Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber, Extended Composition)

2 October 2024*

(Competition – Agreements, decisions and concerted practices – Metal packaging market – Decision finding an infringement of Article 101 TFEU – Cooperation between the Commission and the national competition authorities – Initiation of an investigation procedure by the Commission at the request of a national competition authority – Period for re-allocation – Obligation to state reasons – Legitimate expectations – Principle of subsidiarity – Rights of the defence – Proportionality – Principle of good administration – Counterclaim for re-evaluation of the amount of the fine following a settlement procedure)

In Case T-587/22,

Crown Holdings, Inc., established in Yardley, Pennsylvania (United States),

Crown Cork & Seal Deutschland Holdings GmbH, established in Seesen (Germany),

represented by A. Burnside, C. Graf York von Wartenburg, A. Kidane and D. Strohl, lawyers,

applicants,

v

European Commission, represented by B. Ernst, A. Keidel and L. Wildpanner, acting as Agents,

defendant,

supported by

Federal Republic of Germany, represented by J. Möller and R. Kanitz, acting as Agents,

intervener,

THE GENERAL COURT (Second Chamber, Extended Composition),

composed of A. Marcoulli, President, J. Schwarcz, V. Tomljenović, R. Norkus (Rapporteur) and W. Valasidis, Judges,

Registrar: I. Kurme, Administrator,

having regard to the written part of the procedure,

* Language of the case: English.

further to the hearing on 20 March 2024,

gives the following

Judgment [1]

1 By their action under Article 263 TFEU, the applicants, Crown Holdings, Inc. and Crown Cork & Seal Deutschland Holdings GmbH, seek the annulment of Commission Decision C(2022) 4761 final of 12 July 2022 relating to a proceeding under Article 101 TFEU (Case AT.40522 – Metal packaging) ('the contested decision') in so far as it relates to them. The European Commission submits a counterclaim for the amount of the fine imposed on the applicants to be increased.

I. Background to the dispute

2 The applicants are companies operating in the sector of metal packaging, including metal cans and metal closures.

3 In March 2015, the Bundeskartellamt (Federal Cartel Office, Germany) opened an investigation into several companies in the sector, including the applicants.

4 Following a request by the Federal Cartel Office to investigate the present case, on 19 April 2018 the Commission adopted Decision C(2018) 2466 final on the initiation of proceedings in Case AT. 40522 – Pandora ('the decision to initiate proceedings').

5 On 25 April 2018, the Commission received a leniency application from the applicants.

6 On 23 March 2021, the Commission invited the applicants and the other group concerned by the infringement to participate in settlement discussions.

7 By decision of 1 October 2021, the proceedings were closed in respect of all the territories of the European Economic Area (EEA), with the exception of Germany.

8 The applicants submitted a formal request to settle, in which they, first, acknowledged their liability for the infringement and, second, indicated the maximum amount of the fine they expected to be imposed on them and which they would accept in the framework of a settlement procedure.

9 On 19 May 2022, the Commission sent a statement of objections to the applicants, who responded by confirming that the facts and legal assessment of the infringement as relied on by the Commission reflected the content of their settlement submissions and that they remained committed to following the settlement procedure.

10 On 12 July 2022, the Commission adopted the contested decision. It held in particular that the applicants had participated in a single and continuous infringement of Article 101 TFEU in the sector of metal packaging in Germany from 11 March 2011 to 18 September 2014 and ordered the applicants to pay a fine of EUR 7 670 000.

[1] Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

11 That amount takes account of a 50% reduction in the fine granted to the applicants on the basis of the Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17) and a reduction of 10% under the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (OJ 2008 C 167, p. 1; 'the settlement notice').

...

III. Law

A. The application for annulment

15 As a preliminary point, it should be noted first that Article 105(1) TFEU entrusts the Commission with the task of ensuring the application of Articles 101 and 102 TFEU.

16 The Commission is thus responsible for defining and implementing, in accordance with the case-law, the competition policy of the European Union (see judgment of 16 October 2013, *Vivendi* v *Commission*, T-432/10, not published, EU:T:2013:538, paragraph 22 and the case-law cited).

17 In accordance with those principles, the Commission was entrusted by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1), irrespective of how the case was brought to its attention, namely following a complaint or acting on its own initiative, with the power to decide whether conduct should be the subject of proceedings, a decision finding that an infringement has been committed and of a remedy, including a fine, depending on the priorities it defines within the framework of EU competition policy. The same applies also where, as in the present case the Commission has acted on the case at the request of a national competition authority.

