

Case T-304/02

Hoek Loos NV

v

Commission of the European Communities

(Competition — Cartels — Netherlands market for industrial and medical gases —
Price fixing — Calculation of fines — Guidelines on the method of setting fines —
Principles of proportionality and equal treatment)

Judgment of the Court of First Instance (Fifth Chamber), 4 July 2006 II - 1891

Summary of the Judgment

1. *Actions for annulment — Grounds*
(Arts 81 EC and 253 EC)
2. *Competition — Fines — Amount — Determination*
(Council Regulation No 17, Art. 15(2) and (17))
3. *Competition — Fines — Amount — Determination*
(Council Regulation No 17, Art. 15(2); Commission Notice 98/C 9/03)

4. *Competition — Fines — Amount — Determination — Turnover to be taken into consideration*
(Council Regulation No 17, Art. 15(2))
5. *Competition — Fines — Amount — Determination — Criteria — Reduction in the amount of the fine in exchange for the cooperation of the undertaking involved with the Commission*
(Council Regulation No 17, Art. 15(2); Commission Notice 96/C 207/04)

1. A Commission decision imposing a penalty addressed to various undertakings which participated in an unlawful cartel, 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.

were not penalised and whose situation is unrelated to the dispute before the Community judicature.

(see paras 59-62)

Accordingly, if one of the addressees brings an action for annulment to contest the fine imposed on it, 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.

2. When determining the amount of each fine imposed for breach of the Community competition rules, the Commission has a discretion and is not required to apply any particular arithmetical formula. 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.

This is why that addressee cannot invoke a lack or insufficiency of reasoning in relation to the infringement imputed to certain other undertakings to which the decision was addressed, which did not bring the application in question, and not to their parent companies which

The 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.

the fine as regards the importance of the participants in the cartel.

As regards the account to be taken of the undertaking's importance on the market concerned, 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.

In those circumstances, the fact that the final amount of the fine imposed on an undertaking represents nearly 50% of the total of the fines imposed by the Commission on all the undertakings which participated in a particular cartel does not lead to the conclusion that the fine imposed is disproportionate, if 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 paras 68, 69, 84-86, 93)

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. The 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. Conversely, the starting amount of the fine may be a relevant factor in assessing the possible lack of proportionality of

3. Where the Commission, in applying 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, has not committed an error as regards the amounts of turnover to be taken into account, an undertaking cannot accuse it of having discriminated against it on the ground that, whereas that undertaking was in the same situation in respect of the gravity and duration of the infringement as another undertaking which participated in the infringement, a fine was imposed on it which, although its starting point was the same, turned out to be considerably higher. Apart from the fact that it takes

into account a different level of cooperation — which is not contested — such a difference is accounted for primarily by the application of the upper limit of 10% of the relevant turnover provided for under Article 15(2), over which the Commission has no discretion.

exist in law on the date the decision imposing a penalty was adopted, that decision was imposed on the parent company which accepted liability for its former subsidiary and therefore for the penalty which its conduct attracted.

(see paras 117, 118, 120-122)

(see paras 100-112)

4. The principle that penalties must fit the offence, so that an undertaking may be penalised only for acts imputed to it individually, applies in any administrative procedure that may lead to the imposition of sanctions under Community competition law. That is why the conduct of a subsidiary may be attributed to the parent company only 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.
5. The approach adopted by the Commission in determining fines in the field of competition, to the effect that the fact of cooperation is taken into account after applying the 10% upper limit of the turnover of the undertaking concerned, provided for in Article 15(2) of Regulation No 17, and therefore has a direct impact on the amount of the fine, ensures that the Notice on the non-imposition or reduction of fines in cartel cases is fully effective. If the basic amount was significantly in excess of the 10% limit before the application of notice, 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.

(see para. 123)

Where this is not the case, that is, where breach of the competition rules should be attributed to the subsidiary alone, it is only the turnover of the latter which is to be taken into account for the purposes of setting the fine, irrespective of the fact that, since the subsidiary had ceased to