JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

5 December 2006 *

In Case T-303/02,

Westfalen Gassen Nederland BV, established in Deventer (Netherlands), represented by M. Essers and M. Custers, lawyers,

applicant,

v

Commission of the European Communities, represented by A. Bouquet, acting as Agent,

defendant,

APPLICATION for partial annulment of Commission Decision 2003/207/EC of 24 July 2002 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/E-3/36.700 — Industrial and medical gases) (OJ 2003 L 84, p. 1) and, in the alternative, for a reduction in the fine imposed on the applicant,

* Language of the case: Dutch.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of M. Vilaras, President, F. Dehousse and D. Šváby, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 4 April 2006,

gives the following

Judgment

Background

Facts

1 Westfalen Gassen Nederland BV ('the applicant' or 'Westfalen') is an undertaking active on the Dutch market for industrial and medical gases since 1989.

2 In December 1997 and in the course of 1998, the Commission undertook investigations pursuant to Article 14(2) and (3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) at the premises of the applicant and of various companies also active on the market for industrial and medical gases, in this case AGA Gas BV ('AGA'), Air Liquide BV, Air Products Nederland BV, Boc Gases Benelux ('BOC'), Hydrogas Holland BV and Messer Nederland BV ('Messer').

3 After addressing requests for information to the above companies pursuant to Article 11 of Regulation No 17, on 9 July 2001 the Commission sent a statement of objections to eight undertakings operating in the sector in question, including the applicant.

4 In its reply, the applicant disputed the facts set out in the statement of objections. Following the liquidation of AGA Gas, its parent company, AGA AB, replied on the substance of the statement of objections on behalf of its former subsidiary and expressly stated that it was prepared to accept responsibility for the infringements committed by its subsidiary.

5 Following the oral hearing with the undertakings concerned, the Commission adopted Decision 2003/207/EC of 24 July 2002 relating to a proceeding pursuant to Article 81 EC (Case COMP/E-3/36.700 — Industrial and medical gases) (OJ 2003 L 84, p. 1, 'the Decision').

6 The Decision was notified to the applicant on 26 July 2002 and sent to AGA AB as successor in title to AGA Gas.

The contested decision

7 In the Decision, the Commission states that it collected evidence of collusion between competitors operating in the industrial and medical gases sector in the Netherlands during the period inter alia 1993 to 1997 (recital 331).

8 It thus took the view (recital 393) that the applicant had taken part in the following agreements/concerted practices:

— fixing price increases from October 1994 until December 1995;

— fixing moratorium periods (non-competition periods) from October 1994 until December 1995;

— fixing minimum prices from March 1994 until December 1995.

9 As regards, first, the price increases, the Commission points out that a first discussion on price increases for cylinder gases regarding 1995 took place on 14 October 1994, at the meeting of the Vereniging van Fabrikanten van Industriële Gassen ('VFIG'), which groups together the undertakings which produce and sell industrial gases in the Netherlands. This meeting was attended by AGA, Air Liquide, Air Products, BOC, Hoek Loos, Hydrogas, Messer, Nederlandse Technische Gasmaatschappij ('NTG') and the applicant (recital 136).

10 In order to prove the anti-competitive object of that meeting, the institution refers, inter alia, to the content of handwritten notes dated 17 October 1994 found at AGA's premises or provided by that undertaking.

11 The Commission contends, next, that those price increases for cylinder gases regarding 1995 were fixed in detail by AGA, Air Liquide, Air Products, BOC, Hoek Loos, Messer and Westfalen at the VFIG meeting held on 18 November 1994 and bases that finding on two handwritten tables, one submitted by AGA ('Table 1'), the other found at Air Products' premises ('Table 2') (recitals 139 to 141).

12 According to the Commission, Table 1 of 21 November 1994 inter alia lists for Hoek Loos, AGA, Messer, Air Liquide, Air Products, BOC and the applicant the percentage of price increases for cylinder gases for 1995.

13 As regards Table 2, which again shows price increases, the Commission states that it seems to refer to the same meeting, although not all items in the two tables are identical. The Commission points out that Air Products at first believed that the table had been drawn up in a meeting with competitors held in 1995, but later agreed that it could refer to the VFIG meeting held in November 1994.

14 The Commission explains that, in its reply to the statement of objections, the applicant stated that it had never been an active participant in these meetings and that it had not been aware that such issues as price increases were being discussed as these topics were not mentioned on the agenda of the meetings (recital 145).

15 As regards, secondly, fixing moratorium periods, the Commission contends that, at the VFIG meetings of 14 October and 18 November 1994, price increases for 1995 were discussed and agreed between AGA, Hoek Loos, Air Liquide, Air Products, Messer, BOC and the applicant in combination with a moratorium period from 1 December 1994 to 31 January 1995. The institution refers, in that regard, to AGA's handwritten notes, referred to in paragraph 10 above, and Tables 1 and 2, indicating a moratorium period of two months in which those increases were to be implemented (recitals 168 to 171).

16 The Commission points out that, in its reply to the statement of objections, the applicant argues that the Commission did not show that by its own action it had entered into an agreement with its competitors on a moratorium period at the end of 1994 at the two VFIG meetings (recital 172).

17 As regards, thirdly, the fixing of minimum prices, the Commission contends that the undertakings concerned agreed successive lists of minimum prices for cylinder gases and that the main purpose of the lists was to set thresholds when competing for the same client (recital 189).

18 The Commission states that at the VFIG meetings of 17 March and 14 October 1994 'price scales' and 'minimum prices' for cylinder gases for small customers were discussed with a view to an agreement at least between the applicant, Messer, Air Liquide, Hoek Loos and Air Products, having noted that the latter four undertakings had already come to an agreement on a system of bottom prices for cylinder gases in October 1990 (recitals 194 and 205).

19 According to the Commission, handwritten notes found at AGA's premises mention that 'price scales' were again discussed in the VFIG meetings of March and October 1994 and that in the latter meeting Hoek Loos presented a price scale for cylinder gases, whereas the handwritten notes dated 17 October 1994 confirm that 'minimum prices' were discussed at the October meeting (recital 206).

20 The Commission again points out that the list of prices for small cylinder customers was also found at the premises of three companies, that is, at the applicant's, in a file marked VFIG 1995, at Air Liquide's, in a file marked VFIG 1994, and at Messer's. The three copies of the list feature an identical printed minimum price list dated October 1994 and entitled 'price list for small cylinder customers' and that found at Messer's premises also features a handwritten price list that was added in 1996. The Commission adds that the fact that these companies kept this proposal in their files for a number of years means that the list was important to them (recitals 207 and 208).

21 In the Decision, it is stated that in its reply to the statement of objections the applicant stated that it did not know how the list came into its possession and that it was extremely likely that it was handed out to it at the VFIG meeting of 14 October 1994 but that this did not imply, however, that the applicant actually agreed on the prices mentioned on the list (recital 212).

22 The Commission's overall reply to the applicant's denials are set out in recital 351 of the Decision, as follows:

'The Commission notes that the fact that Air Liquide and [the applicant] participated in several meetings, and that the object of these meetings was to

restrict competition, is confirmed by the documentary evidence in the Commission's file. The finding that the behaviour described constitutes agreements within the meaning of Article 81(1) [EC] is not altered even if it is established that one or more participants had no intention to implement the joint intentions expressed by them. Having regard to the manifestly anti-competitive nature of the meetings at which intentions were expressed, the undertakings concerned, by taking part without publicly distancing themselves, gave the other participants the impression that they subscribed to what was discussed and would act in conformity with it. The notion of "agreement" is objective in nature. The actual motives (and hidden intentions) which underlay the behaviour adopted are irrelevant.'

