

JUDGMENT OF THE COURT (Fourth Chamber)

7 June 2007^{*}

In Case C-76/06 P,

APPEAL pursuant to Article 56 of the Statute of the Court of Justice, brought on 7 February 2006,

Britannia Alloys & Chemicals Ltd, established in Gravesend (United Kingdom),
represented by S. Mobley and M. Commons, solicitors,

applicant,

the other party to the proceedings being:

Commission of the European Communities, represented by F. Castillo de la Torre, acting as Agent, with an address for service in Luxembourg

defendant at first instance,

^{*} Language of the case: English.

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász, R. Silva de Lapuerta (Rapporteur), G. Arestis and T. von Danwitz, Judges,

Advocate General: Y. Bot,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 1 March 2007,

gives the following

Judgment

- ¹ By its appeal, Britannia Alloys & Chemicals Ltd ('Britannia') asks the Court to set aside the judgment of the Court of First Instance of the European Communities of 29 November 2005 in Case T-33/02 *Britannia Alloys & Chemicals v Commission* [2005] ECR II-4973 ('the judgment under appeal'), by which the Court dismissed its appeal against Commission Decision 2003/437/EC of 11 December 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA

Agreement (Case COMP/E-1/37.027 — Zinc phosphate) (OJ 2003 L 153, p. 1; ‘the contested decision’), and to annul Article 3 of that decision in so far as it concerns the applicant.

Legal context

Regulation No 17

- ² Article 15 of Council Regulation No 17: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), provides:

‘1. The Commission may by decision impose on undertakings or associations of undertakings fines of from 100 to 5 000 units of account where, intentionally or negligently:

...

- (b) they supply incorrect information in response to a request made pursuant to Article 11(3) or (5) ...

...

2. The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

(a) they infringe Article [81](1) or Article [82] of the Treaty ...

...

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.'

The Guidelines

- ³ The Commission Notice entitled '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' (OJ 1998 C 9, p. 3) ('the Guidelines') states in its introduction:

'The principles outlined ... by the Guidelines should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of

the Court of Justice alike, whilst upholding the discretion which the Commission is granted under the relevant legislation to set fines within the limit of 10% of overall turnover. This discretion must, however, follow a coherent and non-discriminatory policy which is consistent with the objectives pursued in penalising infringements of the competition rules.

The new method of determining the amount of a fine will adhere to the following rules, which start from a basic amount that will be increased to take account of aggravating circumstances or reduced to take account of attenuating circumstances.’

Background to the dispute

- ⁴ In paragraphs 1 to 10 of the judgment under appeal, the Court summarised the factual background to the dispute brought before it as follows:

¹ Britannia ..., a company incorporated under English law, is a subsidiary of M.I.M. Holdings Limited (“MIM”), an Australian company. In October 1993, Pasminco Europe (ISC Alloys) Limited sold its zinc business to MIM, which transferred it to Britannia. That undertaking produced and sold zinc products, including zinc phosphate. In March 1997, Trident Alloys Limited (“Trident”), an

independent company formed by Britannia's management, acquired Britannia's zinc business for GBP 14 359 072. Britannia is still in existence as a subsidiary of MIM, but is a non-trading company and therefore has no turnover.

- 2 Although they may have slightly differing chemical formulae, zinc orthophosphates form a homogeneous chemical product, generically referred to as "zinc phosphate". Zinc phosphate, which is derived from zinc oxide and phosphoric acid, is widely used as an anti-corrosion mineral pigment in the paint industry. It is marketed either as standard zinc phosphate or as modified (or activated) zinc phosphate.
- 3 In 2001, virtually all of the world zinc production was controlled by the following five European producers: Dr Hans Heubach GmbH & Co. KG ("Heubach"), James M. Brown Limited ("James Brown"), Société Nouvelle des Couleurs Zinciques SA ("SNCZ"), Trident (formerly Britannia) and Union Pigments AS (formerly Waardals AS) ("Union Pigments").
- 4 On 13 and 14 May 1998, the Commission carried out simultaneous and unannounced investigations under Article 14(2) of Regulation No 17 at the premises of Heubach, SNCZ and Trident
- 5 On 11 December 2001, the Commission adopted the contested decision. The decision which is the subject of the present judgment is the one notified to the undertakings concerned, and which is annexed to the application