18 Second, Regulation No 1/2003 puts an end to the previous centralised regime and, in accordance with the principle of subsidiarity, establishes a wider association of national competition authorities, authorising them to implement EU competition law for this purpose. The scheme of the regulation relies on the close cooperation to be built up between the Commission and the competition authorities of the Member States organised as a network (judgment of 16 June 2015, *FSL and Others* v *Commission*, T-655/11, EU:T:2015:383, paragraph 75).

19 Third, it is clear from Article 11(6) of Regulation No 1/2003 that the Commission retains a leading role in investigating and finding infringements of the EU competition rules, which is not affected by the parallel powers of the national competition authorities under that regulation (judgment of 13 July 2011, *ThyssenKrupp Liften Ascenseurs* v *Commission*, T-144/07, T-147/07 to T-150/07 and T-154/07, EU:T:2011:364, paragraph 76).

20 Pursuant to Article 11(6) of Regulation No 1/2003, where the Commission initiates proceedings against one or more undertakings for an alleged infringement of Article 101 or 102 TFEU, the competition authorities of the Member States are relieved of their competence to bring proceedings against the same undertakings for the same, allegedly anticompetitive, practices occurring on the same product and geographical market or markets during the same period or periods (judgments of 25 February 2021, *Slovak Telekom*, C-857/19, EU:C:2021:139, paragraph 30, and of 20 April 2023, *Amazon.com and Others* v *Commission*, C-815/21 P,

EU:C:2023:308, paragraph 27). The Commission retains the option of initiating proceedings even where a national authority is already acting in the matter, subject only to consultation of that authority (judgment of 8 March 2007, *France Télécom* v *Commission*, T-339/04, EU:T:2007:80, paragraph 80).

21 Fourth, it should be recalled that, according to paragraph 4 of the Commission Notice on cooperation within the Network of Competition Authorities (OJ 2004 C 101, p. 43; 'the cooperation notice'), consultations and exchanges within the network formed by the competition authorities are matters between public enforcers, and, according to paragraph 31 thereof, the notice does not create individual rights for the companies involved to have the case dealt with by a particular authority. More generally, neither Regulation No 1/2003 nor that notice creates rights or expectations for an undertaking to have its case dealt with by a particular competition authority (see judgment of 17 December 2014, *Si.mobil* v *Commission*, T-201/11, EU:T:2014:1096, paragraph 39 and the case-law cited, and order of 14 October 2021, *Amazon.com and Others* v *Commission*, T-19/21, EU:T:2021:730, paragraph 48 and the case-law cited).

22 As set out in paragraph 5 of the cooperation notice, each network member retains full discretion in deciding whether or not to investigate a case and paragraph 55 provides, in accordance with Article 11(6) of Regulation No 1/2003, that the Commission must inform the national authority dealing with a case of the reasons why it decides to take over the case.

23 As regards the re-allocation of cases among competition authorities, paragraph 18 of the cooperation notice states that 'where case re-allocation issues arise, they should be resolved swiftly, normally within a period of two months, starting from the date of the first information sent to the network pursuant to Article 11 of [Regulation No 1/2003]' and that 'during this period, competition authorities will endeavour to reach an agreement on a possible re-allocation and, where relevant, on the modalities for parallel action.'

24 Paragraph 19 of the cooperation notice provides as follows:

'… the competition authority or authorities that is/are dealing with a case at the end of the re-allocation period should continue to deal with the case until the completion of the proceedings. Re-allocation of a case after the initial allocation period of two months should only occur where the facts known about the case change materially during the course of the proceedings.'

25 Lastly, paragraph 54 of the cooperation notice relates specifically to the situation in which the Commission initiates proceedings on the basis of Article 11(6) of Regulation No 1/2003 after 'one or more [national competition authorities] have informed the network … that they are acting on a given case'. That paragraph states that 'during the initial allocation period', namely the 'indicative time period of two months' referred to in paragraph 18 of the same notice, the Commission can initiate proceedings on the basis of that provision after having consulted the authorities concerned. In addition, it states that 'after the allocation phase' the Commission will in principle apply that provision only in certain situations, namely where network members envisage conflicting decisions in the same case (paragraph 54(a)); where they envisage a decision which is obviously in conflict with consolidated case-law (paragraph 54(b)); where a member(s) is (or are) unduly drawing out proceedings in the case (paragraph 54(c)); in order to develop EU competition policy in particular when a similar competition issue arises in several Member States or to ensure effective enforcement (paragraph 54(d)); or even where the national competition authorities concerned do not object (paragraph 54(e)).

