

# **Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00**

**JFE Engineering Corp. and Others**

**v**

**Commission of the European Communities**

(Agreements, decisions and concerted practices — Market in seamless steel tubes and pipes — EFTA — Powers of the Commission — Infringement — Fines)

Judgment of the Court of First Instance (Second Chamber), 8 July 2004 . . . II - 2514

## **Summary of the Judgment**

- 1. Actions for annulment — Jurisdiction of the Community judicature — Replacement of an addressee of a decision of a Community institution by a new addressee — Not possible when the designated addressee still exists*  
(Arts 229 EC and 230, fourth para., EC)

2. *Actions for annulment — Application brought by the natural or legal person to whom the contested measure is addressed — Transfer of the application to a third person — Not permissible*  
(Arts 229 EC and 230, fourth para., EC)
3. *Competition — Community rules — Infringements — Imputation — Natural or legal person managing the undertaking at the time of the infringement — Acceptance of responsibility by another person who has taken over the running of the undertaking — Lawfulness — Scope*
4. *Community law — Principles — Fundamental rights — Presumption of innocence — Procedures in competition matters — Applicability*
5. *Competition — Administrative procedure — Commission decision finding an infringement — Means of proof — Reliance on a body of evidence — Degree of evidential value necessary as regards items of evidence viewed in isolation*  
(Art. 81(1) EC)
6. *Competition — Administrative procedure — Commission decision finding an infringement consisting in the conclusion of an anti-competitive agreement — Decision relying on documentary evidence — Evidential obligations on undertakings disputing the existence of the infringement*  
(Art. 85(1) EC)
7. *Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Prejudicial to competition — Criteria for assessment — Anti-competitive object — Sufficient finding*  
(Art. 81(1)(c) EC)
8. *Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Burden of proving the infringement on the Commission — Limits*  
(Art. 81(1)(c) EC)
9. *Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Proof — Undertaking's reply to the Commission's request for information — Statement of an undertaking disputed by other undertakings — Statement made before a public prosecutor — Probative value — Assessment*  
(Council Regulation No 17, Art. 11)

10. *Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Evidence of the infringement — Production by the Commission of a document without revealing its source — Lawfulness*
11. *Competition — Agreements, decisions and concerted practices — Participation in meetings of undertakings having an anti-competitive object — Circumstance from which, where the undertaking concerned has not distanced itself from the decisions adopted, it may be concluded that it participated in the ensuing cartel*  
(Art. 81(1) EC)
12. *Competition — Administrative procedure — Commission decision finding an infringement — Evidence which has to be gathered — Degree of precision required as regards the type of products covered by the infringement*  
(Art. 81(1) EC)
13. *Procedure — Proof — Burden of proof — Transfer from the applicant to the defendant in a particular case — Inability of the Commission to state the date of expiry of an agreement with a non-member State concluded by the Commission*
14. *Competition — Agreements, decisions and concerted practices — Agreements and concerted practices constituting a single infringement — Undertakings to which an infringement in the form of participation in an overall cartel may be imputed — Criteria*  
(Art. 81(1) EC)
15. *Competition — Agreements, decisions and concerted practices — Effect on trade between Member States — Criteria*  
(Art. 81(1) EC)
16. *Acts of the institutions — Statement of reasons — Obligation — Scope*  
(Art. 253 EC)
17. *Actions for annulment — Pleas in law — Breach of the rights of the defence — Subjective nature which precludes review by the Court of its own motion*  
(Art. 230 EC; Rules of Procedure of the Court of First Instance, Art. 48(2))
18. *Competition — Administrative procedure — Commission decision finding an infringement — Decision not identical to the statement of objections — Infringement of the rights of the defence — Condition — Impossibility for the undertaking to defend itself against an objection finally upheld*  
(Council Regulation No 17, Art. 19(1))

19. *Competition — Administrative procedure — Statement of objections — Necessary content (Council Regulation No 17, Art. 19(1))*
20. *Competition — Administrative procedure — Respective competences of the Commission and the Surveillance Authority of the European Free Trade Association — One-stop-shop principle — Opening of a procedure on the basis of provisions both of the EC Treaty and of the Agreement on the European Economic Area — Lawfulness — Condition — Impossibility, at that stage, to determine which authority is competent to find and sanction the alleged infringement (Art. 81 EC; EEA Agreement, Arts 56 and 109; Regulation No 17)*
21. *Competition — Fines — Amount — Determination — Non-imposition or reduction of the fine in return for the cooperation of the undertaking concerned — Respect for the principle of equal treatment (Council Regulation No 17, Art. 15(2))*
22. *Competition — Fines — Amount — Determination — Criteria — Cooperation by the undertaking during the administrative procedure — Definition — Merely providing information requested without recognising the existence of the infringement — Not included (Council Regulation No 17, Art. 15(2))*
23. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement (Council Regulation No 17, Art. 15(2))*
24. *Competition — Fines — Amount — Determination — Commission's margin of discretion — Limits — Compliance with the Guidelines adopted by the Commission — Compliance with the general rules and principles of Community law (Council Regulation No 17, Art. 15; Commission Communication 98/C 9/03)*
25. *Competition — Fines — Amount — Discretion of the Commission — Judicial review — Unlimited jurisdiction — Condition for the exercise thereof — Scope (Art. 229 EC; Council Regulation No 17, Art. 17)*

