Case T-69/04

Schunk GmbH and Schunk Kohlenstoff-Technik GmbH

v

Commission of the European Communities

(Competition — Agreements, decisions and concerted practices — Market for electrical and mechanical carbon graphite products — Plea of illegality — Article 15(2) of Regulation No 17 — Attribution of the unlawful conduct — Guidelines on the method of setting fines — Gravity and effect of the infringement — Deterrent effect — Cooperation during the administrative procedure — Principle of proportionality — Principle of equal treatment — Counterclaim for an increase in the fine)

Summary of the Judgment

1. *Community law — General principles of law — Legal certainty — Proper legal basis for penalties*

2. *Competition — Fines — Amount — Determination — Power of assessment conferred on the Commission by Article 15(2) of Regulation No 17 — Infringement of the principle that penalties must have a proper legal basis — None*

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

3. *Competition — Fines — Commission's own powers under the Treaty*

   (Arts 81 EC, 82 EC, 83(1) and (2)(a) and (d) EC, 202, third indent, EC and 211, first indent, EC; Council Regulation No 17)

4. *Competition — Community rules — Infringements — Attribution — Parent company and subsidiaries — Economic unit — Criteria for assessment*

   (Art. 81(1) EC)

5. *Actions for annulment — Pleas in law — Substantially contesting facts set out in a decision punishing an infringement of the competition rules — Admissibility — Condition — Those facts not acknowledged during the administrative procedure*

   (Art. 230 EC)

6. *Competition — Agreements, decisions and concerted practices — Concerted practice — Concept*

   (Art. 81(1) EC)

7. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement*

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

8. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Price-fixing — Commission's obligation, when assessing the impact of an infringement, to take as a reference the competition that would have existed without that infringement*

   (Council Regulation No 17, Art. 15(2); Commission Notice No 98/C 9/03, point 1 A)

9. *Competition — Fines — Amount — Determination — Division of undertakings concerned into categories having a specific starting point*

   (Council Regulation No 17, Art. 15(2); Commission Notice No 98/C 9/03, point 1 A)

10. *Competition — Fines — Amount — Determination — Deterrent character — General requirement that must be a reference point for the Commission throughout the calculation of the fine*

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

11. *Competition — Community rules — Application by the Commission — Independent of assessments by the authorities of non-member States*

    (Arts 3(1)(g) EC and 81 EC)

12. *Competition — Fines — Amount — Determination — Criteria — Reduction of the amount of the fine in return for cooperation by an undertaking*

    (Council Regulation No 17; Commission Notice No 96/C 207/04)

13. Competition — Fines — Amount — Discretion of the Commission — Judicial review — Unlimited jurisdiction

(Arts 229 EC, 230 EC and 231 EC; Council Regulation No 17, Art. 17; Rules of Procedure of the Court of First Instance)

1. The principle that penalties must have a proper legal basis is a corollary of the principle of legal certainty, which constitutes a general principle of Community law and requires, inter alia, that any Community legislation, in particular when it imposes or permits the imposition of sanctions, must be clear and precise so that the persons concerned may know without ambiguity what rights and obligations flow from it and may take steps accordingly. That principle, which forms part of the constitutional traditions common to the Member States and which has been enshrined in various international treaties, in particular in Article 7 of the European Convention on Human Rights, must be observed in regard both to provisions of a criminal nature and to specific administrative instruments imposing or permitting the imposition of administrative sanctions. It applies not only to the provisions which establish the elements of an offence, but also to those which define the consequences of contravening them. It follows from Article 7(1) of that convention that offences and the relevant penalties must be clearly defined by law. That requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.

According to the case-law of the European Court of Human Rights, there is no requirement that the wording of provisions pursuant to which those sanctions are imposed be so precise that the consequences which may flow from an infringement of those provisions are foreseeable with absolute certainty. According to that case-law, the existence of vague terms in the provision does not necessarily entail an infringement of Article 7 of the European Convention on Human Rights and the fact that a law confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference. In that connection, apart from the text of the law itself, the European Court of Human Rights takes account of whether the indeterminate notions used have been defined by consistent and published case-law. Moreover, there is nothing in the constitutional traditions common to the Member States which would justify a different interpretation of the principle of legality, which is a general principle of Community law.

(see paras 28, 29, 32-34)

2. Article 15(2) of Regulation No 17, relating to the imposition of fines on undertakings that have infringed the competition rules, does not infringe the principle that penalties must have a proper legal basis.