26 It is on the basis of the foregoing that the applicants' pleas must be assessed.

27 In the present case, the applicants point out that they are not challenging the content of the contested decision, which they accepted in the context of the settlement proceedings. They state that the application relates solely to the procedural irregularities which led to the re-allocation of the case to the Commission and ultimately the adoption of that decision.

28 The applicants put forward six pleas in law in support of their action. The first plea alleges infringement of the principles set out in the cooperation notice. The second plea alleges infringement of the principle of protection of legitimate expectations and an inadequate statement of reasons for the contested decision. The third plea alleges infringement of the principle of subsidiarity. The fourth plea alleges infringement of the rights of the defence. The fifth plea alleges infringement of the principle of proportionality. The sixth plea alleges infringement of the principle of good administration.

29 It is appropriate to consider together the first and second pleas, then the other pleas in the order in which they were presented.

1. The first and second pleas, alleging infringement of the cooperation notice and of the principle of the protection of legitimate expectations as well as infringement of the obligation to state reasons

30 The applicants maintain, in essence, first, that the Commission is bound by the cooperation notice, which gives rise to a legitimate expectation and, second, that the Commission failed to state reasons for its decision to depart from the initial period for re-allocation provided for in that notice.

(a) The argument that the Commission is bound by the cooperation notice, which gives rise to a legitimate expectation

31 The applicants' arguments divide, essentially, into three parts. The first concerns whether the Commission is bound by the cooperation notice. The second seeks to determine whether paragraphs 18 and 19 of that notice gave rise to a legitimate expectation that any re-allocation of the case would take place within a period of two months and the third consists in determining whether there were in the present case reasons to depart from that period.

(1) First part: the Commission is bound by the cooperation notice

32 The applicants maintain that it follows from case-law that, in adopting rules of conduct such as those set out in the cooperation notice, the Commission imposes a limit on its discretion and cannot depart from its rules under pain of being found, where appropriate, to be in breach of the general principles of law such as the protection of legitimate expectations.

33 The Commission and the Federal Republic of Germany dispute the applicants' arguments.

34 In that regard, it should be recalled that, according to the Court of Justice, the 'C' series of the *Official Journal of the European Union* is, by contrast with the 'L' series, not intended for the publication of legally binding measures, but only of information, recommendations and opinions concerning the European Union (judgments of 12 May 2011, *Polska Telefonia Cyfrowa*, C-410/09,

EU:C:2011:294, paragraph 35, and of 13 December 2012, *Expedia*, C-226/11, EU:C:2012:795, paragraph 30). The Notice on Cooperation, adopted in the context of the European Cooperation Network, was published in 2004 in the 'C' series of the Official Journal (judgment of 20 January 2016, *DHL Express (Italy) and DHL Global Forwarding (Italy)*, C-428/14, EU:C:2016:27, paragraph 34).

35 However, it is clear from case-law that where the Commission adopts rules of conduct and announces by publishing them that they will henceforth apply to the cases to which they relate, it imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations (judgment of 16 February 2017, *H&R ChemPharm* v *Commission*, C-95/15 P, not published, EU:C:2017:125, paragraph 57).

36 As the applicants point out, the General Court recently stated that that case-law applied to the cooperation notice, by which the Commission restricted itself in the exercise of its discretionary power in the handling of complaints by laying down guidance seeking to clarify, inter alia, the conditions under which either the Commission or a single national competition authority, or several national competition authorities, is or are best placed to examine a complaint (judgment of 9 February 2022, *Sped-Pro* v *Commission*, T-791/19, EU:T:2022:67, paragraph 40).

37 The Commission considers, however, that the cooperation notice differs from other notices because it deals only with relations between competition authorities. Furthermore, the judgment of 9 February 2022, *Sped-Pro* v *Commission* (T-791/19, EU:T:2022:67), is not relevant for the present case since it deals with the 'handling of complaints' under Article 7 of Regulation No 1/2003 and Article 7 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101] and [102 TFEU] (OJ 2004 L 123, p. 18), and not with the re-allocation of cases or a decision establishing an infringement of competition rules. The underlying concern in the case that gave rise to that judgment was to avoid a situation in which a complaint would not be examined, while the applicants are arguing in the present case that the Commission ought to be prevented from enforcing Article 101 TFEU instead of the Federal Cartel Office, for the sole reason that the initial allocation period had expired. That would run counter to the objective pursued by that judgment, namely that the competition rules should be enforced effectively. In addition, the cooperation notice dealt with the handling of complaints essentially in paragraphs 20 to 25, 35 and 36, which is not at issue in the present case.

