JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

4 July 2006 *

In Case T-304/02,

Hoek Loos NV, established in Schiedam (Netherlands), represented by J.J. Feenstra and B.F. Van Harinxma thoe Slooten, avocats,

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: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 19 January 2006,

gives the following

Judgment

Facts

1 The applicant is a Dutch company which produces, markets and distributes industrial and medical gases and related equipment, systems and services.

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, Air Liquide BV, Air Products Nederland BV ('Air Products'), Boc Group plc ('BOC'), Hydrogas Holland BV, Messer Nederland BV ('Messer') and Westfalen Gassen Nederland BV ('Westfalen').

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 did not dispute 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 29 July 2002 and sent to AGA AB as successor in title to AGA Gas.

7 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.'

8 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 ECSC 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').

9 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 14 million (recital 438 in the preamble to the Decision).

10 In the Decision, the Commission did not establish any attenuating or aggravating circumstances for or against the applicant.

11 Finally, the Commission made a 'significant reduction' in the fine within the meaning of Section D of the Leniency Notice. To this end, the Commission granted the applicant a reduction of 10% to the fine it would have imposed on it in the absence of cooperation, which also took into account the fact that it did not substantially contest the facts set out in the statement of objections (recitals 454, 457 to 459 of the Decision).

12 Following the application brought before the Court of First Instance by Westfalen (Case T-303/02) on 4 October 2002, the Commission considered that it had made an error in its assessment concerning the duration of the infringement which that company was alleged to have committed.

13 Consequently, on 9 April 2003 the Commission adopted Decision 2003/355/EC amending the Decision (OJ 2003 L 123, p. 49). In that rectification decision, the Commission admitted to having wrongly established the date of March 1994 as being the starting date of the infringement imputed to Westfalen.

14 Thus, it is now stated in Article 1 of the Decision, as amended, that Westfalen 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, and not March 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.

Procedure and forms of order sought by the parties

15 By application lodged at the Registry of the Court of First Instance on 7 October 2002, the applicant brought the present action.

16 Upon a change in the composition of the Chambers of the Court from 13 September 2004, the Judge-Rapporteur was assigned, as President, to the Fifth Chamber, to which the present case was then allocated.

17 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.

18 The parties presented oral argument and their replies to the questions put by the Court at the hearing on 19 January 2006.

19 The applicant claims that the Court should:

— annul Article 3 of the Decision, in so far as it concerns the applicant;

— in the alternative, reduce the fine imposed fairly and significantly;

— order the Commission to pay all the costs, 'including interest, that is the costs arising from the bank guarantee'.

20 The defendant contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

Arguments of the parties

Scope of the application

21 The applicant states that it does not dispute the substance of the Commission's account of the facts given in Part I.E of the Decision or its legal analysis in Part II.D,

but points out that the offending agreements concerned only a part of the global market for industrial and medical gases.

22 It also does not dispute the various stages of the Commission's calculation of the various fines set out in recitals 412 to 448, the considerations relating to the gravity of the infringement, to the duration thereof or to the involvement of the various undertakings; it does not accept, however, the final outcome of that calculation which, according to the applicant, reflects a considerable imbalance between the fine imposed on the applicant and those imposed on the other undertakings, more particularly on AGA AB.

23 The applicant observes several times that the fine imposed on it, first, is three times greater than that finally imposed on AGA AB — while according to the Commission itself the applicant was involved in the cartel to the same degree and for the same period as AGA Gas — and, second, amounts to 50% of the total of the fines imposed in this case, which is in no way proportionate either to its market share or to its participation in the infringement.

24 The applicant maintains that the Commission, in the exercise of its discretion and thus being free of constraint in fact or in law, made certain choices when calculating the fines, and more particularly when applying the rule on the upper limit of 10% of the turnover of the undertaking concerned, provided for under Article 15(2) of Regulation No 17. According to the applicant, those choices culminated in a significant imbalance in the level of the fines, since the difference between the fine imposed on the applicant and that imposed on the other undertakings was disproportionate. In doing so, the Commission breached Article 15 of Regulation No 17 and Article 253 EC, as well as the principles of equal treatment, proportionality and the prohibition of arbitrary decisions, which justifies the annulment of Article 3 of the Decision.

25 The applicant explains further that the present application does not seek to dispute the fines imposed by the Commission on the other undertakings involved in the cartel. It does not claim that the choices that the Commission made in favour of other undertakings are incorrect or unjustified, even if they may be open to some doubt, but that the institution ought to have based the calculation of the applicant's fine on those same choices.

26 Moreover, irrespective of the legal considerations set out above, the applicant considers that the very considerable difference in the level of the fines to the detriment of the applicant is unfair and thus asks the Court to exercise its unlimited jurisdiction under Article 229 EC and accordingly make a significant reduction in the fine imposed on it.

27 The Commission points out that, by not opposing the calculations made in setting the fine, the applicant has limited the subject-matter of its application to the allegation concerning the comparability of the fine imposed on it with that imposed on other participants in the cartel and has therefore accepted the fine taken in isolation. The action brought by the applicant amounts to a challenge to the reduction in the fines of the other undertakings on the basis of application of the 10% upper limit.