The Commission does not have unlimited discretion in setting fines for infringements of the competition rules as it must comply with the ceiling fixed by reference to the turnover of the undertakings concerned and must take into account the gravity and duration of the infringement. Moreover, the ceiling of 10% of the turnover of the undertaking concerned is reasonable, having regard to the interests defended by the Commission in taking proceedings against and fining infringements of the competition rules and the fact that Article 15(2) of Regulation No 17 permits the establishment of a system which fits the fundamental tasks of the Community. When setting the fines, the Commission is also required to comply with the general principles of law, in particular the principles of equal treatment and proportionality. Moreover, the Commission itself has developed a well-known and accessible administrative practice which, although not constituting the legal framework for fines, may nevertheless serve as a reference point with regard to respect for the principle of equal treatment, the Commission being entitled at any time to adjust the level of fines within the limits laid down in Article 15(2) if the proper application of the Community competition rules so requires. Moreover, the Commission has adopted guidelines for the setting of fines, so that it has imposed limits on the exercise of its discretion, thereby contributing to legal certainty, and must comply in particular with the principles of equal treatment and proportionality. Furthermore, the adoption by the Commission of those guidelines, in so far as it fell within the statutory limits laid down by Article 15(2) of Regulation No 17, merely contributed to defining the limits of the exercise of the discretion which the Commission already had under that provision, and it cannot be inferred from their adoption that the limits of the Commission's competence in the area at issue were initially not sufficiently determined by the Community legislature. Finally, the Commission is required under Article 253 EC to state the reasons for decisions imposing a fine.

(see paras 35, 36, 38-44, 46)

3. The power to impose fines for infringements of Articles 81 EC and 82 EC cannot be regarded as belonging originally to the Council and its exercise having been transferred or delegated to the Commission, as provided for in the third indent of Article 202 EC. Under Article 83(1) and (2)(a) and (d) EC and the first indent of Article 211 EC, that power is part of the Commission's role of ensuring the application of Community law, that role having been defined, framed and formalised, as regards the application of Articles 81 EC and 82 EC, by Regulation No 17. The power to impose fines which that regulation

confers on the Commission therefore stems from the provisions of the Treaty itself and is intended to facilitate the effective application of the prohibitions laid down in those articles.

(see paras 48, 49)

4. The anti-competitive conduct of an undertaking can be attributed to another undertaking where it has not decided independently upon its own conduct on the market, but carried out in all material respects the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them. Thus, the conduct of a subsidiary may be attributed to the parent company where the subsidiary does not decide independently upon its own conduct in the market but carries out, in all material respects, the instructions given to it by the parent company, since those two undertakings form an economic unit.

In the specific case of a parent company holding 100% of the capital of a subsidiary which has committed an infringement, there is a simple presumption that the parent company exercises decisive influence over the conduct of its subsidiary and that they therefore constitute a single undertaking within the meaning of Article 81 EC. It is thus for a parent company which disputes before the Community judicature a Commission decision fining it for the conduct of its subsidiary to rebut that presumption by adducing evidence to establish that its subsidiary was independent.

The fact that the parent company of a wholly-owned subsidiary is a holding company is not sufficient to characterise the subsidiary as independent in terms of its functions and organs. The notion of holding company covers various situations. Generally speaking, a holding company can be defined as a company which has shareholdings in one or more companies with a view to controlling them. A holding company whose object is the acquisition, the sale, the administration, in particular the strategic management of industrial holdings, may be a financial holding company which does not exercise any industrial or commercial activity or a holding company which manages and runs its subsidiaries and whose function is to ensure that they are run as one. In a group of companies, a holding company is a company which seeks to regroup shareholdings in various companies. There may also be unity of management and coordination between the holding company and its subsidiary which may reveal that the group interests are taken into account. The fact that the role of a holding company is to manage its shareholdings in the capital of other companies is therefore not sufficient, in itself, to reverse the presumption arising from the fact that it holds the entire capital of its subsidiary.

(see paras 55, 56, 59-64, 66, 70)

5. The statement of objections, whose aim is to ensure that the rights of the defence of the undertakings to which it is addressed may be exercised effectively, delimits the scope of the administrative procedure initiated against an undertaking, in so far as it establishes the Commission's position vis-à-vis that undertaking and the Commission cannot set out in its decision complaints which are not contained in the statement of objections.

It is, in particular, on the basis of the replies by the undertakings to which the statement of objections is addressed that the Commission has to adopt its position regarding the future course of the administrative procedure.

In that context, where the undertaking alleged to have infringed the competition rules does not expressly acknowledge the facts, the Commission will have to prove those facts and the undertaking is free to put forward, at the appropriate time and in particular in the procedure before the Court, any plea in its defence which it deems appropriate. However, it follows that this cannot be the case where the undertaking at issue acknowledged the facts.

Such an approach does not seek to restrict the bringing of actions by an undertaking sanctioned by the Commission but to clarify the scope of the action which may be brought before the Community judicature, in order to prevent the determination of the facts at the origin of the infringement concerned from being shifted from the Commission to the Community judicature, the latter having jurisdiction, when an action is brought under Article 230 EC, to review the legality of the decision.