23 The Decision includes the following provisions:

'Article 1

AGA AB, Air Liquide BV, [Air Products], [BOC], [Messer], Hoek Loos [NV], [Westfalen] have infringed Article 81(1) [EC] by participating in a continuing agreement and/or concerted practice in the sector of industrial and medical gases in the Netherlands.

The duration of the infringement was as follows:

— AGA AB: from September 1993 until December 1997,

— Air Liquide BV: from September 1993 until December 1997,

— [Air Products]: from September 1993 until December 1997,

— [BOC]: from June 1994 until December 1995,

— [Messer]: from September 1993 until December 1997,

— Hoek Loos [NV]: from September 1993 until December 1997,

— [Westfalen]: from March 1994 until December 1995.

...

Article 3

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

— AGA AB: EUR 4.15 million,

— Air Liquide BV: EUR 3.64 million,

— [Air Products]: EUR 2.73 million,

— [BOC]: EUR 1.17 million,

— [Messer]: EUR 1 million,

— Hoek Loos [NV]: EUR 12.6 million,

— [Westfalen]: EUR 0.43 million.'

24 In calculating the basic amount of the fines, the Commission applied, in the Decision, the method set out in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the [CS] Treaty (OJ 1998 C 9, p. 3, 'the Guidelines') and Notice 96/C 207/04 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4, 'the Leniency Notice').

25 Accordingly, the basic amount of the fine, determined according to the gravity and duration of the infringement, was fixed in respect of the applicant at EUR 0.51 million (recital 438).

26 The Commission took the view that Westfalen played an exclusively passive role in the infringements and did not participate in all the different aspects of the infringement and that those attenuating circumstances justified a decrease of 15% in the basic amount of the fine to be imposed; the latter was thus reduced to EUR 0.43 million (recital 442).

27 The applicant did not, however, receive any reduction under the Leniency Notice.

Procedure and forms of order sought by the parties

28 By application lodged at the Registry of the Court of First Instance on 4 October 2002, the applicant brought the present action.

29 After the application was brought, the Commission considered that it had made an error in its assessment concerning the duration of the infringement which that undertaking was alleged to have committed. It thus admitted in the defence to having wrongly established the date of March 1994 as being the starting date of the infringement imputed to the applicant.

30 Consequently, on 9 April 2003 the Commission adopted Decision 2003/355/EC amending the Decision (OJ 2003 L 123, p. 49).

31 Thus, it is now stated in Article 1 of the Decision, as amended, that the applicant infringed Article 81 EC by participating in a continuing agreement and/or concerted practice in the sector of industrial and medical gases in the Netherlands from October 1994 until December 1995. Article 3 of the Decision, as amended, provides for a reduction in the fine from EUR 0.43 million to EUR 0.41 million.

32 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure provided for in Article 64 of the Rules of Procedure of the Court of First Instance, requested the Commission to lodge a document.

33 The parties presented oral argument and their replies to the questions put by the Court at the hearing on 4 April 2006.

34 The applicant claims that the Court should:

— principally, annul Articles 1 and 3 of the Decision imposing a fine on it of EUR 0.43 million for breach of Article 81 EC;

— in the alternative, annul Article 1 of the Decision and reduce the fine significantly;

— order the Commission to pay the costs.

35 In the reply, the applicant states that its alternative application must be understood as an application for an annulment in part of Article 1 of the Decision with a view to obtaining a significant reduction in the fine imposed on it by Article 3 of that Decision. It also requests the Court to hear under oath Mr P. van den Heuij, who participated in VFIG meetings as the director of an undertaking active in the sector in question and whose statement is annexed to the application.

36 The Commission contends that the Court should:

— dismiss the application for oral testimony;

— dismiss the application;

— order the applicant to pay the costs.

The application for the annulment of Articles 1 and 3 of the Decision

Arguments of the parties

37 As a preliminary point, the applicant states that it disputed the facts set out in the statement of objections and that it also disputes those on which the Decision is based.

38 It claims that the Commission failed to show, to the requisite legal standard, that it participated in an agreement and/or concerted practice and that the defendant was thereby in breach of the duty to give reasons provided for in Article 253 EC. The applicant also alleges that the Commission infringed the principle of equal treatment.

39 The applicant submits that it joined the VFIG, created on 23 March 1989, only in July 1994 and that it attended its first meeting of that association on 14 October 1994. According to the applicant, by basing its reasoning on that participation in the meeting of 14 October 1994 and that of 18 November of the same year, the Commission wrongly attributes to it anti-competitive behaviour on three counts, namely fixing price increases, fixing moratorium periods and setting minimum prices.

Fixing price increases

40 The applicant argues, first of all, that at the two meetings of 14 October and 18 November 1994 it refused to participate in a concerted price increase for 1995. It

states that, at the VFIG meeting of 14 October 1994, it was surprised to hear the topic of price increases addressed which did not appear on the agenda, and expressed its surprise.

41 At each meeting, it refused to say whether there would be a price increase and, if there were, whether it would be of 5% or 6%, since it had not yet at that time determined its prices for 1995 and its parent company, Westfalen AG, had necessarily to be consulted on that subject. The applicant claims to have said that while it was not itself opposed to price increases it did not approve of a cartel and that, being in favour of putting pressure on prices, it intended to adapt its policy to the market independently.

42 Those statements can only be considered to be cautious and vague. The applicant did not give any indication of its future commercial policy, leaving the other undertakings in doubt as to what its behaviour on the market in 1995 would be.

43 The reality of that rejection of an anti-competitive agreement is confirmed by the statements of Mr Nordkamp, who represented the applicant at the meetings in question, and those of Mr van den Heuij, a member of NTG, who was also present at those meetings. The applicant maintains that Mr van den Heuij did not have the least personal interest in making that statement and that there is thus no reason to doubt its sincerity. In the light of the Commission's contention, which merely claims that the statement at issue is devoid of any credibility, the applicant requests that the Court hear Mr van den Heuij under oath.

44 Further, contrary to the Commission's claims, there is no contradiction between the applicant's statements in reply to the statement of objections and those made in the course of these proceedings.

45 Secondly, the applicant argues that the documents on which the Commission bases its findings have no evidential value.

46 Thus, it is not at all certain that Tables 1 and 2 relate to the meeting of 14 October or that of 18 November 1994.

47 The two tables in issue are also inconsistent. While Table 1 refers to a price increase by the applicant in the region of '5-6%', Table 2 indicates an increase of over 6%. This inconsistency is all the more striking in that, for the other undertakings, the percentages indicated in the two documents are the same.

48 The two tables appear to be contradictory in relation to the question of rental rates and transport costs. While it is apparent from Table 1 that the applicant was not even informed of the agreements entered into in that regard, Table 2 indicates that the applicant concluded an agreement on the renting of cylinders. The amounts referred to in the two tables under rental prices are not the same either. It is moreover not inconceivable that the words 'WF was not informed?? Not accepted??', appearing in AGA's handwritten notes dated 17 October 1994, were not limited merely to the rental and transport costs but related to all the questions addressed during the meeting in question.

49 The applicant maintains that, even if the two tables do concern the meetings of 14 October and 18 November 1994, it may be inferred from them that the other operators did not have a precise idea of the applicant's pricing policy and that it had thus made particularly vague statements at those meetings.

50 The Commission merely reproduced, as a matter of convenience, what the other participants had noted with regard to the applicant without taking note of the reservations with which the applicant had qualified its statements. It also did not seek to explain the differences, even though those differences were accepted in recital 141, between the figures contained in the two tables; the Decision is not sufficiently reasoned in this regard.