The application to annul Article 3 of the Decision

— The first plea, alleging a breach of Article 15(2) of Regulation No 17 and Article 253 EC

28 The claimant maintains that it is apparent from the Decision that it is on a wholly equal footing with AGA Gas in respect of the only two criteria which, pursuant to

Article 15(2) of Regulation No 17, are to determine the amount of the fines, namely the gravity and duration of the infringement. It points out, in this respect, that the Commission is wrong to claim, now, that the applicant's market share is appreciably higher than that of AGA Gas. On the contrary, the latter is the largest producer of certain types of gas, particularly of liquid gases.

29 Since the situations of the applicant and AGA Gas are similar as regards their participation in the infringement, the Commission incorrectly applied Article 15(2) of Regulation No 17 by imposing very different fines on these two undertakings, to the detriment of the applicant. The applicant states that, whatever method the Commission uses in a particular case to apply the criteria of the gravity and duration of the infringement, the final outcome must meet those two criteria.

30 The applicant asserts that the Commission in this case incorrectly applied the gravity criterion, the assessment of which requires account to be taken of the deterrent effect. It points out that, as an undertaking of relatively modest size, it received a large fine, while other undertakings, which are subsidiaries of undertakings of global proportions, received considerably lesser fines, a fact which is wholly contrary to the desired deterrent effect.

31 It maintains that the elements taken into account by the Commission to arrive at the result in issue, concerning the choice of addressees of the Decision, the turnover to which to apply the 10% upper limit and the order in which that upper limit and the provisions of the Leniency Notice were applied, neither explain nor justify the very large discrepancy between the amount of the fine imposed on the applicant and that finally imposed on AGA AB.

32 The applicant takes the view, first of all, that the Commission's position on the choice of undertakings to which to address the Decision is difficult to comprehend. It points out that the Decision was addressed to the parent company in the case of certain undertakings (BOC and Hoek Loos) and to the Dutch subsidiary in the case of others (Air Products, Air Liquide and AGA AB), while in relation to the latter three operators, the Commission had indicated in the statement of objections that their parent companies had been involved in the infringement to a greater or lesser extent. The Decision provides no further explanation for this inconsistent approach.

33 In response to the Commission's assertion that it is for it to choose the addressee of a decision imposing a fine, the applicant states that the Commission 'leaves aside' the question of whether that position is consistent with the case-law as it currently stands, and points out that Case T-156/94 *Aristrain* v *Commission* [1999] ECR II-645, to which the defendant refers, concerns the relationship between two sister companies.

34 The applicant submits that the choice of company addressed by a decision affects the application of the 10% upper limit. It is somewhat taken aback that, having found AGA AB to be responsible for the actions of its former subsidiary, AGA Gas, the Commission applied the 10% upper limit not to the total turnover of AGA AB but to the turnover of that subsidiary.

35 Secondly, in relation to the turnover to be taken into account in applying the 10% upper limit, the applicant claims that the Commission is wrong to contend that the choice of addressee of a decision determines the turnover of the undertaking for application of the 10% upper limit.

36 According to the case-law, that 10% limit should be applied to the worldwide turnover of the undertaking concerned (Case 183/83 *Krupp* v *Commission* [1985]

ECR 3609). To allow the Commission to address, as it sees fit, a decision imposing fines to national subsidiaries of companies operating on a global level and, therefore, to link the 10% limit to the turnover of those subsidiaries, effectively disregards the case-law mentioned above.

37 The applicant further maintains that the definition of an undertaking in Community competition law is economic rather than legal. It covers a group of undertakings. Thus, the fact that a decision imposing a fine is addressed to a subsidiary does not, the applicant contends, prevent the 10% limit from being applied to the total turnover of the group of which that subsidiary is part (Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraphs 528 and 529).

38 If another view were to prevail, then the amount of the fine would depend on the way in which an undertaking has spread its activities across different companies, it being noted that a significant number of international undertakings such as Air Products and Air Liquide pursue their activities through the intermediary of separate national companies. This would thus be a departure from an objective application of Article 15(2) of Regulation No 17 and the deterrence factor would therefore become arbitrary.

39 Thirdly, with respect to the order in which to apply the 10% upper limit and the provisions of the Leniency Notice, the applicant asserts that it was only after reducing the amount of the fine imposed on AGA Gas in accordance with the 10% upper limit, from EUR 14 to EUR 5.54 million, that the Commission applied the Leniency Notice. Following a reduction of 25% in accordance with that notice, AGA thus finally received a fine of EUR 4.15 million for the acts committed by its former subsidiary.

40 However, the 10% upper limit is considered both in the legislation and the case-law to be the ultimate limit of a fine and thus the final criterion to be applied (Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraphs 287 to 289). In any event, the order used by the Commission is not in response to any binding requirement.

41 The applicant notes that, if the Commission had followed the correct order for applying the rules on setting fines, AGA AB would have been subject to a fine of EUR 5.54 million, which, compared with the EUR 12.6 million fine imposed on the applicant, still amounts to an unjustifiable difference.

