

Case T-38/02

Groupe Danone

v

Commission of the European Communities

(Competition — Cartels — Fines — Guidelines on the method of setting fines — Leniency Notice)

Judgment of the Court of First Instance (Fifth Chamber), 25 October 2005 II - 4426

Summary of the Judgment

1. *Competition — Administrative procedure — Access to the file — Purpose — Observance of the rights of the defence — Scope — Inculpatory evidence — Exclusion of evidence that was not disclosed*
(Art. 81(1) EC)
2. *Competition — Administrative procedure — Access to the file — Documents not included in the investigation file — Documents capable of assisting the defence of the parties — Obligation of the parties to ask for them to be made available*

3. *Competition — Administrative procedure — Observance of the rights of the defence — Statement of objections — Necessary content
(Council Regulation No 17)*

4. *Competition — Fines — Amount — Determination — Rights of the defence — Judicial review — Unlimited jurisdiction of the Community judicature
(Art. 229 EC; Council Regulation No 17, Art. 17)*

5. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringements — Aggravating circumstances — Obligation of the Commission to adhere to its previous decision-making practice — None
(Council Regulation No 17, Art. 15(2))*

6. *Competition — Administrative procedure — Observance of the rights of the defence — Access to the file — Scope — Inculpatory evidence provided orally by a third party — Obligation to make it available to the undertaking concerned, if necessary by creating a written document*

7. *Competition — Fines — Amount — Whether appropriate — Judicial review — Information which may be taken into account by the Community judicature — Information not contained in the decision imposing the fine and not required by the duty to state reasons — Included
(Arts 229 EC, 230 EC and 253 EC; Council Regulation No 17, Art. 17)*

8. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision imposing fines — Indication of the factors which led the Commission to assess the gravity and the duration of the infringement — Sufficient indication
(Art. 253 EC; Council Regulation No 17, Art. 15(2), second para.; Commission Communications 96/C 207/04 and 98/C 9/03)*

9. *Competition — Agreements, decisions and concerted practices — Definition of the market — Object — Determination of the effect on trade between Member States
(Art. 81(1) EC)*

10. *Competition — Community rules — Infringements — Fines — Determination — Criteria — Raising of the general level of fines — Whether permissible — Conditions*
(Council Regulation No 17)

11. *Competition — Fines — Amount — Determination — Method of calculation laid down by the guidelines drawn up by the Commission — Obligation of the Commission to comply with them — Consequences — Obligation to state reasons in respect of each infringement*
(Council Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03)

12. *Competition — Fines — Amount — Determination — Infringements classified as very serious on the basis of their nature alone — No requirement to determine their impact and their geographical extent*
(Council Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03)

13. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringements — Taking into account of the overall turnover of the undertaking concerned and the turnover achieved from sales of the goods in respect of which the infringement was committed — Limits*
(Council Regulation No 17, Art. 15(2))

14. *Competition — Agreements, decisions and concerted practices — Participation in meetings of undertakings having an anti-competitive object — Evidence from which, where the undertaking concerned has not distanced itself from the decisions adopted, it may be concluded that it participated in the ensuing cartel — Participation allegedly under pressure — Matter not providing a justification for an undertaking which did not make use of the possibility of lodging a complaint with the competent authorities*
(Art. 81(1) EC; Council Regulation No 17, Art. 3)

15. *Competition — Fines — Amount — Determination — Criteria — Gravity of infringements coupled with the taking into account of a deterrent effect*
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16. *Competition — Administrative procedure — Commission decision finding an infringement adopted after another Commission decision referring to the same undertaking — No identity of the infringements forming the subject-matter of the two decisions — Breach of the principle 'non bis in idem' — None*

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18. *Competition — Administrative procedure — Commission decision finding an infringement — Evidence which must be gathered — Degree of evidential value required*
(Art. 81(1) EC)

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20. *Competition — Fines — Amount — Determination — Criteria — Gravity and duration of the infringement — Infringement committed by several undertakings — Gravity to be assessed individually*
(Council Regulation No 17, Art. 15(2))

21. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Aggravating circumstances — Threat of reprisals by one undertaking against another*

22. *Competition — Administrative procedure — Commission decision finding an infringement — Use as evidence of statements of other undertakings which participated in the infringement — Whether permissible — Conditions*
(Arts 81 EC and 82 EC)

23. *Competition — Fines — Amount — Determination — Introduction of guidelines by the Commission — Method of calculation based on the inherent gravity and the duration of the infringement and complying with the maximum limit based on the turnover of each undertaking — Whether lawful*
(Council Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03)

24. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringements — Aggravating circumstances — Recidivism — Meaning*
(Council Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03)

25. *Competition — Fines — No infringement of the principle of legal certainty where a limitation period has not been laid down*
(Council Regulation No 17, Art. 15; Commission Communication 98/C 9/03)
26. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringements — Attenuating circumstances — Agreement not implemented in practice — Assessment at the level of the individual conduct of each undertaking*
(Council Regulation No 17, Art. 15)
27. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringements — Attenuating circumstances — Absence of measures to monitor the implementation of the cartel — Not included*
(Council Regulation No 17, Art. 15(2))
28. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringements — Attenuating circumstances — Financial situation of the undertaking concerned — Not included*
(Council Regulation No 17, Art. 15(2))
29. *Competition — Fines — Amount — Determination — Non-imposition or reduction of the fine in return for the cooperation of the undertaking concerned — Need for conduct which assisted the Commission to ascertain the infringement — Information concerning acts which could not give rise to fines under Regulation No 17 — Not to be taken into account*
(Council Regulation No 17, Arts 11(4), (5), and 15; Commission Communication 96/C 207/04)
30. *Competition — Fines — Amount — Determination — Criteria — Attitude of the undertaking during the administrative procedure — Appraisal of the extent of the cooperation shown by each of the undertakings participating in the cartel — Respect for the principle of equal treatment — Different degrees of cooperation justifying different treatment*
(Council Regulation No 17, Art. 15(2); Commission Communication 96/C 207/04)

31. *Competition — Fines — Amount — Determination — Non-imposition or reduction of the fine in return for the cooperation of the undertaking concerned — Reduction for not disputing the facts — Conditions*

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

1. The right of access to the file in competition cases is intended, in particular, to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file so that, on the basis of that evidence, they can express their views effectively on the conclusions reached by the Commission in its statement of objections. Access to the file is thus one of the procedural safeguards intended to protect the rights of the defence and to ensure, in particular, that the right to be heard can be exercised effectively.

inculpatory documents that were not in the investigation file and were not disclosed to the applicant, those documents should be excluded as evidence.

(see paras 33-35, 65)

The Commission is thus under a duty to make available to the undertakings involved in proceedings under Article 81(1) EC all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, save where the business secrets of other undertakings, the internal documents of the institution or other confidential information are involved

2. In the administrative procedure in competition matters, where documents which might have contained exculpatory evidence are contained in the Commission's investigation file, any finding of an infringement of the rights of the defence is unconnected with the manner in which the undertaking concerned conducted itself during the administrative procedure and with the question whether that undertaking was obliged to ask the Commission for access to its file or have it send particular documents to it.

If the Commission is found to have relied in the contested decision on

By contrast, where documents which might have contained exculpatory evi-

dence are not in the Commission's investigation file, the undertaking concerned must expressly ask the institution for access to those documents, and failure to do so during the administrative procedure will mean that its right in that respect is barred in any action for annulment which may be brought against the final decision.

(see paras 36-37, 42, 79)

3. Where the Commission expressly states in its statement of objections that it will consider whether it is appropriate to impose fines on the undertakings concerned and it also indicates the main factual and legal criteria capable of giving rise to the imposition of a fine, such as the gravity and the duration of the alleged infringement and whether that infringement was 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 means to defend themselves not only against the finding of an infringement but also against the imposition of fines.

