

Case C-511/06 P

Archer Daniels Midland Co.

v

Commission of the European Communities

(Appeal — Competition — Agreements, decisions and concerted practices — Citric acid market — Determination of the amount of the fine — Role of leader — Rights of defence — Evidence arising from a procedure conducted in a non-Member State — Definition of the relevant market — Attenuating circumstances)

Opinion of Advocate General Mengozzi delivered on 6 November 2008 I - 5848
Judgment of the Court (First Chamber), 9 July 2009 I - 5912

Summary of the Judgment

- 1. Competition — Administrative procedure — Statement of objections — Necessary content — Observance of the rights of the defence — Scope — Requirement to state the evidence demonstrating the role of leader of a cartel*
(Council Regulation No 17, Art. 15(2); Commission Notices 96/C 207/04, Section B(e), and 98/C 9/03, Section 2)
- 2. Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Attenuating circumstances*
(Art. 81(1) EC; Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03, Section 3)

3. *Competition — Fines — Amount — Determination — Non-imposition or reduction of the fine for cooperation of the undertaking concerned — Assessment of the conditions of cooperation at the time of the adoption of the final decision*
(Council Regulation No 17; Commission Notice 96/C 207/04, Section E)
4. *Competition — Fines — Amount — Determination — Criteria — Actual impact on the market*
(Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03, Section 1 A, first para.)
5. *Competition — Fines — Amount — Determination — Criteria — Taking into account of the cooperation of the undertaking concerned with the Commission — Concept of 'first undertaking' to adduce decisive evidence*
(Council Regulation No 17, Art. 15(2); Commission Notice 96/C 207/04, Section B(b))

1. Classification as leader of a cartel has significant consequences regarding the amount of the fine to be imposed on an undertaking described as such. Thus, under Section 2 of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, it constitutes an aggravating circumstance which leads to a significant increase in the basic amount of the fine. Similarly, under Section B(e) of the Notice on the non-imposition or reduction of fines in cartel cases, such a classification automatically excludes the granting of a very substantial reduction of the fine, even if an undertaking classified as a leader fulfils all the conditions set out in that provision to qualify for such a reduction.

Accordingly, it is for the Commission to set out in the statement of objections the evidence which it considers relevant to

enable an undertaking under investigation which may be classified as a leader of the cartel to respond to such an objection. However, in light of the fact that that statement remains a step in the adoption of the final decision and does not therefore constitute the Commission's definitive position, the Commission cannot be required, already at that stage, to carry out a legal classification of the evidence on which it relies in its final decision in classifying an undertaking as leader of the cartel. The Commission is not therefore required to state in the statement of objections the manner in which it intends to take account of the facts when setting the level of the fine or, in particular, whether it intends, on the basis of those facts, to classify an undertaking as a leader of the cartel. None the less, the Commission is required, at the very least, to state those facts. Where the documents and items of evidence which are the source of the facts used as a basis for the classification as a leader of the cartel consist of

testimonies of persons involved in the infringement procedure and therefore have a subjective aspect, the fact that those documents are annexed to the statement of objections, without those facts being expressly referred to in the wording itself of the statement, does not enable the undertaking in question either to assess the credence which the Commission gives to each of the items of evidence set out in those documents or to contest them, or consequently usefully to exercise its rights. Accordingly, in such a situation, in classifying the undertaking as a leader of the cartel on the basis of the items of evidence annexed to the statement of objections but which have not been referred to in that statement of objections, the Commission infringes that undertaking's rights of defence and may not therefore rely on those items of evidence in order to classify it as a leader of the cartel. In the absence of other evidence in the statement of objections which makes it possible to arrive at such a classification, the Commission cannot therefore rule out the application of Section B of the Leniency Notice on the grounds that the undertaking had a leadership role.

2. Recognition of entitlement to a reduction of the basic amount of the fine under 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 is necessarily linked to the circumstances of the particular case, and termination of the infringement at issue does not automatically imply a reduction of the basic amount of the fine.

(see paras 70-72, 80, 89-90, 93-95, 112, 133, 136)

To recognise an attenuating circumstance in situations where an undertaking is party to a manifestly unlawful agreement which it knew or could not be unaware constituted an infringement could encourage undertakings to continue a secret agreement as long as possible, in the hope that their conduct would never be discovered, while knowing that if their conduct were discovered they could expect, by then curtailing the infringement, their fine to be reduced. Such a recognition would deprive the fine imposed of any deterrent effect and would undermine the effectiveness of Article 81(1) EC.

Consequently, the Commission cannot be obliged to grant an undertaking the benefit of a reduction of the basic amount of the fine on the ground that the latter had ended its unlawful conduct as soon as the antitrust authorities of a non-Member State intervened.

that infringement, it is one criterion among others, namely the nature of the infringement and the size of the geographic market. Similarly, 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 state that that actual impact on the market is to be taken into account only where this can be measured.

(see paras 100, 102, 105-106)

3. Under Section E of the Notice on the non-imposition or reduction of fines in cartel cases, it is only on its adoption of the final decision that the Commission determines whether or not the conditions set out in Sections B, C and D of that notice are met. Accordingly, the Commission cannot give an undertaking any precise assurance that any reduction of fine will be granted in the phase of the procedure prior to the adoption of the final decision.

(see para. 125)

(see para. 118)

4. Although the actual impact of an infringement on the market is a factor to take into consideration when assessing the gravity of

5. The express wording of Section B(b) of the Notice on the non-imposition or reduction of fines in cartel cases does not require the 'first' undertaking to have provided all the evidence demonstrating every detail of the operation of a cartel. Pursuant to that provision, in order to be considered such, it is sufficient for an undertaking to adduce 'some' decisive evidence of the cartel's existence. Nor does that section require that the evidence adduced be sufficient in itself in order to draw up the statement of objections or for the adoption of a final decision establishing the existence of an infringement. However, although the evidence referred to in Section B(b) need not be sufficient in itself to establish the

cartel's existence, it must none the less be decisive for that purpose. It must therefore not be simply an indication as to the direction which the Commission's investigation should take but must be material which may be used directly as the principal evidence supporting a decision finding an infringement.

In the context of Section B(b), the fact that decisive evidence was provided orally is of no significance. Moreover, the fact that that information does not emerge from a direct testimony or that it was subsequently supplemented or clarified is not

relevant to the assessment of whether it is decisive.

The Commission has a certain discretion in assessing whether an undertaking's cooperation has been 'decisive', within the meaning of that provision, for a finding that an infringement has existed and has come to an end, so that only a manifestly excessive use of that discretion can be censured by the Community judicature.

(see paras 150-152, 161-163)