38 However, in that regard, it should be noted that the distinction raised by the Commission between the situation where a case has been brought following a complaint and the situation where it has acted on a case on its own initiative – and, a fortiori, as in the present case, following a request to do so from the Federal Cartel Office – is not relevant.

39 The judgment of 9 February 2022, *Sped-Pro* v *Commission* (T-791/19, EU:T:2022:67), concerns the risk of infringement of a complainant's rights if a complaint is rejected.

40 However, the cooperation notice deals both with situations where the case has been brought following a complaint and with cases where a competition authority has acted on its own initiative.

41 In particular, paragraphs 18 and 19 of the cooperation notice, which relate to matters of re-allocation and where the applicants rely on an infringement, make no distinction according to whether the case in question is an own-initiative investigation or follows a complaint.

42 It must therefore be held that, despite the fact that exchanges within the network are matters between competition authorities acting in the public interest and do not alter any rights or obligations arising for companies (paragraph 4 of the cooperation notice), the Commission, in adopting that notice, did not restrict itself solely with regard to complainants but also with regard to undertakings whose activities are the subject of an investigation.

43 A failure by the Commission to comply with the rules which it has imposed on itself might accordingly lead, according to the case-law recalled in paragraph 35 above, to a breach of general principles such as the protection of legitimate expectations, which the applicants have claimed in the present case and which is the subject of the second and third parts below.

(2) Second part: paragraphs 18 and 19 of the cooperation notice gave rise to a legitimate expectation

44 The applicants' view is that the rules on the re-allocation of cases set out in paragraphs 18 and 19 of the cooperation notice gave rise to a legitimate expectation that any re-allocation of the case would take place within the initial period of two months.

45 The Commission and the Federal Republic of Germany dispute the applicants' arguments.

46 In that regard, it should be recalled that, for infringement of the principle of the protection of legitimate expectations to be established, it is necessary for an EU institution, by giving a citizen precise assurances, to have led that person to entertain justified expectations. Information which is precise, unconditional and consistent, in whatever form it is given, constitutes such assurances (see judgment of 16 September 2021, *FVE Holýšov I and Others* v *Commission*, C-850/19 P, not published, EU:C:2021:740, paragraph 34 and the case-law cited).

47 However, the cooperation notice provides no precise assurance that the period for re-allocation would not exceed a period of two months.

48 First, since re-allocation ought, according to paragraph 18 of the cooperation notice (see paragraph 23 above), 'normally' to take place within a period of two months, it is clear from that wording that that period is not mandatory. In addition, that paragraph is not, in any event, relevant in the light of the circumstances of the present case, since the parties agree that the Federal Cartel Office and the Commission did not need – to use the words of that provision – to 'endeavour to reach an agreement on a possible re-allocation' in order for 'case re-allocation issues' to be 'resolved' but the Commission initiated proceedings at the request of the Federal Cartel Office.

49 Second, it should be noted that the applicants rely on a strict interpretation of the second sentence of paragraph 19 of the cooperation notice recalled in paragraph 24 above. According to the applicants, the term 'facts known about the case' covers only the facts which are relevant for assessing whether an infringement of competition rules has taken place, not developments which occurred during, and may have an impact on, subsequent administrative proceedings.

50 However, according to settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (see judgment of 27 January 2021, *De Ruiter*, C-361/19, EU:C:2021:71, paragraph 39 and the case-law cited).

51 Accordingly, the interpretation proposed by the applicants cannot be adopted, since it runs contrary to the interpretation of paragraph 19 of the cooperation notice in the light of the context in which it occurs. It is clear from the various situations listed in paragraph 54 of that notice (see paragraph 25 above) that various grounds may justify the Commission initiating proceedings under Article 11(6) of Regulation No 1/2003. Since those situations go beyond the facts which are relevant for assessing whether an infringement of competition rules has taken place, the concept of 'the facts known about the case chang[ing] materially during the course of the proceedings' must be interpreted as covering any relevant fact that comes to light during the proceedings.