51 Those differences can be explained by the fact that the data contained in those tables merely reflects the wishes of their authors and not a price increase decided on by the applicant. That explanation is supported by other documents from undertakings which attended VFIG meetings and in which the applicant's name was mentioned even though it did not participate in those meetings.

52 The applicant argues that, at various times during the currency of the cartel, its participants mentioned the applicant's name in connection with the VFIG meetings which it did not attend and the Commission was right not to use those statements. Even though Tables 1 and 2 relate specifically to those erroneous allegations, the defendant took them into account without the least hesitation. In any event, those handwritten notes corresponding to Tables 1 and 2 are in very summary form and cannot be taken to be a full note of the content of the meetings.

Fixing the moratorium periods

53 The applicant argues that, at the VFIG meetings of 14 October and 18 November 1994, it took part in discussions relating to the implementation of a moratorium, but with the object of stating its opposition to that measure, and received on those occasions the support of other small operators. By way of proof, it refers again to Mr van den Heuij's explicit statement.

54 Tables 1 and 2, which lack consistency and can only reflect the conduct expected of the applicant by the other undertakings, are not at odds with the way the meetings developed, as described in the previous paragraph.

55 While it is aware that the fact of not complying with the terms of an anti-competitive agreement does not preclude an infringement of Article 81(1) EC, the applicant submits that during the moratorium it contacted various customers of competing undertakings and provided evidence of this to the Commission.

Fixing minimum prices

56 The applicant contends that it did not take part in any discussion on minimum prices at the meeting of March 1994, let alone enter into an agreement, since it did not attend that meeting. It adds that it also did not take part in any discussion on minimum prices at the meeting of 14 October 1994, as AGA's handwritten notes of that meeting do not show that the applicant was present at that meeting or that it entered into an agreement. Paragraphs 132 and 133 of the statement of objections even confirm that the small operators, such as the applicant, made a stand at the VFIG meetings.

57 The fact that a list of minimum prices was found at the applicant's premises is of no significance at all. The applicant states that it merely said that it was quite possible that that list was distributed to it at the meeting of 14 October 1994 but not, as the Commission claims, that it was very likely that the list was handed over to it directly at that meeting. The mere fact of having such a document in its possession does not prove in any way that the applicant was party either to an agreement on those minimum prices or to a possible discussion on that subject. The Commission was correct not to set any store by other information received by the applicant which it had not asked for.

58 Finally, the applicant submits that the fact that an undertaking participates in a discussion on coordination of conduct on the market does not constitute a breach of the prohibition on cartels where it is apparent that that undertaking actually made a stand against such coordination (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraphs 94 to 96).

59 The applicant maintains that, in the light of the conduct which it adopted in the VFIG meetings of 14 October and 18 November 1994, it should be considered to have distanced itself publicly from what was discussed at those meetings in the sense required by the case-law (Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 223). According to the applicant, a person who distances himself from what is said at a meeting necessarily takes part in the discussion, but that does not mean that by doing so it infringes the prohibition on cartels. In that respect, the Commission contradicts itself, as it admits that participation in an official meeting does not in itself constitute participation in a cartel. In addition, case-law does not, contrary to what the Commission suggests, require that evidence of distancing be adduced by way of a document contemporaneous with the infringement or that that evidence come only from the participants to the cartel.

60 The applicant's attitude can be readily explained by its situation on the market in question, namely that of a relatively small operator which recently entered the market but which managed to develop its turnover by way of a dynamic commercial policy. The participants in the cartel and the Commission itself (recital 78) recognise that the applicant played a role of 'destroyer' of prices. In such a context, the applicant therefore had no interest in being bound by an agreement on price increases.

61 The applicant argues that its attitude of open opposition, combined with that of other small operators, had the effect of making the large operators pursue their unlawful negotiations outside the confines of the VFIG meetings and when those small operators were not there. The applicant thus ought to be regarded as a 'cartel-

breaker' and not as an undertaking which contributed passively to a cartel. Further, while the situation referred to above is described in paragraph 132 of the statement of objections, the Commission no longer mentions this in the Decision, which, in that respect, is insufficiently reasoned.

62 The Commission points out that the applicant does not dispute the fact of having participated in the cartel meetings of 14 October and 18 November 1994 nor that the object of those meetings was to restrict competition. While participation in the VFIG meetings is not in itself tantamount to participation in meetings of a collusive nature, that still does not mean that, whether in the course of or at the fringes of those official meetings, no agreement was entered into.

63 The Commission states that it is clear from the case-law that the fact that an undertaking participates, albeit not actively, in meetings with members of a cartel means that it will be liable for the infringement, unless it publicly distanced itself from what was discussed at that meeting (*HFB and Others* v *Commission*, paragraph 59 above, paragraph 223).

64 In *Commission* v *Anic Partecipazioni*, paragraph 58 above, relied on by the applicant, the Court stated that it is for any person alleging that it distanced himself to provide evidence of this. In this case, however, the applicant furnished no such evidence.

65 The defendant objects to the request for Mr van den Heuij to be heard by the Court, in that the request is out of time, since the applicant disregarded Article 48 of the Rules of Procedure by failing to give reasons for the delay in offering evidence. Furthermore, that testimony could bring nothing to the hearing and is therefore unnecessary.

The duration of the infringement

66 In the application, the applicant argues that the Decision was not correct as to the duration of the infringement established by the Commission, since the applicant was not present at the VFIG meeting of March 1994. In the reply, it states that it took note of the Commission's recognition of its mistake in relation to the starting date of the infringement, now fixed at October and not March 1994.

67 The Commission takes the view that the applicant's argument as to the duration of the infringement is completely irrelevant, since, in accordance with the Guidelines, it has taken the rectification of the duration of the infringement into account and reduced the fine.

Infringement of the principle of equal treatment

68 The applicant claims that the Commission infringed the principle of equal treatment in its assessment of the small operators' participation, and did so in finding that the applicant alone infringed the prohibition on cartels and not NTG and Hydrogas, which participated in several meetings during which unlawful agreements were discussed. The reasoning of the Decision is seriously insufficient on that point.

69 The Commission contends that the arguments as to the alleged infringement of the principle of equal treatment, which in fact concern the application for the reduction in the fine, are unfounded.

70 NTG's involvement is plainly different from that of the applicant; that undertaking also managed to show, in its reply to the statement of objections, that it was not liable. Hydrogas's situation cannot be compared to the applicant's, since the Commission did not even send Hydrogas a statement of objections in the absence of indicia of unlawful conduct. The Commission goes on to say that participation in the official VFIG meetings does not in itself constitute participation in a cartel meeting and it did not have, as was the case for the applicant, evidence of NTG's and Hydrogas's participation in the price increases, moratoria or minimum prices.

71 The Commission contends that, even if the other companies were inappropriately excluded from the investigation, the applicant's situation remains the same. The fact that an advantage may have been conferred inappropriately does not mean that the applicant is entitled to obtain a reduction in its own fine if that fine has been lawfully set (Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 176, and Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 367).

Findings of the Court

Preliminary observations

72 The applicant claims that the Commission failed to show to the requisite legal standard that it participated in an agreement and/or concerted practice and that 'by acting in this way, the Commission also infringed the principle of stating reasons under Article 253 EC'. The applicant submits more particularly that there is a lack of reasons for the differences identified between the figures in Tables 1 and 2, its role as 'cartel-breaker' and the particular way in which it was treated as compared with the other two small operators. It is clear from the above formulation and the content of the applicant's argument that the complaint raised is not, strictly speaking, directed

at a failure to state reasons or sufficient reasons constituting an infringement of essential procedural requirements within the meaning of Article 230 EC. The complaint in question in fact indissociable from the criticism of the merits of the Decision and thus the substance of that act, which is claimed to be unlawful given the Commission's failure to prove a breach of Article 81 EC and its infringement of the principle of equal treatment.

