JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

24 March 2011 *

In Case T-384/06,

IBP Ltd, established in Tipton (United Kingdom),

International Building Products France SA, established in Sartrouville (France),

represented by M. Clough QC and A. Aldred, Solicitor,

applicants,

v

European Commission, represented by F. Castillo de la Torre and V. Bottka, acting as Agents,

defendant,

* Language of the case: English.

APPLICATION for annulment in part of Commission Decision C(2006) 4180 of 20 September 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F-1/38.121 — Fittings), and also, in the alternative, for a reduction in the fine imposed on the applicants in that decision,

THE GENERAL COURT (Eighth Chamber),

composed of M.E. Martins Ribeiro, President, N. Wahl (Rapporteur) and A. Dittrich, Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 4 February 2010,

gives the following

Judgment

Background to the dispute

1 By Decision C(2006) 4180 of 20 September 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F-1/38.121 — Fittings)

(summary published in OJ 2007 L 283, p. 63; 'the contested decision'), the Commission of the European Communities found that a number of undertakings had infringed Article 81(1) EC and Article 53 of the Agreement on the European Economic Area (EEA) by participating, over various periods between 31 December 1988 and 1 April 2004, in a single, complex and continuous infringement of the Community competition rules taking the form of a complex of anti-competitive agreements and concerted practices in the market for copper and copper alloy fittings, which covered the territory of the EEA. The infringement consisted in fixing prices, agreeing on price lists, agreeing on discounts and rebates, agreeing on implementation mechanisms for introducing price increases, allocating national markets, allocating customers and exchanging other commercial information and also in participating in regular meetings and in maintaining other contacts intended to facilitate the infringement.

2 The applicants, IBP Ltd and International Building Products France SA ('IBP France'), are among the addressees of the contested decision.

3 IBP France is a wholly-owned subsidiary of IBP, which was founded in 2001 by Oystertec plc for the purpose of acquiring, on 23 November 2001, from Delta plc the assets of the former holding company IBP (also called IBP Ltd, then called Aldway Nine Limited) and the shares in its subsidiaries, including IBP France. On 1 June 2005, Oystertec changed its name to Advanced Fluid Connections plc ('AFC'). On 24 March 2006, AFC was placed in administrative receivership. On 25 March 2006, the administrative receivers sold all the assets of AFC, which included those of the applicants and International Building Products GmbH ('IBP Germany'), to Celestial Wing Ltd. Celestial Wing was at the time a wholly-owned subsidiary of a private equity fund, Endless LLP. On 15 September 2006, Celestial Wing became Pearl Fittings Ltd (recital 35 to the contested decision). By two orders of 2 March 2007, Mr Justice Richards of the High Court of Justice (England & Wales) ordered the initiation of

insolvency proceedings against the applicants and appointed two administrators for the duration of those proceedings.

4 On 9 January 2001, Mueller Industries Inc., another producer of copper fittings, informed the Commission of the existence of a cartel in the fittings sector and in other related industries in the copper tubes market, and expressed its willingness to cooperate with the Commission under the terms of the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the 1996 Leniency Notice') (recital 114 to the contested decision).

5 On 22 and 23 March 2001, in the framework of an investigation concerning copper tubes and fittings, the Commission, pursuant to Article 14(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87), carried out unannounced inspections at the premises of a number of undertakings (recital 119 to the contested decision).

6 Following those first inspections, the Commission, in April 2001, split the investigation relating to copper tubes into three different proceedings, namely the proceedings relating to Case COMP/E-1/38.069 (Copper Plumbing Tubes), Case COMP/F-1/38.121 (Fittings) and Case COMP/E-1/38.240 (Industrial Tubes), respectively (recital 120 to the contested decision).

7 On 24 and 25 April 2001, the Commission carried out further unannounced inspections at the premises of Delta, a company at the head of an international engineering group whose 'Engineering' division encompassed a number of fittings manufacturers. Those inspections related solely to fittings (recital 121 to the contested decision).

8 From February/March 2002, the Commission sent the parties concerned a number of requests for information pursuant to Article 11 of Regulation No 17, and then pursuant to Article 18 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) (recital 122 to the contested decision).

9 In September 2003, IMI plc submitted an application for leniency under the 1996 Leniency Notice. That application was followed by applications from the Delta group (March 2004) and FRA.BO SpA (July 2004). The final leniency application was submitted in May 2005 by AFC (recitals 115 to 118 to the contested decision).

10 On 22 September 2005, the Commission initiated an infringement proceeding in the framework of Case COMP/F-1/38.121 (Fittings) and adopted a statement of objections, which was then notified to the applicants (recitals 123 and 124 to the contested decision).

11 On 20 September 2006 the Commission adopted the contested decision.

12 In Article 1 of the contested decision the Commission found that the applicants had infringed Article 81 EC and Article 53 of the EEA Agreement, in the case of IBP, between 23 November 2001 and 1 April 2004 and, in the case of IBP France, between 4 April 1998 and 23 November 2001 (whilst under Delta) and between 23 November 2001 and 1 April 2004 (whilst under AFC).

13 For that infringement, the Commission imposed on AFC a fine of EUR 18.08 million, for the payment of which IBP was held jointly and severally liable as to EUR 11.26 million (Article 2(c)(i) of the contested decision) and IBP France as to EUR 5.63 million (Article 2(c)(ii) of the contested decision). The Commission also imposed on Delta a

fine of EUR 28.31 million for that infringement, for which IBP France was held jointly and severally liable as to EUR 5.63 million (Article 2(d)(iii) of the contested decision).

14 For the purposes of setting the amount of the fine imposed on each undertaking, the Commission applied, in the contested decision, the method set out in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3; 'the 1998 Guidelines').