42 The applicant concludes that therefore no binding requirements or objective necessity can explain the considerable difference between the amount of the fine imposed on it and that imposed on the other undertakings, in particular on AGA AB. The Commission has therefore incorrectly applied the criteria of gravity and duration of the infringement and breached Article 15(2) of Regulation No 17 'in that it failed to provide convincing reasons for applying the rules in this way'.

43 The Commission contends that the first plea should be dismissed as unfounded.

— The second plea, alleging a breach of the principles of equal treatment, proportionality and the prohibition of arbitrary decisions

44 The applicant asserts that, whatever method the Commission follows to calculate the fines of the various protagonists in competition cases, it must always ensure that

the final outcome of the calculation satisfies the above general principles of Community law, which is not the case in this instance.

45 It takes the view, first of all, that in treating so differently two undertakings which it itself considers to have participated in the infringement in an identical way, the Commission is in breach of the principle of equal treatment. It adds that the application of the 10% upper limit cannot provide objective justification for the considerable difference in the amount of the fines imposed and refers to its arguments relating to the breach of Article 15(2) of Regulation No 17.

46 The applicant maintains, secondly, that the extremely high level of fine imposed on it as compared with the fines imposed on the other undertakings also contravenes the principle of proportionality. The Commission itself states in the Decision that in terms of the two criteria for determining the amount of the fines, namely the gravity and duration of the infringement, the applicant and AGA Gas are on the same level. Consequently, according to the applicant, if the application of a different rule leads to a substantial reduction to the fine for one of the undertakings and not for the other, the amount which the latter will still have to bear is no longer proportionate to the objective pursued in imposing a fine. It also refers to the arguments it advances in relation to breach of Article 15(2) of Regulation No 17.

47 Thirdly, the applicant alleges that the considerable difference between the level of the fine imposed on it and the levels of the fines imposed on other undertakings breaches the prohibition of arbitrary decisions. The Commission could not possibly have arrived at its decision on a fair and equitable basis. It further refers to the arguments it advances in relation to the breach of Article 15(2) of Regulation No 17.

48 The Commission contends that the second plea should be dismissed as unfounded.

The claim that the fine should be reduced

49 In the alternative, the applicant asks the Court, in the exercise of its unlimited jurisdiction under Article 229 EC, to establish whether the amount of the fine imposed is appropriate.

50 The manner in which the Commission applied the 10% upper limit leads to the strange situation in which a small undertaking such as the applicant, whose activities are essentially national, receives an appreciably heavier fine than the Dutch subsidiaries of groups of undertakings operating globally and whose turnovers are considerably larger than the applicant's. Such a situation runs counter to the desired deterrent effect.

51 The applicant disputes the Commission's arithmetical exercise set out in its defence and points out that it should be regarded as an undertaking that is entirely distinct from the company, Linde, of which it is a subsidiary.

52 The applicant points out that if, according to the Commission, the fine imposed on it amounts to 3% of its total turnover in the Netherlands, this turnover relates to all its activities, including sales by the tonne (twice as large as the turnover for bottled gas and liquid gas) and sales of medical gases. Moreover, a comparison between the turnover achieved on the market in question, prior to application of the Leniency Notice, and the amount of the fine imposed reveals a considerable difference

between the applicant and AGA Gas. The unfairness of the penalty imposed on the applicant is borne out further by the fact that the fine makes up 50% of the total amount of the fines imposed, while in the period in question the applicant had a market share at best of one third of the market.

53 The Commission maintains that a comparison between the turnover achieved on the market in question and the amount of the fine prior to application of the Leniency Notice makes sense only if the comparison relates to the starting amount of the fine, before application of the individual increases and reductions. Such a comparison would show that the applicant was not dealt with severely, rather the contrary. It therefore submits that the amount of the fine imposed on the applicant is fair and should not be reduced.

Findings of the Court

Preliminary considerations

54 It should be observed, first of all, that in relation to its first plea in law, the applicant alleges both breach of a substantive rule and breach of a procedural rule, in this case, respectively, Article 15(2) of Regulation No 17 and Article 253 EC on the duty to give reasons.

55 Thus, by way of concluding the argument relating to the first plea for annulment, the applicant submits in its application that the Commission has incorrectly applied the criteria of gravity and duration of the infringement and breached Article 15(2) of Regulation No 17 'in that it failed to provide convincing reasons for applying the criteria in this way'.

56 It follows from that formulation, and more specifically, from use of the adjective 'convincing', that the applicant's complaint is not aimed, strictly speaking, at a lack or insufficiency of reasoning, constituting infringement of an essential procedural requirement within the meaning of Article 230 EC, but relates to whether the Decision is well founded and thus to the substantive legality of that act.

57 The applicant then maintains that the Decision was addressed to the parent company in the case of certain undertakings (BOC and itself) and to the Dutch subsidiary in the case of other undertakings (Air Products, Air Liquide et AGA Gas), although the Commission had stated in its statement of objections in relation to the three latter operators that the parent companies had been involved in the infringement to a greater or lesser extent. The applicant asserts that the Decision provides no further explanation for that change.

58 In so far as this last allegation can be understood as being the expression of a complaint of infringement of the duty to give reasons, it is settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and the case-law cited therein).

