JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

24 March 2011 *

In Case T-386/06,

Pegler Ltd, established in Doncaster (United Kingdom), represented by R. Thompson QC and A. Collinson, Solicitor,

applicant,

v

European Commission, represented by A. Nijenhuis and V. Bottka, acting as Agents, and by S. Kinsella and K. Daly, Solicitors,

defendant,

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

* Language of the case: English.

the EEA Agreement (Case COMP/F-1/38.121 — Fittings), and also, in the alternative, for a reduction in the fine imposed on the applicant in that decision,

THE GENERAL COURT (Eighth Chamber),

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

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 January 2010,

gives the following

Judgment

Background to the dispute and the contested decision

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 applicant, Pegler Ltd, and its parent company at the material time, Tomkins plc, are among the addressees of the contested decision.

3 Between 17 June 1986 and 31 January 2004, the applicant was a wholly-owned subsidiary of Tomkins. On 1 February 2004 the applicant was sold to its management team. On 26 August 2005 Pegler Holdings Ltd and the applicant were sold to Aalberts Industries NV, another addressee of the contested decision.

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 plc, 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 Advanced Fluid Connections plc (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 applicant (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 applicant and Tomkins had infringed Article 81 EC and Article 53 of the EEA Agreement between 31 December 1988 and 22 March 2001.

13 For that infringement, the Commission imposed on the applicant, jointly and severally with Tomkins, a fine of EUR 5.25 million under Article 2(h) 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, in the first place, 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 The applicant and its parent company were placed in the sixth category, for which the starting amount of the fine was set at EUR 2 million (recital 765 to the contested decision).

18 In the light of the total turnover of Tomkins, which came to EUR 4 635 million in 2005, the year preceding the adoption of the contested decision, the Commission applied a multiplier of 1.25 for deterrence, thus leading to an increased starting amount for the applicant of EUR 2.5 million (recitals 771 to 773 to the contested decision).

19 On account of the duration of the applicant's participation in the infringement (12 years and 2 months), the Commission then increased the fine by 110 %, namely 5 % per year for each of the first two years and 10 % per complete year, with effect from 31 January 1991, for each of the 10 remaining years (recital 775 to the contested decision), which resulted in the final amount of the fine being set at EUR 5.25 million.

20 The Commission did not find any aggravating or attenuating circumstance against or for the applicant.

Procedure and forms of order sought by the parties

21 By application lodged at the Registry of the Court on 15 December 2006, the applicant brought the present action.

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

23 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 28 January 2010.

24 The applicant claims that the Court should:

— annul Article 1, Article 2(h) and Article 3 of the contested decision;

— in the alternative, reduce the amount of the fine imposed on the applicant;

— order the Commission to pay the costs.

25 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

26 In support of its action, the applicant puts forward six pleas in law.

27 In its first plea, the applicant denies that liability for the infringement can be imputed to it in respect of the period between 31 December 1988 and 20 January 1989 on the sole ground that it had acquired the name Pegler on 20 January 1989. Before 20 January 1989 it was, within the Tomkins group, a dormant subsidiary within the meaning of English company law. In its second plea, the applicant denies liability for the infringement imputed to it in respect of the period between 20 January 1989 and 29 October 1993. During that period, it remained a dormant agent of FHT Holding Ltd ('FHT'), another entity in the Tomkins group, having neither assets nor employees. The third plea concerns the Commission's failure to designate clearly the addressee of the contested decision. In its fourth plea, the applicant relies on a number of arguments in order to demonstrate that the imposition of joint and several liability for an infringement of Article 81 EC to a former parent company and a former subsidiary is, as a matter of principle, unlawful. By its fifth plea, the applicant claims that the fine should have been imposed on its former parent company alone. Last, the sixth plea alleges breach of the principle of equal treatment in the calculation of the amount of the fine.

28 In view of the fact that the third and fifth pleas largely overlap, the underlying arguments being virtually identical, the Court considers it appropriate to examine them together. Furthermore, the fourth plea should be analysed after the third and fifth pleas.