52 It is therefore necessary to reject the applicants' argument that paragraphs 18 and 19 of the cooperation notice gave rise to legitimate expectations that any re-allocation would take place within a period of two months.

...

2. Third plea: infringement of the principle of subsidiarity

73 The applicants refer inter alia to the case-law according to which Regulation No 1/2003, in accordance with the principle of subsidiarity, establishes a wider association of national competition authorities. The Commission is accordingly under an obligation to comply with the principle of subsidiarity in the exercise of its discretionary powers under Regulation No 1/2003. It was therefore inappropriate for the Commission to exercise its discretionary powers to accept the re-allocation of the case in order to circumvent the German rules.

74 The Commission and the Federal Republic of Germany dispute the applicants' arguments.

75 Under the principle of subsidiarity, as enshrined in Article 5(3) TEU, in areas which do not fall within its exclusive competence, the European Union is to act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at EU level.

76 Recital 34 of Regulation No 1/2003 provides that 'in accordance with the principles of subsidiarity and proportionality as set out in Article 5[(1) and (3) TEU], this Regulation does not go beyond what is necessary in order to achieve its objective, which is to allow the [EU] competition rules to be applied effectively'.

77 The General Court has already held that the principle of subsidiarity did not call into question the powers conferred on the Commission by the TFEU, which include the power to apply the competition rules (judgment of 8 March 2007, *France Télécom* v *Commission*, T-339/04, EU:T:2007:80, paragraph 89).

78 As was noted in paragraphs 18 and 19 above, while Regulation No 1/2003 put an end to the previous centralised regime and, in accordance with the principle of subsidiarity, establishes a wider association of national competition authorities, the Commission retains a leading role in investigating and taking action against infringements.

79 Accordingly, as was stated in paragraph 20 above, Article 11(6) of Regulation No 1/2003 provides that, subject only to consultation of the national authority concerned, the Commission retains the option of initiating proceedings for the adoption of a decision, even where a national authority is already acting on the case.

80 In the present case, as stated in recital 11 of the contested decision, since the Commission had initiated proceedings at the request of the Federal Cartel Office, the condition laid down in Article 11(6) of Regulation No 1/2003 was fully satisfied. Such initiation did not therefore undermine the prerogatives of the Member State concerned and any infringement of the principle of subsidiarity is necessarily ruled out.

81 The third plea, alleging infringement of the principle of subsidiarity, must therefore be rejected.

...

B. The Commission's counterclaim

114 According to the Commission, the additional administrative burden caused by the applicants after the settlement was reached makes it necessary to re-evaluate the amount of the fine imposed on them. The applicants put forward only pleas in law by which they challenge the Commission's competence to conduct the administrative procedure at issue, despite the fact that, in the context of their settlement submissions, they stated that they would accept the Commission imposing a fine on them. The Commission's view is that the 10% reduction in the fine under point 32 of the settlement notice is no longer justified, and therefore requests the General Court, in the exercise of its unlimited jurisdiction, to set the fine imposed on the applicants at EUR 9 588 000. In the alternative, the Commission proposes that account be taken of the fact that the settlement procedure in the present case contributed only to a much more limited extent than usual to the preservation of public resources and contends that that would not justify a full reduction of 10% of the amount of the fine.

115 The applicants dispute the Commission's arguments. In particular, in their view, there is no legal basis for the withdrawal of the settlement discount.

116 It is therefore necessary to determine, first, whether the General Court has jurisdiction to withdraw the settlement discount, which would amount to increasing the fine, and then to assess the substance of the Commission's counterclaim.

1. Jurisdiction of the General Court

117 It should be recalled that the review of legality is supplemented by the unlimited jurisdiction which the EU Courts were afforded by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU. That jurisdiction empowers the EU Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or periodic penalty payment imposed (see

judgments of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 63 and the case-law cited, and of 18 October 2023, *Clariant and Clariant International* v *Commission*, T-590/20, EU:T:2023:650, paragraph 185 and the case-law cited).

118 Although the exercise of unlimited jurisdiction is most often requested by applicants in the sense of a reduction of the fine, there is nothing preventing the Commission from also referring to the EU Courts the question of the amount of the fine and from applying to have that fine increased (judgment of 8 October 2008, *Schunk and Schunk Kohlenstoff-Technik* v *Commission*, T-69/04, EU:T:2008:415, paragraph 244, and of 18 October 2023, *Clariant and Clariant International* v *Commission*, T-590/20, EU:T:2023:650, paragraph 221).