- 6 In the contested decision, the Commission states that a cartel, consisting of Britannia (Trident as from 15 March 1997), Heubach, James Brown, SNCZ and Union Pigments, existed between 24 March 1994 and 13 May 1998. The cartel was limited to standard zinc phosphate. The members of the cartel first adopted a market sharing agreement with sales quotas for the producers. Subsequently, they agreed on “bottom” or “recommended” prices at each meeting, which they generally followed. There was also a certain amount of customer allocation.
- 7 The operative part of the contested decision reads as follows:

“Article 1

Britannia ..., Heubach ..., James Brown, [SNCZ], Trident ... and [Union Pigments] have infringed the provisions of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement by participating in continuing agreement and/or concerted practice in the zinc phosphate sector.

The duration of the infringement was as follows:

...

(b) in the case of Britannia ...: from 24 March 1994 until 15 March 1997

...

Article 3

For the infringement referred to in Article 1, the following fines are imposed:

(a) Britannia ...: EUR 3.37 million;

(b) ... Heubach ...: EUR 3.78 million;

(c) James ... Brown ...: EUR 940 000;

(d) [SNCZ]: EUR 1.53 million;

(e) Trident ...: EUR 1.98 million;

(f) [Union Pigments] ...: EUR 350 000.

...”

- 8 In calculating the fines, the Commission applied the method set out in the Guidelines ... and the Commission Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4, “the Leniency Notice”).
- 9 The Commission found first that the appropriate basic amount of fine for the applicant was EUR 3.75 million ([paragraph] 313 [of the grounds of] the contested decision). Next, it referred to the limit which, under Article 15(2) of Regulation No 17, the fine to be imposed on each of the undertakings concerned may not exceed. In fixing the upper limit of 10% of turnover achieved in the previous financial year laid down by that provision, the Commission, in the case of the applicant, “took into account its global turnover for the business year ending 30 June 1996, which is the last available figure reflecting an entire year of normal economic activity” ([paragraph] 345 ...). As that turnover was EUR 55.7 million ([paragraph] 50), the upper limit of the fine was set at about EUR 5.5 million. As the amount of the fine before application of the Leniency Notice was below that upper limit, the Commission did not reduce it on that basis.
- 10 Finally, the Commission granted the applicant a reduction of 10% under the Leniency Notice ([paragraph] 366). The final amount of the fine imposed on the applicant was thus EUR 3.37 million ([paragraph] 370).’

The procedure before the Court of First Instance and the judgment under appeal

- 5 By application lodged at the Registry of the Court of First Instance on 21 February 2002, Britannia brought an action for the partial annulment of the contested decision and, in the alternative, for reduction in the amount of the fine imposed by that decision.

6 By the judgment under appeal, the Court of First Instance dismissed the action.

Forms of order sought by the parties to the appeal

7 By its appeal, Britannia claims that the Court should:

- set aside the judgment under appeal in so far as it dismissed its action;
- annul Article 3 of the contested decision in so far as it concerns the applicant;
- in the alternative, amend Article 3 in so far as it concerns the applicant, so as to annul or substantially reduce the fine imposed on the applicant therein;
- further, in the alternative, refer the case back to the Court of First Instance for judgment in accordance with the judgment of the Court of Justice as to the law;
- in any event, order that the Commission bear its own costs and pay Britannia's costs relating to the proceedings before the Court of First Instance and the Court of Justice.

8 The Commission contends that the Court should:

- dismiss the appeal in part as inadmissible, or, in the alternative, dismiss it as unfounded;
- order the applicant to pay the costs.

The appeal

9 In support of its claims, Britannia relies, in essence, on three pleas alleging, respectively, breach of Article 15(2) of Regulation No 17, infringement of the principle of equal treatment and infringement of the principle of legal certainty.

