

Case T-44/00

Mannesmannröhren-Werke AG

v

Commission of the European Communities

(Competition — Agreements, decisions and concerted practices — Markets in seamless steel tubes — Duration of the infringement — Fines)

Judgment of the Court of First Instance (Second Chamber), 8 July 2004 . . . II - 2233

Summary of the Judgment

1. *Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Evidence of the infringement — Production by the Commission of a document without revealing its source — Lawfulness*

2. *Competition — Administrative procedure — Commission decision finding an infringement — Decision not identical to the statement of objections — Infringement of the rights of the defence — Condition — Impossibility for the undertaking to defend itself against an objection finally upheld*
(Council Regulation No 17, Art. 19(1))
3. *Competition — Agreements, decisions and concerted practices — Prejudicial to competition — Criteria for assessment — Anti-competitive object — Sufficient finding*
(Art. 81(1) EC)
4. *Competition — Administrative procedure — Commission decision finding an infringement of Article 81 EC — Obligation to define the market — None where an arrangement has the object of market-sharing*
(Art. 81 EC)
5. *Competition — Agreements, decisions and concerted practices — Agreements considered to be constituent elements of a single anti-competitive agreement — Conditions — Global plan pursuing a common objective — Undertakings which may be found to have participated in the single agreement — Conditions*
(Art. 81(1) EC)
6. *Procedure — Introduction of new pleas during the proceedings — Distinction between pleas which are a matter of public policy and others, such as substantive pleas — Inadequate statement of reasons — Plea which may be invoked at any stage of the proceedings*
7. *Competition — Fines — Amount — Determination — Guidelines adopted by the Commission — Obligation for the Commission to comply therewith*
(Council Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03)
8. *Competition — Fines — Amount — Commission's margin of discretion — Possibility to raise the level of fines in order to increase their deterrent effect*
(Council Regulation No 17, Art. 15)
9. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement*
(Council Regulation No 17, Art. 15(2))

10. *Competition — Fines — Amount — Determination — Criteria — Need to differentiate between the undertakings involved in the same infringement by reference to their overall turnover — None*
(Council Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03, point 1.A, sixth para.)
11. *Competition — Community rules — Infringements — Imputation — Legal person managing the undertaking at the time of the infringement — Acceptance of responsibility by another person who has taken over the running of the undertaking — Lawfulness — Scope where the person accepting responsibility participated in the infringement*
(Art. 81(1) EC)
12. *Procedure — Proof — Burden of proof — Transfer from the applicant to the defendant in a particular case — Inability of the Commission to state the date of expiry of an agreement with a non-member State concluded by the Commission*
13. *Procedure — Joined Cases — Taking into account of the evidence on the files in the parallel cases*
14. *Competition — Fines — Amount — Determination — Criteria — Attenuating circumstances — Assessment — Need to take separate account of each of the circumstances — None — Global assessment*
(Council Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03, point 3)
15. *Competition — Fines — Amount — Determination — Criteria — Attenuating circumstances — Conduct deviating from that agreed within the cartel — Assessment*
(Council Regulation No 17, Art. 15; Commission Communication 98/C 9/03, point 3, second indent)
16. *Competition — Fines — Amount — Determination — Criteria — Attenuating circumstances — Termination of the infringement after the Commission's intervention — Need for a causal link*
(Council Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03, point 3)

17. Competition — Fines — Amount — Determination — Non-imposition or reduction of the fine in return for the cooperation of the undertaking concerned — Respect for the principle of equal treatment

(Council Regulation No 17, Art. 15(2))

18. Competition — Fines — Amount — Determination — Non-imposition or reduction of the fine in return for the cooperation of the undertaking concerned — Reduction for not disputing the facts — Conditions

(Council Regulation No 17, Art. 15(2); Commission Communication 96/C 207/04, point D.2)

1. The principle that prevails in Community law is that of the unfettered evaluation of evidence and it is only the reliability of the evidence that is decisive when it comes to its evaluation. It may also be necessary for the Commission to protect the anonymity of informants and that circumstance cannot suffice to require the Commission to disregard evidence in its possession.
2. The rights of the defence are infringed as a result of a discrepancy between the statement of objections and the final decision only where an objection stated in the decision was not set out in the statement of objections in a manner sufficient to enable the addressees to defend their interests effectively.