15 As regards, first of all, the fixing of the starting amount of the fine by reference to the gravity of the infringement, the Commission characterised the infringement as very serious, on account of its nature and its geographic scope (recital 755 to the contested decision).

16 Taking the view, next, that there was considerable disparity between the undertakings concerned, the Commission applied differentiated treatment, taking as its basis their relative importance on the relevant market as determined by their market shares. On that basis, the Commission divided the undertakings concerned into six categories (recital 758 to the contested decision).

17 Delta was placed in the second category, for which the starting amount of the fine was set at EUR 46 million, while AFC was placed in the third category, for which the starting amount of the fine was set at EUR 36 million (recital 765 to the contested decision).

18 On account of the duration of the applicants' participation in the infringement, the first part of the starting amount of the fine imposed on IBP France for its participation in the infringement whilst under Delta was increased by 35 %, and the second part, for its participation in the infringement whilst under AFC, by 20 %. The starting amount of the fine imposed on IBP was increased by 20 %.

19 Next, the continued participation in the infringement after the Commission's inspections was considered to be an aggravating circumstance justifying an increase of 60 % in the basic amount of the fine imposed on all the undertakings of Delta and AFC (recital 785 to the contested decision). Likewise, AFC's basic amount was increased by 50 % because of the misleading information it had supplied to the Commission (recital 790 to the contested decision).

20 In the case of IBP, the 10 % ceiling referred to in Article 23(2) of Regulation No 1/2003, that is to say, EUR 11.26 million, was calculated on the basis of its total world-wide turnover. In the case of IBP France, that 10 % ceiling was applied to both parts of the fine for which it was held jointly and severally liable with its two consecutive parent companies. Since those two parts exceeded the 10 % ceiling, IBP France was held to be jointly and severally liable for payment of half the amount of the fine corresponding to the 10 % ceiling of each of its consecutive parent companies.

21 AFC and its subsidiaries were not granted any reduction in the amount of the fine under the provisions set out in the first and second indents of Section D.2 of the 1996 Leniency Notice (recitals 861 to 865 to the contested decision).

Procedure and forms of order sought by the parties

22 By application lodged at the Registry of the Court on 13 December 2006, the applicants brought the present action.

23 By order of 28 March 2007, the President of the Court dismissed the application for interim measures by which the applicants sought the suspension of operation of Article 2(c) and (d) of the contested decision.

24 Upon hearing the Report of the Judge-Rapporteur, the General Court (Eighth Chamber) decided to open the oral procedure.

25 By letter lodged at the Registry of the Court on 20 January 2010, the applicants informed the Court that, owing to their critical financial situation, it was impossible for them to be represented at the hearing. Subsequently, the Court having taken the view that a hearing was useful in order for the Commission to be able to answer certain questions arising from the documents in the case and which could not be fully resolved on the basis of the written pleadings, the Commission presented oral argument and its answers to the questions put by the Court at the hearing on 4 February 2010.

26 The applicants claim that the Court should:

— annul the contested decision in so far as it applies to the applicants for the period from 23 November 2001 to 1 April 2004;

— cancel the fine imposed on them or reduce it to such amount as the Court may deem appropriate;

— order such measures of organisation of procedure or inquiry as may be necessary to resolve the disputes between the applicants and the Commission or FRA.BO concerning evidence relating to the meetings of the Fédération Française des Négociants en Appareils Sanitaires, Chauffage, Climatisation et Canalisations (FNAS) and the telephone calls of Ms B. (FRA.BO); in particular, the hearing of the witnesses concerned, including Ms I., Ms B., Mr T., Mr H., Mr R. and Mr D. and any other witness whom the Court considers it appropriate to hear;

— order the Commission to pay the costs.

27 The Commission contends that the Court should:

— dismiss the action;

— order the applicants to pay the costs, including those relating to the interim measures proceedings.

Law

28 In support of their action, the applicants put forward two pleas in law, alleging infringement of Article 81 EC and miscalculation of the fine, respectively.

The application for measures of organisation of procedure or inquiry

29 It must be borne in mind that, under the first subparagraph of Article 68(1) of the Rules of Procedure, the Court may, either of its own motion or on application by a party, and after hearing the parties, order that certain facts be proved by witnesses. According to the third subparagraph of Article 68(1), an application by a party for the examination of a witness must state precisely about what facts and for what reasons the witness should be examined.

30 As regards the assessment of applications made by a party for measures of organisation of the procedure or inquiry, it must be pointed out that the General Court is the sole judge of any need to supplement the information available to it concerning the cases before it (see Case C-260/05 P *Sniace* v *Commission* [2007] ECR I-10005, paragraph 77 and the case-law cited).

31 Thus, the Court of Justice has held, in particular, that even where a request for the examination of witnesses, made in the application, states precisely about what facts and for what reasons the witness or witnesses should be examined, it falls to the General Court to assess the relevance of the application to the subject-matter of the dispute and the need to examine the witnesses named (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 70; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 68; and order of 15 September 2005 in Case C-112/04 P *Marlines* v *Commission*, not published in the ECR, paragraph 38).

32 In the present case, no statement of reasons or justification has been given by the applicants, other than that included in the third head of claim. Therefore, this application must be dismissed.

First plea in law: infringement of Article 81 EC

Arguments of the parties

33 The applicants claim that the Commission infringed Article 81 EC in so far as its findings constitute manifest errors of assessment with regard to the existence of a single and continuous infringement. In addition, they assert that the Commission did not provide an adequate statement of reasons for its decision and that it breached their right to be heard.

34 The applicants dispute the Commission's assessment of three decisive events on which it relied to support its finding that there had been a single and continuous infringement. The events in question were their participation in FNAS meetings between June 2003 and April 2004, the meeting with certain competitors in Essen (Germany) on 18 March 2004 and various telephone calls between two representatives of FRA. BO and IBP Banninger Italia Srl between 2001 and April 2004.