First plea in law: manifest error in the assessment of the facts and error of law in the imputation to the applicant of liability for the infringement in respect of the period between 31 December 1988 and 20 January 1989 on the sole ground that it had acquired the name Pegler on 20 January 1989

Arguments of the parties

29 By way of preliminary observation, the applicant states that, as regards the overall duration of the infringement referred to in the contested decision, the 'history of the "Pegler" business' can be divided into three separate periods: the period before 20 January 1989, the period between 20 January 1989 and 29 October 1993 and the period beginning 29 October 1993.

30 More specifically, the applicant summarises the facts as follows:

— Until 20 January 1989, the 'Pegler' business was carried on by the entity in the Tomkins group known as FHT, which operated the business through its agent, another legal entity in the Tomkins group called Pegler Ltd. On 20 January 1989, the applicant, then known as The Steel Nut & Joseph Hampton Ltd, and Pegler Ltd ('Old Pegler') exchanged names with each other. Accordingly, from that date the name Pegler was given to the applicant, while its former name was given to Old Pegler. Old Pegler, which remained in existence after 20 January 1989, although dormant within the meaning of English company law, was eventually dissolved on 29 May 2000.

— Subsequently, in the period between 20 January 1989 and 29 October 1993, the 'Pegler' business continued to be operated by FHT, which ran it through the applicant, which was its unremunerated agent.

— On 29 October 1993, the 'Pegler' business was transferred to the applicant, which from that date took over part of the business and assets of FHT related to ferrous taps, valves and plumbing fittings, and which assumed responsibility for the 'Pegler' business.

31 The applicant submits that the undertaking responsible for the infringement before 20 January 1989 must have been Tomkins, as the 100 % owner and controller of FHT.

32 It claims that the Commission failed to take account of the fact that where two companies exchange names and, on the same date, one of them takes over the agency appointment of the other, according to 'established legal principles', the natural or legal person managing the undertaking in question when the infringement was committed must answer for it, even if, at the time of the decision finding the infringement, another person had assumed responsibility for operating the undertaking.

33 The applicant also claims that it was not an undertaking before 29 October 1993, in so far as it did not have any assets or employees and thus lacked the essential characteristics of economic autonomy required to constitute an undertaking within the meaning of Article 81 EC.

34 By way of preliminary observation, the Commission maintains that throughout the contested decision it considered that the activities of a number of related companies in the Tomkins group, namely the applicant, Old Pegler, FHT and Tomkins, were the activities of a single economic entity during the infringement period.

35 The Commission contends that it did not impute to the applicant liability for the infringement in respect of the period between 31 December 1988 and 20 January 1989 solely because of the applicant's acquisition of the Pegler name on 20 January 1989.

36 First, the Commission submits that the applicant had functional links with the 'Pegler' business between 31 December 1988, the starting date of the infringement, and 20 January 1989.

37 In that regard, the Commission observes that there was 'personal and functional continuity'. In support of that assertion, the Commission relies on the fact that Mr W. was a director of Old Pegler from 15 June 1980 until 20 January 1989, when he was appointed a director of the applicant.

38 Furthermore, it is inconceivable that the applicant should have taken over the Pegler name on 20 January 1989 without having at least some involvement in the undertaking in the 20 days before that date, that is to say, from 31 December 1988, the starting date of the infringement found by the Commission. The Commission maintains that it is likely that that transition required the applicant's entity to be aligned and prepared for the taking over of the name of the 'Pegler' business, hence the existence of a functional link between the legal personality of the applicant and the infringement.

39 In addition, the applicant itself had acknowledged that the decision to transfer the 'Pegler' business 'was a decision taken at Tomkins group level, by Tomkins group directors who were also directors of the applicant'.

40 Second, the Commission submits that even if the applicant was not involved in the infringement before 20 January 1989, it is clear that it is the successor of the entity that participated directly in the infringement, both in terms of its most important assets and also the management and business name with which the unlawful activities were implemented, and that, therefore, in accordance with the case-law, it 'inherited' legal liability for the infringement.

