Case T-199/08

Ziegler SA

v

European Commission

(Competition — Cartels — International removal services market in Belgium — Decision finding an infringement of Article 81 EC — Price-fixing — Market-sharing — Bid rigging — Appreciable effect on trade — Fines — 2006 Guidelines on the method of setting fines)

Summary of the Judgment

1. *Competition — Agreements, decisions and concerted practices — Definition of the market — Object*
   (Art. 81 EC; Commission Notice 2004/C 101/07)

2. *Acts of the institutions — Guidelines on the effect on trade concept — Binding measure*
   (Commission Notice 2004/C 101/07)

3. *Competition — Fines — Decision imposing fines — Duty to state reasons — Scope*
   (Art. 253 EC; Commission Notice 2006/C 210/02)

4. *Competition — Administrative procedure — Observance of the rights of the defence — Access to the file — Scope*

5. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Assessment according to the nature of the infringement*
   (Commission Notice 2006/C 210/02, Sections 19 and 21 to 23)

6. *Competition — Fines — Amount — Determination — Mitigating circumstances — Termination of the infringement before the Commission's intervention — Excluded*
   (Commission Notice 2006/C 210/02, Section 29, first indent)

7. *Competition — Fines — Amount — Determination — Mitigating circumstances — Anti-competitive conduct authorised or encouraged by public authorities*
   (Commission Notice 2006/C 210/02, Section 29, last indent)

8. *Competition — Fines — Amount — Determination — Reduction on account of economic difficulties — Conditions*
   (Commission Notice 2006/C 210/02, Section 35)

1. Article 81(1) EC is not applicable if the effect of a restrictive practice on intra-Community trade or on competition is not 'appreciable'. An agreement escapes the prohibition laid down in Article 81(1) EC if it restricts competition or affects trade between Member States only insignificantly. Consequently, there is an obligation on the Commission to define the market in a decision applying Article 81 EC where it is impossible, without such a definition, to determine whether the agreement 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.

   Accordingly, if every cross-border transaction were automatically capable of appreciably affecting trade between Member States, the concept of appreciability, which is a condition for the application of Article 81(1) EC, would be devoid of meaning. Even in the case of an

infringement by object, the infringement must be capable of affecting intra-Community trade appreciably. That is apparent from the Guidelines on the effect on trade concept contained in Articles 81 [EC] and 82 [EC], since the positive presumption, laid down in Section 53 thereof, applies only to agreements or practices that by their very nature are capable of affecting trade between Member States. The fact that an undertaking has not disputed the existence of the cartel does not necessarily contain an admission that that cartel had an appreciable effect on trade. The absence of such an appreciable effect — an effect which is a condition for the application of Article 81(1) EC — would give rise to the annulment of the decision regarding the cartel on the ground of the Commission's lack of competence.

However, since the Commission established to the requisite legal standard that the second alternative condition provided for in the presumption laid down in Section 53 of the above Guidelines was met, by providing, inter alia, a sufficiently detailed description of the relevant sector, including supply, demand and geographic scope, it identified the relevant services and market precisely. Such a description of the sector can be sufficient in so far as it is sufficiently detailed to enable the Court to verify the Commission's basic assertions and in so far as, on that basis, it is clear that the combined market share far exceeds the 5 % threshold. Thus, exceptionally, the Commission is entitled to base its decision on the second alternative condition of Section 53 of the above Guidelines without expressly determining the market within the meaning of Section 55 of those Guidelines.

In the context of the positive presumption laid down in Section 53 of those Guidelines, it is sufficient if only one of the two alternative conditions is met in order to prove that the effect on trade between Member States is appreciable.

(see paras 44-45, 50, 53, 69-70, 72-73)

2. In adopting such rules of conduct as the Guidelines on the effect on trade concept contained in Articles 81 [EC] and 82 [EC] and in announcing by publishing them that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules without running the risk of suffering the consequences of being in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations.

(see para. 67)

3. The Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 have brought about a fundamental change in the methodology for setting fines. In particular, the threefold categorisation of infringements ('minor', 'serious' and 'very serious') has been abolished, and a scale from 0% to 30% introduced in order to enable finer distinctions to be made. In addition, the basic amount of the fine is now 'related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement' (Section 19 of those Guidelines). As a general rule, 'the proportion of the value of sales taken into account will be set at a level of up to 30% of the value of sales' (Section 21). As regards horizontal price-fixing, market-sharing and output-limitation agreements 'which … are, by their very nature, among the most harmful restrictions of competition', the proportion of the value of sales taken into account must generally be set 'at the higher end of the scale' (Section 23).

In those circumstances, the Commission may no longer, as a rule, simply state reasons only for the classification of an infringement as 'very serious' and not for the choice of the proportion of sales taken into account. The corollary of the Commission's margin of discretion in the area of fines is an obligation to state reasons which enables the person concerned to ascertain the reasons for the measure adopted and the Court to exercise its review.