59 In the present case, it should be noted, first, that the Decision, although drafted in the form of a single decision, should be analysed as a bundle of individual decisions in which findings of an infringement or infringements are made in respect of and a fine imposed on each of the addressees, and, second, that the subject-matter of the present proceedings comprises only the annulment of or reduction in the fine imposed on the applicant under Article 3 of the Decision.

60 In such a context, if an addressee of the Decision decides to bring an action for annulment, the matter to be decided by the Community judicature relates only to those aspects of the Decision which concern that addressee. Unchallenged aspects concerning other addressees, on the other hand, do not form part of the matter to be decided by the Community judicature (Case C-310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363, paragraph 53).

61 In the present case, the applicant does not state that there has been a lack or insufficiency of reasoning in relation to the infringement imputed to it in the Decision. The alleged lack of explanation could thus affect the lawfulness of the decision in relation to the three Dutch subsidiaries, Air Products, Air Liquide and AGA Gas. However, neither Air Products nor Air Liquide brought proceedings against the Decision of which they were made addressees, nor did AGA AB which was notified of the Decision, acting as successor in title to AGA Gas.

62 In so far as the applicant claims that the Decision is unlawful by reason of lack of reasoning relating to the treatment of the parent companies of Air Products and Air Liquide, which were not addressees of the Decision and thus were not penalised, it should be recalled that an applicant may not argue from such a circumstance in order himself to escape a penalty imposed for breach of Article 81 EC when the circumstances of the two other undertakings are not even the subject of proceedings before the Community judicature (see, to that effect, 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-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 56).

63 Finally, the Decision must be considered, in any event, to be sufficiently reasoned with regard to the applicant, in that the latter has been able to ascertain the reasons which led the Commission to consider it to be responsible for the alleged infringement and to impose a fine on it — irrespective of the treatment of other undertakings referred to in the statement of objections but which were not addressees of the Decision. Equally, the Court considers that it is fully able to review the Decision as far as it concerns the situation of the applicant.

64 It follows from the preceding considerations that, in so far as the applicant's written pleadings can be understood as advancing a complaint of breach of the duty to give reasons, provided for in Article 253 EC, that complaint must be dismissed.

65 Second, an examination of the applicant's written pleadings reveals a certain interpenetration of the two pleas for annulment and the expression of three complaints, which all challenge the incorrect application of the criteria of gravity and duration provided for in Article 15(2) of Regulation No 17. The first two complaints allege that the fine imposed is disproportionate and discriminatory. A large part of the applicant's argument relates to the differences in the final amount of the fines, examined and criticized by way of a comparison with the situation of AGA Gas and of the application, in the present case, of the 10% upper limit. In the third complaint, the applicant claims that there is a contradiction between the fine imposed and the objective of deterrence.

66 Furthermore, the applicant advances complaints that the fine imposed is disproportionate, discriminatory and contrary to the objective of deterrence, both in the claim for annulment of Article 3 of the Decision and in the claim for seeking reduction of the fine by the Court on the basis of its unlimited jurisdiction.

67 In those circumstances, the applicant's arguments should be assessed in connection with the claim for cancellation or reduction of the fine, keeping the three complaints mentioned above distinct.

The claim for the cancellation or reduction of the fine

68 First of all, it should be recalled that according to settled case-law, when determining the amount of each fine, the Commission has a discretion and is not required to apply any particular arithmetical formula (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59, Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 268, confirmed on appeal in Case C-283/98 P *Mo och Domsjö* v *Commission* [2000] ECR I-9855, paragraph 47). Its assessment must, however, be carried out in compliance with Community law, which includes not only the provisions of the Treaty but also the general principles of law (Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 38).

69 It should also be noted that assessment of the proportionate nature of a 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.

70 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.

71 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 (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-231/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 250 and 252).

72 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 of the Decision).

73 In order to take account of the specific weight and therefore the real impact of the offending conduct of each undertaking involved in the cartel on competition, 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 of the Decision).

74 The applicant and AGA Gas, considered to be by far the two largest players on the market concerned, were thus 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 markets concerned, were placed in the third category. Westfalen, having only an extremely small share of the market concerned, appeared in the fourth category (recital 431 of the Decision).

75 On the basis of the preceding considerations, the Commission established an identical starting amount for the applicant and AGA Gas, that is EUR 10 million, 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 Westfalen.

76 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, the applicant, 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 Westfalen from October 1994 to December 1995. As a result, the starting amount established in relation to the applicant and AGA Gas was increased by 10% per year, amounting to an increase of 40% (recitals 433 and 434 of the Decision).

77 The basic amount of the fine, determined according to the gravity and duration of the infringement, was therefore set, in relation both to the claimant 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 for Westfalen. Except for BOC and Westfalen, which benefited from a reduction of 15% to the basic amount of the fine on account of their exclusively passive role in the infringement, the Commission found there to be no attenuating or aggravating circumstances for or against the undertakings involved in the cartel (recitals 438 to 448 of the Decision).

78 Although, at this stage in the calculation of the fines, the applicant and AGA Gas were on a wholly equal footing, it is common ground that the applicant ultimately received a fine of EUR 12.6 million, that is, an amount in fact three times higher than that imposed on AGA AB, namely EUR 4.15 million, and which represents nearly 50% of the total amount of the fines imposed.