The applicant's claim to have distanced itself publicly

73 The applicant argues that the Commission did not prove to the requisite legal standard any infringement of Article 81(1) EC on the part of the applicant.

74 In that regard, it should be recalled that, where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the facts constituting an infringement (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 58).

75 For the purposes of applying Article 85(1) EC, it is sufficient that the object of an agreement should be to restrict, prevent or distort competition irrespective of the actual effects of that agreement. Consequently, in the case of agreements reached at meetings of competing undertakings, that provision is infringed where those meetings have such an object and are thus intended to organise artificially the operation of the market (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, paragraph 145).

76 Therefore, it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (see, in particular, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 81 and the case-law cited).

77 The reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking gave the other participants to believe that it subscribed to what was decided there and would comply with it (*Aalborg Portland and Others* v *Commission*, paragraph 76 above, paragraph 82).

78 In this case, the applicant does not dispute the fact of having participated in the two VFIG meetings of 14 October and 18 November 1994 and the anti-competitive content of those meetings. It argues, however, that, in the light of its behaviour at those meetings, it should be considered to have distanced itself publicly from the anti-competitive matter discussed, in the sense required by the case-law.

— Fixing price increases and fixing a moratorium

79 In its written pleadings, the applicant claims, generally, that 'at the meetings of 14 October and 18 November 1994 it showed that it was opposed to the agreements concerning the [undertakings] conduct on the market'.

80 As regards the price increases, it submits that it clearly stated that it did not approve any increase in prices and that, being in favour of putting pressure on prices, it intended to adapt its policy to the market independently. It adds that it did not want to say 'during the meeting' whether it intended to increase prices in 1995, and, if so, to what extent, but it did state that it was not in principle opposed to price increases. It also states that its director, Mr Nordkamp, refused 'at every meeting' to say whether there would be a price increase, and, if so, whether it would be of 5% or 6%.

81 In his statement, Mr Nordkamp states that after other undertakings stated 'at one of the two VFIG meetings in question' that they planned a price increase of 5% or 6% he 'remained vague as to whether Westfalen would increase its prices for 1995, and, if so, to what extent'.

82 Those statements only partially correspond to those made by the applicant in its reply to the statement of objections, in which it stated that at the 'post-meeting' on commercial policy, after the other operators had announced that they would increase prices, it said that 'it would envisage a price increase of 5 or 6% for 1995', which is at odds with the wording used in the application, set out above. The applicant added that 'it did not commit to implementing a fixed increase in prices either at the meetings of 14 October or of 18 November 1994 or at any other time', which is not equivalent to an express statement of opposition to the increase in prices.

83 It is apparent at least that the applicant did not express a clear view on the question of a price increase. Therefore, while it did not state expressly that it would increase its prices in 1995, it also did not say that there would be no price increase that year.

84 The applicant therefore did not express a view which would have left the other undertakings in no doubt that it was distancing itself from the idea of such an increase. Its conduct, which it describes as vague, is akin to tacit approval which effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 76 above, paragraph 84).

85 In relation to the second aspect of anti-competitive behaviour of which the applicant is accused by the Commission, the applicant stated, in its reply to the statement of objections, that it 'took a stand against a moratorium at the meeting' and that 'Mr Nordkamp did not commit on Westfalen's behalf to a complying with the moratorium either at the meeting or at any other time', which it confirmed in its written pleadings, stating that it declared its opposition to the introduction of a moratorium.

86 With a view to proving that its statements of opposition are true and thus the fact that it distanced itself publicly from the collusive discussions in which it participated, the applicant relies in essence on the statement of Mr van den Heuij.

87 The witness states that, at a VFIG meeting, the applicant reacted against proposals of anti-competitive conduct made by other members of the professional association, and did so by way of protest. It is clear from his statement that that protest was dictated not by any opposition in principle to manifestly unlawful concerted action, but because such action did not a priori correspond to the economic interests of NTG and the applicant at that time.

88 It must, however, be pointed out that it is apparent from the very wording of Mr van den Heuij's statement that he did not have a very precise recollection of the meeting in question. Thus, the witness states that he recalls neither the date of the meeting nor the duration of the moratorium discussed at that meeting, nor whether the director of Hydrogas had also protested against the proposals at issue.

89 Mr van den Heuij's statement, made on 9 October 2002, concerns only one VFIG meeting which took place 'eight years' earlier. Given that this is the only point of reference in time and in light of the table recapitulating all the VFIG meetings referring to the individual participation of the members of the association (recital 106), it should be pointed out that the statement in question can only relate to the one meeting of 14 October 1994, considering that NTG, the company of which Mr van den Heuij was the director, was not represented at the following meeting of 18 November 1994.

90 Furthermore and in particular, the witness statement of Mr van den Heuij does not accord precisely with the applicant's account of how the meeting in question unfolded — since the witness does not allude to the successive announcements by certain undertakings that they would increase their prices by 5 or 6% — nor with Mr Nordkamp's statement that the applicant planned 'a price increase of 5 or 6% for 1995' or that it was not opposed, in principle, to increases but refused to say whether it itself would increase prices for 1995 and, if so, the extent of that increase.

91 The witness refers to a statement of general opposition after proposals of anti-competitive conduct were announced, which is not mentioned as such by the applicant, which claims, by its reactions to each of the three anti-competitive initiatives in question, to have shown that it was opposed to unlawful coordination.

92 In any event, it is clear from the foregoing that the applicant's assertion that the statement of 'Mr ... van den Heuij, who himself participated in the two VFIG meetings of 14 October and 18 November 1994, shows that at those meetings it was fiercely opposed to the proposal for a prohibited agreement' cannot be accepted by the Court, since it is quite simply wrong.

93 In that regard, when questioned by the Court at the hearing, the applicant expressly admitted that Mr van den Heuij had not participated in the VFIG meeting of 18 November 1994. That finding is decisive in determining the applicant's liability.

94 It should be recalled that the Commission's assertion that the applicant took part in an agreement to fix price increases and fix a moratorium period is based, on the applicant's participation both at the VFIG meeting of 14 October 1994 and at the following one of 18 November.

95 However, the applicant does not provide any concrete, objective evidence that it distanced itself publicly from the manifestly anti-competitive content of the meeting of 18 November 1994.

96 The applicant's mere assertions as to the plausibility of such distancing in the light of its position as a dynamic operator which recently entered the market are not such as to discharge the burden of proof which it bears.

97 As the Commission correctly points out, the applicant might also have had every interest in the gas suppliers' complying with the agreements entered into and their believing that the applicant was also acting in compliance, while, without warning those undertakings, it was charging prices slightly lower than those agreed so as to increase its margins and market share. It should be recalled in this connection that, according to settled case-law, the fact that the conduct on the market of the undertakings concerned does not conform to the agreed 'rules of the game' does not in any way affect its liability for its participation in an anti-competitive agreement (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 1389).

98 The applicant also states that it is by no means inconceivable that the words 'WF was not informed?? Not accepted??', appearing in AGA's handwritten notes referred to by the Commission in the Decision (recitals 138 and 169), concern not just rental and transport costs, but rather, all the issues addressed in the collusive discussions.

99 The documentary evidence adduced by the Commission in fact includes handwritten notes submitted by AGA, which are worded as follows:

'17.10.94

VFIG

Price increase

Rent 0.25 Transport

WF was not informed?? Not accepted??

Gas price cylinders + 6% + rent and transp

Bulk contracts + 4.5%, Index formula?

...

