

Case T-241/01

Scandinavian Airlines System AB

v

Commission of the European Communities

(Competition — Cartel — Air transport — Regulation (EEC) No 3975/87 — Notified agreements — Cooperation beyond the scope of the notification — Market-sharing — Fine — Guidelines for the calculation of fines — Seriousness of the infringement — Notice on the non-imposition or reduction of fines — Attenuating circumstances — Unlimited jurisdiction)

Judgment of the Court of First Instance (Third Chamber), 18 July 2005 . . . II - 2926

Summary of the Judgment

- 1. Competition — Fines — Amount — Determination — Guidelines adopted by the Commission — Obligation on the Commission to comply therewith*
(Council Regulations Nos 17, Art. 15(2), and 3975/87, Art. 12(2); Commission Communication 98/C 9/03)

2. *Competition — Fines — Amount — Determination — Legal context — Article 12(2) of Regulation No 3975/87 — Commission's margin of discretion — Introduction of guidelines by the Commission — Legality*
(Council Regulations Nos 17, Art. 15(2), and 3975/87, Art. 12(2); Commission Communication 98/C 9/03)
3. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringements — Assessment according to the nature of the infringement*
(Art. 81(1) EC; Council Regulation No 17, Art. 15(2))
4. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringements — Obligation to reserve the Guideline classification 'very serious' for infringements that are geographically very extensive — None — Obligation on the Commission to adhere to its previous decision-making practice — None*
(Council Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03)
5. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringements — Obligation to define the geographical market in question — Scope*
(Council Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03, point 1A)
6. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringements — Obligation to take account of the actual market impact — Scope*
(Council Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03)
7. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringements — Obligation on the Commission to adhere to its previous decision-making practice — None*
(Council Regulations Nos 17, Art. 15(2), and 3975/87, Art. 12(2); Commission Communication 98/C 9/03)
8. *Competition — Fines — Imposition — Requirement that the undertaking benefited from the infringement — None — Whether unlawful benefit to be taken into account in calculating the amount of the fine*
(Council Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03)

9. *Competition — Fines — Amount — Determination — Introduction by the Commission of guidelines innovative in relation to its previous decision-making practice — Use of a calculation method relating to the inherent seriousness and the duration of the infringement and including an adjustment by reference to the circumstances — Legality (Council Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03)*
10. *Competition — Fines — Amount — Determination — Turnover to be taken into account in calculating the fine — Commission's discretion within the limit fixed by Article 15(2) of Regulation No 17 (Council Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03)*
11. *Competition — Fines — Amount — Determination — Non-imposition or reduction of the fine in return for the cooperation of the undertaking concerned — Need for conduct which facilitated the Commission's finding of an infringement — Mere willingness to cooperate insufficient (Council Regulation No 17, Arts 11(4) and (5), and 15; Commission Communication 96/C 207/04)*
12. *Competition — Fines — Amount — Discretion of the Commission — Unlimited jurisdiction of the Court of First Instance — Factors which the Community judicature may take into account in reducing the amount of the fine — Conduct of the undertaking after the decision — Irrelevant save in wholly exceptional circumstances (Art. 229 EC; Council Regulation No 17, Art. 17)*

1. Article 12(2) of Regulation No 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, like Article 15(2) of Regulation No 17, merely provides that, in determining the amount of the fine, account is to be taken of the seriousness and the duration of the infringement. That provision confers upon the Commission a wide discretion in the fixing of fines which is, amongst other things, a func-

tion of its general policy in competition matters. It is in that context that, in 1998, in order to ensure the transparency and objectivity of its decisions on fines, the Commission adopted the Guidelines for the calculation of fines imposed pursuant to Article 15(2) of Regulation No 17 and of Article 65(5) [CS], which are designed, whilst complying with higher-ranking law, to specify the criteria which the Commission intends to apply when exercising its

discretion; a self-limitation of that power results, in that the Commission is required to comply with guidelines that it has itself laid down.

ment allowing undertakings to have a more precise idea of the competition policy which the Commission intends to follow in order to ensure the transparency and objectivity of its decisions on fines.