41 Last, the Commission observes that the taking into account of the 20-day period before 20 January 1989 had no impact on the calculation of the amount of the fine.

Findings of the Court

42 It is apparent from recitals 682 and 683 to the contested decision, in conjunction with recitals 647 and 734, that the applicant was held liable for the infringement on account of its direct participation in the infringement in the period between 31 December 1988 and 22 March 2001.

43 It must nevertheless be noted that it is apparent from the documents produced by the applicant during the administrative procedure and in the present action that the applicant was, in the period between 31 December 1988 and 20 January 1989, a dormant company within the meaning of English company law.

44 It is established that, before 20 January 1989, the applicant did not have any assets or employees.

45 Although the applicant acknowledges that it adopted the name under which the unlawful activities referred to in the contested decision were carried on in the market, and admits that it became an unremunerated agent of FHT after 20 January 1989, the fact remains that it did not, before that date, undertake any economic activity or have any staff except for a company director, as required by English company law.

46 Moreover, it must be observed that the applicant was, during the period in question, one of five subsidiaries of FHT, itself a wholly-owned subsidiary of Tomkins, which, under the business name Pegler, operated inter alia in the fittings sector. It is apparent from the annexes in the file, namely the annual accounts filed with the United Kingdom authorities, the authenticity of which is not disputed by the Commission, that the applicant was, during that period, a dormant company within the meaning of English company law since it did not carry on any economic activity or have any turnover.

47 It must be observed in that regard that Community competition law refers to the activities of undertakings (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 59) and that the concept of an undertaking covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed (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 112; Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 107; and Case C-205/03 P *FENIN* v *Commission* [2006] ECR I-6295, paragraph 25).

48 It must also be observed that, according to settled case-law, any activity consisting in offering goods or services on a given market is an economic activity (see Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 75 and the case-law cited, and Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 47).

49 Consequently, given that the applicant was, in the period between 31 December 1988 and 20 January 1989, a legal entity that was not engaged in any economic activity, in that it did not offer goods or services on a given market for remuneration or, therefore, assume the financial risks associated with the exercise of such activities, the Commission was not entitled to find that the applicant had directly participated in the infringement before the date on which it changed its name (see the case-law in the previous paragraph).

50 The fact that the applicant was part of the Tomkins group during that period does not alter that finding.

51 The same applies to the fact that Mr W., former director of Old Pegler, was appointed as a director of the applicant on 20 January 1989, a post from which, moreover, he resigned on 26 May 1989.

52 Furthermore, the Court must reject the Commission's argument that there is evidence to show that Mr W. personally participated in the cartel during and around that period. The Commission refers in that regard to recitals 74 and 187 to the contested decision. Recital 74 to the contested decision merely mentions that Mr W. was Pegler's managing director in 1989, while recital 187 concerns the contact made with Mr W. by a Delta representative following the meeting of the British Plumbing Fittings Manufacturers Association (BPFMA) in 1989, a meeting which took place after the period at issue here.

53 Moreover, the Court cannot accept the Commission's assertion that the applicant had 'some involvement' in the 20 days before the exchange of names referred to above. It is true that there are legal and contractual requirements associated with a change of

business name. However, compliance with those requirements does not imply that an economic activity is being exercised or, much less, an anti-competitive activity.

54 Finally, the argument put forward in the alternative by the Commission, according to which the applicant was, in any event, the economic successor of the 'Pegler' business, cannot be accepted.

55 It has, it is true, consistently been held that where the activities covered by an infringement have been transferred from one legal entity to another within the same group, the successor may be held responsible for the infringement even if the first legal entity still exists in law (Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 48; Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraph 132; see also, to that effect, *Aalborg Portland and Others* v *Commission*, cited in paragraph 47 above, paragraph 358).