Moratorium: 1 December + 3-4 months.'

100 Besides the fact that the wording in question relates to the first point of the notes concerning rental and transport costs and not the increase in cylinder gas prices referred to in a separate point below, it need merely be pointed out that the handwritten notes are expressly dated 17 October 1994, being only some days after the collusive VFIG meeting, held on 14 October 1994, in which AGA participated. Thus, the handwritten notes and wording referred to by the applicant cannot relate to the second collusive meeting of 18 November 1994.

101 In those circumstances, it is apparent that, having participated in a first meeting which was clearly anti-competitive, whose content the applicant allegedly disapproved, the applicant participated only a little more than a month later in a second collusive meeting in respect of which it has not been established that it publicly distanced itself from it.

102 That deliberate participation in a second meeting with an anti-competitive purpose, which followed straight on from the first unlawful concerted action, completely overrides the initial protest, assuming it were established, voiced at the meeting of 14 October 1994 and suffices to reject, in the overall analysis of the applicant's

conduct in the period from 14 October to 18 November 1994, any claim that it distanced itself publicly from the collusive discussions concerning the fixing of price increases of cylinder gas and the fixing of a two-month moratorium.

103 It must be pointed out in this regard that the notion of public distancing as a means of excluding liability must be interpreted narrowly. If the applicant had in fact wanted to disassociate itself from the collusive discussions, it could easily have written to its competitors and to the secretary of the VFIG after the meeting of 14 October 1994 to say that it did not in any way want to be considered to be a member of the cartel or to participate in meetings of a professional association which served as a cover for unlawful concerted actions (see, to that effect, Case T-61/99 *Adriatica di Navigazione* v *Commission* [2003] ECR II-5349, paragraph 138).

104 For the sake of completeness, it should also be pointed out that the Commission relies on documentary evidence which supports the conclusion that the applicant did in fact take part in the agreements mentioned above. It consists of handwritten notes taking the form of tables and described as such by the Commission in the Decision.

105 The applicant alleges, generally, that those notes are so summary in form as to be devoid of any probative value. As well as raising certain specific complaints with regard to one or other of the documents, it asserts that the handwritten notes cannot, in any event, be taken to be complete minutes of the meetings at issue.

106 It should be recalled in that respect that, since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements

entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction (*Aalborg Portland and Others* v *Commission*, paragraph 76 above, paragraphs 55 and 56).

107 In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (*Aalborg Portland and Others* v *Commission*, paragraph 76 above, paragraph 57).

108 In the present case, it is common ground that the collusive discussions took place at the fringes of the VFIG meetings of 14 October and 18 November 1994 and that they clearly could not and did not allow official accounts to be drawn up in exhaustive detail. Therefore, there can be no question of dismissing the handwritten notes relied on by the Commission merely because they are summary in form.

109 Furthermore, the applicant's complaints that the two tables cannot be linked to one or other of the VFIG meetings and that those tables are inconsistent do not stand up to a specific analysis of the documents in question.

110 First, Table 1, submitted by AGA, is dated 21 November 1994 and shows the names in abbreviated form of seven undertakings, including AGA, which actually took part in the VFIG meeting of 18 November 1994 (recital 140). Table 2 was found at the

premises of Air Products, which stated that the table could be the result of that meeting (recital 141). In addition, Table 2 contains the same list of companies as that in Table 1 as well as similar indications as to price increases for cylinder gases, transportation costs and rent.

111 It should also be recalled that the VFIG meeting of 18 November 1994 is the second and last meeting with an anti-competitive purpose at which the applicant participated with the large operators and that the collusive discussions then continued elsewhere.

112 Secondly, while Table 1 contains the following wording 'WF 5-6% on all products 1/1-95', in Table 2 the words 'W/F 6%' appear in the column headed 'Product'. As the Commission correctly points out, even if those figures are not exactly the same, they are none the less fully compatible with one another and show that the applicant did participate in a price increase planned for January 1995 in the region of 5 to 6%.

113 Furthermore, Table 1 contains the wording 'Moratorium: 1.12.- 31.1.95' at the top of the page, which can only mean that it concerns all the undertakings referred to in that table. Table 2 contains the words 'W/F ... 2 ms' which, in all likelihood, is an expression of the two-month moratorium agreed by the undertakings involved in the cartel. It should be noted, in addition, that the question of the moratorium had already been discussed at the meeting of 14 October 1994, as is clear from AGA's handwritten notes referred to in paragraph 99 above.

114 It is, moreover, of particular significance that Hydrogas, the small operator mentioned in Mr van den Heuij's statement and whose participation in the VFIG meetings of 14 October and 18 November 1994 is not disputed, is not, unlike the applicant, referred to at all in those tables.

115 It follows from the foregoing that the applicant has not proved that it distanced itself publicly from those meetings, and that the Commission has established to the requisite legal standard that the applicant took part in price-fixing agreements from October 1994 to December 1995 and in setting a moratorium from October 1994 to January 1995.

— Fixing minimum prices for buyers of small quantities of cylinder gases

116 First of all, it should be pointed out that it is apparent from the Decision (recital 352) that the Commission considered that the conduct of the various undertakings involved in the cartel constituted a single continuous infringement, which progressively took shape through agreements and/or concerted practices.

117 Thus, as is stated in Article 1 of the Decision, the undertakings concerned, including the applicant, 'have infringed Article 81(1) EC by participating in a continuing agreement and/or concerted practice in the sector of industrial and medical gases in the Netherlands'.

118 As regards, more particularly, the applicant, the Commission took the view that it had participated in that infringement through specific anti-competitive conduct of its own, inter alia, by fixing minimum prices for buyers of small quantities of cylinder gases. The applicant's liability in this respect is based on its participation in the one meeting of 14 October 1994, having regard to the rectification of the Decision on 9 April 2003.

119 After having stated in the statement of objections that 'it is still not clear whether an agreement on minimum prices was actually entered into in 1994', the Commission pointed out in recital 205 of the Decision that at the VFIG meetings of March and October 1994 'price scales' and 'minimum prices' for cylinder gases for small customers were 'discussed with a view to an agreement' at least by the applicant, Messer, Air Liquide, Hoek Loos and Air Products. It is also stated in recital 341 that 'Hoek Loos, AGA, Air Products, Air Liquide and Messer' agreed minimum prices for cylinder gases for small customers for '1995, 1996 and 1997'.

120 It is clear from the foregoing that the Commission alleges that the applicant took part in a concerted practice concerning the fixing of minimum prices for purchasers of small quantities of cylinder gases.

121 It should be recalled, at this stage, that a 'concerted practice' constitutes a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition (Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 64). The criteria of coordination and cooperation, far from requiring the elaboration of an actual 'plan', must be understood in the light of the concept inherent in the Treaty provisions relating to competition, according to which each economic operator must determine independently the policy which he intends to adopt on the common market. Although that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators with the object or effect either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and

114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 173 and 174, and Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 720).

122 As in the case of the anti-competitive actions which it is alleged by the Commission to have committed, the applicant disputes its liability by claiming that it distanced itself publicly from the collusive discussions on fixing minimum prices for purchasers of small quantities of cylinder gases.

123 In that respect, it is clear both from the applicant's written pleading and from the statement of Mr Nordkamp, who represented the applicant at the VFIG meetings, that Mr Nordkamp was silent on the question of fixing minimum prices for purchasers of small quantities of cylinder gases when it was discussed at the meeting of 14 October 1994.

124 Silence by an operator in a meeting during which the parties colluded unlawfully on a precise question of pricing policy is not tantamount to an expression of firm and unambiguous disapproval. On the other hand, according to case-law, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 76 above, paragraph 84).