1. The transferee of the entire business of a natural or legal person who has ceased to exist is necessarily substituted by operation of law for that person as addressee of a measure of an institution and can therefore pursue an action for annulment which that natural or legal person had brought.

On the other hand, the Community judicature has no power in the context of an action for annulment under Article 230 EC, not even in the exercise of its unlimited jurisdiction under Article 229 EC with regard to penalties in order to amend the decision of a Community institution by replacing the addressee thereof by another natural or legal person when that addressee still exists. That power belongs a priori only to the institution that adopted the measure concerned. Thus, once the competent institution has adopted a decision and, therefore, established the identity of the person to whom the decision is to be addressed, it is not for the Court to substitute another person for the latter.

(see paras 46, 47)

2. An application brought by a person in his capacity of addressee of a measure in order to give effect to his rights in the context of an action for annulment under Article 230 EC and/or of an application for amendment under Arti-

cle 229 EC cannot be transferred to a third person who is not the addressee thereof. If such a transfer were to be allowed, there would be a discrepancy between the status by virtue of which the action was brought and the status by virtue of which it was purportedly pursued. Moreover, such a transfer would give rise to a discrepancy between the identity of the addressee of the measure and that of the person litigating as addressee.

(see para. 48)

3. The person who becomes responsible for the running of an undertaking may, at the stage of the administrative procedure before the Commission, assume, by making a declaration to that effect, responsibility for the matters alleged against the person actually responsible, even though it falls, in principle, to the natural or legal person managing the undertaking in question when the infringement was committed to answer for that infringement. However, such a declaration cannot have the effect of changing the identity of the addressee of a Commission decision once the decision has been adopted or that of the applicant in an action for the annulment of such a decision once the action has been brought.

(see para. 50)

4. The principle of the presumption of innocence resulting in particular from Article 6(2) of the European Convention on Human Rights is one of the fundamental rights which, according to the case-law of the Court of Justice and as reaffirmed in the preamble to the Single European Act, by Article 6(2) of the Treaty on European Union and by Article 47 of the Charter of Fundamental Rights of the European Union, are protected in the Community legal order. Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments.
5. In competition cases, the Commission must produce sufficiently precise and consistent evidence to support the firm conviction that the infringement which it found took place.

However, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement. Therefore, the fact that a document refers only to some of the facts referred to in other evidence is not sufficient to require the Commission to exclude that document from the body of inculpatory evidence.

It follows that where there is doubt, the benefit of that doubt must be given to the undertakings accused of the infringement. The Court cannot therefore conclude that the Commission has established the existence of the infringement at issue to the requisite legal standard, as it is required to do, if it still entertains doubts on that point.

(see paras 179, 180, 238, 263)

6. Since, in order to prove the infringement that it sought to penalise, namely the conclusion of an agreement with an anti-competitive object prohibited by Article 81(1)(c) EC, the Commission relies on documentary evidence, the undertakings implicated can successfully dispute the existence of the infringement only by showing that the evidence relied on is insufficient to establish the existence of the illegal agreement. It is of no avail to
- (see paras 173, 177, 178)

those undertakings to attempt to prove that the conclusion of an agreement was against their commercial interests or that the conduct that they actually adopted on the market could be explained other than by the existence of an anti-competitive agreement.

(see paras 181-187)

7. Since the task of the Commission is to penalise infringements of Article 81(1) EC and given that agreements which 'share markets or sources of supply' are expressly mentioned in Article 81(1)(c) EC as being prohibited by that provision, it is sufficient for it to establish that an agreement between undertakings capable of affecting trade between Member States had the object or effect of sharing the Community markets in one or more products between them for that agreement to constitute an infringement.

