

Case T-348/94

Enso Española SA

v

Commission of the European Communities

(Competition — Article 85(1) of the EC Treaty —
Right to an independent and impartial tribunal — Rights of the defence —
Statement of reasons — Fine — Determination of the amount —
Method of calculation — Mitigating circumstances —
Principle of equal treatment — Principle of proportionality)

Judgment of the Court of First Instance (Third Chamber, Extended Composition), 14 May 1998 II - 1884

Summary of the Judgment

1. *Community law — Principles — Fundamental rights — Guaranteed by the Community judiciary — European Convention on Human Rights taken into account (Treaty on European Union, Art. F(2))*
2. *Competition — Administrative procedure — Inapplicability of Article 6 of the European Convention on Human Rights — Observance by the Commission of procedural guarantees — Effective judicial review of Commission decisions — Independent and impartial tribunal — Unlimited jurisdiction (EC Treaty, Arts 85 and 86; Council Regulation No 17, Art. 17; Council Decision No 88/591)*

3. *Community law — Principles — Rights of the defence — Observance of those rights during administrative proceedings*
4. *Competition — Administrative procedure — Statement of objections — Matters to be stated (Council Regulation No 17, Art. 19(1); Commission Regulation No 99/63, Art. 4)*
5. *Acts of the institutions — Statement of reasons — Obligation — Scope (EC Treaty, Art. 190)*
6. *Procedure — Application initiating proceedings — Procedural requirements — Statement of the subject-matter of the proceedings — Summary of the pleas in law relied upon (Rules of Procedure of the Court of First Instance, Art. 44(1)(c))*
7. *Competition — Agreements, decisions and concerted practices — Participation in meetings of undertakings with an anti-competitive object — Ground for concluding that an undertaking participated in the subsequent cartel, if it has not distanced itself from the decisions taken (EC Treaty, Art. 85(1))*
8. *Competition — Agreements, decisions and concerted practices — Agreements and concerted practices constituting a single infringement — Undertakings to which an infringement in the form of participation in an overall cartel may be imputed — Criteria (EC Treaty, Art. 85(1))*
9. *Competition — Agreements, decisions and concerted practices — Infringement with the object of restricting competition on a particular geographical market — Whether geographical market must first be defined — No such obligation (EC Treaty, Art. 85(1))*
10. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision imposing fines on several undertakings for an infringement of the competition rules (EC Treaty, Art. 190; Council Regulation No 17, Art. 15)*
11. *Competition — Fines — Amount — Determination thereof — Criteria — Gravity of the infringements — Aggravating circumstances — Concealment of the cartel — Proof inferred from the absence of notes on meetings of cartel members (Council Regulation No 17, Art. 15)*
12. *Competition — Community rules — Infringements — Intentional — Meaning (Council Regulation No 17, Art. 15)*

13. *Competition — Fines — Amount — Determination thereof — Criteria — Gravity of the infringements — Mitigating circumstances — Conduct at odds with that agreed by the cartel — Assessment*

(Council Regulation No 17, Art. 15)

14. *Competition — Fines — Amount — Determination thereof — Criteria — Gravity of the infringements — Mitigating circumstances — Financial situation of the undertaking concerned — Excluded*

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

15. *Competition — Fines — Amount — Determination thereof — Criteria — Gravity of the infringements — Mitigating circumstances — No measures to monitor the implementation of a cartel — Excluded*

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

16. *Competition — Fines — Amount — Methods of calculation — Conversion into ecus of the undertakings' turnover figure for the reference year on the basis of the average exchange rate over the same year — Whether permissible*

(Council Regulation No 17, Art. 15)

17. *Competition — Fines — Amount — Determination thereof — Criteria — Gravity and duration of the infringements — Criteria to be applied — Possibility of increasing the fines in order to strengthen their deterrent effect*

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

1. Fundamental rights form an integral part of the general principles of law whose observance the Community judicature ensures. For that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The European Convention on Human Rights has special significance in that respect.

law, be described as a 'tribunal' within the meaning of Article 6 of the European Convention on Human Rights. A decision applying the Community competition rules cannot therefore be unlawful merely because it was adopted under a system in which the Commission carries out both investigatory and decision-making functions. However, during the administrative procedure before it, the Commission must observe the procedural guarantees provided for by Community law.