125 Mr van den Heuij's imprecise recollections alone, recounted in a statement that was asked of him and put together shortly before the present action was brought, which do not correspond exactly to the applicant's own statements, are not such as to invalidate the above finding. At best, it could be inferred from Mr van den Heuij's

statement that the small operators, including the applicant, protested when the unlawful proposals of other operators were announced, before the specific discussions on each of those proposals began and each undertaking expressed its view, which the applicant did, in the particular circumstances referred to in paragraph 123 above, in relation to fixing minimum prices for purchasers of small quantities of cylinder gases.

126 However, the applicant's behaviour in that regard cannot be interpreted as showing its firm and unambiguous disagreement such that it amounts to public distancing as required by and interpreted, narrowly, in the relevant case-law.

127 It should also be pointed out that, in the Decision, the Commission states that, according to the explanations provided by AGA, supported by the wording of handwritten notes found at AGA's premises, the list of price scales for small cylinder customers was presented by Hoek Loos at the fringes of the VFIG meeting of October 1994. In addition and in particular, in a file marked VFIG 1995, a document dated October 1994 and entitled 'price list for small cylinder customers' was found at the applicant's premises, and which actually featured a printed minimum price list. The same document was found at the premises of Messer and Air Liquide (recitals 207 and 208).

128 The applicant merely stated that while it was possible that that document was given at the meeting of 14 October 1994, the fact of having it in its possession does not prove that it participated in an agreement on minimum prices or even in a discussion on that subject.

129 The fact remains that the applicant did participate in the meeting of 14 October 1994, and, as the Commission correctly points out, it is hardly surprising that, unlike the price increase and fixing of the moratorium, no reference was made to the applicant or another undertaking, as the document in question was a price list which was distributed at that meeting. The fact that the applicant had kept such a document is hardly consistent with its claim to have publicly distanced itself and independently determined its commercial policy on the market concerned which such distancing necessarily entails, as required by the case-law in respect of each economic operator (*Commission* v *Anic Partecipazione*, paragraph 58 above, paragraph 116, and the case-law cited therein).

130 By the same token, even though not directly refuting the applicant's claim of public distancing, as in the case of the first two actions of which it is accused by the Commission, the applicant's participation in the second collusive meeting of 18 November 1994 provides an indication of its anti-competitive state of mind and contradicts, retrospectively, its claim that it distanced itself publicly from the collusive discussions in the meeting of 14 October 1994.

131 The mere finding that the applicant has not provided evidence of its alleged public distancing is not sufficient, however, to conclude that the applicant is liable.

132 In the judgment on appeal in, *Commission* v *Anic Partecipazioni*, paragraph 58 above, the Court of Justice stated that, as is clear from the very terms of Article 81(1) EC, a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices and a relationship of cause and effect between the two (paragraph 118). The Court also held that, subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting

arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market (*Commission* v *Anic Partecipazioni*, paragraph 58 above, paragraph 121).

133 In the present case, in the absence of evidence which it is for the applicant to adduce, it must be considered that the applicant, which remained active on the market in question after the meeting of 14 October 1994, took account of the unlawful concerted practice, in which it participated at that meeting, when determining its own conduct on that market (*Commission* v *Anic Partecipazioni*, paragraph 58 above, paragraphs 119 and 121).

134 It is clear from the above considerations that the Commission has established to the requisite legal standard that the applicant took part in a concerted practice concerning the fixing of minimum prices for purchasers of small quantities of cylinder gases.

The duration of the infringement

135 It should be pointed out, first of all, that the Commission's definitive assessment of the duration of the infringement for which the applicant is held liable is set out in Article 1 of the Decision, as rectified by the decision of 9 April 2003, namely that the infringement began in October 1994 and ended in December 1995.

136 In the light of the rectification of the Decision, the applicant's complaint alleging that the starting date of the infringement referred to in Article 1 of the Decision is wrong has become devoid of purpose.

137 At the hearing, the applicant pointed out that the reference in Article 1 of the Decision to December 1995 as the end of the infringement was erroneous, since, after the VFIG meeting of 18 November 1994, the applicant no longer participated in any other collusive meeting.

138 To the extent that that new complaint may be considered to be admissible, it cannot be upheld by the Court. In that regard, it should be recalled that the Commission has established to the requisite legal standard that the applicant, inter alia, participated in an agreement which had a clearly anti-competitive object, namely the fixing of price increases for the year 1995. To calculate the duration of an infringement whose object is to restrict competition, it is necessary merely to determine the period during which the agreement existed, that is, the time between the date on which it was entered into and the date on which it was terminated (Joined Cases T-49/02 to T-51/02 *Brasserie Nationale* v *Commission* [2005] ECR II-3033, paragraph 185).

139 However, the applicant failed to show to the requisite legal standard that it terminated its participation in the cartel before December 1995, by adopting fair and independent competitive conduct in the relevant market. Furthermore, it must be observed that the applicant did not withdraw from the cartel in order to report it to the Commission (Case T-62/02 *Union Pigments* v *Commission* [2005] ECR II-5057, paragraph 42).

Infringement of the principle of equal treatment

140 The applicant claims that the Commission infringed the principle of equal treatment in its assessment of the participation of the small operators, and did so by finding that the applicant was the only one to have disregarded the prohibition on cartels and not NTG and Hydrogas, which did, however, take part in several meetings involving discussions of unlawful agreements.

141 It should be pointed out, in this regard, that, where an undertaking has acted in breach of Article 81(1) EC, it cannot escape being penalised altogether on the ground that another trader has not been fined, when that trader's circumstances are not even the subject of proceedings before the Court (Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 197, and Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 86).

142 Therefore, the applicant's argument that other undertakings, which were allegedly in a comparable situation to the applicant's, were not fined, must be rejected.

The application for the reduction in the fine

Arguments of the parties

143 The applicant states, first of all, that the short duration of the infringement should give rise to a reduction in the amount of the fine.

144 At the hearing, the applicant stated that reasons were not given for the reduction of EUR 20 000 made following the rectification decision of 9 April 2003, nor was the reduction sufficient.

145 The applicant claims, secondly, that the Commission infringed the principles of proportionality and equal treatment in setting the amount of the fine which was imposed on it.

146 In that respect, it sets forth the differences which set it apart from the other operators to which the Decision was addressed, that is, its dynamic conduct on the market in question, acknowledged by the Commission and another operator, the fact of joining the VFIG belatedly, in July 1994, which explains why it did not attend that association's 13 meetings held between 1989 and September 1994, its declared opposition to the anti-competitive agreements at the meetings of 14 October and 18 November 1994, its absence from the collusive meetings which took place, after November 1994, at Breda and Barendrecht between the large players on the market, its low market share of 1.5%, the other operators' being at least twice its size, the brief period of its involvement in the prohibited conduct and the fact that it did not participate in the agreements concerning contractual terms other than price.

147 In the light of these differences, and in view of its percentage share of turnover in the industrial gases sector, the applicant was penalised more heavily than the other undertakings referred to in the Decision.

148 The applicant asserts that, although the fines are set in relation to the total turnover of the undertakings in the industrial gases sector in the Netherlands in 1996, the final result is disproportionate. Thus, the fine imposed on the applicant amounts to 13.6% of its turnover as against only 2.2% for Hoek Loos and 7.5% for AGA. If the fines were indeed set according to the turnover generated in 1996 on the industrial gases market in the Netherlands, it also appears that the fine imposed on the applicant is comparable in proportion to those imposed on the other undertakings even though the applicant's participation in the cartel cannot at all be compared to that of the other undertakings. The applicant also points out that the fine imposed on AGA is approximately nine times higher than that imposed on the applicant while AGA's market share (27.4%) is 18 times higher than the applicant's (1.5%).