35 As regards the FNAS meetings, the applicants emphasise, as a preliminary point, that in the statement of objections they were not accused of any wrongdoing in

connection with those meetings. Furthermore, the statement of objections was addressed to FNAS, although it was not held guilty of an infringement of Article 81 EC.

36 The applicants assert that the Commission relied on the minutes of the FNAS meetings, which, with one exception, were not approved by the participants. The participants signed only an attendance sheet.

37 The applicants maintain that the FNAS meetings did not have an anti-competitive purpose. In order to support their position, they rely on the statement of Ms I. and also on a formal invitation to the FNAS meeting of 25 June 2003, the agenda of which related to a technical matter, namely the packaging chosen by the customer members of FNAS. The applicants further observe that Ms I. had signed Oystertec's policy statement on anti-competitive practices. In addition, FNAS meetings were not secret and customers were able to attend.

38 The applicants claim that IBP France sought to distance itself from Comap SA's efforts to discuss prices. They rely, in that regard, on the statement of Ms I., who confirmed that she had always taken steps to ensure that any discussion at the FNAS meetings of future prices or the exchange of confidential information was avoided or stopped.

39 The applicants submit that while IBP France's price increase of 1 January 2004 was indeed mentioned by a retailer at the meeting on 3 November 2003, customers were informed of the increase on 28 October 2003 and the information was therefore no longer confidential in the market. Furthermore, in the applicants' submission, given

the atmosphere of mistrust that prevailed among the participants, it is unlikely that consensus was reached at the meeting on 20 January 2004.

40 The applicants assert that, in any event, the 2004 price increases were not connected with the FNAS meetings. The price increase announced by IBP France in its letter of 28 October 2003 was imposed on the applicants by Oystertec. There are also other plausible explanations for the price rises introduced by Comap and Raccord Orléanais SAS in 2004, notably the increase in the price of raw materials.

41 It follows, in the applicants' submission, that the FNAS meetings were not part of the previous single and continuous infringement, since their objective was legitimate and entirely different from the objective of the 'Super EFMA' meetings held before or after the meetings of the European Fittings Manufacturers Association (EFMA).

42 Last, the applicants claim that the Commission made a manifest error of assessment in considering that the geographic scope of the FNAS meetings was pan-European. They maintain that the scope of those meetings was confined to France and that the only references made in that regard were to the packaging units used on other national markets. In the applicants' submission, these were legitimate discussions concerning the requirements of other markets.

43 As regards the meeting in Essen on 18 March 2004 between IBP Germany, R. Woeste & Co. Yorkshire GmbH and Comap, the applicants maintain that the Commission's assessment of the facts is erroneous. In that regard, they claim that Mr H. of IBP Germany only responded to questions about his company's own prices and that there was no discussion of the exact percentage or the exact date of implementation of the

increases. The applicants further maintain that that information was already public and was therefore no longer confidential.

44 The applicants also contend that the Essen meeting was a one-off occasion for discussion but that it was not in any way premeditated. They maintain that there is no evidence that they pursued the same object as that which existed before the inspections. It follows that, in the absence of an 'overall plan', the Commission cannot conclude that that meeting was part of the previous single and continuous infringement.

45 In addition, the applicants emphasise that the complaint relating to the Essen encounter was not relied on as against them in the statement of objections. In that regard, the contested decision is also silent so far as any infringement of Article 81 EC by IBP Germany or IBP France is concerned.

46 As regards the telephone contacts between the applicants and certain of their competitors, the applicants assert that it follows from the contested decision that the Commission has evidence, notably telephone records, relating only to the period from 10 April 2002 to 17 July 2003. The Commission therefore made a manifest error of assessment in concluding that that evidence supported its findings with respect to the period from March 2001 to April 2004.

47 In order to refute the Commission's argument, the applicants claim, first of all, that Ms B. (FRA.BO) took the initiative to call Mr R. (IBP Banninger Italia) much more frequently than vice versa. Contrary to the Commission's contention, the total duration of those calls was only approximately one hour.

48 Next, the applicants submit that there is another plausible explanation for those telephone contacts, namely that, although IBP Banninger Italia's last invoice to FRA.BO was issued in September 2002, FRA.BO continued to contact IBP Banninger Italia with a view to purchasing products from it.

49 The applicants further observe that the period covered by those telephone records does not coincide with IBP Banninger Italia's price increases. Those telephone records show, moreover, that calls were indeed made, but they do not prove the content of those calls. FRA.BO simply made allegations but failed to back them up with documentary evidence or to provide detailed information.

50 Last, the applicants contend that, as in the case of IMI and Aalberts Industries NV, the duration of their involvement in the infringement should, at most, be limited to the period of the FNAS meetings.

51 The applicants maintain that the Commission was wrong to find that there had been a single and continuous infringement. They emphasise, first of all, the absence of an 'overall plan' or of an 'identical object'. In their submission, the Commission did not discover any statistical information of the same quality as that relating to the period before 2001 showing the functioning of a monitoring system. They further maintain that the implementation within Oystertec of a competition law compliance programme 'broke the chain of continuity', thus precluding the establishment of a single and continuous infringement.

52 As regards the procedural irregularities, in the first place, the applicants assert that the Commission did not put forward any adequate reason for relying on the unparticularised and uncorroborated evidence of FRA.BO, or state why it relied on FRA.BO's evidence against the applicants but not against Aalberts Industries.

53 In the second place, the applicants claim that there was a breach of their right to be heard during the administrative procedure. They refer, in particular, to the fact that the Commission relied in its decision on the FNAS meetings in relation to the applicants, although it had not done so in the statement of objections, and, indeed, it did not rely on those meetings with regard to AFC, having invoked them only in relation to FNAS. The Commission also relied on the conduct of Mr R., although IBP Banninger Italia was not an addressee of the statement of objections and was never heard, and although there was no statement by the Commission that Ms B.'s allegations constituted an infringement of Article 81 EC.

