, in particular, from the need to have due regard for the reputation and standing of the person concerned during a period in which no penalty has been imposed on that person. Moreover, the Commission's duty not to disclose to the press information on the specific penalty envisaged is coterminous not merely with its duty to respect professional secrecy but also with its duty of sound administration.

Even if the Commission's officials were responsible for the disclosure to the media of precise details of a fine for infringing the competition rules before its adoption, an irregularity of that type may lead to annulment of the decision in question only if it is established that the decision would not have been adopted or its content would have differed if that irregularity had not occurred. That criterion does not have the effect that irregularities of this kind remain practically unpunished. Quite apart from the possibility of securing annulment of the decision in question in the event that the irregularity committed affected the content of the decision, the person concerned is entitled to seek to establish the liability of the institution involved for any harm which he claims to have suffered by reason of that irregularity.

(see paras 604, 606, 607)