

Case T-120/04

Peróxidos Orgánicos, SA

v

Commission of the European Communities

(Competition — Agreements, decisions and concerted practices — Organic peroxides — Fines — Article 81 EC — Regulation (EEC) No 2988/74 — Limitation period — Duration of the infringement — Apportionment of the burden of proof — Equal treatment)

Judgment of the Court of First Instance (Third Chamber), 16 November 2006 II - 4446

Summary of the Judgment

1. *Competition — Administrative procedure — Powers of the Commission (Council Regulation No 2988/74, Art. 1(1))*
2. *Competition — Administrative procedure — Time-limit with regard to proceedings — Point from which time starts to run (Council Regulation No 2988/74, Arts 1(1)(b) and (2), and 2(1), (2) and (3))*
3. *Competition — Administrative procedure — Commission decision finding an infringement (Art. 81(1) EC)*

4. *Competition — Agreements, decisions and concerted practices — Participation of an undertaking in an anti-competitive initiative*
5. *Competition — Administrative procedure — Commission decision finding an infringement (Commission Notice 96/C 207/04)*
6. *Competition — Fines — Assessment by reference to the individual conduct of the undertaking (Art. 81(1) EC)*

1. A decision finding an infringement is not a penalty within the meaning of Article 1(1) of Regulation No 2988/74 concerning limitation periods in proceedings and the enforcement of sanctions under the rules relating to competition and is not therefore covered by the limitation period laid down by that provision. Therefore, the fact that the Commission's power to impose fines is time-barred cannot affect its implicit power to find an infringement. However, the exercise of that implicit power to adopt a decision finding an infringement after expiry of the limitation period is conditional on the Commission's showing a legitimate interest in making such a finding.

2988/74 concerning limitation periods in proceedings and the enforcement of sanctions under the rules relating to competition, in the case of continuing or repeated infringements, for the Commission's power to impose fines to be time-barred, five years must have elapsed from the day on which the infringement ceased. Under Article 2(1), that period may be interrupted by any action taken by the Commission to investigate the infringement, in particular written requests for information, that interruption taking effect from the date on which that request is notified to the addressee and with the consequence, under Article 2(3), that time starts running afresh from that date.

(see para. 18)

2. As regards limitation under Article 1(1)(b) and (2) of Regulation No

In that regard, interruption of the limitation period according to the

second paragraph of Article 2(1) of Regulation No 2988/74, brought about by the notification of a request for information to undertakings which participated in a sub-arrangement of a cartel, pursuant to Article 2(2), also applies to another undertaking as a participant in that sub-arrangement, even though it was not the addressee of that request.

(see paras 46, 47)

3. It is for the party or the authority alleging an infringement of the competition rules to prove its existence by establishing, to the requisite legal standard, the facts constituting an infringement, and it is for the undertaking invoking the benefit of a defence against a finding of an infringement to demonstrate that the conditions for applying such defence are satisfied, so that the authority will then have to resort to other evidence.

The duration of the infringement is an intrinsic element of an infringement under Article 81(1) EC, the burden of proof of which is borne principally by the Commission. In this respect, according to the case-law, if there is no evidence directly establishing the duration of an infringement, the Commis-

sion should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates.

The general principle that the Commission is required to prove every constituent element of the infringement, including its duration, that is likely to have an effect on its definitive findings as to the gravity of that infringement, is not called into question by the fact that the undertaking in question raised a defence of limitation, the burden of proof of which is in principle borne by the latter. Not only does that defence not relate to the finding of an infringement, but it is clear that reliance on such a plea necessarily requires that the duration of the infringement and the date on which it came to an end be established. Those circumstances cannot alone provide justification for transferring the burden in this regard to the undertaking in question. The duration of the infringement, which requires that the date on which it ended be known, is one of the essential elements of the infringement, which must be proved by the Commission, irrespective of the fact that the disputing of those elements also forms part of the defence of limitation. That conclusion is also justified in light of the fact that the non-limitation of a Commission proceeding under Regulation No 2988/74 concerning limitation

periods in proceedings and the enforcement of sanctions under the rules relating to competition is an objective legal criterion, pursuant to the principle of legal certainty, confirmed by the second recital in the preamble to that regulation, and, thus, is a condition for the validity of any decision imposing a penalty. The Commission is required to comply with this condition even if the undertaking concerned has raised no defence in this regard.

encourages the continuation of the infringement and compromises its discovery, so that that tacit approval may be deemed to be complicity or a passive mode of participation in the infringement.

(see para. 68)

That apportionment of the burden of proof is likely to vary, however, inasmuch as the evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged.

(see paras 50-53)

4. The fact that an undertaking has not distanced itself publicly from an anti-competitive initiative in which it participated or of not reporting it to the administrative authorities effectively
5. Even if some caution as to the evidence provided voluntarily by the main participants in an unlawful agreement is generally called for, considering the possibility that they might tend to play down the importance of their contribution to the infringement and maximise that of others, the fact remains that maintaining that the evidence is not reliable because it was submitted with a view to benefiting from the application of the Commission notice on the non-imposition or reduction of fines in cartel cases and that those parties had a certain interest in submitting incriminating evidence against the other participants in the cartel does not correspond to the inherent logic of the procedure provided for in the Leniency Notice. The fact of seeking to benefit from the application of the Leniency Notice in order to obtain a reduction in the fine does not necessarily create an incentive for the other participants in the offending cartel to

submit distorted evidence. Moreover, any attempt to mislead the Commission could call into question the sincerity and the completeness of cooperation of the person seeking to benefit, and thereby jeopardise his chances of benefiting fully under the Leniency Notice.

(see para. 70)

6. The principle of equal treatment must be reconciled with the principle of legality and thus a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party. A possible unlawful act committed with regard to another undertaking, which is not party to the proceedings, cannot induce the Community judicature to find that it is discriminatory and, there-

fore, unlawful with regard to the undertaking in question in the proceedings before it. Such an approach would be tantamount to laying down a principle of 'equal treatment in illegality' and would lead, for example, to requiring the Commission to disregard the evidence in its possession to sanction the undertaking which has committed a punishable infringement, solely on the ground that another undertaking which may find itself in a comparable situation has unlawfully escaped being penalised. In addition, where an undertaking has acted in breach of Article 81(1) EC, it cannot escape being penalised altogether on the ground that other undertakings have not been fined, where those undertakings' circumstances are not the subject of proceedings before the Court.

(see para. 77)