

their possible mistake of law.⁸ The responsible Board members and sales managers of the defendants knew, at least after the above-mentioned findings of the Federal Cartel Commission and the EEC Commission in 1965, that identical action by competitors as to the formation of prices might be considered as an agreement within the meaning of article 1 GWB. In taking reasonable care, they should have examined whether their behavior was authorized or forbidden by the law on cartels. The Board members and sales managers in question, as officials of important enterprises, were in a perfect position to have such an examination carried out by their legal departments or by some other legal adviser, who would have recognized the character of the agreement (compare the Federal Cartel Commission's Report on its Activities in 1960, Federal House of Representatives Document No. 2734, S. 17).

4. Despite this, the defendants listed under 1, 2 and 3 have wilfully violated the provisions of paragraph 1, section 1 of article 38, considered together with article 1 GWB. Because of the illegal action of these defendants, section 3 of article 7 OWiG⁹ is not applicable, and fines should be levied against them and the enterprises for which they acted, fines which, under section 4 of article 38 GWB, can be as high as 100,000 DM. In this respect, the fixing of the fines is based:

(a) for the defendant listed under 5, on the ground that a member of the organ [Board] which legally represents it, namely the defendant listed under 1, Mr. -----, has committed the proven violation of paragraph 1, section 1 of article 38, considered together with article 1 GWB (article 41 GWB¹⁰);

(b) for the defendant listed under 6, [on the ground that] the fine could be imposed under article 41 GWB, because its sales manager, Mr. -----, the defendant listed under 3, has committed a violation of articles 1 and 38(1)(1) GWB and because this action was approved by the competent Board member, Mr. -----¹¹;

(c) for the defendant listed under 7, [on the ground that] the Board member, Mr. -----, the defendant listed under 2, had violated paragraph 1, section 1 of article 38, considered together with article 1 GWB; hence a fine was levied under article 41 GWB;

(d) for the defendant listed under 4, on the ground of the proven illegal behavior of its executive bodies, which, on its behalf and in the same manner as the defendants listed under 1, 2 and 3, have subjectively and objectively met the conditions characterizing the prohibited acts. Indeed, not only individuals but also enterprises and associations of enterprises are potential violators of paragraph 1, section 1 of article 38 GWB (compare the February 1, 1962 decision of the BGH [German Supreme Court] for an association of enterprises—Wu W/E, BGH 465).

5. As to the amount of the fines levied, for the corporate defendants listed under 4, 5, 6 and 7, it was deemed appropriate to take into consideration their general size, their economic power in the markets affected by the price increase and in related markets, and, finally, the large volume of aniline-dye sales attained. Moreover, it was deemed appropriate to give weight to the fact that, respecting the aniline dyes affected by the price increase, one was dealing with dyes which—apart from the paint and color manufacturers transforming them—are also needed by other industries, such as the textile and leather industries, and that the action of the defendants therefore also brings about price increases in these fields—[that,] as a consequence of the agreement of the enterprises in question, the price increase for dyes also initiates a chain reaction of price increases.

Respecting the defendants under 1, 2 and 3, it was deemed appropriate to take their responsible and prominent positions and their income into consideration.

On the other hand, for the benefit of all defendants, consideration was given to the fact that individual uniform prices had not been fixed for each product, and that, when the particular situation requires it for the conclusion of sales, the enterprises in question depart in isolated cases from the increased prices.

⁸ Article 12, "Error", of the Law on Violations of Law (Ordnungswidrigkeitsgesetz, or OWiG) states in part that fines may be reduced respecting persons who cause their own error as to the existence or applicability of a law.

⁹ Under this provision, fines are not imposed for unimportant infractions.

¹⁰ This provision permits a legal entity to be fined for certain violations by its legal representatives.

¹¹ Presumably, Mr. Ohliger.