(see para. 50)

4. So far as the setting of the amount of the fines imposed for infringement of the competition rules is concerned, the rights of defence of the undertakings in question are guaranteed before the Commission by virtue of the fact that they have the opportunity to make submissions on the duration, the gravity and the foreseeability of the anti-competitive nature of the infringement. Moreover, undertakings have an additional guarantee, as regards the setting of the amount of the fine, in that the Court of First Instance has, pursuant to Article 17 of Regulation No 17, unlimited jurisdiction within the meaning of Article 229 EC in proceedings brought against decisions in which the Commission has fixed the amount of a fine and may, accordingly, cancel, reduce or increase the fine imposed. In the exercise of its unlimited jurisdiction, the Court must consider whether the amount of the fine imposed is proportionate to the gravity and duration of the infringement and must weigh the seriousness of the infringement with the circumstances invoked by the undertaking.

(see paras 51, 136)

5. The mere fact that the Commission has found in its previous decisions that certain factors did not constitute an aggravating circumstance for the purpose of determining the amount of the fine does not mean that it is obliged to

do so also in a subsequent decision. Moreover, the opportunity afforded to an undertaking in another case to make known its views on the intention to make a finding of repeated infringement on its part does not mean that the Commission is obliged to do the same in all cases, or that, where such an opportunity is not afforded, the undertaking concerned is prevented from fully exercising its right to be heard.

intends to use in its decision inculpatory evidence provided orally by another party it must make it available to the undertaking concerned so as to enable the latter to comment effectively on the conclusions reached by the Commission on the basis of that evidence. Where necessary, it must create a written document to be placed in the file.

(see paras 57, 153, 395)

(see paras 66-67)

6. There is no general duty on the part of the Commission to draw up minutes of discussions which it has had, in the course of the application of the Treaty's competition rules, with some only of the participants in an infringement in meetings held with them.
7. The Court of First Instance has jurisdiction in two respects over actions contesting Commission decisions imposing fines on undertakings for infringement of the competition rules. First, under Article 230 EC, it has the task of reviewing their legality. In that context, it must in particular review compliance with the duty to state reasons laid down in Article 253 EC, infringement of which renders a decision liable to annulment. Secondly, the Court has power to assess, in the exercise of the unlimited jurisdiction accorded to it by Article 229 EC and Article 17 of Regulation No 17, the appropriateness of the amounts of fines. That assessment may justify the produc-

However, the absence of such an obligation does not mean that the Commission is relieved of the obligations incumbent on it as regards access to the file. The practice of using information provided orally by third parties cannot be permitted to infringe the rights of the defence. Thus, if the Commission

tion and taking into account of additional information which the duty to state reasons laid down under Article 253 EC does not as such require to be set out in the contested decision.

requirement to state reasons is satisfied where the Commission indicates in its decision the factors which it took into account in accordance with the Guidelines and, where appropriate, the Leniency Notice and which enabled it to determine the gravity of the infringement and its duration for the purpose of calculating the amount of the fine.

(see para. 95)

(see para. 97)

8. The scope of the duty to state reasons as it applies to the setting of a fine imposed for infringement of the Community competition rules falls to be fixed having regard to the terms of the second subparagraph of Article 15(2) of Regulation No 17, which states that 'in fixing the amount of the fine, regard shall be had both to the gravity and the duration of the infringement'. The essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration. Furthermore, 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 the Notice on cooperation in cartel cases, indicate what factors the Commission is to take into consideration in measuring the gravity and duration of an infringement. That being so, the essential procedural
9. For the purposes of applying Article 81 (1) EC, the reason for defining the relevant market is to determine whether an agreement is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market. Consequently, there is an obligation on the Commission to define the market in a decision applying Article 81(1) EC only where it is impossible, without such a definition, to determine whether the agreement, decision by an association of undertakings or concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market.

(see para. 99)

10. In the context of Regulation No 17, the Commission possesses a wide margin of discretion when setting fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules.

imposed upon itself. In determining the gravity of infringements once guidelines are adopted, the Commission is thus obliged to take into account, amongst other factors, the matters referred to in those guidelines, save where it specifically sets out the reasons justifying, should the case arise, its departure from them in a specific area.