(see para. 64)

(see paras 70, 75)

2. In so far as the Guidelines for the calculation of fines imposed pursuant to Article 15(2) of Regulation No 17 and of Article 65(5) [CS] provide that assessment of the seriousness of the infringement must take account of its nature, its actual impact on the market, where that can be measured, and the size of the relevant geographic market, they fall within both the legislative framework laid down by Article 12(2) of Regulation No 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector and the scope of the discretion which the Commission has when fixing fines.
3. Even if the size of the geographic market concerned and the impact on the market when measurable must also be taken into account, the nature of the infringements of the competition rules constitutes an essential criterion for assessing the seriousness of an infringement.

Those Guidelines cannot be regarded as excessively and unlawfully limiting the Commission's discretion in fixing fines, but must rather be viewed as an instru-

As the Guidelines for the calculation of fines imposed pursuant to Article 15(2) of Regulation No 17 and of Article 65(5) [CS] state, horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardise the proper functioning of the single market are particularly serious; they also appear amongst the examples of agreements, decisions or concerted practices expressly declared incompatible with the common market in Article 81(1)(c) EC. Apart from the serious distortion of

competition which they entail, such agreements, by obliging the parties to respect distinct markets, often delimited by national frontiers, cause the isolation of those markets, thereby counteracting the EC Treaty's main objective of integrating the Community market.

Moreover, its decision-making practice does not in itself serve as a legal framework for fines in competition matters.

(see para. 87)

(see paras 84-85)

4. The fact that, as simple examples of infringements classified as 'very serious', the Guidelines for the calculation of fines imposed pursuant to Article 15(2) of Regulation No 17 and of Article 65(5) [CS] have referred only to infringements concerning most Member States cannot be interpreted as meaning that only infringements of such a geographic extent are capable of receiving that classification. On the contrary, the Commission has a wide discretion in determining the seriousness of infringements and fixing the fine by reference to numerous factors which do not fall within a binding or exhaustive list of the criteria to be taken into account.

5. Where it assesses the seriousness of an infringement of the competition rules, and is obliged under point 1 A of the Guidelines for the calculation of fines imposed pursuant to Article 15(2) of Regulation No 17 and of Article 65(5) [CS] to take account of the geographic extent of the market concerned, the Commission is not obliged, to that end, to define precisely which are the markets in question, but simply to assess the greater or lesser extent of the market or markets concerned. Moreover, even in order to find an infringement, the Commission is not required to define precisely the markets in question where the agreements are clearly designed to restrict competition.

(see para. 99)

6. According to the Guidelines for the calculation of fines imposed pursuant

to Article 15(2) of Regulation No 17 and of Article 65(5) [CS], the Commission does not, for the purposes of assessing the seriousness of the infringement, have to take its actual market impact into account unless it is measurable. Therefore, where it is faced with an overall agreement designed to restrict potential competition, the actual effect of which is *ex hypothesi* difficult to measure, the Commission is not required precisely to demonstrate the actual impact of the cartel on the market and to quantify it, but may confine itself to estimates of the probability of such an effect.

a certain type as 'serious' cannot prevent it from regarding them as 'very serious' in a subsequent case if that is necessary in order to ensure the implementation of Community competition policy.

(see para. 132)

(see para. 122)

8. The fact that an undertaking has derived no profit from an infringement of the competition rules cannot prevent it from being fined, as otherwise the fine would lose its deterrent effect. It follows that the Commission is not required, for the purpose of fixing the amount of fines, to establish that the infringement secured an improper advantage for the undertakings concerned, or to take into consideration, where it applies, the fact that no profit was derived from the infringement in question.