The first plea, alleging breach of Article 15(2) of Regulation No 17

Arguments of the parties

10 By its first plea, Britannia submits that the Court of First Instance erred in law by holding that, in fixing the fine, the Commission had correctly applied the upper limit

of 10% of turnover to Britannia's turnover for the business year ending 30 June 1996, rather than to the turnover for the business year preceding the adoption of the contested decision.

- 11 Britannia argues that, since it had not achieved any turnover for the business year immediately before the adoption of the contested decision, the Commission could only impose on it a fine of between EUR 1 000 and 1 000 000. Accordingly, the Court erred in law by holding that the Commission did not have to refer to the turnover for the business year ending on 30 June 2001.
- 12 Britannia submits that the adjective 'preceding', in the first subparagraph of Article 15(2) of Regulation No 17, refers to the last full 12-month financial year as at the date of adoption of the decision imposing the fine.
- 13 It maintains that the purpose of the upper limit on turnover, provided for in that provision of Regulation No 17, requires that that limit be applied to a business year which reflects the economic importance of the undertaking concerned on the date of the Commission decision. However, the Court of First Instance considered that, if an undertaking has not carried on any economic activity in the business year preceding such a decision, the turnover for that period will give no indication of its standing, and therefore cannot serve as a basis for setting the fine.
- 14 Britannia states that the figures, which appear in its audited accounts for the business year preceding the adoption of the contested decision, reflect its financial

situation at the date on which the fine was imposed on it, that is, a turnover of zero. In order to determine the amount of that fine, the Commission could therefore not use a business year in which that company's economic activity was greater.

- 15 The Commission contends that, in accordance with the objective pursued by Article 15(2) of Regulation No 17, the premiss of the Court's reasoning is that the upper limit relating to turnover only applies if the undertaking has achieved that turnover in the business year preceding the decision closing the administrative procedure.
- 16 According to the Commission, the Court of First Instance correctly held that the upper limit was not applicable since there was no turnover for the last business year and, since the 10% upper limit seeks to reflect the financial capacity of the undertaking concerned, it applies where there is a turnover to which it can be linked.
- 17 The Commission states that the pre-condition for applying the 10% upper limit is the existence of a turnover. Where there is no turnover for the business year preceding the adoption of the final decision, other indicators have to be found in order to assess the amount of the fine to be imposed.
- 18 The Commission goes on to state that the Court's findings as to whether a zero turnover is a valid indication of Britannia's economic situation is a matter of fact which cannot be reviewed in the course of an appeal.

Findings of the Court

- 19 By its first plea, the applicant submits that the Court erred in law as regards the interpretation of the concept of ‘preceding business year’ contained in the first subparagraph of Article 15(2) of Regulation No 17.
- 20 Thus, at issue between the parties before the Court of Justice is the question of how the Commission has to determine the concept of ‘preceding business year’ in those cases where substantial changes in the economic situation of the undertaking concerned have taken place between the period in which the infringement was committed and the date of adoption of the Commission decision imposing the fine.
- 21 As regards that concept, it should be pointed out that, according to settled case-law, in interpreting a provision of Community law it is necessary to consider not only its wording, but also its context and the objectives pursued by the rules of which it is part (see Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 41, and Case C-391/05 *Jan De Nul* [2007] ECR I-1793, paragraph 20).
- 22 In that regard, it should be recalled that the purpose of Article 15(2) of Regulation No 17 is to empower the Commission to impose fines with a view to enabling it to carry out the task of supervision conferred on it by Community law (see Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* [1983] ECR 1825, paragraph 105). That task includes in particular suppressing illegal activities and preventing their reoccurrence (see Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, paragraph 173).