79 It is clear from the Decision that the origin of the difference in the amount of the fines imposed referred to in the preceding paragraph is twofold, namely the reduction of the basic amount of the fine from EUR 14 million to EUR 5.54 million through the application of the 10% upper limit in favour of AGA Gas and then the latter's being granted a reduction of 25% of the fine under the Leniency Notice, while the applicant, for its part, benefited only from a reduction of 10% (recitals 450, 454 to 459 of the Decision).

— The alleged disproportionality of the fine imposed

80 The applicant points out that the final amount of the fine imposed on it is three times larger than that imposed on AGA AB and represents nearly 50% of the total amount of the fines imposed by the Commission in the Decision, which is out of all proportion to its participation in the infringement or to its market share, the latter representing at best one third of the market during the period at issue.

81 This complaint reveals a contradiction in the applicant's written pleadings. In its application, the latter clearly indicated that it was not disputing the various stages in the Commission's calculation of the fines in recitals 412 to 448 of the Decision, the

considerations relating to the gravity of the infringement, the duration thereof and the involvement of the various undertakings (see paragraph 22 above).

82 However, the final amount of the fine is only the result of a series of arithmetical calculations performed by the Commission according to the Guidelines, as noted above, and, where relevant, the Leniency Notice.

83 Furthermore, the allegation that the final amount of the fine imposed on the applicant is disproportionate, compared with the total amount of the fines imposed, in terms of the first parameter in question concerning the applicant's individual participation in the infringement, is in no way substantiated.

84 As regards the second parameter in question, relating to the account to be taken of the undertaking's importance on the market concerned, it should be noted 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*, cited in paragraph 71 above, paragraph 312).

85 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 participants in the cartel. That final amount is set, inter alia, on the basis of various factors linked to the individual conduct of the undertaking in question, such as the duration of the infringement, the existence of aggravating or attenuating circumstances and the degree to which that undertaking cooperated, but not to its market share or turnover.

86 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.

87 As explained above, in the Decision in order to take account of the specific weight and therefore the real impact of the offending conduct of each undertaking involved in the cartel on competition, the Commission grouped the undertakings concerned into four categories, precisely according to their relative importance on the market concerned. The applicant and AGA Gas, regarded as being by far the largest operators on the market concerned, were placed in the first category.

88 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.

89 It should be noted that AGA Gas's market share and turnover on the market concerned were substantially smaller than those of the applicant. However, notwithstanding the fact that the applicant's turnover was 40% greater than that of AGA Gas, both these undertakings were placed in the same category and attributed the same starting amount of EUR 10 million, which may be considered to be objectively favourable to the applicant. Furthermore, although the latter questions the way in which the turnover of AGA Gas was calculated, it does not provide any concrete evidence enabling the arithmetical evaluation set out in the table above to be challenged.

90 The applicant seeks to play down its importance by comparing its market shares with the larger market shares of AGA Gas in certain sub-segments of the market in question, namely certain types of gas, and to this end refers to the figures set out in tables 3 (cylinder gases) and 4 (liquid gases) of the Decision (recitals 77 and 78). However, as the Commission correctly points out, this comparison is not relevant to assessing the two undertakings' respective importance, inasmuch as the market shares shown in Table 1 of the Decision take account of the weighted average of these various sub-segments thereby permitting the relative importance of those undertakings to be properly assessed.

91 It is revealing in fact that the applicant, in its written pleadings, insists on the similarity of its situation to that of AGA Gas and maintains, in this respect, that it is apparent from Table 1 in the Decision that its turnover for cylinder gases and liquid gas is comparable to that of AGA Gas and that the Commission was thus right to place these two undertakings in the same category.

92 The size of the applicant's turnover and market share provides an explanation and justification for a starting amount that is nearly four times that imposed on the

undertakings in the second category and over eight times that established in respect of the undertakings in the third category. Moreover, the links 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 14% of the turnover on the market in question in the case of the applicant, as against 20.3% for AGA Gas, 13.98% for Air Products, 20.2% for Air Liquide, 14.6% for Messer, 17.6% for BOC and 17.3% for Westfalen.

93 In those circumstances, the fact that the final amount of the fine imposed on the applicant represents nearly 50% of the total of the fines imposed by the Commission does not lead to the conclusion that the fine imposed on the applicant is disproportionate, since the starting point for its fine is justified in the light of the criteria 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*, cited in paragraph 40 above, paragraph 304).

94 The latter assessment also provides the basis for rejecting the applicant's argument drawn from a comparison with AGA Gas concerning the relationship between the turnover achieved on the market concerned and the amount of the fine prior to application of the Leniency Notice.

95 In addition, it should be noted that the reduction, prior to application of the Leniency Notice, of AGA Gas's fine from EUR 14 million to EUR 5.54 million, while the applicant's remained unaltered at EUR 14 million, can be explained by the application of the 10% upper limit and does not evince any discriminatory treatment to the applicant's detriment, as indicated below.

— The alleged discriminatory nature of the fine imposed

96 According to settled case-law, the principle of equal treatment is breached only where comparable situations are treated differently or different situations are treated in the same way, unless such 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).