(see para. 202)

8. Whilst it is necessarily incumbent upon the Commission, where it seeks to penalise an infringement of Article 81(1)(c) EC, to establish that an illegal market-sharing agreement was concluded, it would be excessive also to

require it to produce evidence of the specific mechanism by which that object was attained. Indeed, it would be too easy for an undertaking guilty of an infringement to escape any penalty if it was entitled to base its argument on the vagueness of the information produced regarding the operation of an illegal agreement in circumstances in which the existence and anti-competitive purpose of the agreement had nevertheless been sufficiently established. Undertakings are able properly to defend themselves in such circumstances provided that they have an opportunity to comment on all the evidence relied on against them by the Commission.

(see paras 203, 317)

9. Answers given to requests for information sent by the Commission under Article 11 of Regulation No 17 on behalf of an undertaking as such carry more weight than that of an employee of the undertaking, whatever his individual experience or opinion.

However, an admission by one undertaking charged with having participated in a cartel, the accuracy of which is

contested by several other undertakings which have also been charged, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence.

perjured himself in an inquiry, are circumstances which render such a deposition more reliable than a mere statement.

(see paras 205, 211-212, 219, 296, 312)

In addition, statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence. In particular, where a person who has been asked to comment on documents admits that he committed an infringement and thus admitted the existence of facts going beyond those whose existence could be directly inferred from the documents in question, that fact implies, a priori, in the absence of special circumstances indicating otherwise, that that person had resolved to tell the truth.

10. The prevailing principle in Community law is that of unfettered evaluation of evidence and the only relevant criterion for assessing evidence produced lies in the reliability thereof. It is not possible to dismiss a document as unreliable on the ground that the Commission which produces it refuses to divulge its source, since it may be necessary for the Commission to protect the anonymity of its informers.

(see para. 273)

Finally, although, admittedly, a statement made before a public prosecutor does not have the same value as evidence given under oath in a court, it must be considered that the compulsion deriving from the investigative powers enjoyed by a public prosecutor, and the adverse consequences which might arise under criminal law for a person who

11. Where an undertaking participates in meetings between undertakings with an anti-competitive object and does not publicly distance itself from what occurred at them, thus giving the impression to the other participants that it subscribes to the results of the meeting and will act in conformity with them, it may be concluded that it is participating in the cartel in question.

(see para. 327)



12. If a decision sanctioning an agreement, taken as a whole, shows that the infringement found related to a particular kind of product and mentions the evidence on which that conclusion is based, the fact that the decision does not contain a precise and exhaustive list of all the types of product covered by the infringement is not sufficient in itself to justify annulment thereof. If that were not the case, an undertaking could escape any penalty despite the fact that the Commission had established with certainty that it had committed an infringement in circumstances in which the identity of the specific products, included in a range of similar products marketed by the undertaking in question, had not been established.

of those agreements. The Commission's inexplicable inability to adduce evidence relating to a circumstance which is of direct concern to it deprives the Court of the possibility of adjudicating with all the facts before it as regards that expiry date and it would be contrary to the principle of the proper administration of justice to require that the consequences of that inability on the Commission's part be borne by the undertakings to which the contested decision was addressed, which, unlike the Commission, are not in a position to provide the missing evidence.

(see paras 342-344)

(see para. 336)

13. Although an applicant cannot generally transfer the burden of proof to the defendant by relying on circumstances which it is not in a position to establish, the concept of burden of proof cannot, where the Commission decided not to make a finding of an infringement of the competition rules for the period during which voluntary restraint agreements concluded between a non-member country and the Community, represented by the Commission, were in force, be applied to the Commission's advantage as regards the date of expiry

14. An undertaking may be held responsible for an overall cartel even though it is shown to have participated directly only in one or some of its constituent elements if it is shown that it knew, or must have known, that the collusion in which it participated, especially by means of regular meetings organised over several years, was part of an overall plan intended to distort competition and that the overall plan included all the constituent elements of the cartel.

Similarly, the fact that different undertakings have played different roles in the pursuit of a common objective does not

mean that there was no identity of anti-competitive object and, therefore, of infringement, provided that each undertaking has contributed, at its own level, to the pursuit of the common object.

16. The obligation to state the reasons on which a measure is based cannot embody an obligation for the institution from which it emanates to give reasons for the fact that it did not adopt other measures of a similar kind addressed to third parties.

(see para. 414)

(see para. 370)

15. For an agreement, decision or concerted practice to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. It follows that the Commission was not required to demonstrate the actual existence of such an effect on trade, a potential effect being sufficient. However, it is important that that actual or potential influence should not be insignificant.

17. A breach of the rights of the defence, which by its nature is subjective, does not fall within the scope of an infringement of essential procedural requirements and, therefore, must not be raised on a party's own initiative. Consequently, such a plea must be rejected as inadmissible, under Article 48(2) of the Rules of Procedure, if it has been raised for the first time by a party in its reply.