- 23 It should be added that, pursuant to the second subparagraph of Article 15(2) of Regulation No 17, the Commission is required to take into account the gravity and the duration of the infringement in question.
- 24 In the light of those factors, the Court has stated that the limit relating to turnover laid down in the first subparagraph of Article 15(2) of Regulation No 17 seeks to prevent fines imposed by the Commission from being disproportionate in relation to the size of the undertaking concerned (*Musique Diffusion française and Others v Commission*, paragraph 119).
- 25 It is clear from the above considerations that, in determining the ‘preceding business year’, the Commission must assess, in each specific case and having regard both to the context and the objectives pursued by the scheme of penalties created by Regulation No 17, the intended impact on the undertaking in question, taking into account in particular a turnover which reflects the undertaking’s real economic situation during the period in which the infringement was committed.
- 26 Having regard to that legal framework, the Court of First Instance held, in paragraphs 38 and 48 of the judgment under appeal, that the calculation of the upper limit of the fine presupposes not only that the Commission has at its disposal the turnover figures for the last business year preceding the date of adoption of its decision, but also that those figures represent a full year of normal economic activity over a period of 12 months.
- 27 Furthermore, in paragraphs 39 and 49 of the judgment under appeal, the Court referred to a number of specific situations in order to illustrate the fact that the Commission must be able to use turnover achieved in a complete year of normal business activity for the purposes of applying Article 15(2) of Regulation No 17.

28 Thus, if it had been accepted, the applicant's argument would have led to an interpretation of the first subparagraph of Article 15(2) of Regulation No 17 to the effect that, in cases in which no turnover has been achieved in the business year preceding the adoption of the Commission decision, the Commission would be required to apply only the first part of that subparagraph, since there is no turnover to which the upper limit set out in the second part of that subparagraph can be linked.

29 However, such an interpretation disregards not only the scope of the Commission's powers under Article 15(2), but also the fact that, in certain situations, the turnover for the business year preceding the adoption of the Commission decision does not provide any useful indication as to the actual economic situation of the undertaking concerned and the appropriate level of fine to impose on that undertaking.

30 Accordingly, where, as in the present case, the undertaking concerned has not achieved any turnover for the business year preceding the adoption of the Commission decision, the Commission is entitled to refer to another business year in order to be able to make a correct assessment of the financial resources of that undertaking and to ensure that the fine has a sufficient deterrent effect.

31 It must be added that, as the Advocate General noted in point 74 of his Opinion and as the Court of First Instance correctly held in paragraph 40 of the judgment under appeal, the determination of the upper limit of the fine is not a mere question of choosing between the two possibilities provided for in the first subparagraph of Article 15(2) of Regulation No 17, that is, between a maximum fine of EUR 1 million and an upper limit set by reference to the turnover of the undertaking concerned.

32 The Court of First Instance therefore did not err in law by holding that the Commission could refer, pursuant to the first subparagraph of Article 15(2) of Regulation No 17, to the last complete business year preceding the adoption of the contested decision, namely the year ending 30 June 1996.

33 Accordingly, the first plea in law relied on by Britannia in support of its appeal must be rejected.

The second plea, alleging infringement of the principle of equal treatment

34 This plea is in two parts.

The first part of the second plea

— Arguments of the parties

35 By the first part of its second plea, Britannia submits that the Court of First Instance infringed the principle of equal treatment by dismissing the action, when, in the contested decision, the upper limit of 10% was applied to the last business year in which that company was considered by the Commission to have pursued ‘normal economic activity’, and, in the case of other undertakings participating in the cartel, the Commission took into account the business year preceding the adoption of that decision.

- 36 Britannia asserts that the application of the upper limit relating to turnover to a business year other than that preceding the contested decision fails to have regard to its financial situation on the date of adoption of that decision. In order to ensure compliance with the principle of equal treatment, the Commission should have applied the upper limit laid down in the first subparagraph of Article 15(2) of Regulation No 17 to the business year preceding the adoption of that decision in respect of all the undertakings concerned.
- 37 Britannia takes the view that, contrary to the Court's findings, its zero turnover for that business year accurately reflects its economic situation for the period in which the infringement was committed.
- 38 The Commission observes that the Court considered that the applicant was in a different situation from that of the other two undertakings which participated in the cartel, since the 10% upper limit laid down in the first subparagraph of Article 15(2) of Regulation No 17 was applicable to those undertakings. Those undertakings achieved a turnover for the business year preceding the adoption of the contested decision, which was a reliable indication of their economic situation.
- 39 The Commission submits that the applicant claims not that it was in the same situation as those undertakings, but merely that its zero turnover for that business year precisely reflected its economic situation at the time. However, such an argument calls into question a finding of fact by the Court of First Instance.