97 Although the applicant disputes, generally, the difference between the amount of the fine imposed on it and that imposed on the other undertakings involved in the cartel, it bases and expands its complaint as to the alleged discriminatory nature of its fine in the light of the way AGA Gas in particular was treated. Thus the applicant claims to have been in the same position in terms of the gravity and duration of the infringement only in relation to AGA Gas.

98 It is clear from the Decision that the Commission did in fact establish an identical basic amount of the fine, determined according to the gravity and duration of the infringement, for AGA Gas and the applicant, but finally imposed on the latter a fine three times greater than that imposed on AGA AB for the acts committed by its former subsidiary.

99 The applicant maintains that the Commission, in the exercise of its discretion, made certain choices when calculating the fines, and more particularly when applying the 10% upper limit, which resulted in the final outcome at issue. According to the applicant, there are no binding requirements to explain the significant difference between the amount of the fine imposed on it and that imposed on AGA AB.

100 As set out above, this difference must be accounted for by a decrease of 10% in the amount of AGA Gas's fine following application of the 10% upper limit and a further 25% reduction, as against only 10% in the case of the applicant, granted to AGA Gas under the Leniency Notice.

101 The applicant did not make any observations in its written pleadings as to the circumstances in which the Commission applied that notice both in its case and in the case of the other undertakings in question.

102 Although the Commission has discretion, subject to review by the Court, as regards reducing fines under the Leniency Notice in the light of the circumstances of each case, it is still required to comply with the 10% upper limit. Contrary to the applicant's assertions, the Commission does not have discretion in the application of the 10% upper limit, which is linked only to the level of turnover referred to in Article 15(2) of Regulation No 17. As Advocate General Tizzano points out in his Opinion in *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 71 above, point 125, 'by definition, a ceiling represents an absolute limit which applies automatically in the event of a specified threshold being reached, regardless of any other criterion'.

103 It is thus only in the definition of turnover used by the Commission in its Decision that the discrimination alleged by the applicant could lie.

104 It is settled case-law that the turnover referred to in Article 15(2) of Regulation No 17 must be understood as referring to the total turnover of the undertaking concerned, which alone gives an approximate indication of its size and influence on the market (Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v

Commission [1983] ECR 1825, paragraph 119; *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 71 above, paragraph 181; Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 160).

105 In the present case, the Commission considered that the facts set out in Part I of the Decision proved that the applicant had directly participated in the collusive arrangements regarding medical and industrial gases in the Netherlands and that it should consequently bear responsibility for its infringements and therefore be an addressee of the Decision (recital 396 of the Decision).

106 It is further apparent from the Decision that the total turnover of the applicant amounted to EUR 470 648 000 for 2001 (Table 1 of the Decision), while the basic amount of the fine which the Commission set in respect of the applicant, following the calculation performed in accordance with the Guidelines, amounted to EUR 14 000 000. Clearly the latter amount is significantly smaller than the above limit, which was therefore not applied.

107 Conversely, following the calculation performed in accordance with the Guidelines, the Commission set a fine of EUR 14 million in respect of AGA Gas, an amount which far exceeds the 10% limit of the total turnover of the undertaking concerned, which amounted to EUR 55 479 000 for 2000, which was the last complete business year for which turnover figures were available for AGA Gas. This explains why the fine was reduced to the maximum permitted level, that is EUR 5.54 million. Given a total turnover assessed at EUR 11.275 million, Messer also benefited, by application of the 10% upper limit, from its fine being capped at EUR 1.12 million.

108 However, besides the fact that it did not dispute the amount set by the defendant in respect of its total turnover, the applicant has neither shown nor even claimed that the anti-competitive conduct of which it is accused by the Commission should have been attributed to another undertaking and that it was not responsible for the infringement of Article 81 EC. The applicant, as addressee of the statement of objections, insists, on the contrary, that despite Linde's holding of 58% of its share capital in 1992, increasing to 65% in 1995, it was to a large extent free to define its own commercial policy and that there was no group relationship for the purposes of the relevant case-law. Nor does it claim that its subsidiary, Hoek Loos BV, under which its activities in the Netherlands are grouped, is responsible for the offending anti-competitive dealings and that the latter determined its conduct on the market autonomously.

109 The applicant asserts only that the Commission was wrong to treat it differently from the other undertakings, in particular AGA Gas, and it demands to receive the same treatment, which it describes as advantageous, as that accorded to the latter undertaking.

110 It need merely be pointed out that this line of argument by the applicant cannot justify the allegation that the Commission committed an error of assessment in its regard concerning the 10% upper limit, either as concerns the preliminary question of attribution of the infringement or the question of the turnover to be taken into account.

111 In relation to the argument concerning the way the other undertakings, particularly AGA Gas, were treated, the applicant states in its rejoinder that it has shown that the favourable choices made by the Commission concerning the addressees of the Decision, the turnover subject to the 10% upper limit, and the order in which to apply that limit and the provisions of the Leniency Notice 'were not always self-evident without, however, [the applicant's] wishing to claim that they were not correct or expressing a view as to their appropriateness, even if they (arguably) may be open to some doubt'. The applicant is surprised, in particular, that the Commission did not consider AGA AB to be responsible for the infringement and that it took into account the total turnover of that undertaking. The fact that the Decision was directed at AGA AB, acting as successor in title to its former subsidiary AGA Gas, is not a convincing argument justifying the large discrepancies in the fines imposed.