56 However, it must be noted that the Commission gave no indication in the statement of objections or in the contested decision that it considered the applicant to be liable for the infringement as the successor in respect of the economic activities of its intermediate parent company FHT or of its sister company Old Pegler.

57 On the contrary, in recital 718 to the contested decision, the Commission portrayed the applicant as a direct participant which had had anti-competitive contacts with its competitors from 31 December 1988.

58 Furthermore, during the administrative procedure the applicant, in response to questions put by the Commission, provided information about the Tomkins group and its restructuring at the material time. It also stated, in its response of 25 November 2005 to the statement of objections, that, before 1993, it was a dormant company

within the meaning of English company law, a point which it confirmed at the hearing on 27 February 2006. Finally, that assertion was corroborated by reliable evidence such as the applicant's and FHT's accounts, which had been filed with the competent authority and which indicated that the applicant, which was not carrying on any economic activities, was a dormant company in the financial years at issue.

59 Against that background, it must be noted that the Commission did not respond to those arguments in the contested decision. As it acknowledged at the hearing, the Commission took the view that the applicant had, from the outset, been a direct participant in the cartel.

60 Having regard to the foregoing, it must be concluded that the first plea in law is well founded.

Second plea in law: manifest error in the assessment of the facts and error of law in the imputation to the applicant of liability for the infringement in respect of the period between 20 January 1989 and 29 October 1993

Arguments of the parties

61 The applicant claims that, since it did not display the essential characteristics of an undertaking between 20 January 1989 and 29 October 1993, it could not be held liable for the infringements committed in its name by its parent company during that

period. In the applicant's submission, the undertaking to be held liable for that period should, according to the rules of competition law, be FHT and/or Tomkins.

62 It states that it began to 'participate' in the 'Pegler' business as from 20 January 1989, but only in so far as it acquired its current name and became an undisclosed and unremunerated agent of FHT, without any assets or employees.

63 Referring to Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 475 to 483, to Case C-266/93 *Volkswagen and VAG Leasing* [1995] ECR I-3477, paragraph 19, and to the Guidelines on vertical restraints (OJ 2000 C 291, p. 1), the applicant takes the view that the Commission either failed to understand the nature of the applicant's agency relationship with FHT or erred in dismissing the issue without proper consideration of the evidence that was presented to it.

64 According to the applicant, although it was unable to produce a copy of the agency agreement, the Commission should have attached more weight to the documents which the applicant was able to provide, such as Old Pegler's board minutes confirming that the agency agreement with FHT was terminated on 20 January 1989, the applicant's board minutes confirming that its agency agreement with FHT was terminated on 29 October 1993, FHT's accounts, which show that FHT owned all the assets and was liable for all the debts of the 'Pegler' business until 29 October 1993, and the applicant's accounts, which show that it did not take over the assets and liabilities of the 'Pegler' business until 29 October 1993 and that it did not, at any time before that date, have any significant assets or liabilities or enter into any significant accounting transactions and, finally, the Memorandum of 16 February 1995, which

shows conclusively that the transfer of the 'Pegler' business by FHT to the applicant took effect on 29 October 1993.

65 Last, the applicant adds that the same arguments apply to the activities of Old Pegler as agent of FHT in the period before 20 January 1989, so that it is of no consequence that Old Pegler, which was dissolved by Tomkins on 29 May 2000, no longer existed on the date of the contested decision.

66 The Commission contends that this plea in law should be rejected.

67 The Commission submits that the applicant's arguments relating to the fact that it was both dormant and at the same time 'acting as an agent' of its sister company do not stand up to scrutiny. In spite of being requested to do so, the applicant had provided no documentary evidence of any agency agreement.

68 The documents produced by the applicant refer in general terms to an agency relationship without specifying the nature of the arrangements, and do not establish the applicant's lack of participation in the infringement before 29 October 1993.

69 The Commission adds that, even if the applicant had proved the existence of an agency agreement, that would not have prevented the Commission from addressing the contested decision to it.

