Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

15 July 2015*

(Competition — Agreements, decisions and concerted practices — European prestressing steel market — Price fixing, market sharing and exchanging of sensitive commercial information — Decision finding an infringement of Article 101 TFEU — Cooperation during the administrative procedure — Article 139(a) of the Rules of Procedure of the General Court)

In Case T-406/10,

Emesa-Trefilería SA, established in Arteixo (Spain),

Industrias Galycas SA, established in Vitoria (Spain),

represented by A. Creus Carreras and A. Valiente Martin, lawyers,

applicants,

v

European Commission, represented initially by V. Bottka and F. Castilla Contreras, and subsequently by V. Bottka and A. Biolan, acting as Agents, and by M. Gray, Barrister,

defendant,

supported by

Council of the European Union, represented by F. Florindo Gijón and R. Liudvinaviciute-Cordeiro, acting as Agents,

intervener,

APPLICATION for annulment and alteration of Commission Decision C(2010) 4387 final of 30 June 2010 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (case COMP/38344 — Prestressing Steel), amended by Commission Decision C(2010) 6676 final of 30 September 2010, and by Commission Decision C(2011) 2269 final of 4 April 2011,

THE GENERAL COURT (Sixth Chamber),

composed of S. Frimodt Nielsen (Rapporteur), President, F. Dehousse and A.M. Collins, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written procedure and further to the hearing on 26 June 2014,

* Language of the case: English.

gives the following

Judgment[1] *[omissis]*

Findings of the Court

113 The first plea in law alleges, in essence, that the procedure followed concerning infringements of competition law is illegal in the light of Article 6 of the ECHR and Article 47 of the Charter of Fundamental Rights, in so far as, since a procedure of a criminal nature is involved, the Commission cannot be entrusted simultaneously with the functions of investigator, prosecutor and decision-maker by which it imposes a penalty without the Court's exercising full review over those decisions, which, the applicants claim, is not the case.

Outline of the principles

114 It should be recalled that, in its judgment in *Schindler Holding and Others* v *Commission*, paragraph 69 above (EU:C:2013:522), the Court held as follows:

'33. … [c]ontrary to the appellants' submissions, the fact that decisions imposing fines in competition matters are adopted by the Commission is not in itself contrary to Article 6 of the ECHR as interpreted by the European Court of Human Rights. It is to be noted in this connection that, in its judgment in A. Menarini Diagnostics v. Italy, relating to a penalty imposed by the Italian competition authority for anti-competitive practices similar to those of which the appellants were accused, the European Court of Human Rights considered that, given that the fine imposed was high, the penalty, because of its severity, fell within the criminal sphere.

34. It pointed out, however, in paragraph 58 of that judgment, that, entrusting the prosecution and punishment of breaches of the competition rules to administrative authorities is not inconsistent with the ECHR in so far as the person concerned has an opportunity to challenge any decision made against him before a tribunal that offers the guarantees provided for in Article 6 of the ECHR.

35. In paragraph 59 of its judgment in A. Menarini Diagnostics v. Italy, the European Court of Human Rights explained that, in administrative proceedings, the obligation to comply with Article 6 of the ECHR does not preclude a "penalty" from being imposed by an administrative authority in the first instance. For this to be possible, however, decisions taken by administrative authorities which do not themselves satisfy the requirements laid down in Article 6(1) of the ECHR must be subject to subsequent review by a judicial body that has full jurisdiction. The characteristics of such a body include the power to quash in all respects, on questions of fact and law, the decision of the body below. The judicial body must in particular have jurisdiction to examine all questions of fact and law relevant to the dispute before it.

36. Ruling on the principle of effective judicial protection, a general principle of EU law to which expression is now given by Article 47 of the Charter [of Fundamental Rights] and which corresponds, in EU law, to Article 6(1) of the ECHR, the Court of Justice has held that, in addition to the review of legality provided for by the FEU Treaty, the European Union judicature has the unlimited jurisdiction which it is afforded by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU, and which empowers it to substitute its own appraisal for the

1 — Only the paragraphs of this judgment which the Court considers it appropriate to publish are reproduced here.

Commission's and, consequently, to cancel, reduce or increase the fine or periodic penalty payment imposed ([judgment of 8 December 2001 in *Chalkor* v *Commission*, C-386/10 P, ECR, EU:C:2011:815],paragraph 63).

