



## Reports of Cases

### Case C-408/12 P

#### YKK Corporation and Others v European Commission

(Appeal — Agreements, decisions and concerted practices — Markets for zip fasteners and other fasteners and for attaching machines — Successive responsibilities — Legal upper limit of the fine — Article 23(2) of Regulation No 1/2003 — Concept of ‘undertaking’ — Personal responsibility — Principle of proportionality — Deterrence multiplier)

Summary — Judgment of the Court (Second Chamber), 4 September 2014

- 1. Competition — Fines — Amount — Determination — Criteria — Actual impact on the market — Criterion not conclusive*  
*(Council Regulation No 1/2003, Art. 23(2))*
- 2. Appeal — Jurisdiction of the Court — Whether it may review, on grounds of fairness, the assessment by the General Court with regard to the amount of the fines imposed on undertakings which have infringed the competition rules of the Treaty — Excluded*  
*(Arts 256 TFEU and 261 TFEU; Statute of the Court of Justice, Art. 58; Council Regulation No 1/2003, Arts 23(1) and 31)*
- 3. Competition — Fines — Amount — Determination — Criteria — Reduction of the amount of the fine for cooperation of the undertaking concerned — Conditions — Discretion of the Commission — Twofold reward for the same information excluded*  
*(Council Regulation No 1/2003, Art. 23(2); Commission Communications 96/C 207/04, Titles C and D, and 2002/C 45/03, paras 21 and 23)*
- 4. Appeal — Grounds — Mistaken assessment of the facts — Inadmissibility — Review by the Court of the assessment of the facts and evidence — Possible only where the clear sense of the evidence has been distorted*  
*(Art. 256 TFEU; Statute of the Court of Justice, Art. 58, first para.)*
- 5. Competition — Fines — Amount — Determination — Maximum amount — Calculation — Turnover to be taken into consideration — Undertaking acquired by another undertaking constituting a distinct economic entity at the time of the infringement — Taking account of the specific turnover of each of those economic entities*  
*(Art. 81 EC; Council Regulation No 1/2003, Art. 23(2))*

6. *Competition — Fines — Amount — Determination — Deterrent effect — Taking account of the size and global resources of the fined undertaking*

(Art. 81 EC; Regulation No 1/2003, Art. 23(2))

7. *Competition — Fines — Amount — Determination — Maximum amount — Distinction between setting an upper limit on the fine and its deterrent effect*

(Art. 81 EC; Council Regulation No 1/2003, Art. 23(2))

8. *Appeal — Appeal upheld — Judgment to be given on the substance by the appeal court — Condition — Whether the state of the proceedings permits final judgment to be given*

(Statute of the Court of Justice, Art. 61, first para.)

1. See the text of the judgment.

(see para. 26)

2. See the text of the judgment.

(see para. 29)

3. It is a requirement of both the 1996 Commission Notice on the non-imposition or reduction of fines in cartel cases (Sections C and D) and the 2002 Commission notice on immunity from fines and reduction of fines in cartel cases (Points 21 and 23) that, as a condition for qualifying for a reduction of the fine which would otherwise be imposed, the undertakings concerned must provide to the Commission evidence which contributes to establishing the infringement committed. In that regard, information which does not satisfy the condition that it must contribute to establishing the existence of the infringement, under the 1996 Leniency Notice, cannot constitute evidence representing significant added value with respect to the evidence already in the Commission's possession, under Point 21 of the 2002 Leniency Notice.

Further, the undertakings concerned cannot claim the right to a twofold reward for the same information, namely that which made it possible for them to qualify for partial immunity in respect of the period to which that information refers, if that information did not provide, for the period following that period, any added value to the Commission's investigation.

(see paras 42, 43, 47)

4. See the text of the judgment.

(see para. 44)

5. Where an undertaking regarded by the Commission as responsible for an infringement of Article 81 EC is acquired by another undertaking within which it retains, as a subsidiary, the status of a distinct economic entity, the Commission must take account of the specific turnover of each of those economic entities in order to apply to them, where necessary, the upper limit of 10% of its total turnover in the preceding business year, as laid down by the second subparagraph of Article 23(2) of Regulation No 1/2003.

Accordingly, where two companies constituted two distinct economic entities, before one became the subsidiary of the other, they cannot be regarded as one and the same undertaking, whose structure and financial capacity changed over time, which is at issue during the period of the infringement.

In that regard, the objective sought by the establishment, in Article 23(2), of an upper limit of 10% of the turnover of each undertaking participating in an infringement is, *inter alia*, to ensure that the imposition of a fine higher in amount than that ceiling should not exceed the capacity of an undertaking to make payment at the time when it is identified as responsible for the infringement and a financial penalty is imposed on it by the Commission. That finding is confirmed by the second subparagraph of Article 23(2) of Regulation No 1/2003 which requires, as regards the 10% upper limit, that it should be calculated on the basis of the turnover in the business year preceding the Commission decision imposing a penalty for an infringement. Such a requirement is fully respected where that ceiling is determined solely on the basis of the turnover of the subsidiary, in respect of the fine which is imposed exclusively on it, in relation to the period prior to its acquisition by the parent company.

Likewise, a company cannot be held to be responsible for infringements committed independently by its subsidiaries before the date of their acquisition, since the latter must themselves answer for their unlawful conduct prior to that acquisition, and the company which has acquired them cannot be held to be responsible.

(see paras 60-65)

6. The concept of ‘deterrence’ is one of the factors to be taken into account in calculating the amount of the fine to be imposed for infringements of the competition rules. In that regard, the link between, on the one hand, undertakings’ size and overall resources and, on the other, the need to ensure that a fine has deterrent effect cannot be denied. Taking into consideration the size and overall resources of the undertaking in question is, primarily, justified by the impact sought on the undertaking concerned, in order to ensure that the fine has sufficient deterrent effect, as the penalty must not be negligible in the light, particularly, of its financial capacity. It follows that, in order to impose a fine of an amount capable of deterring the undertakings concerned from infringing, in the future, EU rules of competition, account must be taken of the size and overall resources of those undertakings at the time when the contested decision is adopted.

(see paras 84-86)

7. The purpose of setting an upper limit on a fine imposed on an undertaking for an infringement of the competition rules at 10% of its turnover, as laid down by the second subparagraph of Article 23(2) of Regulation No 1/2003 is to adjust the amount of the fine imposed in respect of the infringement committed to the economic capacity of the undertaking held to be responsible, even though the reference period for the calculation of turnover to be taken into account is the business year preceding that when the Commission decision imposing a penalty on that undertaking is adopted.

Conversely, the objective of pursuing a deterrent effect through the financial penalty is essentially to control, in the future, the conduct of the economic entity to which the Commission decision is addressed. Such an effect must necessarily be produced on the undertaking in the state which it exists at the time when that decision is adopted.

(see paras 90, 91)

8. See the text of the judgment.

(see para. 95)