Judgment of the Court of First Instance (Second Chamber) of 15 June 2005 — Tokai Carbon and Others v Commission

(Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03)

Competition — Cartels — Specialty graphite market — Price fixing — Liability — Calculation of fines — Cumulation of penalties — Duty to state reasons — Rights of the defence — Guidelines on the method of setting fines — Applicability — Gravity and duration of the infringement — Attenuating circumstances — Aggravating circumstances — Ability to pay — Cooperation during the administrative procedure — Methods of payment

1. *Competition — Agreements, decisions and concerted practices — Undertaking — Meaning — Economic unit — Attribution of the infringements — Parent company and subsidiary undertakings — Joint and several liability of the companies concerned (Art. 81(1) EC) (see paras 54, 58-60, 62)*

2. *Competition — Agreements, decisions and concerted practices — Participation in meetings of undertakings having an anti-competitive object — Circumstance from which, where the undertaking concerned has not distanced itself from the decisions adopted, it may be concluded that it participated in the ensuing cartel (Art. 81(1) EC) (see para. 65)*

3. *Competition — Fines — Community penalties and penalties imposed by the authorities of a Member State or a non-member State for infringement of national competition law — Breach of the principle* non bis in idem *— None (Council Regulation No 17, Art. 15) (see para. 112)*

4. *Competition — Administrative procedure — Observance of the rights of the defence — Statement of objections — Necessary content — Indications concerning the method of determining the level of the proposed fine — Premature indications — Consequences (Council Regulation No 17, Art. 19 (1)) (see paras 138-141)*

5. *Competition — Fines — Amount — Determination — Legal framework — Article 15(2) of Regulation No 17 — Introduction by the Commission of guidelines introducing changes to its previous decision-making practice — Infringement of the principles of non-retroactivity and legal certainty — None (Regulation No 17, Art. 15(2); Commission Communication 98/C 9/03) (see paras 160-161)*

6. *Competition — Fines — Amount — Discretion of the Commission — Unlimited jurisdiction of the Court of First Instance — Possibility, in that context, of taking into consideration additional information which is not mentioned in the decision imposing the fine (Art. 229 EC; Council Regulation No 17, Art. 17) (see para. 164)*

7. *Competition — Fines — Amount — Determination — Turnover to be taken into consideration in calculating the fine — Commission's discretion while respecting the limit set down in Article 15(2) of Regulation No 17 (Council Regulation No 17, Art. 15(2)) (see para. 180)*

8. *Competition — Fines — Amount — Determination — Turnover to be taken into consideration — Turnover internal to the group of undertakings — Included (Council Regulation No 17, Art. 15(2)) (see para. 260)*

9. *Competition — Fines — Amount — Determination — Criteria — Attenuating circumstances — Termination of the infringement after the Commission's intervention — Need for a causal link (Council Regulation No 17, Art. 15(2); Commission Communication No 98/C 9/03, para. 3) (see paras 288-292)*

10. *Competition — Fines — Amount — Determination — Criteria — Gravity of the infringements — Respective roles of the undertakings involved in the infringements (Council Regulation No 17, Art. 15) (see para. 316)*

11. *Competition — Fines — Amount — Determination — Criteria — Financial situation of the undertaking concerned — May be taken into consideration — Whether obligatory — No such obligation (Council Regulation No 17, Art. 15) (see para. 333)*

12. *Competition — Fines — Amount — Determination — Criteria — Taking into account of the cooperation with the Commission of the undertaking charged with an offence — Concept of 'first undertaking' which cooperated (Council Regulation No 17, Art. 15(2); Commission Communication No 96/C 207/04) (see para. 362)*

13. *Competition — Fines — Amount — Limit fixed by Article 15(2) of Regulation No 17 — Implementing procedures (Council Regulation No 17, Art. 15(2)) (see paras 389-390)*

14. *Competition — Fines — Determined on the basis of an undertaking's own conduct — Effect of the fact that another trader has not been penalised — None (Council Regulation No 17, Art. 15) (see para. 397)*

15. *Competition — Fines — Discretion of the Commission — Scope — Power to determine the arrangements for payment of the fines — Imposition of default interest — Margin of discretion in fixing the rate (Council Regulation No 17, Art. 15(2) (see paras 411-412)*

Re

ACTIONS for the annulment in whole or in part of Commission Decision C(2002) 5083 final of 17 December 2002 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (Case COMP/E-2/37.667 — Speciality Graphite)

Operative part

The Court:

1. In Case T-71/03 *Tokai Carbon* v *Commission*:

   — dismisses the action;

   — orders the applicant to pay the costs.

2. In Case T-74/03 *Intech EDM BV* v *Commission*:

   — dismisses the action;

   — orders the applicant to pay the costs.

3. In Case T-87/03 *Intech EDM AG* v *Commission*:

   — sets the fine imposed on the applicant by Article 3 of Decision COMP/E-2/37.667 at EUR 420 000;

   — amends Article 3(h) of Decision COMP/E-2/37.667 so that the joint and several liability of Intech EDM AG is limited to EUR 420 000;

   — dismisses the remainder of the action;

   — orders the applicant to bear two thirds of its own costs and to pay two thirds of the costs incurred by the Commission, and the Commission to bear one third of its own costs and to pay one third of the costs incurred by the applicant.

4. In Case T-91/03 *SGL Carbon* v *Commission*:

— sets the fine imposed on the applicant by Article 3 of Decision COMP/E-2/37.667 at EUR 9 641 970 in respect of the infringement committed in the isostatic graphite sector;

— dismisses the remainder of the action;

— orders the applicant to bear two thirds of its own costs and to pay two thirds of the costs incurred by the Commission, and the Commission to bear one third of its own costs and to pay one third of the costs incurred by the applicant.

Order of the Court of First Instance (Second Chamber, Extended Composition) of 20 September 2005 — Makro Cash & Carry Nederland v Commission

(Case T-258/99)

State aid — Commission notice on the de minimis rule for State aid — Service stations — Risk of cumulation of aid — Aid covered by the notice — Interest in bringing proceedings

Actions for annulment — Interest in bringing proceedings — Need for a vested and current interest — Commission decision holding aid to be incompatible with the common market and ordering its abolition — Recipient relieved of obligation to repay by the application of the de minimis rule (Art. 230 EC) (see paras 35-40)