70 The Commission also refers to Tomkins' formal response to the request for information which it sent to Tomkins pursuant to Article 18 of Regulation No 1/2003. That response, which contradicts the applicant's arguments, states that 'between 1987 and 31 January 2004, Pegler Ltd was a wholly owned subsidiary company within Tomkins (formerly FH Tomkins plc)' and that '[i]t was run as an autonomous business making its own decisions on technical, manufacturing and sales-marketing issues'.

71 In addition, the Commission emphasises, with reference to recitals 135, 145 and 187 to the contested decision, that the other members of the cartel were colluding with the applicant and that no (purely internal) allocation of tasks between the applicant, Old Pegler, FHT or any other entity within the Tomkins group was taken into account.

72 In conclusion, the Commission claims that it is also clear that the applicant has responsibility for the infringement during the period between 20 January 1989 and 29 October 1993, since, as already explained in the context of the first plea, it is the economic successor of the 'Pegler' business.

Findings of the Court

73 It must be observed that, as regards the period between 20 January 1989 and 29 October 1993, it is apparent from the documents annexed to the application — such as the accounts of FHT and those of the applicant, which were certified by an external auditor and filed with the United Kingdom authorities — that, in the financial years throughout the whole of that period, the applicant generated neither income nor losses. In the detailed accounts of FHT, it is consistently stated that the applicant had no

economic activities. Likewise, it is apparent from the applicant's accounts that it did not enter into any accounting transaction during the period referred to.

74 It must be noted that, under English company law, the term 'dormant' is applied to a company which, from a legal perspective, has not entered into a significant accounting transaction in a financial year. The absence of any written entries in the company's accounting ledgers corresponds to the absence of any significant accounting transactions. The only accounting transaction permitted at no risk to the company's dormant status relates to the costs of company registration and the filing of annual returns with the competent authority, Companies House. Accordingly, a resumption of commercial activity would result in the loss of that status. Since all the conditions were satisfied in accordance with English company law, it is indisputable that the applicant was a dormant company and, therefore, that it was not active on the market.

75 Furthermore, as the applicant itself admitted at the hearing, there is no doubt that business was carried out under the name of Pegler in the period between 20 January 1989 and 29 October 1993. It is also apparent from the documents mentioned in paragraph 73 above that, both before and after the applicant's change of name, FHT and/or Tomkins marketed products falling within the category of fittings under the business name Pegler, using FHT employees. It must be observed, therefore, that that fact does not lead to the conclusion that the activities being carried out were those of the applicant.

76 With regard to the minutes of Executive Meetings, upon which the Commission relies in rejecting the applicant's argument that it was not carrying on commercial

activities, it must be noted that those minutes indicate, prima facie, commercial activity on the part of the applicant.

77 However, contrary to what is claimed by the Commission, the fact that the minutes are headed 'Tomkins Plc' and 'Pegler Ltd' is not, in itself, significant in that respect; it merely indicates that economic activities were carried on under the business name Pegler and does not mean that the applicant participated directly in those activities.

78 Similarly, the fact that the applicant's directors, some of whom were also directors of FHT, took part in the abovementioned meetings and were involved in certain ancillary tasks associated with the activities of other entities within the Tomkins group does not mean that the applicant participated directly in the cartel during the period concerned, particularly given that those directors were not employees of the applicant.

79 Finally, the content of those minutes does not lead to the conclusion that the applicant was actually the entity which operated the business relating to fittings. Furthermore, none of the minutes upon which the Commission relies were signed. In all events, it must be noted that, as regards the applicant's lack of activity, less value should be placed on those minutes than on the accounts of FHT and of the applicant, which were certified by an external auditor and filed, in accordance with English law, with the competent authorities.

80 With regard to the Commission's assertion, referring to recitals 135 and 145 to the contested decision, that the other members of the cartel understood that they were colluding with the applicant, it will be recalled that recital 135 refers to a statement by

Delta describing the scheme of the cartel, and that recital 145 refers to a statement by IMI to the effect that Pegler was one of the participants in the pan-European cartel. Contrary to the Commission's contention, it does not follow from this that it was the applicant that was specifically referred to in those recitals. Furthermore, while there is no doubt that FHT carried on business under the business name Pegler, there is nothing in the recitals referred to above to indicate that the authors of those statements had any knowledge of the internal structure of the Tomkins group.