119 That unlimited jurisdiction also applies in a situation where, as in the present case, the applicants are not requesting, in the alternative, a reduction in the amount of the fine which has been imposed on them. Article 31 of Regulation No 1/2003, which expressly provides that the EU Courts may 'cancel, reduce or increase the fine' when reviewing decisions whereby the Commission has set a fine, does not make such jurisdiction conditional upon such a request.

120 The applicants' plea of inadmissibility in respect of the Commission's counterclaim must therefore be dismissed.

2. The substance of the counterclaim

(a) Preliminary observations

121 In the first place, the General Court outlined the essential features of the settlement procedure in paragraphs 58 to 74 of the judgment of 20 May 2015, *Timab Industries and CFPR* v *Commission* (T-456/10, EU:T:2015:296) and more recently in paragraphs 208 to 216 of the judgment of 18 October 2023, *Clariant and Clariant International* v *Commission* (T-590/20, EU:T:2023:650).

122 It is apparent from that case-law that the settlement procedure enables the Commission to handle cartel cases faster and more efficiently. The aim of that procedure is to simplify and speed up administrative procedures, in order to enable the Commission to handle more cases with the same resources (judgments of 20 May 2015, *Timab Industries and CFPR* v *Commission*, T-456/10, EU:T:2015:296, paragraph 60, and of 18 October 2023, *Clariant and Clariant International* v *Commission*, T-590/20, EU:T:2023:650, paragraph 209).

123 The settlement procedure is conducted, in essence, in the following manner. The procedure is initiated by the Commission with the agreement of the undertakings concerned (settlement notice, points 5, 6 and 11). Once the procedure is initiated, undertakings which are subject to investigations and which take part in the settlement procedure are informed by the Commission, during bilateral discussions, of the essential elements 'such as the facts alleged, the classification of those facts, the gravity and duration of the alleged cartel, the attribution of liability, an estimation of the range of likely fines, as well as the evidence used to establish the potential objections' (settlement notice, point 16). That mechanism enables the parties effectively to assert their views on the potential objections which the Commission could raise against them and allows them to make an informed decision on whether or not to settle (settlement notice, point 16).

124 Once that information has been communicated, the undertakings concerned may opt for the settlement procedure and put forward a settlement submission. That settlement submission must contain, in particular, an acknowledgement in clear and unequivocal terms of the parties' liability for the infringement; an indication of the maximum amount of the fine the parties foresee to be imposed by the Commission and which they would accept in the framework of a settlement procedure; and confirmation that they do not envisage requesting access to the file or requesting to be heard again in an oral hearing, unless the Commission does not reflect their settlement submissions in the statement of objections and the decision (settlement notice, point 20).

125 Once the undertakings concerned have acknowledged their liability and provided the confirmations, the Commission sends them the statement of objections and adopts a final decision. That decision is based, in essence, on the fact that the parties have unequivocally acknowledged their liability, have not disputed the statement of objections, and have remained committed to achieving a settlement (settlement notice, points 23 to 28).

126 In its final decision, the Commission may decide to reward a party for reaching a settlement, by reducing by 10% the amount of the fine to be imposed (settlement notice, point 32).

127 In the second place, as regards the Commission's counterclaim, while, as is clear from the case-law referred to in paragraph 118 above, the Commission may request the General Court to increase the amount of the fine, it should be noted that, to that end, it must enable the Court to ascertain whether the circumstances of the case in point warrant such an increase (see, to that effect, judgments of 9 July 2003, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, T-224/00, EU:T:2003:195, paragraph 362, and of 8 October 2008, *Schunk and Schunk Kohlenstoff-Technik* v *Commission*, T-69/04, EU:T:2008:415, paragraph 251).

128 In particular, it is incumbent on the Commission to demonstrate that the increase in the amount of the fine is appropriate, inter alia in the light of the facts and circumstances that arose during the proceedings, and of which it was unaware at the time it adopted the decision setting the amount of the fine (see, to that effect, judgments of 5 October 2011, *Transcatab* v *Commission*, T-39/06, EU:T:2011:562, paragraph 402 and of 18 October 2023, *Clariant and Clariant International* v *Commission*, T-590/20, EU:T:2023:650, paragraph 222). It is important to ascertain whether the applicant's conduct made it necessary for the Commission, contrary to any expectation which it might reasonably have based on that party's cooperation in the administrative procedure, to draw up and submit a defence to the Court which focused on arguments which it was entitled to consider that that party would no longer call in question (see, to that effect, judgment of 14 December 2006, *Raiffeisen Zentralbank Österreich and Others* v *Commission*, T-259/02 to T-264/02 and T-271/02, EU:T:2006:396, paragraph 573).