54 The Commission contends that this plea should be rejected.

Findings of the Court

55 As a preliminary point, it should be recalled that an infringement of Article 81 EC may result not only from an isolated act but also from a series of acts or from continuous conduct. When the different actions form part of an 'overall plan' because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 258).

56 Furthermore, an undertaking may be held responsible for an overall cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it is shown that it knew, or must have known, that the

collusion in which it participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel. Similarly, an undertaking which has participated in a single complex infringement by its own conduct, which was intended to play a part in bringing about the infringement as a whole, may also be responsible for the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement. That is the case where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct, and was prepared to accept the risk (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 203).

57 As regards proof of an infringement of Article 81(1) EC, it must be observed that the Commission must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place (see, to that effect, Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 20). Any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding the infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment of a decision imposing a fine (Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 215).

58 It has also consistently been held that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement (Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 180 and the case-law cited).

59 Furthermore, it is normal for the activities which anti-competitive agreements entail to take place clandestinely, for meetings to be held in secret and for the associated documentation to be reduced to a minimum. It follows that, even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of meetings, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. Accordingly, 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 (*Aalborg Portland and Others* v *Commission*, cited in paragraph 55 above, paragraphs 55 to 57, and Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel* v *Commission* [2007] ECR I-729, paragraph 51).

60 It is also for the Commission to prove the duration of the infringement, since duration is a constituent element of the concept of an infringement under Article 81(1) EC. The principles referred to above are applicable in that regard (see, to that effect, Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraphs 94 to 96).

61 Finally, it is settled case-law that unless an undertaking has expressly distanced itself, the Commission is entitled to consider that the infringement has not been brought to an end (see, to that effect, Case C-510/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-1843, paragraph 119 et seq. and the case-law cited).

62 In the present case, it must be noted that IBP France does not deny that it participated in the cartel before the Commission's inspections in March 2001.

63 It must also be noted that the events alleged by the Commission with regard to the applicants — the participation in FNAS meetings, the contacts between the applicants and FRA.BO and the contacts made at the trade fair in Essen — are not, in themselves, disputed by the applicants. By contrast, they dispute the anti-competitive nature of those events and the fact that they form part of the single, complex and continuous infringement identified in relation to the period before March 2001.

64 Accordingly, it is necessary to determine whether the conduct identified after the Commission's inspections in March 2001 must be characterised as anti-competitive contact and whether it shows that there was an extension of the same infringement.

65 As regards, first, the applicants' participation in the FNAS meetings, it is apparent, in particular, from the minutes of those meetings that issues relating to pricing, such as sales margins and price increases for fittings, were discussed at the meetings of the FNAS Logistics Committee.

66 It must be noted that the minutes of 25 June 2003 refer to the competitors' resolve that 'the objective would be to ensure, as a minimum, that prices stabilise'. It is apparent from the minutes of 15 October 2003 that Aquatis France, IBP and Comap provided the other manufacturers with information concerning the distribution of their sales between certain product categories and relating to their margins. At the meeting on 3 November 2003, there was an exchange of information relating to future price increases. Similarly, it is apparent from the minutes of 20 January 2004 that, after some discussion, Mr L. (Comap) suggested that 'the manufacturers inform their clients of the eventuality of a 6% increase linked to the increase in costs of materials, in order to test the reaction of the market, and improve, at the same time, the cost of packaging'. According to those minutes, '[t]his increase in costs of materials [was to]

occur throughout the entire range' and '[t]he unit price of the new packaging [would] therefore be 5.3% or 5.4% higher'. Last, following that meeting, a telephone conference call was held on 16 February 2004 during which each manufacturer commented on the proposed price increase.

67 Although the discussions with suppliers concerning their request for a change in packaging was of no consequence in terms of competition law and such a request involved additional production costs, the fact remains that concerted action in relation to the percentage that would be passed on to suppliers or to the proportion of costs that would be absorbed by the manufacturers cannot, in itself, be said to have no effect on the market. That is an issue that an undertaking must resolve autonomously. The same applies in relation to sales margins and price increases for fittings.

68 Second, as regards bilateral contacts, it is apparent from the statement made by FRA.BO in connection with its leniency application and from certain documentary evidence which it provided during the administrative procedure that there were exchanges of sensitive information between competitors after the Commission's inspections. In that context, it must be noted that the evidence of the content of the telephone conversations consists of some handwritten notes taken during conversations between a Comap representative and a FRA.BO representative (recitals 508 to 510 to the contested decision) and a note concerning a conversation between the representative of Aalberts Industries and the FRA.BO representative (recital 511 to the contested decision). However, it must be noted that there is no such evidence in relation to the applicants. Admittedly, FRA.BO's telephone records show that there was contact between its own representative and that of the applicants, but they do not give any indication as to what was discussed in those conversations. Consequently it must be held that, with regard to the applicants, the Commission relied solely on FRA.BO's statement.

69 It must be noted in that regard that the statements made in the context of the leniency policy play an important role. Those statements made on behalf of undertakings have a probative value that is not insignificant, since they entail considerable legal and economic risks (see, to that effect, *JFE Engineering and Others* v *Commission*, cited in paragraph 58 above, paragraphs 205 and 211, and *Sumitomo Metal Industries and Nippon Steel* v *Commission*, cited in paragraph 59 above, paragraph 103). The fact remains that an admission by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence (see *JFE Engineering and Others* v *Commission*, cited in paragraph 58 above, paragraph 219 and the case-law cited). Notwithstanding the fact that it is apparent from the contested decision that, with the exception of the telephone contact in July 2002, those telephone contacts cannot be explained on the basis of cross-supply (recital 788 to the contested decision), and that the Commission has evidence indicating that FRA.BO had anti-competitive contacts with other competitors, it must be concluded that, in the absence of other evidence, the allegedly anti-competitive content of the contact between FRA.BO and the applicants has not been proved to the requisite legal standard. The contested decision does not mention anti-competitive bilateral contacts between the applicants and other competitors either.