(see paras 80, 81, 84, 85)

6. As is clear from the very terms of Article 81(1) EC, a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices and a relationship of cause and effect between those two elements. Subject to proof to the contrary, which it is for the operators concerned to adduce, there must be a presumption that undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market.

(see para. 118)

7. When the amount of a fine for infringement of the competition rules is determined, the gravity of an infringement is assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, in respect of which the Commission has a margin of discretion. When determining the gravity of the infringement, the Commission may therefore take into consideration the fact that the undertakings took many precautions to prevent the cartel from being exposed and also the harm incurred by the general public.

With regard to the general public, all infringements of competition law do not harm competition and consumers in the same way. The taking into account of the harm suffered by the public, when determining the gravity of an infringement, is different from the taking into account of the economic capacity of a member of the cartel to cause harm to competition and to consumers, which takes place at the stage of calculating the amount of the fine 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 and seeks to distinguish between undertakings in cases where the infringement involves several undertakings.

(see paras 153, 154, 156)

8. In order to assess the actual effect of an infringement on the market, the Commission must take as a reference the competition that would normally exist if there had been no infringement.

In the case of a price cartel, the Commission may legitimately infer that the infringement had effects from the fact that the cartel members took measures to apply the agreed prices, for example by announcing them to customers, instructing their employees to use them as a basis for negotiation and monitoring their application by their competitors and their own sales departments. In order to conclude that there has been an impact on the market, it is sufficient that the agreed prices have served as a basis for determining individual transaction prices, thereby limiting customers' room for negotiation.

On the other hand, the Commission cannot be required, where the implementation of a cartel has been established, systematically to demonstrate that the agreements in fact enabled the undertakings concerned to achieve a higher level of transaction prices than that which would have prevailed in the absence of a cartel. In that regard, it cannot be held that only the fact that the level of transaction prices would have been different in the absence of collusion may be taken into account in determining the gravity of the infringement. Moreover, it would be disproportionate to require such proof, which would absorb considerable resources, given that

it would necessitate making hypothetical calculations based on economic models whose accuracy it would be difficult for the Court to verify and whose infallibility is in no way proved.

In order to assess the gravity of the infringement, the decisive point is whether the cartel members did all they could to give concrete effect to their intentions. The members of the cartel cannot therefore benefit from external factors which counteracted their own efforts by turning them into factors justifying a reduction of the fine.

The Commission may therefore legitimately rely on the implementation of the cartel in concluding that there was an impact on the market, and it is not necessary for it to measure that impact precisely.

(see paras 165-169, 171)

Even supposing that the actual impact of the cartel was not established to the required legal standard by the Commission, the classification of an infringement as 'very serious' is none the less appropriate. The three aspects of the assessment of the gravity of the infringement in accordance with the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, namely the particular nature of the infringement, its actual impact on the market where measurable and the size of the relevant geographic market, do not carry the same weight in the context of an overall examination. The nature of the infringement plays a major role, in particular, in characterising 'very serious' infringements. It is clear from the description of very serious infringements given in those guidelines that agreements or concerted practices designed, in particular, to set prices may, on the basis of their nature alone, be classified as 'very serious', without there being any need to characterise such conduct by reference to a particular impact or geographic area. That conclusion is corroborated by the fact that, whilst the description of serious infringements expressly mentions their impact on the market and their effects on extensive areas of the common market, that of very serious infringements, on the other hand, does not mention any requirement as to the actual market impact or the effects produced in a particular geographic area.

9. The Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty provide for numerous factors to be taken into account in assessing the gravity of the infringement for the purpose of determining the amount of the fine, including in particular the nature of the infringement,

its actual impact, the size of the relevant geographic market and the necessary deterrent effect of the fine. Although the Guidelines do not provide that the fines are to be calculated according to the overall turnover of the undertakings concerned or their turnover on the relevant product market, 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.

In the light of the large disparity in size between the undertakings concerned and in order to take account of the specific weight of each of them and, thus, the real impact of their unlawful conduct on competition, the Commission in the case of an unlawful cartel may, in accordance with the fourth and sixth paragraphs of point 1.A of the Guidelines, treat each of the undertakings which had participated in the infringement differently in its decision. To that end, it may group the undertakings concerned into several categories on the basis of the turnover of each of them in the goods concerned by the present proceedings, and including in that calculation, inter alia, the value of captive use of each undertaking. The resulting figure is a market share which represents the relative weight of each undertaking in the infringement and its effective economic capacity to cause significant damage to competition.

(see paras 176, 177)

10. The aim of the penalties 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 infringement of 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.