81 With regard to recital 187 to the contested decision, which relates to the contact made with Mr W. by a Delta representative following the BPFMA meeting, it must be held that the fact that Mr W. accepted the suggestion made by that Delta representative to bring Pegler's aggressive strategy to an end is not sufficient for liability for the infringement to be imputed to the applicant. It has not in any way been established that Mr W. acted as the applicant's agent, given that he was not an employee of the applicant during the relevant period, a point the Commission does not contest.

82 Furthermore, although the applicant was unable to produce a copy of the agency agreement, it is apparent from the documents referred to in paragraph 64 above that it was FHT's agent until 29 October 1993, when it took over the assets and liabilities of the 'Pegler' business, including employees, so far as the business relating to fittings was concerned. The fact that the applicant was not a remunerated agent is apparent from the evidence mentioned in paragraph 73 above.

83 In any event, it must be observed that the concept of 'dormant companies acting as agents' referred to in paragraph 51 of Schedule 4 to the English Companies Act 1985, entitled 'Form and content of company accounts', and in paragraph 58A of Schedule 8 to the English Companies Act 1985, entitled 'Form and content of accounts prepared

by small companies', differs from the concepts of 'principal' and 'agent' under Community competition law.

84 It must be held that the relationship between the applicant and its parent company, or its ultimate parent company, differs from the relationship between principal and agent for the purposes of Community competition law, according to which categorisation as an agent implies economic activity, which does not apply in the case of the applicant. Consequently, both the applicant's and the Commission's reliance on the case-law concerning the relationship between a principal and his agent is irrelevant, given that the present case concerns an intra-group relationship.

85 In the contested decision, the Commission described the applicant as a direct participant. It is also apparent from recital 718 to that decision that the Commission found that there was no evidence to indicate that the applicant acted on behalf of any other company in those anti-competitive contacts during the infringement period.

86 It is thus apparent from that recital that the Commission did not interpret the internal relationships and operation of the Tomkins group correctly, and therefore held a legal entity liable for an infringement of Article 81 EC which had no economic activity and, accordingly, no involvement of its own in the cartel.

87 Consequently, it must be held that, with regard to the period between 20 January 1989 and 29 October 1993, the Commission erred in finding that the applicant was liable for the infringements committed by other entities within the Tomkins group.

88 Likewise, as regards the Commission's argument that the applicant assumed responsibility for the infringement before 29 October 1993 as economic successor, it is sufficient to refer to paragraphs 54 to 59 above.

89 It follows from the foregoing that the second plea in law is well founded.

Third and fifth pleas in law: lack of clarity and an error, respectively, in the designation of the addressees of the contested decision

Arguments of the parties

90 In the context of the third plea in law, the applicant complains that the Commission did not clearly identify the addressees of the contested decision.

91 In that regard, the applicant claims that, in requiring both Tomkins and the applicant to pay the full amount of the fine of EUR 5.25 million, when they are two distinct legal entities which no longer form part of the same undertaking, the Commission did not clearly define the degree of liability imputed to each of those entities. In the applicant's submission, those entities cannot both be liable for and ordered to pay the full amount of the fine of EUR 5.25 million, otherwise the Commission 'would receive twice the sum of money due to it'. The Commission failed to identify clearly

in the contested decision the entity to which liability for the infringement was to be imputed.

92 Furthermore, to impute liability for the infringement to the applicant on the ground that it was a subsidiary of Tomkins is inconsistent with the analysis undertaken in the contested decision, according to which Tomkins is the undertaking to which liability for the infringement should be imputed, since it controlled and owned 100 % of the capital in the 'Pegler' business throughout the infringement period. Moreover, it is incorrect, according to the applicant, for liability for the infringement to be imputed to it for the period during which a different subsidiary was responsible for operating the business in respect of which the infringement was found (the period between 30 December 1988 and 20 January 1989) or during which it was a dormant company within the meaning of English law, without staff or assets (the period between 20 January 1989 and 29 October 1993).