70 Third, as regards the meeting between Mr H. (IBP Germany) and the Comap representative at the Essen trade fair on 18 March 2004, it is apparent from Mr H.'s statement that he answered a question in connection with prices and that IBP had planned a price increase at the end of March 2004. Since the applicants have not proved that that information was already public and IBP's official letter concerning that increase was not sent until 30 March 2004, it must be noted that, whether or not it was an isolated incident, this contact was linked to pricing policy on the German market.

71 The argument that that exchange was not anti-competitive owing to the lack of reciprocity is not relevant. According to the case-law, an exchange of information does

not have to be reciprocal for the principle of autonomous conduct on the market to be undermined. It follows from the case-law that the disclosure of sensitive information removes uncertainty as to the future conduct of a competitor and directly or indirectly influences the strategy of the recipient of the information (see, to that effect, Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 51 and the case-law cited).

72 At this stage, it must therefore be concluded that the majority of the events in question that took place after the Commission's inspections in March 2001 — that is to say, the contact in the framework of the FNAS meetings and the encounter at the Essen trade fair — were anti-competitive.

73 As to whether the infringement was a continuation of the infringement that existed before March 2001, it must be noted that the latter consisted in the regular organisation over a number of years of multilateral and bilateral contacts between competing producers, the object of which was the establishment of unlawful practices by which the functioning of the fittings market was artificially affected, in particular in relation to prices.

74 Those contacts were made at meetings organised in connection with trade associations, more particularly in connection with EFMA (at the 'Super EFMA' meetings), trade fairs, ad hoc meetings and bilateral discussions. Generally, the initiative to discuss a price increase was often taken at a European level and the outcome implemented at national level, since each country's producers had their own processes for price coordination and local arrangements complementing the arrangements adopted at European level.

75 The conduct in question that occurred after March 2001 also consisted of contacts made in connection with trade associations (FNAS meetings), bilateral contacts between competitors concerning the parameters of competition, such as prices, price increases and commercial terms offered to customers, and contacts at trade fairs (Essen trade fair).

76 Since the objective of the anti-competitive practices remained the same, namely collusion on prices, the fact that certain characteristics or the intensity of those practices changed is not relevant to the continuation of the cartel in question. It may well be that the cartel became less structured after the Commission's inspections, and the intensity of its activities more variable. Nevertheless, the fact that a cartel might have experienced periods of activity of varying intensity does not mean that the cartel has come to an end.

77 In that regard, it must be noted that although the number of participants in the cartel dropped from nine to four after the inspections in March 2001, the main participants in the cartel before those inspections (Comap, IBP and the former subsidiaries of IMI) were, as the contested decision shows, still involved in the conduct in question after the Commission's inspections. Similarly, some of the persons who had already been involved in the cartel before March 2001 were also involved in the conduct in question after that date.

78 With regard to the geographic scope of the infringement, although the FNAS meetings concerned only the French market, it appears that anti-competitive contacts between competitors after March 2001 also related to other national markets, such as the German, Greek and Italian markets. Even though the applicants had been involved in the cartel only in relation to the German and French markets, they must

have known that the cartel was more extensive and thus that other national markets were also covered by their competitors.

79 Given that the conduct of each of the participants, including the applicants, was intended to pursue the same anti-competitive objective, that is to restrict competition on the fittings market by the coordination of prices and price increases and the exchange of sensitive information, the Commission was entitled to take the view that this was the continuation of an earlier infringement.

80 Finally, the other arguments raised by the applicants in connection with this plea, namely that the minutes of the meetings were not approved, that FNAS itself was not an addressee of the contested decision or that there was a programme of measures to combat anti-competitive practices, do not alter that finding.

81 First of all, the argument that the minutes of the FNAS meetings had not been approved is irrelevant. It is common ground that the applicants were represented at those meetings. Therefore, given that the minutes were distributed to them, the applicants had the opportunity, either in writing or at the following meeting, to correct them or to indicate those points on which they disagreed.

82 Second, the argument that FNAS itself was not an addressee of the contested decision is also irrelevant. It is apparent from recital 606 to the contested decision that the Commission took the view that 'while there is evidence showing that the

manufacturers reached an agreement which, according to [AFC], they implemented, there is no evidence indicating that FNAS actively accepted the task entrusted to it by the manufacturers or facilitated the implementation of the agreement'. Consequently, the Commission was entitled, in recital 607 to the contested decision, to conclude that FNAS had not been part of the agreement in question and could not, therefore, be included as one of the addressees of the contested decision.

83 Third, as regards the argument that there was a programme of measures to combat anti-competitive practices, it must be noted that the fact that the applicants had implemented a 'compliance programme' does not alter the fact that they participated in anti-competitive meetings. Moreover, there is no documentation to suggest that they publicly distanced themselves from the cartel.

84 Finally, fourth, as regards the proposition that the applicants were not accused of an infringement in connection with the FNAS meetings in the statement of objections and that, therefore, there has been a breach of their right to be heard, it must be noted that the applicants themselves provided the minutes of the FNAS meetings in their leniency application, and that the Commission subsequently indicated in the statement of objections that, in its view, the anti-competitive contacts — including those which were formed at the FNAS meetings — formed part of the single and continuous infringement.