The fact that in the past the Commission 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. 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 para. 138)

(see paras 134-135, 154, 395, 407, 415)

11. Given that the Commission has adopted 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, which are consistent with the Treaty and are designed to specify the criteria which it intends to apply in the exercise of its discretion, it has limited that discretion in that it must comply with the guidelines which it has

12. The Commission indicated 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 that horizontal restrictions such as price cartels and market-sharing quotas or other practices which jeopardise the proper functioning of the single market will more often than not be classified as very serious infringements. It follows from that indicative description that agreements or concerted practices involving in particular price-fixing and customer-sharing may be classified in that way on the basis of their nature alone, without it being necessary for such conduct to have a particular impact or cover a particular geographic area. That conclusion is supported by the fact that, while the indicative description of the types of

infringement liable to be considered as serious mentions that they comprise infringements of the same type as those defined as minor 'but more rigorously applied, with a wider market impact, and with effects in extensive areas of the common market', the description of very serious infringements makes, by contrast, no mention of a requirement that there be an impact or that there be effects in a particular geographic area.

gives an indication of the scale of the infringement. On the other hand, 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 be the result of a simple calculation based on overall turnover.

(see paras 158, 367)

(see paras 150-151)

13. The criteria for assessing the gravity of an infringement may, depending on the circumstances, include the volume and value of the goods in respect of which the infringement was committed, the size and economic power of the undertaking and, consequently, the influence which it was able to exert on the market. It follows that, on the one hand, it is permissible, for the purpose of fixing a fine, to have regard both to the overall turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which

14. Once it has been established that an undertaking has taken part in meetings between undertakings having a manifestly anti-competitive nature, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs. Failing such evidence of distancing, it may be concluded from participation in those meetings that the undertaking is participating in the cartel which results from them, even if it does not actively do so. In addition, the fact that an undertaking does not abide by the outcome of those meetings is not such as to relieve it of full responsibility for the fact that it participated in the cartel. Lastly, an undertaking which has participated in such meetings cannot rely on the fact that it did so under pressure from other participants which may have

had greater economic power. It could have complained to the competent authorities about the pressure brought to bear on it and lodged a complaint with the Commission under Article 3 of Regulation No 17 rather than participating in the activities in question.

(see paras 164, 245, 423)

15. The taking into account of the deterrent effect of fines imposed for infringements of the competition rules forms an integral part of the weighting of fines to reflect the gravity of the infringement, since the purpose of doing so is to ensure that a calculation method does not lead to fines which, for certain undertakings, would not be sufficiently high to ensure that the fine had a sufficiently deterrent effect.

(see para. 170)

16. The principle *non bis in idem*, enshrined also in Article 4 of Protocol No 7 to the European Convention on Human Rights, is a general principle of Community law which will be upheld by the Community judicature.

In the field of Community competition law, that principle prohibits an undertaking being punished or having proceedings brought against it by the Commission on a second occasion in relation to anti-competitive conduct in respect of which a penalty has been imposed on it or for which it has been declared not to be liable by an earlier decision of the Commission which is no longer capable of being appealed against. The application of the principle *non bis in idem* is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected.

(see paras 184-185)

17. The gravity of an infringement of the competition rules does not depend only on its geographic extent and on the proportion which the sales covered by the infringement bears to sales made in the whole of the European Union. Irrespective of those criteria, the absolute value of the sales in question is also a relevant indication of the gravity of the infringement, since it is an accurate reflection of the economic importance of the transactions which the infringement seeks to remove from the normal interplay of competition.

(see para. 191)

18. As regards proof of an infringement of Article 81(1) EC, the Commission must prove the infringements which it has found and adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement. Any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment of a decision imposing a fine.
19. The principle of the presumption of innocence resulting in particular from Article 6(2) of the European Convention on Human Rights is one of the fundamental rights which, according to the settled case-law of the Court of Justice, reaffirmed in the Preamble to the Single European Act, by Article 6(2) of the Treaty on European Union and by Article 47 of the Charter of Fundamental Rights of the European Union, are protected in the Community legal order. Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments.