— Findings of the Court

- 40 It is settled case-law that the principle of equal treatment is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified (see Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 95).
- 41 In relation to the present case, it should be recalled that the two undertakings which are the subject of Britannia's argument still carried on a commercial activity on the market which was the subject of the cartel when the Commission adopted the contested decision. Their turnover for the business year preceding the adoption of that decision thus enabled the Commission to assess the financial resources of those undertakings and to determine their economic situation.
- 42 In contrast, such an assessment was not possible in the case of Britannia. It is common ground that Britannia, on the date the contested decision was adopted, was in an entirely different situation from that of the other two undertakings which participated in the cartel.
- 43 In those circumstances, the Court of First Instance was correct to hold, in paragraphs 61 to 63 of the judgment under appeal, that the Commission was justified in treating the applicant differently from those undertakings, given that those undertakings were still active and that their turnover for the business year preceding the adoption of the contested decision was a strong indication of their economic situation.

44 It should be added that, in the context of calculating fines imposed under Article 15(2) of Regulation No 17, differentiated treatment of the undertakings concerned is inherent in the exercise of the Commission's powers under that provision. In exercising its discretion, the Commission is required to fit the penalty to the individual conduct and specific characteristics of the undertakings concerned in order to ensure that, in each case, the Community competition rules are fully effective (see, to that effect, Case C-308/04 P *SGL Carbon v Commission* [2006] ECR I-5977, paragraph 46 and the case-law cited).

45 The first part of the second plea cannot therefore be upheld.

The second part of the second plea

— Arguments of the parties

46 By the second part of its second plea, Britannia submits that the Court of First Instance infringed the principle of equal treatment by dismissing the action, when the contested decision, in so far as it fixes the business year to which the 10% upper limit applies, does not accord with previous administrative practice in comparable cases.

47 Britannia states that, according to the Court, the Commission was entitled to depart from its previous practice in this area given that Britannia's situation was not comparable to that in other cases in which fines were imposed on the undertakings concerned.

48 In support of that second part of the second plea, Britannia refers to three types of situation.

49 First, it considers that its situation was comparable to cases in which an undertaking involved in a cartel had transferred its activities to another commercial entity while continuing to exist.

50 Secondly, Britannia takes the view that it was the subject of discrimination as compared with other undertakings whose turnover had decreased.

51 Thirdly, Britannia submits that it was not treated in the same way as an undertaking which was the subject of Commission Decision 1999/271/EC of 9 December 1998 relating to a proceeding pursuant to Article [81] of the EC Treaty (IV/34.466 — Greek Ferries) (OJ 1999 L 109, p. 24).

52 On that latter point, Britannia observes that that undertaking had withdrawn from the market before adoption of the Commission decision. As the turnover of that undertaking for the preceding business year was not available, the Commission relied on the first part of the first subparagraph of Article 15(2) of Regulation No 17 in order to impose on it a fine of EUR 1 million. Accordingly, Britannia should not be in a less favourable situation than that of the undertaking in that case.

- 53 The Commission takes the view that the question as to whether or not the applicant's situation was comparable to that of other undertakings which were the subject of previous decisions is a matter of fact which was ruled on by the Court of First Instance in the judgment under appeal and, therefore, cannot be reviewed by the Court of Justice in the context of the appeal.
- 54 As regards the first argument based on a transfer of activities, the Commission states that the Court held that the applicant was not in a comparable situation to that of other undertakings concerned by previous decisions, since, unlike those undertakings, Britannia had not achieved any turnover in the business year preceding the adoption of the contested decision.
- 55 In relation to the second argument, namely that Britannia was not treated in the same way as other undertakings whose turnover had decreased, the Commission submits that this argument was never raised by the applicant during the procedure before the Court of First Instance.
- 56 Finally, as regards the third argument, based on Decision 1999/271, the Commission observes that this was rejected by the Court. The Commission's previous practice cannot serve as a legal framework for setting fines in the field of competition, since the legal framework is laid down solely in Article 15(2) of Regulation No 17. Consequently, the interpretation of that provision in an earlier case that benefits a specific undertaking is not a matter of law such as to give rise to an obligation to treat another undertaking in a later case in the same way.