7. The Commission's previous decision-making practice does not in itself serve as a legal framework for fines in competition matters, since the latter is defined in Regulation No 17, or in equivalent sectoral regulations such as Regulation No 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, and in the Guidelines for the calculation of fines imposed pursuant to Article 15(2) of Regulation No 17 and of Article 65(5) [CS]. The fact that in the past the Commission regarded infringements of

In that regard, even if point 5(b) of the Guidelines for the calculation of fines imposed pursuant to Article 15(2) of Regulation No 17 and of Article 65(5) [CS], containing a series of general comments, provides that, depending on the circumstances, account is to be taken of certain objective factors such as a specific economic context or any economic benefit derived by the offenders, such indications do not mean that the Commission has henceforth assumed the burden of establishing, in

all circumstances, for the purposes of determining the amount of the fine, the financial advantage linked to the infringement found. They merely show its willingness to take that factor further into account and to use it as a basis for calculating the amount of fines, in so far as it has been in a position to assess it, if only approximately.

adjusting the fine within the amounts laid down by the Guidelines for the various categories of infringements ('minor', 'serious' and 'very serious').

(see para. 160)

(see paras 146-147)

9. The Guidelines for the calculation of fines imposed pursuant to Article 15(2) of Regulation No 17 and of Article 65(5) [CS] introduced a new approach for the calculation of fines. Whereas previously the Commission's practice consisted in calculating the fine in proportion to the turnover of the undertakings concerned, the Guidelines are based more on the flat-rate principle, the starting-point being determined henceforth in absolute terms by reference to the inherent seriousness of the infringement, increased by reference to the duration, and, finally, adjusted by reference to aggravating or extenuating circumstances. Under that method, expressly confirmed by the case-law, the turnover appears only as a secondary criterion for

10. Concerning the determination of fines in competition cases, the only express reference to turnover contained in Article 15(2) of Regulation No 17 concerns the upper limit that the amount of a fine may not exceed, that limit being understood as relating to total turnover. Provided it remains within that limit, the Commission may, in principle, choose which turnover to take in terms of territory and products, without being obliged to use the precise figure for total turnover or turnover achieved on the geographic or product market in question. Moreover, even if the Guidelines for the calculation of fines imposed pursuant to Article 15(2) of Regulation No 17 and of Article 65(5) [CS] do not require fines to be calculated by reference to a given turnover figure, neither do they prevent such a figure from being taken into account, provided the choice made by the Commission is not vitiated by an obvious error of assessment.

It follows that, for the purposes of determining the amount of the fine, the Commission is free to take into account the turnover figure of its choice, provided it does not appear unreasonable by reference to the circumstances of the case. Similarly, the Commission is not required, when determining the amount of fines, to ensure, where fines are imposed on various undertakings involved in the same infringement, that the final amounts of the fines reflect all differentiations between the undertakings concerned as regards their total turnover.

of an undertaking to cooperate during the administrative procedure before the Commission for applying the competition rules is of no significance.

Similarly, a reduction in the fine on account of cooperation during the administrative procedure is justified only if the conduct of the undertaking enabled the Commission to establish the existence of an infringement with less difficulty, and, where appropriate, bring it to an end.

(see paras 165-166)

11. Section D.2, first indent, of the notice on the non-imposition or reduction of fines in cartel cases leniency notice provides for a reduction only in favour of an undertaking 'which provides the Commission with information, documents or other evidence which contribute to establishing the infringement' and not in favour of an undertaking which is merely willing to cooperate, or limits itself to cooperating, with the Commission. It follows that the mere willingness

Finally, cooperation in the investigation which does not go beyond that which undertakings are already obliged to provide under Article 11(4) and (5) of Regulation No 17 or equivalent provisions contained in sectoral regulations does not warrant a reduction in the fine.

(see paras 212-213, 218)

12. Reduction of a fine by the Community judicature in the context of its unlimited jurisdiction pursuant to Article 229 EC, in consideration of conduct adopted subsequently to the issuing of the decision imposing it, even if it were possible, could in any event be operated only with great care and in altogether exceptional circumstances. Such a practice could be perceived as an incentive to
- commit infringements while speculating on a possible reduction in the fine by reason of alteration of the undertaking's conduct after the decision.
- (see paras 226, 228)