Where the Commission has set the percentage at a level scarcely above the midpoint of the scale, in the present case at 17%, basing its choice solely on the 'very serious' nature of the infringement, while failing to explain in a more detailed manner how the classification of the infringement as 'very serious' led it to set the percentage at 17% and not at a percentage considerably more 'at the higher end of the scale', that reasoning can be sufficient only when the Commission applies a percentage very close to the lower end of the scale laid down for the most serious restrictions; the latter, moreover, is favourable to the company. In that case, supplementary reasons going beyond the reasoning inherent in the guidelines are not necessary. By contrast, had the Commission wished to apply a higher percentage, it would have had to provide more detailed reasons.

(see paras 91-93)

4. On the basis of the statement of objections alone, an individual company concerned has not much opportunity of

ascertaining whether the turnovers used in order to prove that there was an appreciable effect on trade between Member States and the combined market shares of all the members of a cartel exceed the EUR 40 million threshold or the 5% threshold. Each company can only dispute its own figures with certainty. Therefore, in order to dispute the size of the market and the market shares of the other companies in question, and in order to assert its own arguments concerning those figures, it is essential to know the breakdown of the other companies' turnovers, failing which the company concerned is not in a position to make known its views effectively on the truth and relevance of the facts, objections and circumstances put forward by the Commission.

(see para. 118)

An infringement consisting in price-fixing and market sharing is, by its nature, particularly serious.

In addition, the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 expressly state, under Section 20 thereof, that '[t]he assessment of gravity will be made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case'. Those Guidelines have introduced a scale from 0% to 30% in order to enable finer distinctions to be made. Under Section 19 of those Guidelines, the basic amount of the fine must be 'related to a proportion of the value of sales, depending on the degree of gravity of the infringement'. As a general rule, under Section 21 of those Guidelines, 'the proportion of the value of sales taken into account will be set at a level of up to 30% of the value of sales'.

5. The gravity of an infringement is to be assessed by taking into account such matters as the nature of the restrictions on competition. The gravity of the infringement could be established by reference to the nature and the object of the abusive conduct. The factors relating to the object of a course of conduct may therefore be more significant for the purposes of setting the amount of the fine than those relating to its effects.

Therefore, the Commission cannot use its margin of discretion in the imposition of fines, and thereby determine the precise level from 0% to 30%, without also taking into account the particular circumstances of the case. Section 22 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 provides that, '[i]n order to decide whether the proportion of the value of sales to be

considered in a given case should be at the lower end or at the higher end of that scale, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented'.

That difficulty in determining an exact percentage is reduced to a certain extent in the case of secret horizontal price-fixing and market-sharing agreements in which, under Section 23 of those Guidelines, the proportion of the value of sales taken into account will generally be set 'at the higher end of the scale'. It is clear from that point that, for the most harmful restrictions, the rate should, at the very least, be above 15 %.

There is therefore no cause to annul the Commission's decision setting the rate of 17 % solely on the basis of the inherently serious nature of the infringement. Where the Commission simply applies a rate equal or almost equal to the minimum rate laid down for the most serious restrictions, it is not necessary to take into account additional factors or circumstances. That would be required only if a higher rate had to be established.

(see paras 136-137, 139-142)

6. The termination of the offending conduct does not constitute a mitigating circumstance justifying a reduction in the fine, where the company concerned ceased participating in the infringement only a few days before the Commission's inspections.

Section 29, first indent, of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 provides that, although the basic amount of the fine may be reduced where the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened, that 'will not apply to secret agreements or practices (in particular, cartels)'. In addition, the benefit of that mitigating circumstance is limited to cases where the infringement is terminated as soon as the Commission intervenes.

(see paras 151-152)

7. Even if facts known to a person working for the Commission could be imputed to the latter as an institution, mere

knowledge of anti-competitive conduct does not imply that that conduct was implicitly 'authorised or encouraged' by the Commission within the meaning of Section 29, last indent, of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. Alleged inaction cannot be treated in the same way as a positive act such as an authorisation or encouragement. In addition, where the infringement of the competition rules is so obvious, a diligent operator cannot submit that it had a legitimate belief that that practice was lawful.

(see paras 157-158)

8. In order to benefit from an exceptional reduction in the fine on account of economic difficulties, pursuant to Section 35 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, a request must be submitted and two cumulative conditions must be met, namely, first, an insuperable difficulty in paying the fine and, second, the existence of a specific 'social and economic context'.

The assessment of the first condition must be based on taking account of the specific circumstances of the company concerned. A simple calculation of the fine as a percentage of the company's worldwide turnover cannot of itself lead to the conclusion that the fine is not liable to irretrievably jeopardise that company's economic viability. If that were the case, it would be possible to set out specific thresholds for the application of Section 35 of those Guidelines.

(see paras 165, 167)