2. The Commission cannot, when applying provisions of Community competition

Community law confers upon the Commission a supervisory role which includes

the task of conducting proceedings in respect of infringements of Articles 85(1) and 86 of the Treaty. Furthermore, Regulation No 17 gives it the power to impose, by decision, fines on undertakings and associations of undertakings which have infringed those provisions either intentionally or negligently.

The requirement for effective judicial review of any Commission decision finding and punishing an infringement of the Community competition rules is a general principle of Community law which follows from the common constitutional traditions of the Member States. That principle is not infringed where such a review is carried out, pursuant to Council Decision 88/591, by an independent and impartial court, such as the Court of First Instance, which may, in accordance with the pleas on which the natural or legal person concerned may rely in support of his application for annulment, assess the correctness in law and in fact of any accusation made by the Commission in competition proceedings and which, pursuant to Article 17 of Regulation No 17, has jurisdiction to assess whether the fine imposed is proportionate to the seriousness of the infringement found.

3. Observance of the right to be heard is, in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed, a fundamental principle of Community law which must be respected

even if the proceedings in question are administrative proceedings.

4. The statement of objections — the purpose of which is to give undertakings under investigation in application of the competition rules all the information necessary to enable them properly to defend themselves before the Commission adopts a final decision — must be framed in terms which, albeit concise, are sufficiently clear to enable the persons concerned properly to identify the conduct to which the Commission objects.
5. The purpose of the obligation to give reasons for an individual decision is to enable the Community judicature to review the legality of the decision and to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted.

Although pursuant to Article 190 of the Treaty the Commission is bound to state the reasons on which its decisions are based, mentioning the facts, law and considerations which have led it to adopt them, it is not required to discuss all the issues of fact and law which have been

- raised during the administrative procedure.
6. Under Article 44(1)(c) of the Rules of Procedure of the Court of First Instance all applications must indicate the subject-matter of the proceedings and include a brief statement of the grounds relied on. The information given must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to decide the case, if appropriate without other information in support. In order to ensure legal certainty and the sound administration of justice, if an action is to be admissible, the essential facts and law on which it is based must be apparent from the text of the application itself, even if only stated briefly, provided the statement is coherent and comprehensible.
 7. The fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings. Even assuming that the undertaking's conduct on the market was not in conformity with the conduct agreed, that in no way affects its liability for an infringement of Article 85(1) of the Treaty.
 8. For the Commission to be entitled to hold that each of the undertakings addressed in a decision applying the competition rules is responsible for an overall cartel covering various anti-competitive actions during a given period, it must demonstrate that they each either consented to the adoption of an overall plan comprising the constituent elements of the cartel or participated directly in all those elements during that period. An undertaking may also be held responsible for an overall cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it is shown that it knew, or must have known, that the collusion in which it participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel. Where that is the case, the fact that the undertaking concerned did not participate directly in all the constituent elements of the overall cartel cannot relieve it of responsibility for the infringement of Article 85(1) of the Treaty. Such a circumstance may nevertheless be taken into account when assessing the seriousness of the infringement which it is found to have committed.
 9. Where the Commission finds that there has been an infringement whose object was to restrict competition on a particular geographical market, it is not necessary first to define the geographical market before finding that there is such a restriction of competition.

10. The purpose of the obligation to give reasons for an individual decision is to enable the Community judicature to review the legality of the decision and to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted.

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 assessed in the light of the fact that the gravity of infringements falls to be determined by reference to numerous factors including, in particular, the specific circumstances and context of the case and the deterrent character of the fines; moreover, no binding or exhaustive list of criteria to be applied has been drawn up.

Furthermore, when fixing the amount of each fine, the Commission has a margin of discretion and cannot be considered obliged to apply a precise mathematical formula for that purpose.

Lastly, the reasons for a decision must appear in the actual body of the decision

and, save in exceptional circumstances, explanations given *ex post facto* cannot be taken into account.

When the Commission finds in a decision that there has been an infringement of the competition rules and imposes fines on the undertakings participating in it, it must, if it has systematically taken into account certain basic factors in order to fix the amount of fines, set out those factors in the body of the decision in order to enable the addressees thereof to verify that the level of the fine is correct and to assess whether there has been any discrimination.

11. The fact that the undertakings participating in price collusion orchestrated the announcement of the concerted price increases and that they were discouraged from taking notes on the meetings to discuss this proves that they were aware of the unlawfulness of their conduct and that they took steps to conceal the collusion. The Commission is entitled to hold those steps to be aggravating circumstances when assessing the gravity of the infringement.