149 According to the applicant, those figures show that the operators playing the most important role in the cartel and with the greatest ability to damage competition on the market in question received, all things considered, the lightest fines. The applicant, whose role, if any, was extremely limited, and which has a very low market share, was penalised more severely than the leaders of the cartel.

150 After pointing out that it has discretion in setting the amount of the fines in cartel cases, the Commission contends that the amount of the fine imposed on the applicant is entirely appropriate and denies any infringement of the principle of equal treatment.

Findings of the Court

151 It should be recalled, first of all, that when fixing the amount of each fine, the Commission has a discretion and cannot be considered obliged to apply a precise mathematical formula for that purpose (Case C-283/98 P *Mo och Domsjö* v *Commission* [2000] ECR I-9855, paragraph 47, Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59, and Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 268). Its assessment, however, must be conducted in accordance with Community law, which includes not only the provisions of the Treaty but also the general principles of law (see, to that effect, Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 38).

152 In that regard, as has been consistently held, 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 (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, Case

C-174/89 *Hoche* [1990] ECR I-2681, paragraph 25, and Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 309).

153 It should also be noted that assessment of the proportionate nature of the fine imposed with regard to the gravity and duration of an infringement, the criteria referred to in Article 15(2) of Regulation No 17, falls within the unlimited jurisdiction conferred on the Court of First Instance by Article 17 of that regulation.

154 In the present case, it is common ground that the Commission determined the amount of the fine imposed on the applicant in accordance with the general method which it laid down for itself in the Guidelines.

155 The first paragraph of Section 1 of the Guidelines states that in calculating the amount of fines, the basic amount is to be determined according to the gravity and the duration of the infringement, which are the only criteria referred to in Article 15(2) of Regulation No 17. By way of general comment, Section 5(a) of the Guidelines also states that 'the final amount calculated according to this method (basic amount increased or reduced on a percentage basis) may not in any case exceed 10% of the worldwide turnover of the undertakings, as laid down by Article 15(2) of Regulation No 17'. Consequently, the Guidelines do not go beyond the legal framework relating to penalties set out in that provision (*Dansk Rørindustri and Others* v *Commission*, paragraph 75 above, paragraphs 250 and 252).

The duration of the infringement

156 In relation to the duration of the infringement, the Guidelines distinguish between infringements of short duration (in general, less than one year), where no increase should be made to the starting amount determined for gravity, infringements of medium duration (in general, one to five years), where that amount may be increased by up to 50%, and infringements of long duration (in general, more than five years), where that amount may be increased by up to 10% per year (first to third indents of the first paragraph of Section 1.B).

157 Although an increase of up to 50% is thus provided for in the case of infringements of medium duration, Section 1.B of the Guidelines does not provide that there should be an automatic increase of a certain percentage per year, but leaves the Commission a margin of assessment (Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 134).

158 As set out above, the Commission considered at first, wrongly, that the duration of the infringement committed by the applicant was from March 1994 to December 1995, which warranted its classification as one of medium duration (recital 434).

159 The amendment of the Decision on 9 April 2003 allowed Article 1 thereof to be rectified as regards the duration of the infringement which the applicant was alleged to have committed. The Commission clearly explains in its rectification decision that the starting amount of the fine of EUR 0.45 million was initially increased by 15% for duration, and then reduced to 10% given that the starting date of the infringement was brought forward to October 1994.

160 Since the duration of the infringement now, correctly, covers the period from October 1994 to December 1995, being a little over one year, the classification of the infringement as of medium duration is still appropriate and the Commission was therefore entitled, according to the Guidelines, to increase the fine by 10%. The applicant has not adduced any evidence warranting the conclusion that the Commission erred in its assessment in this regard and that the increase in the fine should have been less than 10%.

161 It follows that the Court must dismiss the complaint that the reduction in the fine made by the Commission in its rectification decision was not allegedly reasoned and not sufficient.

The allegedly discriminatory and/or disproportionate nature of the fine imposed on the applicant

162 It should be pointed out that, in setting the starting amount of the fines, determined in accordance with the gravity of the infringement, the Commission took the view that, notwithstanding the fact that the undertakings concerned had taken part in a price-fixing cartel, the infringement should be considered to be serious rather than very serious, given the limited geographical scope of the market and the medium economic importance of the sector at issue (recitals 423 and 428).

163 In order to take account of the specific weight and therefore the real impact on competition of the offending conduct of each undertaking involved in the cartel, the Commission grouped the undertakings concerned into four categories according to their relative importance in the market concerned. To that end, the Commission considered it appropriate to take the turnover in 1996 in the market concerned as the basis for the comparison of the relative importance of an undertaking in that market (recitals 429 to 432).

164 As a result, Hoek Loos and AGA Gas, considered to be the two largest players on the market concerned, were placed in the first category. Air Products and Air Liquide, medium-sized operators in this market, constituted the second category. Messer and BOC, which were described as 'significantly smaller' on the market concerned, were placed in the third category. The applicant, having only an extremely small share of the market concerned, appeared in the fourth category (recital 431).

165 On the basis of the preceding considerations, the Commission established an identical starting amount of EUR 10 million for Hoek Loos and AGA Gas, as against EUR 2.6 million for Air Products and Air Liquide, EUR 1.2 million for Messer and BOC and EUR 0.45 million for the applicant.

166 As regards the duration of the infringement, the Commission found that the infringement was of medium duration (one to four years) for every undertaking involved, Hoek Loos, AGA Gas, Air Products, Air Liquide and Messer having infringed Article 81(1) EC from September 1993 until December 1997, BOC from June 1994 to December 1995 and the applicant from October 1994 to December 1995, after rectification of the Decision on 9 April 2003. Initially increased by 15%, the starting amount established in relation to the applicant was finally increased by 10% for duration, according to recital 9 of the decision of 9 April 2003.

167 The basic amount of the fine, determined according to the gravity and duration of the infringement, was therefore set, in relation both to Hoek Loos and AGA Gas, at EUR 14 million, as against EUR 3.64 million for Air Products and Air Liquide, EUR 1.68 million for Messer, EUR 1.38 million for BOC and EUR 0.51 million, then, following rectification, EUR 0.49 million for the applicant.

168 The Commission took the view that the applicant had played a passive role in the infringements and did not participate in all their aspects and that those attenuating circumstances justified a decrease of 15% in the basic amount of the fine to be imposed, the latter being reduced to EUR 0.43 million (recital 442) then to EUR 0.41 million following the rectification decision of 9 April 2003.

169 The applicant, however, did not benefit from any reduction under the Leniency Notice.

170 It is clear from the preceding considerations that the Commission took full account of the particular circumstances of the applicant's situation, which differentiate it from the other undertakings to which the Decision was addressed — whether it is a case of the duration of the infringement, the applicant's passive role or its low market share — and explain why the applicant received the lowest of the fines imposed by the Commission in the Decision.

171 The claim that the applicant is in a different situation from that of the other undertakings involved in the cartel, as a result of its alleged stated opposition to the anti-competitive agreements, combined with dynamic behaviour on the market concerned, does not fall within the discussion on fixing the amount of the fine, but within that concerning the existence of the infringement.

172 The applicant claims, however, that the final amount of the fine imposed is not proportionate to its low market share and its turnover, both globally and on the market concerned, and thus it was more heavily penalised than larger undertakings which played a leading role in the agreement.

173 It should be recalled, first of all, that the Commission is not required, when assessing fines in accordance with the gravity and duration of the infringement in question, to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines resulting from its calculations for the undertakings concerned reflect any distinction between them in terms of their overall turnover or their relevant turnover (*Dansk Rørindustri and Others* v *Commission*, paragraph 75 above, paragraph 312).

