Joined Cases T-49/02 to T-51/02

Brasserie nationale SA (formerly Brasseries Funck-Bricher and Bofferding) and Others

v

Commission of the European Communities

(Restrictive practices — Luxembourg beer market — Fines)

Judgment of the Court of First Instance (Second Chamber), 27 July 2005 . . II - 3038

Summary of the Judgment

1. *Competition — Agreements, decisions and concerted practices — Agreements entered into to mitigate the effect of legal rules considered to be too unfavourable — Not permissible*
   (Art. 81(1) EC)

2. *Competition — Agreements, decisions and concerted practices — Not allowed — Justification for an agreement prohibited under Article 81(1) EC on the basis of a rule of reason — Not permissible*
   (Art. 81(1) EC)

3. *Competition — Agreements, decisions and concerted practices — Impairment of competition — Criteria for assessment — Anti-competitive purpose — Sufficient finding*

(Art. 81(1) EC)

4. *Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Definition — Joint intention as to the conduct to be adopted on the market — Form of the expression of intention — Not relevant*

(Art. 81(1) EC)

5. *Competition — Administrative procedure — Decision establishing an infringement — Obligation to define the market in question — Scope*

(Art. 81 EC)

6. *Competition — Community rules — Infringements — Committed intentionally — Meaning*

(Council Regulation No 17, Art. 15)

7. *Competition — Fines — Amount — Determination — Discretion of the Commission — Judicial review*

(Art. 229 EC; Council Regulation No 17, Art. 17)

8. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Particularly serious infringements — Market-sharing arrangement — Partitioning of the market*

(Art. 81(1) EC); Council Regulation No 17, Art. 15(2))

9. *Competition — Fines — Amount — Determination — Criteria — Duration of the infringements — Agreement penalised because of its anti-competitive object regardless of its effects — Consideration of the duration of the agreement without regard to its non-application*

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

10. Competition — Fines — Amount — Determination — Criteria — Gravity of the infringement — Mitigating circumstances — Agreement not implemented in practice — Assessment at the level of the individual conduct of each undertaking

(Council Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03, point 3)

1. It is unacceptable for undertakings to attempt to mitigate the effects of legal rules which they consider excessively unfavourable by entering into restrictive arrangements intended to offset those disadvantages on the pretext that they have created an imbalance detrimental to them.

(see para. 81)

2. Once it has been established that the object of an agreement constitutes, by its very nature, a restriction of competition, such as a sharing of clientele, that agreement cannot, by applying a rule of reason, be exempted from the requirements of Article 81(1) EC by virtue of the fact that it also pursued legitimate objectives.

(see para. 85)

3. In so far as an agreement between undertakings has the object of restricting competition, there is no need to examine whether it also had the effect of restricting it.

(see paras 97, 140)

4. The concept of an agreement within the meaning of Article 81(1) EC centres round the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention.

(see para. 119)

5. There is an obligation on the Commission to define the market in question in a decision applying Article 81 EC only where it is impossible, without such a definition, to determine whether the

agreement, decision by an association of undertakings or concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market.

(see para. 144)

6. For an infringement of the competition rules in the Treaty to be regarded as having been committed intentionally, it is not necessary that the undertaking was aware that it was restricting competition; it is sufficient that it could not have been unaware that the object of its conduct was the restriction of competition, and it is unimportant whether the undertaking was aware that it was infringing Article 81 EC.

(see para. 155)

7. The gravity of infringements of competition law has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, without there being any binding or exhaustive list of the criteria which must be applied. In addition, in the context of Regulation No 17 the Commission has a wide margin of discretion in fixing the amount of fines in order to steer the conduct of undertakings towards compliance with the competition rules.

The Court of First Instance is, however, under a duty to verify whether the amount of the fine imposed is proportionate in relation to the gravity and duration of the infringement, and to weigh the gravity of the infringement and the circumstances invoked by the applicant. The Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] do not prejudge the assessment of the fine by the Community judicature, which has unlimited jurisdiction in this respect under Article 17 of Regulation No 17.

(see paras 169-170)

8. Market-sharing arrangements and partitioning of the common market constitute some of the most serious infringements of Article 81 EC.

As regards market-sharing, agreements of this type are among the examples of agreements explicitly declared to be incompatible with the common market in Article 81(1)(c) EC. They are categorised as obvious restrictions of competition.

As regards the partitioning of the common market, such a patent infringement of competition law is, by its nature, particularly serious. It goes against the most fundamental aims of the Community and, in particular, the accomplishment of the single market.

(see paras 173-175)

9. Where the Commission has not proven the effects of an agreement and was under no obligation to do so, the agreement in question having as its object the restriction of competition, it is irrelevant for calculating the duration of the infringement whether or not the agreement at issue was implemented. To calculate the duration of an infringement the object of which 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.

(see para. 185)

10. The second indent of Section 3 of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] referring to the 'non-implementation in practice of the offending agreements or practices' may not be interpreted as referring to the case in which an agreement as a whole is not implemented, regardless of the conduct of each undertaking, but must be understood as a circumstance based on the individual conduct of each undertaking.

(see para. 195)