85 It follows from all of the above considerations that the first plea must be rejected.

Second plea in law: miscalculation of the fine

Arguments of the parties

86 The applicants claim, first of all, that the fine imposed on IBP France exceeds 10 % of its turnover, which was only EUR 4 896 000 in 2005. The maximum amount of the fine imposed on IBP France should therefore have been EUR 489 600.

87 The applicants also maintain that the fine of EUR 5.63 million was imposed on IBP France twice for the same conduct, the first time in respect of the period during which it belonged to Delta and the second time in respect of the period during which it belonged to AFC.

88 As regards the application of the 1998 Guidelines, the applicants put forward a number of arguments with respect to the Commission's approach. In the first place, they maintain that the infringement should have been characterised as 'minor' and not as 'very serious'. In support of their argument, the applicants refer to the change in Oystertec's policy, to the distance that they had demonstrably put between themselves and the cartel and also to the fact that they were never accused by the Commission of having participated in a 'very serious' infringement.

89 In the second place, the applicants maintain that the duration of the infringement proved against them is only seven months, whereas the Commission calculated that their participation lasted two years and four months. They also claim to have suffered unequal treatment by comparison with Aalberts Industries, which was not held to

have participated in the infringement during the period from 2001 to June 2003, even though the Commission had no evidence against Aalberts Industries other than the evidence used against the applicants.

90 In the third place, the applicants claim that by adjusting the amount of the fines by reference to the market shares of the undertakings concerned, the Commission disregarded the fact that AFC was a 'minor player'. They also dispute the increase of 60 % of the basic amount of the fine applied in their case for not having brought the infringement to an end after the Commission's inspections, stating that their acquisition by AFC did not take place until 23 November 2001, eight months after those inspections.

91 In the fourth place, as regards the increase applied in respect of AFC's transmission of misleading information, the applicants claim that the Commission breached the principle of proportionality by applying that 50 % increase. Although Mr R. made a mistake, the Commission was unable to establish that he had intended to mislead it. Furthermore, Regulation No 1/2003 empowers the Commission only to impose a fine of up to 1 % of turnover of a company which has supplied false or misleading information in response to a request for information.

92 The applicants also maintain that FRA.BO's statements lack credibility. In their submission the evidence which FRA.BO supplied is not corroborated by other evidence and it had every interest in passing the blame on to its competitors in order to secure a reduction in the amount of the fine imposed on it.

93 In the fifth place, the applicants take issue with the Commission for having referred in the contested decision only to the 'products concerned' and ignored the true size of the product market, which would also include products such as plastic fittings.

94 In the sixth place, the applicants contend that if they had been accused of a 'very serious' infringement they would have made further representations concerning AFC's financial difficulties. They maintain that the Commission also breached their rights by not seeking to ascertain whether AFC's subsidiaries had the means to pay the fine.

95 Last, the applicants submit that the Commission misapplied the 1996 Leniency Notice. They maintain, in particular, that they had a legitimate expectation that they would obtain a reduction as the Commission had accepted their leniency application. Consequently, if the Commission had any reservations regarding their leniency application, it ought to have stated them.

96 Contrary to the Commission's contention, the applicants maintain that their cooperation provided added value, owing, in particular, to the evidence provided about the FNAS meetings and the meeting which took place on the occasion of the Essen trade fair. Furthermore, the applicants provided information corroborating the information contained in FRA.BO's leniency application.

97 The applicants claim, moreover, that the Commission attached too much importance to the date of the allegedly belated submission of their leniency application. They maintain that after discovering the potential anti-competitive activities they took immediate steps to seek leniency.

98 As regards the possible contestation of the facts, the applicants submit that it is clear from their leniency application that they do not contest the facts relating to FNAS and the meeting at the Essen trade fair. All that they contest is the Commission's interpretation of those facts as supporting the existence of a single and continuous infringement. As regards the telephone calls, the applicants assert that they were not in a position to admit to anything, as those allegations were not substantiated.

99 The applicants conclude that they ought to have obtained a reduction of the fine under the 1996 Leniency Notice at least the same as that granted to Delta, namely 20%, or even a reduction in the region of 50% to take into account their evidential contribution.

100 The Commission contends that this plea should be rejected.

Findings of the Court

101 As regards the allegation that the 10%-of-total-turnover ceiling referred to in Article 23(2) of Regulation No 1/2003 was exceeded, it must be borne in mind that, where the addressee of a decision in which the Commission imposes a fine on it is the head of a group constituting an economic entity, the turnover to be taken into consideration for the purpose of applying that ceiling is the turnover of the group as a whole. At the time when the contested decision was adopted, IBP France was a wholly-owned subsidiary of IBP and the two companies formed a single economic entity. Consequently, the Commission was entitled to rely on IBP's overall turnover when calculating that ceiling.

102 The allegation that the fine of EUR 5.63 million was imposed on IBP France twice for the same conduct — the first time for the period during which it was owned by Delta and the second time for the period during which it was part of AFC — must be rejected. The single fine imposed on IBP France, after the application of the 10 % ceiling calculated on the basis of IBP's turnover, was divided into two separate parts owing to its joint and several liability, on the one hand, with its former parent company and, on the other, with its current parent company.

103 With regard to the allegation that the 1998 Guidelines were misapplied as regards, in the first place, the gravity of the infringement, first, it must be recalled that the Court has already rejected the applicants' argument that the events after 2001 were unrelated to an earlier infringement. Consequently, the argument that the conduct that occurred after 2001 cannot be characterised as a very serious infringement is irrelevant. Horizontal agreements on prices are, by nature, very serious infringements. Second, it is inherent in the concept of a 'single, complex and continuous infringement' that the classification of that infringement as 'very serious' applies to all of its constituent elements and for its entire duration. The fact that the infringement involved periods of activity of varying intensity does not alter that finding. Third, the characterisation of an infringement as very serious applies in relation to all its participants. It is by reference to aggravating or attenuating circumstances that the degree of individual participation of each of the undertakings concerned can be taken into consideration. Finally, it had already been indicated in the statement of objections that the Commission regarded the infringement as very serious. The applicants cannot reasonably claim, therefore, that that characterisation applied only to IBP France.