174 It must then be pointed out that Article 15(2) of Regulation No 17 likewise does not require that, where fines are imposed on several undertakings involved in the same infringement, the fine imposed on a small or medium-sized undertaking must not be greater, as a percentage of turnover, than those imposed on the larger undertakings. It is clear from that provision that, both for small or medium-sized undertakings and for larger undertakings, account must be taken, in determining the amount of the fine, of the gravity and duration of the infringement. Where the Commission imposes on undertakings involved in a single infringement fines which are justified, for each of them, by reference to the gravity and duration of the infringement, it cannot be criticised on the ground that, for some of them, the amount of the fine is greater, by reference to turnover, than that imposed on other undertakings (Case T-21/99 *Dansk Rørindustri and Others* v *Commission* [2002] ECR II-1681, paragraph 203).

175 The final amount of the fine is only the result, in the present case, of a series of arithmetical calculations performed by the Commission according to the Guidelines, and, if appropriate, the Leniency Notice

176 The Commission's findings as to the duration of the infringement, the aggravating or attenuating circumstances and the degree to which an undertaking involved in the cartel cooperated, are linked to the individual conduct of the undertaking in question, but not to its market share or turnover.

177 In those circumstances, the final amount of the fine is not, in principle, an appropriate factor in assessing the possible lack of proportionality of the fine as regards the importance of the undertakings involved in the cartel.

178 Conversely, the starting amount of the fine is, in the instant case, a relevant factor in assessing the possible lack of proportionality of the fine as regards the importance of the participants in the cartel.

179 In the Decision, the Commission set the starting amount of the fine, determined according to the gravity and duration of the infringement, at EUR 0.45 million for the applicant.

180 As explained above, in the Decision and in order to take account of the specific weight and therefore the real impact on competition of the offending conduct of each undertaking involved in the cartel, the Commission grouped the undertakings concerned into four categories, precisely according to their relative importance on the market concerned. The applicant was placed in the last category.

181 The Commission referred in this connection to the figures in the third column of Table 1 set out in recital 75 of the Decision:

Undertaking	Total turnover of the addressees of the Decision for 2001 (EUR)	Turnover in cylinder and liquid gases in the Netherlands (EUR) and estimated market shares for 1996
Hoek Loos [NV]	470 648 000	71 400 000 (39.7 %)
AGA Gas BV [1]	55 479 000 [2]	49 200 000 (27.4 %)
[Air Products]	110 044 000	18 600 000 (10.4 %)
Air Liquide BV	60 720 000	12 900 000 (7.2 %)
[Messer]	11 275 000	8 200 000 (4.4 %)
[BOC]	6 690 905 000	6 800 000 (3.8 %)
[Westfalen]	5 455 000	2 600 000 (1.5 %)

[1] Following the liquidation of AGA Gas BV in 2000 to 2001, AGA AB has accepted liability for the acts of its subsidiary and is the addressee of the Decision.

[2] 2000 is the last complete business year for which turnover figures are available for AGA Gas BV.

182 It need merely be pointed out that, for the year taken as reference, the applicant's turnover on the relevant market and its market share were the lowest of all the undertakings to which the Decision was addressed, which explains and justifies why the applicant was placed in the last category and the starting amount was the lowest of all those established by the Commission in respect of the undertakings. The starting amount used for the applicant is thus objectively different from those used for the other undertakings.

183 Moreover, the relationship between the turnovers on the market concerned of the undertakings referred to in Table 1 of the Decision and the starting amounts of the fines which the Commission used for each undertaking does not evince any disproportionate treatment of the applicant, since the starting amounts of the fines represent 17.3% of the turnover on the market in question in the case of the applicant, as against 14% for Hoek Loos, 20.3% for AGA Gas, 13.98% for Air Products, 20.2% for Air Liquide, 14.6% for Messer and 17.6% for BOC.

184 In its application, the applicant asserts that, although the fines were set according to the turnover generated in 1996 on the market for industrial gases in the Netherlands, the fine which was imposed on it is proportionately comparable to those imposed on the other undertakings, whereas its participation in the cartel cannot at all be compared to that of the other undertakings. In that connection, it need merely be recalled that the minor role played by the applicant in the infringement compared to that of the other undertakings was taken into account by the Commission as an attenuating circumstance, for the purposes of reducing the amount of the fine to be imposed on the applicant.

185 It therefore clear that the applicant cannot legitimately claim that the fine imposed on it is disproportionate, since the starting point for its fine is justified in the light of the criterion which the Commission used in assessing the importance of each of the undertakings on the relevant market (see, to that effect, *LR AF 1998* v *Commission*, paragraph 71 above, paragraph 304).

186 The latter assessment also provides the basis for rejecting the applicant's argument drawn from a comparison with Hoek Loos and AGA concerning the relationship

between the final amount of the fine and the worldwide turnover, since the latter was not taken into account by the Commission in assessing the gravity of the infringement and setting the starting amounts for the calculation of the fines.

187 It follows from the preceding considerations that the applicant has not proved the allegedly discriminatory and/or disproportionate nature of the fine imposed and that the final amount of the fine was entirely appropriate.

The application for Mr van den Heuij to be heard

188 The applicant requests, in its application, that the Court hear, under oath, Mr van den Heuij. At the hearing, the applicant stated that the request was based on Article 48 of the Rules of Procedure of the Court of First Instance concerning offers of evidence.

189 It should be recalled that, under Article 44(1)(e) and Article 48(1) of the Rules of Procedure of the Court of First Instance, the application must contain, where appropriate, offers of evidence, and the parties may offer further evidence in support of their arguments in reply or rejoinder, provided that they give reasons for the delay in offering it. Thus, evidence in rebuttal and the amplification of the offers of evidence submitted in response to evidence in rebuttal from the opposite party in his defence are not covered by the time-bar laid down in Article 48(1) of the Rules of Procedure. That provision concerns offers of fresh evidence and must be read in the light of Article 66(2), which expressly provides that evidence may be submitted in rebuttal and previous evidence may be amplified (*Baustahlgewebe* v *Commission*, paragraph 74 above, paragraphs 71 and 72).

190 In the present case, it need merely be pointed out that it is clear from the file that the evidence relied on by the Commission in its defence was also referred to in the Decision and the statement of objections or in the annex thereto.

191 As a result, the request for Mr van den Heuij to be heard cannot be regarded as an offer of evidence in rebuttal which is not subject to the time-bar laid down in Article 48(1) of the Rules of Procedure, since the applicant was able to submit that offer of evidence in its application before the Court. The offer of oral testimony as set out in the reply must therefore be considered to be out of time, and, thus, refused on the ground that the applicant has not justified the delay in offering it.

Costs

192 Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court of First Instance may order that the costs be shared or that each party bear its own costs.

193 It should be pointed out, in the present case, that the amendment of the Decision on 9 April 2003 allowed Article 1 regarding the duration of the infringement which the applicant was alleged to have committed to be rectified, such that the Commission recognised the substance of the complaint raised by the applicant in its application in relation to the starting date of the infringement initially established, that is, March 1994.

194 In the light of that fact and of the dismissal of the action brought, it is appropriate to order the applicant to bear its own costs and three quarters of those incurred by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the action;

2. Orders Westfalen Gassen Nederland BV to bear its own costs and to pay three quarters of those incurred by the Commission and orders the Commission to bear one quarter of its own costs.

Vilaras Dehousse Šváby

Delivered in open court in Luxembourg on 5 December 2006.

E. Coulon M. Vilaras

Registrar President

Table of contents