Consequently, although arguments put forward by an applicant concerning the fact that the Commission did not disclose the identity of the author of a document used against it, or its origin, may be relevant to the evaluation of the reliability and therefore the probative value of that document, that document cannot be regarded as inadmissible evidence which must be removed from the file.

The obligation placed on the Commission in connection with a statement of objections is limited to setting out the objections and to specifying clearly the facts upon which it relies and its classification of those facts, so that the addressees of the statement of objections are able to defend their interests effectively.

In that regard, the legal classification of the facts made in the statement of objections can, by definition, be only provisional, and a subsequent Commission decision cannot be annulled on the

(see paras 84, 85)

sole ground that the definitive conclusions drawn from those facts do not correspond precisely with that intermediate classification. The Commission is required to hear the addressees of a statement of objections and, where necessary, to take account of any observations made in response to the objections by amending its analysis specifically in order to respect their rights of defence.

(see paras 98-100)

within the common market. In principle, if the actual object of an agreement is to restrict competition by 'market sharing', it is not necessary to define the geographic markets in question precisely, provided that actual or potential competition on the territories concerned was necessarily restricted, whether or not those territories constitute 'markets' in the strict sense.

(see para. 132)

3. Undertakings which conclude an agreement whose purpose is to restrict competition cannot, in principle, avoid the application of Article 81(1) EC by claiming that their agreement should not have an appreciable effect on competition.

(see paras 130, 196)

5. In competition matters, conduct which forms part of a global plan and pursues a common objective may be regarded as coming within a single agreement. If the Commission shows that an undertaking, when it participated in cartels, knew or must necessarily have known that in doing so it was joining in a single agreement, its participation in the cartels concerned may constitute the expression of its accession to that agreement.

4. The obligation to define the market in a decision adopted pursuant to Article 81 EC is binding on the Commission only where, without such a definition, it is impossible to determine whether the agreement in question is capable of affecting trade between Member States and has the object or effect of preventing, restricting or distorting competition

(see para. 181)

6. In an action for annulment a plea alleging failure to state or failure sufficiently to state the reasons on which a Community act is based is, unlike a substantive plea, a matter of public policy which must, as such, be raised by the Community judicature of its own motion and which, in consequence, may be invoked by the parties at any stage of the proceedings.

(see paras 192, 210)

fact that the Commission may in the past have applied fines of a certain level to certain types of infringements cannot preclude it from raising that level within the limits indicated by Regulation No 17, if that is necessary to ensure the implementation of the common competition policy. The proper application of the Community competition rules in fact requires that the Commission may at any time adjust the level of fines to the needs of that policy.

7. Although the Commission has a margin of discretion in setting the amount of the fines, it cannot depart from the rules which it has imposed on itself. Thus, the Commission must necessarily take account of the terms of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, in particular of the mandatory provisions thereof.

(see paras 212, 230, 231, 274)

(see para. 217)

9. The amount of the fine imposed on an undertaking for infringement in a competition-related matter must be proportionate to the infringement, assessed in its entirety, account being taken, in particular, of its gravity.

8. The Commission has a discretion in setting the amount of fines in order to steer undertakings towards respect for the competition rules. Furthermore, the

In assessing the gravity of an infringement, regard must be had to a large number of factors, the nature and

importance of which vary according to the type of infringement in question and the particular circumstances of the case.