104 In the second place, the allegation of unequal treatment of the applicants by comparison with Aalberts Industries so far as concerns the duration of their participation in the infringement cannot be upheld either. The Commission concluded after an overall assessment of the evidence that it did not have sufficient proof of Aalberts

Industries' participation in the period immediately after the inspections. Furthermore, IMI, Aalberts Industries' predecessor, ended its participation immediately after the inspections. That was not so, however, in the case of Delta and the applicants, who did not distance themselves publicly from the cartel at issue. Furthermore, even if the Commission had, in its assessment of the evidence, disregarded the principle of equal treatment, observance of that principle must be reconciled with observance of the principle of legality, according to which no one may rely, to his own benefit, on an unlawful act committed in favour of another.

105 As regards, in the third place, the argument relating to the 60 % increase in the basic amount of the fine, owing to the continuation of the applicants' participation in the cartel after the Commission's inspections, it must be observed that the applicants have merely argued that such an increase was 'irrational' since the acquisition by AFC had only taken place on 23 November 2001, and that their new management had immediately distanced itself from the cartel by introducing compliance procedures. Therefore, first, it must be noted that the applicants do not dispute that the Commission is entitled to take into account as an aggravating circumstance the fact that an undertaking has continued to participate in an infringement after the relevant investigation has begun. Second, as has already been noted above, notwithstanding the implementation of a Community law compliance programme, the applicants continued to participate in the cartel after March 2001. The applicants' argument cannot, therefore, be upheld.

106 As regards, in the fourth place, the 50 % increase in the basic amount of the fine applied on account of misleading information supplied by AFC, it is apparent from recital 789 to the contested decision that the Commission took the view that it had been misled by the information supplied, which, according to the Commission, must be treated as an aggravating circumstance.

107 It must be borne in mind in that regard that the information in question consisted of a statement attached to AFC's response to the statement of objections, in which Mr R. (IBP Banninger Italia) indicated that he had not had any contacts with FRA.BO during the period concerned. After being confronted with certain telephone bills of FRA.BO, he modified his response, however, stating that he did not remember those contacts and claiming, moreover, that those contacts were of no consequence from the point of view of competition law.

108 It must be noted that, irrespective of whether the fine was imposed under Article 23(1) or Article 23(2) of Regulation No 1/2003, the fine may be imposed where the act in question has been committed 'either intentionally or negligently'. Furthermore, aggravating circumstances enable the relative gravity of the participation in the infringement of each of the undertakings concerned to be taken into consideration, since the increase in the amount of the fine on account of an aggravating circumstance must be proportional to the gravity of the conduct alleged.

109 The fact that Regulation No1/2003 allows the Commission to impose a fine of a maximum of 1 % of an undertaking's turnover for obstruction or for the supply of false or misleading information in response to a request for information, as an autonomous infringement, does not mean that it cannot be taken into account as an aggravating circumstance (see, to that effect, Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 64). However, if conduct is classified under one of those heads, it cannot at the same time be classified under the other.

110 In addition, in so far as the applicants maintain that the principle of proportionality has been breached in that the ceilings referred to in Article 23(1) and (2) of Regulation No 1/2003 differ, the Court cannot accept their reasoning. The two provisions relate to different infringements.

111 In any event, Article 23(1) of Regulation No 1/2003 does not apply in the present case, since what is at issue is not a request or a question formulated pursuant to Article 18 or to Article 20 of that regulation, but a response to the statement of objections made in the context of the exercise of rights of the defence. Even though the undertakings are free to reply or not to reply to requests put to them under Article 18(1) of Regulation No 1/2003, it follows from Article 23(1)(a) of that regulation that where undertakings have agreed to reply, they are required to provide accurate information. In that regard, it must be concluded that, in light of the general scheme of Regulation No 1/2003, the obligation to provide accurate information applies equally in the case of a response to the statement of objections. Admittedly, there is no obligation to respond to a statement of objections. In addition, the exercise of rights of the defence also involves the right to challenge the probative value of the documents on which the Commission relies. However, if an undertaking provides other information, such as a witness statement, in order to demonstrate that the evidence adduced by the Commission in the statement of objections is incorrect, that information must be accurate.

112 In the present case, the aggravating circumstance identified by the Commission consists of the provision of misleading information. The Commission accuses AFC of having denied, on the one hand, that the telephone calls existed and, on the other, that those calls were, according to the Commission, anti-competitive. As the Commission itself acknowledged at the hearing, unless those telephone calls were anti-competitive, they might have been irrelevant in this case and therefore not have constituted an aggravating circumstance.

113 With regard to the first element, it must be noted that, as has already been indicated in paragraph 107 above, Mr R. denied the existence of those contacts in his first statement of 29 November 2005. He stated that he '[understood] that [Ms B. claimed] that she [had] had telephone contact with [him] in the period 2001 to 2005, possibly limited to the period 2001 to April 2004', but that this was 'incorrect'. In his amended

statement of 17 March 2006, in light of the telephone records, he indicated that he did not remember those calls. He had checked whether those calls existed in his mobile telephone records for the period from September 2002 to December 2003, which confirmed that he had not called Ms B.'s telephone numbers.

114 In that regard, it must be noted that it was the applicants' responsibility to check whether the statement was plausible before attaching it to their response to the statement of objections or, at the very least, to check the telephone records concerned, as was done, moreover, for the purposes of Mr R.'s amended statement. In that sense, the act in question could have been committed negligently. The fact that the applicants subsequently adopted internal measures changes nothing in that respect.