It is necessary for the Commission to produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place.

(see para. 216)

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

(see paras 215, 217-218)

20. Where an infringement has been committed by several undertakings, it is appropriate, when setting the amount of the fines, to consider the relative gravity of the participation of each of them, which implies in particular that the roles played by each of them in the infringement for the duration of their participation in it should be established.

That conclusion follows logically from the principle that penalties must fit the offence, according to which an undertaking may be penalised only for acts imputed to it individually. That principle applies in any administrative procedure that may lead to the imposition of sanctions under Community competition law.

(see paras 277-278)

21. The fact that an undertaking which is a member of a cartel forces another member of that cartel to extend its scope by threatening that member with reprisals if it does not cooperate may represent an aggravating circumstance. Such conduct has the direct effect of aggravating the damage caused by the cartel and an undertaking which conducts itself in that way must bear a special responsibility.

(see para. 281)

22. There is no provision or any general principle of Community law which prevents the Commission from relying, as against an undertaking, on statements made by other accused undertakings. If

that were not the case, the burden of proving conduct contrary to Article 81 EC and Article 82 EC, which is borne by the Commission, would be unsustainable and incompatible with the task of supervising the proper application of those provisions which is entrusted to it by the EC Treaty. However, an admission by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence. Where the cartel comprises only two parties, it is sufficient for one of them to challenge the material contained in the statement of the other for other evidence to be required in support of it. That applies particularly to a statement which seeks to attenuate the responsibility of the undertaking in whose name it was made by emphasising the responsibility of another undertaking.

Furthermore, as regards a document which establishes that a threat was made by one undertaking to another and the probative value of which is contested by the former, it is necessary, in order to assess the probative value of such a document, to have regard first and foremost to the credibility of the account it contains. Regard should be had in particular to the person from whom the document originates, the circumstances in which it came into being, the person

to whom it was addressed and whether, on its face, the document appears sound and reliable.

(see paras 285-286)

23. Under the method laid down 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, fines continue to be set according to the two criteria referred to in Article 15(2) of Regulation No 17, namely the gravity of the infringement and its duration, and the maximum percentage of turnover of each undertaking as laid down in that provision is observed.

Consequently, the Guidelines cannot be regarded as going beyond the legal framework relating to penalties set out in that provision.

(see paras 343-344)

24. In assessing the seriousness of an infringement for the purpose of setting the fine, the Commission must take into consideration not only the particular circumstances of the case but also the context in which the infringement occurred and must ensure that its action has the necessary deterrent effect, especially as regards those types of infringement which are particularly harmful to the attainment of the objectives of the Community.

In that respect, the analysis of the gravity of the infringement must take account of any repeated infringements. In the context of deterrence, repeated infringements are a matter which justifies a significant increase in the basic amount of the fine. It is evidence that the sanction previously imposed was not sufficiently deterrent.

Furthermore, although repeated infringement relates to a characteristic specific to the perpetrator of the infringement, namely its propensity to commit such infringements, it is precisely, for that very reason, a very significant indication of the gravity of the conduct in question and, accordingly, of the need to increase the level of the penalty in order to achieve effective deterrence.

The concept of repeated infringement, as understood in certain national legal systems, implies that a person has committed new infringements after having been penalised for similar infringements.

However, bearing in mind the objective it pursues, the concept of repeated infringement does not necessarily imply that a fine has been imposed in the past, but merely that a finding of infringement has been made in the past. Repeated infringement is taken into account, for a particular infringement, so that a more severe penalty may be imposed on the undertaking responsible for the relevant facts when it transpires that a previous finding of infringement on its part has not been sufficient to prevent the repetition of unlawful conduct. It is not the previous imposition of a fine that determines that conduct constitutes repeated infringement, which is determinative of recidivism, but the fact that a previous finding of infringement has been made against the person concerned.