The absence of official minutes and the almost total absence of internal notes relating to the meetings may constitute, having regard to the number of such meetings, to the length of time for which they continued and to the nature of the

discussions in question, sufficient proof that the participants were discouraged from taking notes.

undertaking concerned. Recognition of such an obligation would be tantamount to conferring an unjustified competitive advantage on the undertakings least well adapted to the conditions of the market.

12. It is not necessary for an undertaking to have been aware that it was infringing Article 85(1) of the Treaty for an infringement to be regarded as having been committed intentionally. It is sufficient that it could not have been unaware that the contested conduct had as its object or effect the restriction of competition in the common market.
 13. The fact that an undertaking which has been proved to have participated in collusion on prices with its competitors has not behaved on the market in the manner agreed with its competitors is not necessarily a matter which must be taken into account as a mitigating circumstance when the amount of the fine to be imposed is determined. An undertaking which, despite colluding with its competitors, follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit.
 14. When determining the amount of the fine to impose for infringement of the Community competition rules, the Commission is not obliged to take into account, by way of a mitigating circumstance, the loss-making situation of the
 15. Although the existence of measures to monitor the implementation of a cartel may be taken into account as an aggravating factor when fixing the fines, the absence of such measures cannot, in itself, constitute a mitigating factor.
 16. When the Commission imposes fines on several undertakings for infringement of the Community competition rules, nothing precludes it from expressing the amount of the fines in ecus, a monetary unit which is convertible into national currency. That also allows the undertakings more easily to compare the amounts of the fines imposed. Moreover, the fact that the ecu may be converted into national currency distinguishes it from the 'unit of account' referred to in Article 15(2) of Regulation No 17, the use of which — since it is not a currency in which payment is made — necessarily means that the amount of the fine must be determined in national currency.
- In calculating the fine, the Commission is entitled to use a method whereby it converts into ecus each undertaking's reference turnover at the average exchange rate for that same year, not the

exchange rate in force on the date when the decision was adopted.

First of all, the Commission should ordinarily use one and the same method of calculating the fines imposed on the undertakings penalised for having participated in the same infringement. Second, in order to be able to compare the different turnover figures sent to it, which are expressed in the respective national currencies of the undertakings concerned, the Commission must convert those figures into a single monetary unit such as the ecu, the value of which is determined in accordance with the value of each national currency of the Member States.

Furthermore, in the first place, the taking into account of the turnover achieved by each undertaking during the reference year, that is to say, the last complete year of the period of infringement found, enables the Commission to assess the size and economic power of each undertaking and the scale of the infringement committed by each of them, those aspects being relevant for an assessment of the gravity of the infringement committed by each undertaking. In the second place, the taking into account, in order to convert the turnover figures in question into ecus, of the average exchange rates for the reference year adopted, enables the Commission to prevent any monetary fluctuations occurring after the cessation of the infringement from affecting the assess-

ment of the undertakings' relative size and economic power and the scale of the infringement committed by each of them and, accordingly, its assessment of the gravity of that infringement. The assessment of the gravity of an infringement must have regard to the economic reality as revealed at the time when that infringement was committed.

Consequently, the method of calculating the fine by using the average rate of exchange for the reference year makes it possible to avoid the uncertain effects of changes in the real value of the national currencies which may arise between the reference year and the year in which the decision is adopted. Although this method may mean that a given undertaking must pay an amount, expressed in national currency, which is in nominal terms greater or less than that which it would have had to pay if the rate of exchange at the date of adoption of the decision had been applied, that is merely the logical consequence of fluctuations in the real values of the various national currencies.

17. When the amount of the fine for infringement of the Community competition rules is determined, regard is to be had to both the gravity and the duration of the infringement. The gravity of infringements falls to be determined by reference to numerous factors including, in particular, the specific circumstances and context of the case, and the deterrent character of the fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up.

When assessing the general level of fines the Commission is entitled to take account of the fact that clear infringements of the Community competition rules are still relatively frequent and that, accordingly, it may raise the level of fines in order to strengthen their deterrent effect. Consequently, the fact that in the past the Commission has applied fines of a certain level to certain types of infringement does not mean that it is estopped from raising that level, within the limits set out in Regulation No 17, if that is necessary in order to

ensure the implementation of Community competition policy.

Furthermore, in fixing the general level of fines, the Commission is entitled to take into account, in particular, the lengthy duration and obviousness of an infringement of Article 85(1) of the Treaty which has been committed despite the warning which the Commission's previous decisions should have provided.