112 To the extent that the applicant merely refers to the advantage obtained by AGA Gas on account of the 10% upper limit being applied, it need merely be pointed out that that undertaking and the applicant were not in a comparable situation and that the objective difference in their situation both explains and justifies the objective difference in their treatment. Thus, what the applicant describes as a discriminatory final outcome of the Commission's calculation process is, in reality, nothing other than an inevitable consequence of the application of the 10% limit.

113 In so far as the applicant alleges that AGA Gas obtained an unlawful reduction in its fine and even if the Commission wrongly granted that undertaking a reduction by incorrectly applying the 10% upper limit, compliance with the principle of equal treatment must be reconciled with the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (Case 134/84 *Williams* v *Court of Auditors* [1985] ECR 2225, paragraph 14; Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 160, confirmed on appeal in Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101; and *LR AF 1998* v *Commission*, cited in paragraph 40 above, paragraph 367).

114 For the sake of completeness, it should be noted that the applicant's allegations as to the choice of addressees of the Decision, the fact of taking into account for the purposes of applying the 10% upper limit the worldwide turnover of the group to which the addressee of the Decision belongs and the need to apply the Leniency Notice prior to applying that upper limit are unfounded.

115 First of all, while the applicant takes issue with the change in the Commission's assessment with regard to AGA AB as regards the attribution of the anticompetitive behaviour found, the fact remains that it was AGA GAS alone, and not AGA AB, which was the addressee of the statement of objections and thus it was to that undertaking alone that the Commission attributed the infringement. Secondly, the defendant maintained that assessment in the Decision in holding AGA Gas alone responsible for the infringement identified therein. The applicant did not provide any evidence capable either of casting doubt on that assessment or of establishing that AGA AB should have been held responsible in the first place, whether alone or together with AGA Gas, for the actions of the latter.

116 Secondly, in applying the 10% upper limit, the Commission must take into account the turnover of the undertaking concerned, namely the undertaking to which the infringement was attributed which was therefore declared responsible and notified of the decision imposing the fine (see, to that effect, the judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission,* not published in the ECR, paragraph 390).

117 The applicant's argument concerning the need to take into account the total turnover of the group of which the subsidiary, to which the decision imposing fines for infringement of the competition rules is addressed, is part, is incompatible with, and renders completely meaningless, the settled case-law according to which the anti-competitive conduct of an undertaking can be attributed to another undertaking where it has not decided independently upon its own conduct on the market, but carried out, in all material respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them (Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, paragraph 27, and *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 71 above, paragraph 117). Thus, the conduct of a subsidiary may be attributed to the parent company where the subsidiary does not decide independently upon its own conduct in the market but carries out, in all material respects, the instructions given to it by the parent company (Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 133).

118 The applicant's argument would render pointless any analysis of the relations within a group of companies to determine whether the group constitutes a single undertaking for the purposes of applying the competition rules, since recognition of the responsibility of one member of the group would lead automatically to the parent company, if there is one, representing the group, or to the other undertakings constituting the group being held jointly and severally responsible. It therefore runs completely counter to the principle that penalties must fit the offence, so that an undertaking may be penalised only for acts imputed to it individually, a principle applying in any administrative procedure that may lead to the imposition of sanctions under Community competition law (Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 63, confirmed on appeal by Joined Cases C-65/02 P and C-73/02 P *ThyssenKrup Stainless and ThyssenKrup Acciai speciali* v *Commission* [2005] ECR I-6773, paragraph 82).

119 In that connection the applicant wrongly relies on the judgment in *HFB and Others* v *Commission*, cited in paragraph 37 above. Although, in that judgment, the Court of First Instance calculated the 10% upper limit on the basis of the cumulative turnover of three companies comprising the group in question, it also upheld the Commission's decision to hold each of those companies jointly and severally responsible for the infringement found to have been committed by the group which itself constituted the undertaking that committed the infringement for the purposes of Article 81 EC (*HFB and Others* v *Commission*, cited in paragraph 37 above, paragraph 527).

120 In those circumstances, since AGA AB had not initially been held responsible for the anticompetitive actions of its subsidiary AGA Gas, only the turnover of the latter was to be taken into account for the purposes of applying the 10% upper limit, irrespective of the fact that the Decision was ultimately addressed to AGA AB as successor in title to its subsidiary, which had ceased to exist in law after the statement of objections had been sent out.

121 It should be recalled in this respect that it falls, in principle, to the natural or legal person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking (Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 78, and *SCA Holding* v *Commission*, cited in paragraph 113 above, paragraph 27). The situation would be different only where the legal person or persons responsible for running the undertaking have ceased to exist in law after the infringement has been committed (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 145, and *HFB and Others* v *Commission*, cited in paragraph 37 above, paragraph 104), which is the case here.

122 Following the liquidation of AGA Gas, the parent company, AGA AB, agreed to accept liability for its former subsidiary and therefore for the penalty which would have been imposed on AGA Gas had it continued to exist. In such a case, the amount of the fine is still determined by the participation and situation of AGA Gas.