(see paras 347-349, 362-363)

25. A limitation period can fulfil its function of ensuring legal certainty, and its infringement can constitute a breach of the principle of legal certainty, only if the period has been fixed in advance. Such a period is not specified, as regards a finding that an undertaking has com-

mitted repeated offences, under either Article 15 of Regulation No 17, which constitutes the legal framework for the penalties which may be imposed by the Commission for an infringement of the Community competition rules, or by 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.

(see paras 352-353)

26. The attenuating circumstances referred to in Section 3 of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty are based on the individual conduct of each undertaking.

It follows that in order to assess any attenuating circumstances, including that relating to the non-implementation of agreements, it is necessary to take into account not the effects arising from the infringement as a whole, which must be taken into consideration in assessing the actual impact of an infringement on the market for the purposes of determining its gravity (first paragraph of Section 1.A

of the Guidelines), but the individual conduct of each undertaking, for the purposes of examining the relative gravity of the participation of each undertaking in the infringement.

(see paras 383-384)

27. The absence of measures to monitor the implementation of a cartel does not, of itself, constitute a mitigating factor.

(see para. 393)

28. The Commission is not required, when determining the amount of the fine for infringement of the Community competition rules, to take account of an undertaking's financial losses, since recognition of such an obligation would have the effect of conferring an unfair competitive advantage on the undertakings least well adapted to the conditions of the market.

(see para. 413)

29. A reduction of the fine on grounds of cooperation during the administrative procedure is justified only if the conduct of the undertaking concerned enabled the Commission to ascertain the infringement more easily and, if appropriate, to put an end to it.

In that regard, the cooperation of an undertaking in the investigation gives no entitlement to a reduction in a fine when that cooperation did not go further than that which it was required to provide under Article 11(4) and (5) of Regulation No 17. By contrast, where the undertaking provides information in response to a request for information under Article 11 of Regulation No 17 which is well in excess of that which the Commission may require it to provide under that article, the undertaking concerned may benefit from a reduction in the fine.

Similarly, where, in the course of the Commission's investigation of a cartel, an undertaking makes available to it information concerning acts for which it could not in any event have been required to pay a fine under Regulation No 17, that does not amount to coop-

eration falling within the scope of the Notice on cooperation in cartel cases or, *a fortiori*, Section D thereof.

(see paras 449, 451-452, 471)

30. In appraising the cooperation shown by undertakings during the administrative procedure initiated in respect of a prohibited cartel, the Commission is not entitled to disregard the principle of equal treatment, a general principle of Community law which is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference of treatment is objectively justified.

(see paras 453-455)

In that regard, the appraisal of the extent of the cooperation shown by undertakings cannot depend on purely random factors. A difference in the treatment of the undertakings concerned must therefore be capable of being ascribed to differences in the degree of cooperation provided, particularly where different information was provided or that information was supplied at different stages in the administrative procedure or in dissimilar circumstances.

It is also the case that where an undertaking providing cooperation does no more than confirm, in a less precise and explicit manner, certain information already provided by another undertaking by way of cooperation, the extent of the cooperation provided by the former undertaking, while possibly of some benefit to the Commission, cannot be treated as comparable to that provided by the undertaking which was the first to supply that information. A statement which merely corroborates to a certain degree a statement which the Commission already had at its disposal does not facilitate the Commission's task significantly and therefore sufficiently to justify a reduction in the fine for cooperation.

31. If it is to benefit from a reduction of the fine by reason of the absence of a challenge to the facts, pursuant to the second indent of Section D.2 of the Notice, on cooperation in cartel cases, an undertaking must expressly inform the Commission that it has no intention of substantially contesting the facts, after perusing the statement of objections.

However, it is not sufficient for an undertaking to state in general terms that it does not contest the facts alleged for the purposes of the Leniency Notice if, in the circumstances of the case, that statement is not of any help to the Commission at all. In order for an undertaking to benefit from a reduction of the fine for its cooperation during the

administrative procedure, its conduct must facilitate the Commission's task of identifying and penalising infringements of the Community competition rules.

(see paras 504-505)