37. As regards the review of legality, the Court has pointed out that the European Union judicature must carry it out on the basis of the evidence adduced by the applicant in support of the pleas in law put forward and that it cannot use the Commission's margin of discretion — either as regards the choice of factors taken into account in the application of the criteria mentioned in the 1998 Guidelines or as regards the assessment of those factors — as a basis for dispensing with the conduct of an in-depth review of the law and of the facts ([judgment in] *Chalkor* v *Commission*, [EU:C:2011:815], paragraph 62).

38. As the review provided for by the Treaties involves review by the European Union judicature of both the law and the facts, and means that it has the power to assess the evidence, to annul the contested decision and to alter the amount of a fine, the Court has concluded that the review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation No 1/2003, is not contrary to the requirements of the principle of effective judicial protection which is currently set out in Article 47 of the Charter [of Fundamental Rights] ([judgment in] *Chalkor* v *Commission* [EU:C:2011:815], paragraph 67).'

115 Moreover, the failure to review the whole of the contested decision of the court's own motion does not contravene the principle of effective judicial protection. Compliance with that principle does not require that the General Court — which is indeed obliged to respond to the pleas in law raised and to carry out a review of both the law and the facts — should be obliged to undertake of its own motion a new and comprehensive investigation of the file (judgments of 8 December 2011 in *Chalkor* v *Commission* in C-386/10 P, ECR, EU:C:2011:815, paragraph 66, and of 26 October 2013 in *Kone and Others* v *Commission*, C-510/11 P, EU:C:2013:696, paragraph 32).

116 As regards the relative scope of judgments by which measures are annulled, the Court of Justice has repeatedly held that a decision adopted in a competition matter with respect to several undertakings, although drafted and published in the form of a single decision, must be seen as a set of individual decisions finding that each of the addressees is guilty of the infringement or infringements of which they are accused and imposing on them, where appropriate, a fine (judgments of 14 September 1999 in *Commission* v *AssiDomän Kraft Products and Others*, C-310/97 P, ECR, EU:C:1999:407, paragraph 49 et seq., and of 15 October 2002 in *Limburgse Vinyl Maatschappij and Others* v *Commission*, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, ECR, EU:C:2002:582, paragraph 100).

117 In its judgment of 11 July 2013 in *Team Relocations and Others* v *Commission* (C-444/11 P, EU:C:2013:464), the Court of Justice held that if an addressee of a decision decides to bring an action for annulment, the matter to be tried by the European Union judicature relates only to those aspects of the decision which concern that addressee, whereas aspects concerning other addressees do not form part of the matter to be tried by the Union judicature, subject however to particular circumstances and it referred in that regard to its judgment of 22 January 2013 in *Commission* v *Tomkins* (C-286/11 P, ECR, EU:C:2013:29, paragraphs 43 and 49).

118 As to the remainder, the decision remains therefore binding on those addressees which have not applied for its annulment (see, to that effect, judgment in *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 116 above, EU:C:2002:582, paragraph 100).

119 Moreover, it has been held that the procedural guarantees which must attach to the procedure followed in cases of infringement of the rules on competition do not require the Commission to adopt an internal organisation precluding the same official from acting as investigator and rapporteur in the same case (see judgment of 11 March 1999 in *Aristrain* v *Commission*, T-156/94, ECR, EU:T:1999:53, paragraph 26 and the case-law cited).

120 The Court of Justice has moreover held that there was nothing to prevent the members of the Commission who were responsible for taking a decision imposing fines from being informed of the outcome of the hearing by such persons as the Commission had appointed to conduct it (judgment of 15 July 1970 in *Buchler* v *Commission*, 44/69, ECR, EU:C:1970:72, paragraphs 19 to 23).

The merits of the first plea in law

121 On 18 December 2013, by way of measures of organisation of procedure under Article 64 of the Rules of Procedure of 2 May 1991, the Court decided to put a written question to the applicants concerning the possible consequences of the judgment in *Schindler Holding and Others* v *Commission*, paragraph 69 above (EU:C:2013:522), on the first plea in law raised in support of the action. The applicants complied with that request on 30 January 2014.

122 The applicants stated on that occasion that, notwithstanding the judgment in *Schindler Holding and Others* v *Commission*, paragraph 69 above (EU:C:2013:522), they intended to maintain their first plea in law (see paragraph 111 above).