— Findings of the Court

- 57 It should be recalled that, as stated in paragraph 44 above, when calculating fines imposed on undertakings which participated in a cartel, differentiated treatment of those undertakings is inherent in the Commission's discretion in this area.
- 58 As regards the first two arguments relied on by Britannia, namely that the Commission departed from previous administrative practice, it should be borne in mind that the Court of First Instance, in paragraph 61 of the judgment under appeal, held that the applicant was not in a comparable situation to that of the undertakings referred to in previous Commission decisions since it had not achieved any turnover in the business year preceding the adoption of the contested decision.
- 59 In those circumstances, the Court correctly concluded, in paragraph 61, that the Commission was justified in treating Britannia differently from those undertakings.
- 60 In relation to the applicant's argument based on Decision 1999/271, it must also be pointed out that, while the situation of the undertaking referred to in that decision was similar to that of Britannia, it is clear from established case-law of the Court of Justice, set out in paragraphs 201 and 205 of Case C-167/04 P *JCB Service v Commission* [2006] ECR I-8935, that the Commission's practice in previous decisions cannot itself serve as a legal framework for the imposition of fines in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether there might be discrimination, since the facts of those cases, such as markets, products, the undertakings and periods concerned, are not likely to be the same.

61 It must be added that undertakings involved in an administrative procedure in which fines may be imposed for infringement of the Community competition rules cannot acquire a legitimate expectation that the Commission will not exceed the level of fines previously imposed or of a particular method of calculating the fines. The Court has stated in particular that the undertakings in question must take account of the possibility that the Commission may decide at any time to raise the level of the fines by reference to that applied in the past (see, to that effect, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paragraphs 228 and 229).

62 In the light of all the foregoing, the Court of First Instance did not err in law by holding that the Commission did not infringe the principle of equal treatment when establishing the business year to which the upper limit of 10% was applicable.

63 Accordingly, the second part of the second plea cannot succeed.

64 Consequently, the second plea relied on by Britannia in support of its appeal must be rejected in its entirety.

The third plea, alleging infringement of the principle of legal certainty

65 The third plea relied on by Britannia in support of its appeal is also in two parts.

The first part of the third plea

— Arguments of the parties

- ⁶⁶ By the first part of its third plea, Britannia submits that the Court of First Instance infringed the principle of legal certainty by dismissing the appeal, when, in the contested decision, the Commission had taken into account a business year other than the one preceding the adoption of that decision when fixing the upper limit relating to turnover provided for in the first subparagraph of Article 15(2) of Regulation No 17.
- ⁶⁷ More precisely, Britannia asserts that the Court erred in law by holding that the fact that the Commission departed from the wording of the first subparagraph of Article 15(2) of Regulation No 17 and used a business year other than the one preceding the adoption of the contested decision did not constitute an infringement of the principle of legal certainty.
- ⁶⁸ Britannia submits that it could not be foreseen that the Commission intended to refer to a year other than that business year. In that regard, the Court's approach led to a significant lack of legal certainty given that it is impossible for undertakings concerned by a Commission investigation to determine the relevant reference year used for setting the upper limit of the fine.
- ⁶⁹ Britannia adds that the only way to ensure that administrative practice is coherent and predictable is to apply the upper limit laid down in the first subparagraph of Article 15(2) of Regulation No 17 to the business year preceding the adoption of the

Commission decision in all circumstances, even if such an interpretation would mean applying the upper limit laid down in that provision to a turnover which is zero.

