

## Case T-48/02

**Brouwerij Haacht NV**

**v**

**Commission of the European Communities**

(Competition — Cartels — Fines — Guidelines on the method of setting fines — Effective capacity of the offender to cause significant damage to other operators — Attenuating circumstances — Leniency Notice)

Judgment of the Court of First Instance (Fifth Chamber), 6 December 2005 II - 5265

### Summary of the Judgment

- 1. Competition — Fines — Amount — Whether appropriate — Judicial review — Information which may be taken into account by the Community judiciary — Information not contained in the decision imposing the fine and not required by the duty to state reasons — Inclusion*

*(Arts 229 EC, 230 EC and 253 EC; Council Regulation No 17, Art. 17)*

2. *Acts of the Community institutions — Statement of reasons — Obligation — Scope — Decision imposing fines — Indication of the factors which led the Commission to assess the gravity and the duration of the infringement — Sufficient indication*  
(Art. 253 EC; Council Regulation No 17, Art. 15(2), second para.; Commission Communications 96/C 207/04 and 98/C 9/03)
3. *Competition — Agreements, decisions and concerted practices — Definition of the market — Subject-matter — Determination of the effect on trade between Member States*  
(Art. 81(1) EC)
4. *Competition — Fines — Amount — Determination — Criteria — Seriousness of the infringements — Attenuating circumstances — Passive or 'follow-my-leader' role of the undertaking*  
(Council Regulation No 17, Art. 15; Commission Communication 98/C 9/03, point 3)
5. *Competition — Community rules — Infringements — Fines — Determination — Criteria — Raising of the general level of fines — Lawfulness — Conditions*  
(Council Regulation No 17)
6. *Competition — Fines — Amount — Determination — Non-imposition or reduction of the fine in return for the cooperation of the undertaking concerned — Need for conduct which facilitated the Commission's finding of an infringement*  
(Council Regulation No 17, Arts 11(1), (4) and (5) and 15; Commission Communication 96/C 207/04)
7. *Competition — Fines — Amount — Determination — Criteria — Attitude of the undertaking during the administrative procedure — Appraisal of the extent of the cooperation shown by each of the undertakings participating in the cartel — Respect for the principle of equal treatment — Different degrees of cooperation justifying different treatment*  
(Council Regulation No 17, Art. 15(2); Commission Communication 96/C 207/04)

1. The Court of First Instance has jurisdiction in two respects over actions contesting Commission decisions imposing fines on undertakings for infringement of the competition rules. First, under Article 230 EC, it has the task of reviewing the legality of those decisions. In that context, it must in particular

review compliance with the duty to state reasons laid down in Article 253 EC, infringement of which renders the decision illegal. Second, the Court of First Instance has jurisdiction to assess, in the exercise of the unlimited jurisdiction accorded to it by Article 229 EC and Article 17 of Regulation No 17, the

appropriateness of the amounts of fines. That assessment may justify the production and taking into account of additional information which the duty to state reasons provided for in Article 253 EC does not as such require to be set out in the decision.

measuring the gravity and duration of an infringement.

(see para. 44)

In those circumstances, the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which it took into account in accordance with the Guidelines and, where appropriate, the Leniency Notice and which enabled it to determine the gravity of the infringement and its duration for the purpose of calculating the amount of the fine.

(see para. 46)

2. The scope of the duty to state reasons for the calculation of a fine imposed for infringement of the Community competition rules must be determined by reference to the second subparagraph of Article 15(2) of Regulation No 17, which provides that '[i]n fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement'. The essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration. Furthermore, 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 and the Leniency Notice indicate what factors the Commission takes into consideration in
3. For the purposes of applying Article 81 (1) EC, the reason for defining the relevant market is to determine whether an agreement 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. Consequently, there is an obligation on the Commission to define the market in a decision applying Article 81(1) 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.

at a late stage, regardless of the length of its involvement in the infringement, or where a representative of another undertaking which has participated in the infringement makes an express declaration to that effect.

(see para. 58)

4. At 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) of the ECSC Treaty it is indicated that the basic amount of an undertaking's fine may be reduced where there are specific attenuating circumstances, such as an 'exclusively passive or "follow-my-leader" role in the infringement'.

The specific characteristics of one undertaking's conduct cannot determine whether an aggravating circumstance or an attenuating circumstance is applicable to another undertaking. Whether or not such circumstances are taken into account depends on the individual conduct of an undertaking and must therefore necessarily be based on the characteristics of its own conduct.

(see paras 74-75, 79)

In order to be eligible for an attenuating circumstance resulting from an 'exclusively passive or "follow-my-leader" role', the undertaking concerned must have adopted a 'low profile', characterised by no active participation in the creation of any anti-competitive agreement or agreements. The factors which may indicate that an undertaking has played a passive role in a cartel include, in particular, where its participation in cartel meetings is significantly more sporadic than that of the ordinary members of the cartel, where it enters the market affected by the infringement

5. In the context of Regulation No 17 the Commission has a margin of discretion when fixing the amount of fines in order that it may channel the conduct of undertakings towards observance of the competition rules.

The fact that the Commission, in the past, imposed fines of a certain level for certain types of infringements does not mean that it is estopped from raising that level within the limits indicated in

Regulation No 17 if that is necessary to ensure the implementation of Community competition policy. On the contrary, the proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy.

(see para. 81)

6. A reduction in the fine for cooperation during the administrative procedure is justified only if the conduct of the undertaking concerned enabled the Commission to establish the infringement more easily and, where relevant, to bring it to an end.

In that regard, an undertaking's cooperation in the investigation does not entitle it to a reduction in its fine where that cooperation did not go further than that which it was required to provide under Article 11(4) and (5) of Regulation No 17. On the other hand, where an undertaking, in response to a request for information under Article 11, supplies information going much further than that which the Commission may require under that article, the undertaking in question may receive a reduction in its fine.

Where, in a request for information under Article 11 of Regulation No 17, the Commission, in addition to putting purely factual questions and requesting production of pre-existing documents, asks an undertaking to describe the object and course of a number of meetings in which it participated and also the results of or the conclusions reached in those meetings, when it is clear that the Commission suspects that the object of those meetings was to restrict competition, a request of that nature is of such a kind as to require the undertaking concerned to admit its participation in an infringement of the Community competition rules, so that the undertaking is not required to answer questions of that type. In such a situation, the fact that an undertaking none the less supplies information on those points must be regarded as spontaneous cooperation on the undertaking's part capable of justifying a reduction in the fine in application of the Leniency Notice.

(see paras 104, 106-107)

7. In the context of the appraisal of the cooperation shown by undertakings during the administrative procedure initiated in respect of a prohibited cartel, the Commission is not entitled to disregard the principle of equal treatment, a general principle of Community

law which is infringed where comparable situations are treated differently or different situations are treated in the same way, unless such difference of treatment is objectively justified.

comparable, notably in so far as they consisted in supplying different information or in supplying that information at different stages of the administrative procedure, or in circumstances that were not similar.

In that regard, a difference in treatment of the undertakings must be attributable to degrees of cooperation which are not

(see paras 108-109)