(see para. 425)

18. The rights of the defence are not breached by an inconsistency between the statement of objections and the final decision unless a criticism contained in the latter had not been set out in the former sufficiently clearly to enable the addressees to defend themselves.

(see para. 392)

It follows that, in principle, the Commission cannot be criticised for making the scope of a final decision narrower than that of the preceding statement of objections, in so far as the Commission must hear the views of the addressees and, if appropriate, take account of the observations submitted by them in response to the objections made, specifically in order to observe their rights of defence.

(see paras 429, 430)

19. The Commission's obligation at the stage of the statement of objections is limited to setting out its objections and describing clearly the facts on which it relied and the classification attributed to them, so that its addressees can properly defend themselves. The Commission is not obliged to set out the conclusions which it draws from facts, documents and legal arguments.

(see para. 453)

20. The Agreement on the European Economic Area (EEA), in particular Articles 56 and 109 thereof, establishes a 'one-stop-shop' for the application of the competition rules, a system which is applicable as from the investigation

stage, so that each of the two authorities is under an obligation to cease handling the matter and to transfer its file to the other authority if it determines that the other authority is the competent authority.

However, that 'one-stop' concept cannot apply from the start of the investigation if it is not possible at that stage to determine which authority is competent, otherwise, in the event of the Surveillance Authority of the European Free Trade Association (EFTA) being seised of the case but the Commission ultimately proving to be the competent authority, there would be a breach of the principle whereby the provisions of the EEA Agreement cannot deprive the Commission of its power to investigate anti-competitive conduct affecting trade between Member States of the Community.

For that reason, the Commission cannot be criticised for opening an investigation into a particular sector using simultaneously as legal basis Article 81 EC, Regulation No 17 and Article 53 EEA, and a decision of the EFTA Surveillance Authority giving authority for a request for assistance to be sent to the Commission, if, at the time when that investigation is opened, it cannot reasonably know with certainty what the correct

legal basis is, since the answer to that question depends specifically on the investigations to be carried out.

(see paras 489-490, 492)

21. In so far as undertakings provide the Commission, at the same stage of the administrative procedure and in similar circumstances, with similar information concerning the conduct imputed to them, the extent of the cooperation provided by them must be regarded as comparable, with the consequence that those undertakings must be treated equally when the amount of the fine imposed on them is determined.

(see paras 501, 573)

22. In order to justify reduction of the fine for cooperation, an undertaking's conduct must facilitate the Commission's task of identifying and penalising infringements of the Community competition rules.

An undertaking which merely provides the factual information which the Commission has asked it to provide, the usefulness of which derives solely from the fact that it corroborates, to some extent, other statements which are already in the Commission's possession, whilst at the same time rejecting any interpretation thereof which is capable of establishing the existence of an infringement on its part, and which has not informed the Commission at any time that it admitted the materiality of the facts during the administrative procedure whilst moreover continuing to contest them before the Court, does not significantly facilitate the Commission's task.

(see paras 499, 503-505)

23. The amount of the fine imposed on an undertaking in respect of an infringement of competition law must be proportional to the infringement, seen as a whole, having regard, in particular, to the gravity thereof.

It is necessary in assessing that gravity to take account of numerous elements whose nature and importance varies according to the type of infringement concerned and the special circumstances surrounding it.

(see para. 532)

24. Whilst the Commission enjoys a discretion in fixing the amount of fines in competition cases, it cannot depart from the rules which it has set for itself and must take account in particular of the elements which are mandatory under its Guidelines. None the less, in so far as its Guidelines do not require it to take account systematically of any given circumstance, it can determine which factors should be taken into account for that purpose, which enables it to adapt its assessment to specific cases. Its assessment must, however, be carried out in compliance with Community law, which includes not only the provisions of the Treaty but also the general principles of law.

(see paras 537, 553, 572)

25. Where an undertaking which has brought an action against a decision of the Commission fining it for infringement of the Community competition rules has asked the Community judicature in its application to exercise its unlimited jurisdiction, including in connection with an application for reduc-

tion of the fine, the Court is empowered to amend the contested measure, even if it does not annul it, having regard to all the factual circumstances, in order to amend the amount of the fine imposed. The unlimited jurisdiction conferred on the Community judicature by Article 17 of Regulation No 17, in accordance with Article 229 EC, expressly includes the power to increase the fine imposed, if appropriate.

Commission representatives may, subject to any express instructions to the contrary from their superiors, lawfully plead that the Community judicature should exercise its unlimited jurisdiction to increase the amount of a fine set by the Members of the Commission. The mere fact that a Commission representative asks the Community judicature to exercise a power available to it and puts forward arguments which might justify such a course of action cannot mean that the representative is acting in the stead of the Members of the Commission.

(see paras 575, 577)