123 First, it is necessary, in the light of the case-law recalled in paragraph 114 et seq. above, to reject all the complaints alleging incompatibility with Article 6 of the ECHR and Article 47 of the Charter of Fundamental Rights of the procedure followed by the Commission as regards cartels as that procedure is laid down in Regulation No 1/2003 and alleging failure by the Court to carry out a review of unlimited jurisdiction in that area.

124 The case-law recalled in paragraph 115 above leads also to the rejection of the complaints alleging failure by the Court to review the whole of the contested decision of its own motion.

125 It is also necessary to reject the applicants' line of argument that, in essence, the absence of any *erga omnes* effects of judgments annulling an individual decision in the area of competition imposing a fine on the addressee thereof is incompatible with the requirement of full review by the Court and makes the entire procedure applied by the Commission and by the Court incompatible with the requirements of Article 6(1) of the ECHR.

126 In the first place, it must be observed that the annulment of an individual decision has an *erga omnes* effect and is binding on everyone, but, on the basis of the case-law recalled in paragraph 116 above, such annulment does not benefit everyone — unlike the annulment of an act of general application — subject however to certain particular circumstances (judgment in *Commission* v *Tomkins*, paragraph 117 above, EU:C:2013:29, paragraphs 43 and 49). A judgment annulling a decision forming part of a set of individual decisions in a procedure carried out by the Commission in the area of cartels is therefore capable, in certain circumstances, of having certain consequences for parties other than the applicant in the procedure which led to that annulment judgment.

127 In the second place, it must be stated that, in the judgment in *Schindler Holding and Others* v *Commission*, paragraph 69 above (EU:C:2013:522), the Court of Justice sought to uphold the compatibility with Article 6 of the ECHR and Article 47 of the Charter of Fundamental Rights of the entire procedure carried out, in the area of cartels, by the Commission and the General Court. That conclusion cannot therefore be called in question by the applicants' claims that the General Court does not exercise full review over the Commission's decision in the absence of any *erga omnes* effects

of its annulling judgments, since the Court of Justice must have taken into account its settled case-law recalled in paragraphs 116 to 118 above when giving judgment in *Schindler Holding and Others* v *Commission*, paragraph 69 above (EU:C:2013:522).

128 Lastly, in the third place, and in so far as is necessary, it should be recalled that, according to settled case-law, it is not in any event for the Union judicature to usurp the function of the founding authority of the Union in order to change the system of legal remedies and procedures established by the Treaty (see judgment of 21 April 2005 in *Holcim (Deutschland)* v *Commission*, T-28/03, ECR, EU:T:2005:139, paragraph 34 and the case-law cited).

129 Consequently, the complaint alleging the absence of any *erga omnes* effects of decisions by annulling judgments must be rejected.

130 Second, with respect to the line of argument put forward by the applicants in response to the written questions put by the Court, and to the questions put to them in this regard at the hearing, it must be held that it is, in any event, unfounded.

131 It must be observed that Regulation No 1/2003 does not provide that the decision bringing the administrative procedure to an end is one which might be made by the Court. That *de lege ferenda* line of argument — which the applicants moreover acknowledged at the hearing — has no basis in the legislation applicable to these proceedings and cannot therefore found an action for annulment of a Commission decision.

132 Moreover, it should be observed that, admittedly, Article 25(5) of Regulation No 1/2003 provides that the limitation period is to expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment. Furthermore, Article 25(5) specifies that the maximum period of 10 years is to be extended by the time during which limitation is suspended pursuant to Article 25(6). Article 25(6) of that regulation provides that the limitation period for the imposition of fines or periodic penalty payments is to be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Union.

133 In the present case, it is not disputed that the Commission adopted a decision imposing a fine on the applicants before the expiry of the period of 10 years laid down in Article 25(5) du Regulation No 1/2003.

134 Accordingly, to the extent that the applicants seek to claim that the limitation period has expired so far as they are concerned, the Court observes that they brought their action on 15 September 2010 and that the limitation period was therefore suspended from that date, in accordance with Article 25(6) of Regulation No 1/2003.