123 Thirdly, in relation to the fact of cooperation being taken into account by the Commission after it has applied the 10% upper limit, it need merely be pointed out that that approach ensures that the Leniency Notice is fully effective: if the basic amount was significantly in excess of the 10% limit before the application of the Leniency Notice, as was the case with AGA Gas, and that limit could not be applied immediately, the incentive for the undertaking concerned to cooperate with the Commission would be much less, since the final fine would be reduced to 10% in any event, with or without the undertaking's cooperation (Case T-52/02 *SNCZ* v *Commission* [2005] ECR II-5005, paragraph 41).

124 It follows that the applicant's complaint of discriminatory treatment compared with that accorded to AGA Gas, and the other undertakings involved in the cartel in so far as that complaint was also aimed at the treatment of the latter, has not been established.

— The alleged conflict with the objective of deterrence

125 The applicant contends that the manner in which the Commission, in the Decision, applied the 10% upper limit led to a result, in terms of the final amount of the fines, which completely conflicts with the objective of deterrence. It points out that, as a relatively modest undertaking whose activities are essentially on a national scale, it received a fine that was appreciably heavier that those imposed on the Dutch subsidiaries of groups of undertakings operating on a global scale and whose turnovers far exceed the applicant's. To this end, it cites the worldwide turnover of the parent companies of Air Products (USD 5 717 million) and Air Liquide (EUR 8 328 million).

126 It goes on to state that the fact of not applying the 10% upper limit to the overall turnover of the group to which the subsidiary, which is the only addresse of a decision imposing a fine, belongs, leads to a situation where the amount of the fine is dependent on the way in which an undertaking has spread its activities across various companies, it being noted that a significant number of international undertakings, such as leading companies Air Products and Air Liquide, pursue their activities through separate national companies. This marks a departure from an objective application of Article 15(2) of Regulation No 17 and the deterrence factor therefore becomes arbitrary.

127 It must be pointed out first of all that the applicant's comparison is wholly irrelevant, in that it compares its own total turnover (EUR 470 648 000 in 2001) with those, indeed larger than its own, achieved by undertakings which have not been held responsible for the infringement found by the Commission and which were therefore not addressees of the Decision.

128 It appears in fact that the applicant's argument is based on an incorrect premiss, namely the need to take into account for the purposes of applying the 10% upper limit the overall turnover of the group of which the subsidiary, which alone is responsible for the infringement and is the addressee of a decision imposing fines, is part, as has been shown in paragraphs 116 to 118 above.

129 Contrary to what the applicant claims, application of the 10% upper limit in a way that is consistent with case-law does not make the amount of the fine depend on how a particular operator divides up its different activities. The determination of the amount of the fine is based on a legal assessment by the Commission, subject to review by the Court of First Instance, namely attribution of the infringement to one or several undertakings, which is the only view consistent with the principle of personal responsibility. The question of attribution may be answered in varying ways according to the individual circumstances of each case in which it arises, which may be that of sole responsibility of the subsidiary or of the parent company or that of joint and several responsibility of those two entities.

130 In so far as the applicant claims that the final amount of its fine is contrary to the desired deterrent effect, in that it is far higher than the fines imposed on the Dutch subsidiaries, which are addressees of the Decision, of large multinational suppliers of gas, it should be recalled that according to settled case-law, when assessing the general level of fines the Commission is entitled to take account of the fact that clear infringements of the Community competition rules are still relatively frequent and that, accordingly, it may raise the level of fines in order to strengthen their deterrent effect (Case T-327/94 *SCA Holding* v *Commission*, cited in paragraph 113 above, paragraph 179).

131 In this connection, the fourth paragraph of Section 1A of the Guidelines states inter alia that it is necessary, when assessing the gravity of an infringement and the starting amount of the fine, 'to set the fine at a level which ensures that it has a sufficiently deterrent effect'.

132 In the instant case, which presents a classic type of infringement of competition law and conduct whose illegality has been confirmed by the Commission on numerous occasions since its earliest intervention in such matters, the Commission was entitled to regard it as necessary to set the fine at a sufficiently deterrent level, within the limits laid down in Regulation No 17.

133 As explained above (in paragraph 110), the applicant has not shown that the Commission erred in its assessment in respect of the applicant concerning the 10% upper limit, since it must also be borne in mind that the institution is required pursuant to Regulation No 17 to apply that limit.

134 It follows from all the above considerations that the complaints raised by the applicant, alleging breach of Article 15(2) of Regulation No 17 and that the fine imposed is disproportionate, discriminatory and contrary to the objective of deterrence, must be dismissed as unfounded and that since the final amount of the fine imposed on the applicant appears to be wholly appropriate, no points raised by the latter justify any reduction thereof.

135 Finally, in relation to the alleged breach of 'the principle of prohibition of arbitrary decisions', the applicant's line of argument concerning this complaint does not distinguish it, in substance, from the complaints referred to in the preceding paragraph, so that it also must be rejected.

Costs

136 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in

the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

Vilaras Dehousse Šváby

Delivered in open court in Luxembourg on 4 July 2006.

E. Coulon M. Vilaras

Registrar President