(see para. 229)

10. Having regard to the wording of the sixth paragraph of point 1.A of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, it must be considered that the Commission has retained a certain discretion as to whether it is appropriate to weight the fines by reference to the size of each undertaking. Thus, the Commission is not required, when determining the amount of fines, to satisfy itself, where fines are imposed in a number of undertakings involved in the same infringement, that the final amounts of the fines reflect a differentiation between the undertakings concerned as regards their overall turnover.

(see para. 247)

11. In matters relating to competition, it falls, in principle, to the natural or legal person managing the undertaking in

question when the infringement of the Community competition rules was committed to answer for that infringement, even if, when the decision finding the infringement was adopted, another person had assumed responsibility for running the undertaking. That is not the case, however, where the person now responsible for running the undertaking has stated that he is prepared to answer for the conduct imputed to his predecessor.

However, such a rule does not in any event allow the inference that, in circumstances where the person accepting responsibility also participated in the infringement independently, a single fine, in a sum lower than the sum of the two fines which would have been imposed on autonomous undertakings, should be imposed on the person accepting responsibility.

(see paras 254, 255)

12. Although an applicant cannot generally transfer the burden of proof to the defendant by relying on circumstances which it is not in a position to establish, the concept of burden of proof cannot, where the Commission decided not to make a finding of an infringement of the competition rules for the period during which voluntary restraint agreements

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

(see paras 261-263)

13. In joined cases where all the parties have had the opportunity to consult all the files, the Court may of its own motion take account of the evidence in the files in the parallel cases.

(see para. 264)

14. Although the circumstances listed at point 3 of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty are undoubtedly among those which may be taken into account by the Commission in a specific case, there is no automatic requirement, in view of the wording of point 3, for the Commission to grant a further reduction under that head when an undertaking provides some indication that one of those circumstances may apply. Whether it is appropriate to grant a reduction of the fine on grounds of attenuating circumstances must be determined on the basis of an overall assessment which takes account of all the relevant circumstances.

(see para. 274)

15. The fact that an undertaking which has been proved to have participated in collusion on market-sharing with its competitors did not behave on the market in the manner agreed with its competitors is not necessarily a matter which must be taken into account as an attenuating circumstance when determining the amount of the fine to be imposed.

The second indent of point 3 of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty must therefore be interpreted as meaning that the Commission is not required to recognise the existence of an attenuating circumstance consisting of non-implementation of a cartel unless the undertaking relying on that circumstance is able to show that it clearly and substantially opposed the implementation of the cartel, to the point of disrupting the very functioning of it, and that it did not give the appearance of adhering to the agreement and thereby incite other undertakings to implement the cartel in question.

(see para. 277)

16. The 'termination of the infringement as soon as the Commission intervenes' referred to in point 3 of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, can logically constitute an attenuating circumstance only if there are reasons to suppose that the undertakings concerned were encouraged to cease their anti-competitive conduct by the interventions in question. It appears that the purpose of that provision is to encourage undertakings to terminate their anti-competitive conduct immedi-

ately when the Commission launches an investigation. A fine cannot be reduced on that basis where the infringement has already come to an end before the date on which the Commission first intervenes or where the undertakings concerned have already taken a firm decision to put an end to it before that date.

(see paras 280, 281)

17. On condition that undertakings provide the Commission, at the actual stage of the administrative procedure and in comparable circumstances, with similar information concerning the facts imputed to them, the extent of the cooperation provided by them must be regarded as comparable, with the consequence that those undertakings must be treated equally as regards the determination of the amount of the fine imposed on them.

(see paras 295, 298)

18. In order to receive a reduction in the fine on the ground of not contesting the facts, in accordance with point D.2 of the Leniency Notice, an undertaking must expressly inform the Commission that it has no intention of substantially

contesting the facts, after perusing the statement of objections. In the absence of such an express declaration, mere passivity on the part of an undertaking cannot be considered to facilitate the Commission's task, since the Commis-

sion is required to establish the existence of all the facts in the final decision without being able to rely on a declaration by the undertaking in doing so.

(see para. 303)