135 The first plea must therefore be rejected in its entirety.

[omissis]

Findings of the Court

Outline of the principles

152 It should be pointed out that, according to settled case-law, only an undertaking which has cooperated with the Commission on the basis of the Leniency Notice can be granted, under that notice, a reduction of the fine which would have been imposed without that cooperation. That reduction

cannot be extended to a company which, for part of the duration of the infringement in question, had formed part of the economic unit constituted by an undertaking, but no longer formed part of it at the time when the undertaking cooperated with the Commission. A contrary interpretation would thus mean, inter alia, that, in instances where one undertaking succeeds another, a company which participated initially in an infringement, as the parent company of a subsidiary directly involved in it, and which then transferred that subsidiary to another undertaking would benefit, as the case may be, from a fine reduction granted to the latter undertaking in respect of its cooperation with the Commission, although that company neither contributed itself to the detection of the infringement in question nor exercised decisive influence at the time of that cooperation on its former subsidiary. In the light of the objective pursued by the Leniency Notice, consisting in promoting the detection of conduct contrary to European Union competition law, and in order to ensure effective application of that law, there is nothing to justify extending a fine reduction granted to an undertaking in respect of its cooperation with the Commission to an undertaking which, whilst having controlled, in the past, the area of activity involved in the infringement in question, did not itself contribute to detection of the infringement (see, to that effect, judgments of 30 April 2014 in *FLSmidth* v *Commission*, C-238/12 P, ECR, EU:C:2014:284, paragraphs 83 and 85; of 19 June 2014 in *FLS Plast* v *Commission*, C-243/12 P, ECR, EU:C:2014:2006, paragraphs 85 and 87; and in *Hoechst* v *Commission*, paragraph 148 above, EU:T:2009:366, paragraph 76).

153 It follows from that case-law that the criterion that must be taken into consideration in order to assess whether leniency should be granted to an undertaking is its effective contribution to the detection or establishment of the infringement.

154 It also follows from that case-law that leniency is granted to an undertaking, that is to say the economic unit which exists at the time that the leniency application is submitted to the Commission.

155 The principle of effective cooperation of the undertaking is reflected in point 7 of the Leniency Notice and in point 11(a) thereof, relating to immunity from fines, according to which the undertaking is to cooperate fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure, and by the second paragraph of point 23(b) of that notice, relating to the reduction of the fine, which provides that the Commission may take into account the extent and continuity of any cooperation provided by the undertaking following the date of its submission.

156 Consequently, no reduction in the amount of the fine can be granted to an undertaking in the absence of effective cooperation on its part in establishing the infringement.

157 On that basis, the Court of Justice, in the judgments mentioned in paragraph 152 above, therefore considered that a company which, for part of the duration of the infringement in question, had formed part of the economic unit constituted by an undertaking, but no longer formed part of it at the time when the undertaking cooperated with the Commission, could not benefit from the leniency granted to the economic unit that cooperates effectively with the Commission.

158 It is also on that basis that the Court of Justice held that there is nothing to justify extending a fine reduction granted to an undertaking in respect of its cooperation with the Commission to an undertaking which, whilst having controlled, in the past, the area of activity involved in the infringement in question, did not itself contribute to detection of the infringement.

159 It must be held that exclusion — justified by the absence of any contribution to the detection of the infringement and of effective cooperation — from the benefit of leniency applies, to that extent, both in respect of a former subsidiary when a leniency application has been made by its former parent company and of a former parent company following a leniency application made by its former subsidiary.

Assessment in the present case

160 In the present case, the Court would first of all point out that the leniency application from which the applicants claim that they are entitled to benefit was made on 28 June 2007 by Arcelor España and its subsidiaries, Mittal Steel Company and its subsidiaries, including Arcelor, and Tréfileurope and its subsidiaries, that application requesting expressly that any immunity or fine reduction granted to Arcelor España also be extended to Emesa and Galycas, with Arcelor España ensuring their rights of defence, in accordance with the sale and purchase agreement between Arcelor España and Companhia Previdente.

161 However, it must be stated that, despite the explicit references to Emesa and Galycas in the leniency application of 28 June 2007, formally, they were not part of the undertaking constituted by the leniency applicants, and the applicants do not indeed claim that they were.

162 It is apparent from the case-law cited in paragraph 152 above that a company may benefit from a leniency application in respect of which it is not formally an applicant only if, at the time that that application was made, it formed part of the same undertaking as the leniency applicant.