(b) Examination of the Commission's counterclaim

129 In the present case, the Commission contends that the increase in the fine is appropriate, first, because the applicants cannot call into question before the General Court the Commission's competence in conducting the administrative proceedings in the present case when the applicants had acknowledged that competence in their request to settle and, second, because the present case entails an additional administrative burden.

130 In the first place, it is necessary to determine whether the Commission established to the requisite legal standard that during the administrative proceedings the applicants had acknowledged its competence in place of that of the Federal Cartel Office.

131 First, while the Commission has argued, since the defence, that the applicants had, in essence, acknowledged that competence during the administrative proceedings, it has not provided, or offered to provide, any evidence that would establish their alleged recognition of that competence during the settlement procedure, whether in the defence or in the rejoinder, whereas the very purpose of the their action is to challenge that competence.

132 It was only at the hearing that the Commission stated that it was prepared to forward to the Court, in the context of a measure of inquiry ordered under Article 92(3) and Article 103 of the Rules of Procedure of the General Court, the applicants' request to settle, since the content of the latter was very 'sensitive' and 'confidential'. According to the Commission, that request contains evidence that that competence was acknowledged.

133 In that regard, it should be recalled that Article 85(3) of the Rules of Procedure provides that 'the main parties may, exceptionally, produce or offer further evidence before the oral part of the procedure is closed or before the decision of the General Court to rule without an oral part of the procedure, provided that the delay in the submission of such evidence is justified.'

134 Likewise, Article 88(2) of the Rules of Procedure provides that where an application for measures of inquiry is made after the first exchange of pleadings, the party submitting that application must state the reasons why he or she was unable to submit it earlier.

135 In addition, in accordance with Article 92(3) of the Rules of Procedure, the party applying for a measure of inquiry under that provision must justify the need for such a measure to be in the form of an order for a measure of inquiry.

136 However, irrespective of whether the Commission's action ought to be regarded as being an offer of further evidence submitted under Article 85(3) of the Rules of Procedure or an application for measures of inquiry under Article 92(3) of those Rules, the fact remains that it has failed to provide any valid justification for the delay in its action.

137 The Commission merely referred, at the hearing, to paragraph 222 of the judgment of 18 October 2023, *Clariant and Clariant International* v *Commission* (T-590/20, EU:T:2023:650), cited in paragraph 128 above, and stated that, in the present case, when it adopted the contested decision it was unaware that the applicants would challenge its competence.

138 However, the Commission's explanation does not alter the fact that, following the applicants' action, since the defence, it has been in a position to submit any evidence, offer of further evidence or application for measures of inquiry in support of its argument concerning, in essence, the applicants' implicit acknowledgment of its competence in respect of the settlement procedure.

139 In addition, assuming that the Commission intended to rely on the judgment of 18 October 2023, *Clariant and Clariant International* v *Commission* (T-590/20, EU:T:2023:650), on the ground that it had been delivered after the defence of 7 December 2022 and the rejoinder of 5 April 2023, it must also be observed that, as is apparent from paragraph 128 above, that judgment contains no new legal assessments as regards evidence justifying a counterclaim to increase a fine capable of justifying the delay in the Commission's action. It is clear from the Court's case-law that it was incumbent on the Commission to justify its counterclaim in the light of evidence of which it was unaware when it granted the reduction of the fine (see, to that effect, judgment of 5 October 2011, *Transcatab* v *Commission*, T-39/06, EU:T:2011:562, paragraph 402).

140 Moreover, in so far as the Commission referred to Article 92(3) of the Rules of Procedure, it must be stated that it has not explained why a measure of inquiry was necessary in the present case, confining itself to a general reference to alleged reasons of confidentiality or sensitivity whereas the documents it offered to produce came from the applicants themselves.

141 The Commission's request for certain evidence to be adduced before the Court, made at the hearing on 20 March 2024, must therefore be rejected as inadmissible.

142 Second, according to the Commission, acknowledgement of its competence follows from the fact that the applicants had stated in their settlement submission that they would accept the Commission imposing on them a fine up to a certain cap.