93 In the context of the fifth plea, the applicant claims that Tomkins alone ought to have been held liable for the infringement. In support of that assertion, the applicant refers to Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623 and Case T-354/94 *Stora Kopparbergs Bergslags* v *Commission* [2002] ECR II-843. In the applicant's submission, it follows from those judgments that the legal entity to be held accountable for the infringement is in principle the parent company of the group. It also follows from the case-law that the Commission is entitled only in exceptional circumstances to seek to impose liability for an infringement outside the relevant undertaking (*Enichem Anic* v *Commission*, paragraph 237).

94 The applicant submits that, in the present case, the undertaking involved in the infringement was Tomkins. During the infringement period the 'Pegler' business was owned by different legal entities within the Tomkins group. The applicant emphasises that Tomkins, as the ultimate parent company, determined the precise legal entity under whose control a business was placed during that period. The applicant likewise

submits that it ought to be regarded as a separate undertaking, liable in its own right for any infringement of the competition rules, only from the time when it ceased to form part of the Tomkins group, that is to say, when the infringement had ceased.

95 The Commission contends that those two pleas should be rejected.

Findings of the Court

96 With regard to the plea alleging a lack of clarity in the designation of the addressees of the contested decision, it must be observed that the addressees, including the applicant, are clearly mentioned in Article 4 of that decision.

97 It must also be noted that, in recital 682 to the contested decision, the Commission identified the applicant as a legal entity that had directly participated in the infringement and, on that basis, held it liable for that infringement, whereas Tomkins was held liable for the applicant's unlawful conduct only in its capacity as parent company (recital 683 to the contested decision).

98 Consequently, the plea alleging a lack of clarity in the designation of the addressees of the contested decision must be rejected.

99 Likewise, as regards the plea alleging an error in the designation of the addressees of the contested decision, the applicant's argument that it cannot be held liable for the infringement because it no longer formed part of the Tomkins group, or the argument that Tomkins alone ought to be held liable, as the ultimate parent company and operator of the undertaking which committed the infringement, cannot be upheld.

100 The fact that the 'undertaking' which carried out the unlawful activities was split up after the termination of the infringement, in that the legal entities of which that undertaking was comprised were separated, has no bearing on their joint and several liability with regard to the infringement committed.

101 According to settled case-law, joint and several liability may be imputed to undertakings even if the legal entities constituting the undertaking during the infringement no longer belong to the same group (see, to that effect, Case C-248/98 P *KNP BT* v *Commission* [2000] ECR I-9641, paragraph 71).

102 It follows from this that, contrary to the applicant's assertion, the separation — after the infringement of Article 81 EC had ceased, but before the adoption of the contested decision — of the two legal entities Pegler and Tomkins, which belonged to the infringing undertaking, does not preclude the applicant's liability.

103 Furthermore, it has consistently been held that the Commission has the power to impute liability for unlawful conduct to the parent company, to the subsidiary, or to the parent company jointly and severally with its subsidiary (see, to that effect, Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich*

and Others v *Commission* [2006] ECR II-5169, paragraph 331 and the case-law cited). Moreover, it must be noted that the applicant does not dispute that power.

104 It follows from this that the applicant cannot claim, by reference to *Stora Kopparbergs Bergslags* v *Commission*, cited in paragraph 93 above, that Tomkins was the only legal person that could be held liable for the infringement because the undertaking that committed the infringement was operated by Tomkins.

105 Consequently, there is no substance to the claim that the Commission, in the exercise of its discretion, committed a manifest error of assessment of the facts and of law by imputing to the applicant liability for the unlawful conduct referred to in the contested decision, since the applicant is no longer a legal person forming part of the undertaking responsible for the infringement.