The Commission did not lay 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 any method or specific criteria as to the manner in which the objective of deterrence was to be taken into account and which, had they been set out expressly, would have been capable of having binding effect. In the indications concerning the evaluation of the gravity of an infringement, Section 1 A, fourth paragraph, of the Guidelines refers only to the need to determine the amount of the fine at a level which ensures that it will have sufficient deterrent effect.

(see paras 191-193)

11. The exercise of powers by the authorities of non-member States responsible for protecting free competition under their territorial jurisdiction meets requirements specific to those States. The elements underlying other States' legal systems in the sphere of competition not only include specific aims and objectives but also result in the adoption of specific substantive rules and a wide variety of legal consequences, whether administrative, criminal or civil, when the authorities of those States have established that there have been infringements of the applicable competition rules. On the other hand, the legal situation is completely different where an undertaking is caught exclusively — in competition matters — by the application of Community law and the law of one or more Member States, that is to say, where a cartel is confined exclusively to the territorial scope of application of the legal system of the European Community.

It follows that, when the Commission imposes sanctions on the unlawful conduct of an undertaking, even conduct originating in an international cartel, it seeks to safeguard free competition within the common market which constitutes a fundamental objective of the Community under Article 3(1)(g) EC. On account of the specific nature of the legal interests protected at Community level, the Commission's assessments pursuant to its relevant powers may diverge considerably from those of authorities of non-member States.

Any consideration concerning the existence of fines imposed by the authorities of a non-member State can be taken into account only under the Commission's discretion in setting fines for infringements of Community competition law. Consequently, although the Commission may take into account fines imposed previously by the authorities of non-member States, it cannot be required to do so.

The objective of deterrence, which the Commission is entitled to pursue when setting the amount of a fine, is to ensure compliance by undertakings with the competition rules laid down by the EC Treaty for the conduct of their activities within the common market. Consequently, when assessing the deterrent nature of a fine to be imposed for infringement of those rules, the Commission is not required to take into account any penalties imposed on an undertaking for infringement of the competition rules of non-member States.

(see paras 205-209)

12. The Commission has a wide discretion as regards the method of calculating fines and it may, in that regard, take account of numerous factors, including the cooperation provided by the undertakings

concerned during the investigation conducted by its departments. The Commission also has a broad discretion when assessing the quality and usefulness of the cooperation provided by an undertaking, in particular in comparison with the contributions of the other undertakings.

The reduction of fines for cooperation on the part of the undertakings is based on the consideration that such cooperation facilitates the Commission's task of establishing the existence of an infringement and, where relevant, bringing it to an end.

In the course of its overall assessment, the Commission may take account of the fact that that undertaking sent it the documents only after receiving a request for information, but cannot consider that fact as decisive for minimising the cooperation provided by that undertaking under Section D, paragraph 2, first indent, of the Notice on the non-imposition or reduction of fines in cartel cases.

(see paras 211, 212, 225, 234)

13. The Court of First Instance has power to assess, in the context 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 for an infringement of Community competition law. In the context of its unlimited jurisdiction, the powers of the Community judicature are not limited to declaring the contested decision void, as provided in Article 231 EC, but allow it to vary the penalty imposed by that decision. The Community judicature is therefore empowered, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed.

Although the exercise of unlimited jurisdiction is most often requested by applicants in the sense of a reduction of the fine, there is nothing preventing the Commission from also referring to the Community judicature the question of the amount of the fine and from applying to have that fine increased, such a possibility being, moreover, expressly provided for in Section E, fourth paragraph, of the Notice on the non-imposition or reduction of fines in cartel cases.

Unlimited jurisdiction is necessarily exercised by the Community judicature in the context of the review of acts of the

Community institutions, more particularly in actions for annulment. The sole effect of Article 229 EC is to enlarge the scope of the powers of the Community judicature in the context of the action referred to in Article 230 EC. An application by the Commission for an increase in the fine is not therefore incompatible with Article 230 EC.

In the light of the power to increase the amount of a fine, the Commission's counterclaim, for the cancellation of a reduction granted to an undertaking for its cooperation in the administrative procedure on the ground that the facts set out in the statement of objections were challenged by it for the first time before the Court of First Instance, is admissible.

Such a claim must, however, be rejected on the ground that, since the amount of a fine is to be determined solely on the basis of the gravity and duration of the infringement, the fact that the Commission was constrained to draw up a defence dealing with facts which it was entitled to consider would no longer be called in question is not such as to justify an increase of that fine. The expenses incurred by the Commission as a result of the proceedings before the Court of First Instance are not a criterion for determining the amount of the fine and must be taken into account only when applying the provisions of the Rules of Procedure of the Court of First Instance relating to costs.

(see paras 242-247, 251, 259, 262)