115 However, as regards the second element, it must be noted that there is no evidence corroborating FRA.BO's statement that regular telephone contacts with an anti-competitive purpose took place with Mr R. (IBP Banninger Italia) (see also paragraph 69 above). It is apparent from FRA.BO's response to the statement of objections that Ms P. and Ms B. stated that they had no recollection of the content of each telephone call. According to that response, they merely stated that they recalled that, in general, there were many telephone contacts, including discussions with competitors on prices and conditions applied to customers. In her statement, Ms B. merely indicated that she recalled having had contacts with Mr R.

116 It follows from this that although it was proved that those telephone contacts existed, it was not established that they were anti-competitive. Consequently, the Commission was wrong to find that the provision of the information at issue was an aggravating circumstance.

117 It follows from the foregoing considerations that, irrespective of whether the rate of increase was proportional in the circumstances of the case, the Commission was wrong to apply the 50 % increase in the basic amount of the fine. As regards the impact on the amount of the fine, it must be observed that the amount of the fine imposed on the applicants nevertheless remains unchanged in view of the application of the 10 % ceiling referred to in Article 23(2) of Regulation No 1/2003.

118 As regards, in the fifth place, the argument that the Commission did not define the relevant market and referred only to the 'products concerned', it must be observed that, according to the case-law, the market covered by a Commission decision finding an infringement of Article 81 EC is determined by the agreements and the activities of the cartel (see, to that effect, judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, not published in the ECR, paragraph 90). According to recital 634 to the contested decision, the Commission's investigation showed that at various times during the operation of the cartel, all types and sizes of fittings, including press fittings, had been part of the anti-competitive discussions. However, even on the assumption that plastic fittings form part of the fittings market, as the applicants maintain, it does not follow from the documents in the case that they were the subject-matter of anti-competitive arrangements.

119 As regards, in the sixth place, AFC's financial difficulties and in so far as the applicants take issue with the Commission for having failed to take into account their ability to pay the fine, it must be held that that argument cannot be accepted.

120 First of all, the Commission is not required, when determining the amount of the fine, to take into account the poor financial situation of an undertaking, since recognition of such an obligation would be tantamount to giving unjustified competitive advantages to undertakings least well adapted to the market conditions (see, to that effect,

Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others* v *Commission* [1983] ECR 3369, paragraphs 54 and 55, and *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 31 above, paragraph 327).

121 Second, the fact that the ability to pay is specifically mentioned in Section 5(b) of the 1998 Guidelines does not alter that case-law. The ability to pay can be relevant only in a 'specific social context', namely the consequences which payment of a fine could have, in particular, by leading to an increase in unemployment or deterioration in the economic sectors upstream and downstream of the undertaking concerned (*SGL Carbon* v *Commission*, cited in paragraph 109 above, paragraph 106).

122 As it is, the applicants have submitted no evidence that such a context exists. Furthermore, as addressees of the statement of objections, which contained a characterisation of the infringement, they did not ask the Commission to take account of their inability to pay the fine during the administrative procedure.

123 Finally, the arguments alleging misapplication of the 1996 Leniency Notice owing to the Commission's refusal to grant a reduction in the amount of the fine under the provisions set out in the first and second indents of Section D.2 of that notice must also be rejected. In that regard, it is apparent from the case-law that a reduction in the amount of the fine on grounds of cooperation during the administrative procedure is justified only if the conduct of the undertaking in question enabled the Commission to establish the existence of an infringement more easily, and, where relevant, to bring it to an end (see, to that effect, Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraph 36). It is also apparent from the case-law that a reduction of the fine under the 1996 Leniency Notice can be justified only where the information

provided and, more generally, the conduct of the undertaking concerned could be considered to demonstrate genuine cooperation on its part (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 31 above, paragraphs 388 to 403, in particular paragraph 395). However, it is apparent from the documents in the case that the applicants' cooperation was very limited.

124 In that regard, first, it must be noted that AFC submitted a leniency application on behalf of the group at a very advanced stage of the procedure and after that of FRA.BO, which had already provided direct evidence of the infringement. Admittedly, the information provided by AFC helped the Commission to establish the existence of the infringement for the period between June 2003 and April 2004, as it corroborated the information provided by FRA.BO. However, AFC acknowledged only a limited number of facts in respect of the period after the Commission's inspections, and contests IBP's participation in the infringement during that period.

125 Second, even though the information relating to the meeting at the Essen trade fair came from AFC, the applicants played down the nature of that event. The same applies to the meetings held in the framework of FNAS.

126 Last, the applicants cannot, in that context, claim that they had a legitimate expectation as to the outcome of their leniency application. The provisions set out in Section E.2 of the 1996 Leniency Notice state that it is only on its adoption of a decision that the Commission determines whether or not the conditions set out in Sections B, C and D of that notice are met.

127 It follows from all of the foregoing considerations that the second plea must be rejected as, consequently, must the action in its entirety, and there is no need to grant the application for measures of organisation of procedure or inquiry put forward by the applicants.

Costs

128 Under Article 87(3) of the Rules of Procedure, the Court may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads, or where the circumstances are exceptional. In the circumstances of the present case (see paragraph 117 above), it is appropriate to order that the applicants bear their own costs and pay 80 % of those incurred by the Commission, and that the Commission bear 20 % of its own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Dismisses the action;

2. **Orders IBP Ltd and International Building Products France SA to bear their own costs and to pay 80 % of the European Commission's costs, and also to bear their own costs and to pay the Commission's costs relating to the interim measures proceedings;**

3. **Orders the Commission to bear 20 % of its own costs.**

Martins Ribeiro Wahl Dittrich

Delivered in open court in Luxembourg on 24 March 2011.

[Signatures]