Case T-303/02

Westfalen Gassen Nederland BV

v

Commission of the European Communities

(Competition — Cartels — Netherlands market for industrial and medical gases — Price fixing — Proof of participation in the cartel — Proof of distancing — Principles of non-discrimination and proportionality — Calculation of fines)

Judgment of the Court of First Instance (Fifth Chamber), 5 December 2006 II - 4574

Summary of the Judgment

1. *Competition — Agreements, decisions and concerted practices — Prejudicial to competition — Criteria for assessment*

   (Art. 81(1) EC)

2. *Competition — Agreements, decisions and concerted practices — Participation of an undertaking in an anti-competitive initiative*

   (Art. 81(1) EC)

3. *Competition — Agreements, decisions and concerted practices — Proof*
   (Art. 81(1) EC)

4. *Competition — Agreements, decisions and concerted practices — Concerted practice — Concept*
   (Art. 81(1) EC)

5. *Competition — Agreements, decisions and concerted practices — Concerted practice — Concept*
   (Art. 81(1) EC)

6. *Competition — Fines — Amount — Determination — Criteria — Duration of the infringement*
   (Council Regulation No 17, Art. 15(2))

7. *Competition — Fines — Assessment by reference to the individual conduct of the undertaking*
   (Council Regulation No 17, Art. 15(2))

8. *Competition — Fines — Amount — Determination*
   (Council Regulation No 17, Art. 15(2))

9. *Competition — Fines — Amount — Determination*
   (Council Regulation No 17, Art. 15(2); Commission Notice 96/C 207/04; Commission Notice 98/C 9/03)

10. *Procedure — Time-limit for producing evidence*
    (Rules of Procedure of the Court of First Instance, Arts 44(1)(e), 48(1), and 66(2))

1. For the purposes of applying Article 81(1) EC, it is sufficient that the object of an agreement should be to restrict, prevent or distort competition irrespective of the actual effects of that agreement. Consequently, in the case of agreements reached at meetings of competing undertakings, that provision is infringed where those meetings have such an object and are thus intended to organise artificially the operation of the market.

(see para. 75)

2. It is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs.

The reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking gave the other participants to believe that it subscribed to what was decided there and would comply with it.

The notion of public distancing as a means of excluding liability must, in itself, be interpreted narrowly.

In that regard, silence by an operator in a meeting during which the parties colluded unlawfully on a precise question of pricing policy is not tantamount to an expression of firm and unambiguous disapproval. On the other hand, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable.

(see paras 76, 77, 103, 124)

3. Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction.

In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.

(see paras 106, 107)

4. A 'concerted practice' constitutes a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition. The criteria of coordination and cooperation, far from requiring the elaboration of an actual 'plan', must be understood in the light of the concept inherent in the Treaty provisions relating to competition, according to which each economic operator must determine independently the policy which he intends to adopt on the common market. Although that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators with the object or effect either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.

(see para. 121)

5. As is clear from the very terms of Article 81(1) EC, a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices and a relationship of cause and effect between the two. Subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market.

(see para. 132)

6. To calculate the duration of an infringement whose object 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. 138)

7. Where an undertaking has acted in breach of Article 81(1) EC, it cannot escape being penalised altogether on the ground that another trader has not been fined, when that trader's circumstances are not even the subject of proceedings before the Court.

(see para. 141)

In that regard, the principle of equal treatment is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified.

Assessment of the proportionate nature of the 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.

(see paras 151-153)

8. When fixing the amount of each fine imposed for breach of the Community competition rules, the Commission has a discretion and cannot be considered obliged to apply a precise mathematical formula for that purpose. Its assessment, however, must be conducted in accordance with Community law, which includes not only the provisions of the Treaty but also the general principles of law.

9. 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 that regard, Article 15(2) of Regulation No 17 likewise does not require that, where fines are imposed on several undertakings involved in the same infringement, the fine imposed on a small or medium-sized undertaking must not be greater, as a percentage of turnover, than those imposed on the larger undertakings. It is clear from that provision that, both for small or medium-sized undertakings and for larger undertakings, account must be taken, in determining the amount of the fine, of the gravity and duration of the infringement. Where the Commission imposes on undertakings involved in a single infringement fines which are justified, for each of them, by reference to the gravity and duration of the infringement, it cannot be criticised on the ground that, for some of them, the amount of the fine is greater, by reference to turnover, than that imposed on other undertakings.

The Commission's findings as to the duration of the infringement, the aggravating or attenuating circumstances and the degree to which an undertaking involved in the cartel cooperated, are linked to the individual conduct of the undertaking in question, but not to its market share or turnover.

In those circumstances, 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 undertakings involved in the cartel.

Conversely, the starting amount of the fine may be a relevant factor in assessing the possible lack of proportionality of the fine as regards the importance of the participants in the cartel.

(see paras 173, 174, 176-178)

10. Under Article 44(1)(e) and Article 48(1) of the Rules of Procedure of the Court of First Instance, the application must contain, where appropriate, offers of evidence, and the parties may offer further evidence in support of their arguments in reply or rejoinder, provided that they give reasons for the delay in offering it. Thus, evidence in rebuttal and the amplification of the offers of

evidence submitted in response to evidence in rebuttal from the opposite party in his defence are not covered by the time-bar laid down in Article 48(1) of the Rules of Procedure. That provision concerns offers of fresh evidence and must be read in the light of Article 66(2), which expressly provides that evidence may be submitted in rebuttal and previous evidence may be amplified.

(see para. 189)