143 Accordingly, in accordance with recital 16(a) of the contested decision, the applicants acknowledged in clear and unequivocal terms their liability, the main facts, their legal qualifications, including their role and the duration of their participation in the infringement. According to recital 16(b) of that decision, they also gave an indication of the maximum amount of the fine they foresaw to be imposed and which they would accept in the framework of a settlement procedure.

144 However, it cannot be inferred from the acknowledgment of those factors that the applicants had also acknowledged the Commission's competence, which was not provided for in the settlement notice, unlike the acknowledgment of those factors which was specifically provided for in point 20 of that notice (see paragraph 124 above).

145 It must therefore be concluded that the Commission has not established that the applicants had acknowledged its competence to conduct the administrative procedure in question.

146 Furthermore, it should be recalled that, in circumstances similar to those at issue in the present case, the Court of Justice has previously held that if, on the conclusion of the administrative proceedings following the decision to initiate proceedings, the Commission were to adopt a decision which affects the interests of a company such as the applicant, that decision could, in accordance with Article 263 TFEU, be subject to judicial review, in the course of which it would be permissible for that company to advance all the appropriate arguments. In particular, it is apparent from that provision that the competence of the authority which adopted the measure is subject to review by EU Courts in the context of such an action. It will then be for the EU Courts to assess whether in the course of the administrative proceedings anything unlawful occurred and if so whether it is such as to affect the lawfulness of the decision taken by the Commission following that procedure (order of 29 January 2020, *Silgan Closures and Silgan Holdings* v *Commission*, C-418/19 P, not published, EU:C:2020:43, paragraphs 63 and 64).

147 It follows from the above that, contrary to the Commission's arguments, the increase in the fine cannot be justified, in the circumstances of the present case, by the applicants' alleged challenge, for the first time before the General Court, regarding a fact (namely, in the present case, the competence of the Commission in place of the Federal Cartel Office's competence) which they had acknowledged during the settlement procedure before the Commission. In the present case, the Commission has failed to demonstrate that during the settlement procedure the applicants acknowledged its competence in place of the Federal Cartel Office's competence, nor even that it could reasonably suppose that the applicants would not challenge that competence, especially following the disputes referred to in paragraph 146 above and brought by the other group concerned by the infringement.

148 In the second place, it is appropriate to consider the Commission's alternative line of argument, that bringing the present action jeopardised the procedural gains it had derived from the settlement procedure.

149 In that regard, it is apparent from recital 16 of the contested decision that the applicants acknowledged their liability and gave an indication of the maximum amount of the fine they would accept (see paragraph 143 above) and that they confirmed they had been sufficiently informed of the objections the Commission envisaged raising against them, and that they had been given sufficient opportunity to make their views known to the Commission (recital 16(c)). They also stated that they did not envisage requesting access to the file or to be heard again in an oral hearing (recital 16(d)) and they gave their agreement to receive the statement of objections and the final decision in English (recital16(e)).

150 Accordingly, contrary to its assertions, the Commission's benefited from procedural gains, which remain vested, irrespective of the present action being brought (see, to that effect, judgment of 18 October 2023, *Clariant and Clariant International* v *Commission* (T-590/20, EU:T:2023:650, paragraph 237). The mobilisation of Commission resources for the purposes of defending the contested decision before the General Court is an integral feature of any judicial proceedings and does not undermine those procedural gains, since, in the present case the applicants do not intend to revisit the factors referred to in paragraph 149 above, which they acknowledged in the context of the settlement procedure, rather they merely dispute the competence of the Commission in place of the competence of the Federal Cartel Office.

151 It follows from the above that, in the specific circumstances of the present case, the increase in the fine requested by the Commission cannot be justified either by the alleged loss of procedural gains or by the alleged additional administrative burden caused by the present action having been brought.

152 The Commission's counterclaim, including the request made in the alternative, must therefore be dismissed.

...

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Dismisses the European Commission's counterclaim;

3. Orders Crown Holdings, Inc. and Crown Cork & Seal Deutschland Holdings GmbH to bear their own costs and to pay 90% of the costs incurred by the Commission;

4. Orders the Commission to bear 10% of its own costs;

5. Orders the Federal Republic of Germany to bear its own costs.

Marcoulli Schwarcz Tomljenović

Norkus Valasidis

Delivered in open court in Luxembourg on 2 October 2024.

[Signatures]