- 70 The Commission takes the view that its interpretation of the first subparagraph of Article 15(2) of Regulation No 17 was predictable, since the upper limit set by that provision applies to turnover achieved in the business year preceding the decision closing the administrative phase and the applicant had no turnover during that year.
- 71 The Commission asserts that the concept of predictability of fines means that undertakings must be in a position to assess the consequences of their actions before carrying them out. In the present case, when the applicant decided to commit the infringement, its turnover was not very different from that used in calculating the upper limit of 10%, that is, EUR 55.7 million for the year ending at the end of June 1996.
- 72 The Commission concludes that, when the infringement of which it is accused was committed, Britannia could assume that, if the infringement was discovered and penalised immediately, it would have to pay a fine of around EUR 5.5 million.

— Findings of the Court

- 73 It must be held that by its argument Britannia, in essence, seeks to reformulate all the arguments already set out in support of the first plea relied on to support this appeal, alleging infringement of Article 15(2) of Regulation No 17.

74 Accordingly, since it is clear from paragraph 32 of the present judgment that the first plea is unfounded, the arguments put forward by the applicant in support of the first part of its third plea are also unfounded.

75 The first part of the third plea cannot therefore be upheld.

The second part of the third plea

— Arguments of the parties

76 By the second part of its third plea, Britannia submits that the Court of First Instance erred in law in dismissing the action, even though the contested decision infringes fundamental rights. In fact, in the field of criminal penalties, legal certainty is a fundamental right enshrined in Article 7(1) of the European Convention on Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and in Article 49(1) of the Charter of fundamental rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

77 The Commission contends that that part of the third plea is new since it was not raised before the Court of First Instance.

78 The Commission goes on to state that, as Britannia's turnover during the period in which the infringement was committed, that is, from 1994 to 1997, was approximately EUR 55 million, that undertaking could have expected a maximum

fine of EUR 5.5 million if the cartel had been discovered. As Britannia was not in a position to ascertain its turnover for the business year preceding the adoption of the contested decision, it cannot claim that it expected a fine of a precise amount.

— Findings of the Court

⁷⁹ It must be borne in mind that the principle of legal certainty requires that rules of Community law be clear and precise, so that interested parties can ascertain their position in situations and legal relationships governed by Community law (see Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20).

⁸⁰ As regards the Community competition rules, the Court of First Instance pointed out in paragraph 70 of the judgment under appeal that the provisions governing the implementation of those rules, and in particular Regulation No 17 and the Guidelines, enable undertakings to foresee with certainty the financial consequences likely to result from an infringement of those rules.

⁸¹ The Court of First Instance was correct to hold in paragraph 73 of the judgment under appeal that the principle of legal certainty could give the applicant no guarantee that its cessation of commercial activities in the zinc sector would result in its escaping the imposition of a fine for the infringement committed. In fact, Britannia was perfectly able to foresee that a fine would be imposed on it, since it was clearly in breach of the competition rules and the fine would be determined by reference not only to the gravity and duration of that infringement, but also to the circumstances specific to that undertaking.

82 Britannia does not put forward any argument or other evidence such as to show that the Court's finding in paragraph 73 of the judgment under appeal is vitiated by error of law.

83 Furthermore, in the light of the Commission's discretion in this field, an undertaking participating in a cartel cannot acquire any certainty as to the amount of the fine likely to be imposed on it by the Commission under the provisions of Regulation No 17.

84 In those circumstances, the fact that Britannia was not able to ascertain in advance the relevant reference year for the purposes of determining the upper limit of the fine does not, by itself, constitute an infringement of the principle of legal certainty.

85 The second part of the third plea cannot therefore be upheld.

86 Accordingly, the third plea relied on by Britannia in support of its appeal must be rejected.

87 It follows from the foregoing considerations that the appeal must be dismissed in its entirety.

Costs

- ⁸⁸ Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs against Britannia and Britannia has been unsuccessful, it must be ordered to pay the costs.

On those grounds, the Court (Fourth Chamber) hereby:

- 1. Dismisses the appeal;**
- 2. Orders Britannia Alloys & Chemicals Ltd to pay the costs.**

[signatures]