163 In that regard, it must be stated that, since Emesa and Galycas were acquired by Companhia Previdente in 2004, they no longer formed part of Arcelor España when the latter filed its leniency application in 2007. The Commission was therefore right to find, in the contested decision, that they no longer formed part of the undertaking which submitted a leniency application to it.

164 The Court observes that the 5% reduction granted to Emesa and Galycas in respect of the information that they themselves provided to the Commission in 2002 was extended to Arcelor España because, at the time that the applicants communicated that information, Arcelor España and the applicants did indeed form part of the same undertaking.

165 Next, it is necessary to examine whether, in the light of the specific circumstances of the case and notwithstanding the foregoing considerations, the Commission ought to have granted the benefit of the leniency application made by Arcelor España to the applicants.

166 In that regard, it should be noted, in the first place, that the applicants' active cooperation with the Commission in the procedure which led to the adoption of the contested decision is limited to the information that they supplied to the Commission in their own leniency application lodged on 25 October 2002, in respect of which the Commission granted a fine reduction of 5%.

167 It is true that the applicants state that the Emesa notebooks communicated by Arcelor España in the leniency application of 28 June 2007 originate from them, having been drawn up contemporaneously by a former Emesa employee, and that they had a significant bearing on the duration and gravity of the infringement.

168 However, the Court observes that the provenance of those notebooks and their indisputable added value does not establish active cooperation on the part of the applicants in respect of the Commission. It is apparent on the contrary from the documents before the Court — and the applicants do not contest this — that the Emesa notebooks communicated to the Commission by Arcelor España were in the latter's and not the applicants' possession and it is not disputed that the applicants were unaware of the leniency application made by Arcelor España, that application having been kept confidential by Arcelor España in accordance with the applicable rules.

169 In the second place, the conduct of the Commission, which, contrary to the Commission's claims, did not inform Arcelor España in due time and specifically that its leniency application could not be extended to cover Emesa and Galycas, is not however capable of creating an entitlement for the applicants to benefit from Arcelor España's leniency application.

170 It is true that ArcelorMittal España could have complained, from the point of view of the principle of good administration, that the Commission replied to Arcelor España's leniency application of 28 June 2007 only on 19 September 2008 without expressly rejecting the application for extension of the benefit of that application to Emesa and Galycas; however, this has no bearing on the possibility for the applicants to benefit from a leniency application to which they did not actively contribute.

171 For all those reasons, it must be held that the Commission did not infringe the principle of good administration and Article 41 of the Charter of Fundamental Rights or the principles of equal treatment and fairness by not extending to Emesa and Galycas — which had no entitlement thereto — the benefit of the leniency application made by Arcelor España and, accordingly, by not granting them a fine reduction similar in amount to that which the Commission had granted to ArcelorMittal España.

172 The second plea must therefore be rejected in its entirety.

[omissis]

Costs

188 Under the first subparagraph of Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

189 Since the applicants have been unsuccessful and the Commission and the Council have applied for costs, the applicants must be ordered to bear their own costs and to pay those incurred by the Commission and the Council.

190 Moreover, Article 139(a) of the Rules of Procedures provides that where a party has caused the General Court to incur avoidable costs, in particular where the action is manifestly an abuse of process, the General Court may order that party to refund them.

191 It should be recalled that, in the present case, by order of 16 May 2014, the Court ordered the Commission to produce the confidential version of the documents which were the subject of the measures of organisation of the procedure of 17 December 2013 which had not yet been forwarded to the Court by the Commission.

192 On 23 May 2014, the Commission communicated a non-confidential version of those documents to the Tribunal.

193 By order of 12 June 2014, the Court ordered the Commission to produce the confidential version of those documents.

194 The Commission complied with that order on 16 June 2014.

195 It is therefore appropriate, in the light of the amount of the costs which the Court had to incur and which could have been avoided, to order the Commission to refund to the Court a part of those costs in an amount of EUR 1 500.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Emesa-Trefilería, SA and Industrias Galycas, SA to bear their own costs and to pay those of the European Commission and the Council of the European Union;**

3. **Orders the Commission to pay the General Court the sum of EUR 1 500 under Article 139(a) of its Rules of Procedure, in order to refund part of the costs which the Court had to incur.**

Frimodt Nielsen Dehousse Collins

Delivered in open court in Luxembourg on 15 July 2015.

[Signatures]