106 Finally, with regard to the argument that the applicant and Tomkins cannot both be held liable for the infringement because otherwise the Commission 'would receive twice the sum of money due to it', suffice it to note that it is based on a misinterpretation of the meaning of joint and several liability of two undertakings, which is that payment of the full amount of the fine by one undertaking cancels the obligation of the other undertaking to pay that fine.

107 It follows from the foregoing that the third and fifth pleas in law must be rejected as unfounded.

Fourth plea in law: actual and potential breaches of the principle of equal treatment in the implementation of Article 23 of Regulation No 1/2003, the 1998 Guidelines and the 1996 Leniency Notice

Arguments of the parties

108 The applicant claims that the approach taken by the Commission in the contested decision in imposing on the applicant and on Tomkins — notwithstanding that they are two distinct undertakings — joint and several liability for a fine calculated by reference to circumstances that apply to only one of them, namely to Tomkins, places the applicant at a disadvantage by comparison with the Tomkins group, contrary to the principle of equal treatment.

109 In order to demonstrate the unequal treatment resulting from the approach adopted by the Commission, the applicant refers to Article 23 of Regulation No 1/2003, to the 1998 Guidelines with respect to consideration of the duration of the infringement, deterrence and aggravating or attenuating circumstances and, last, to the 1996 Leniency Notice.

110 As regards Article 23(2) of Regulation No 1/2003, the applicant claims that even if the maximum limit of the fine that could be imposed on it and on Tomkins did not constitute a 'material factor' in setting the amount of the fine imposed in the present case, the Commission's approach, which was to treat the applicant and the Tomkins group as a single undertaking for the purposes of calculating the fines, even though the applicant is no longer part of that group, 'potentially [subjects the applicant] to disadvantages'.

111 As regards Article 23(3) of Regulation No 1/2003, the applicant recalls that, in the words of that article, in fixing the amount of the fine, regard is to be had both to the gravity and to the duration of the infringement. If the Commission was minded to make a finding of joint and several liability against legal entities which no longer form part of the same undertaking, it should have differentiated between FHT's initial participation in the infringement, on the one hand, and the applicant's less serious continuation of that infringement, on the other.

112 As regards the account taken of the duration of the infringement in accordance with the 1998 Guidelines, the applicant claims that the only period during which it can reasonably be said to have been an economic entity capable of independent action as an undertaking was the period beginning on 29 October 1993. During that period, however, the applicant remained subject to the effective control and decisive influence of Tomkins, so that the infringement ought to have been imputed to Tomkins. The applicant observes that it is well established in the case-law and in the Commission's practice in taking decisions that the Commission's finding must be limited to the period for which it has evidence of the infringement. In the applicant's submission, it follows that any 'joint and several' liability could not exceed the period of around seven and a half years between 29 October 1993 and 22 March 2001, and that there was no justification for imposing on it joint and several liability with Tomkins for the same fine, when the duration of their potential liability for the infringement was 'materially different'.

113 As regards the setting of the fine at a sufficiently deterrent level, the applicant maintains that it is difficult to envisage a case in which the Commission's approach would not infringe this aspect of the 1998 Guidelines, since it would require both the former subsidiary and the former parent company to be in a 'materially identical' situation. In the present case, the increase of the fine that was applied for deterrence was calculated by reference to the size of a separate undertaking, namely Tomkins, and had no connection with the applicant's economic or financial situation. In response to the arguments put forward by the Commission in the defence, the applicant contends that recital 771 to the contested decision relates only to the size and strength of Tomkins

and does not otherwise consider the applicant's position or contain any justification for the increase for deterrence by reference to the applicant's position as a former subsidiary of Tomkins.

114 The applicant points to another problem linked with the Commission's approach, namely that the aggravating or attenuating circumstances to be taken into account in the calculation of the fine are very often quite different for two independent undertakings such as Tomkins and the applicant. In the applicant's submission, those circumstances are not limited to issues arising from the infringement itself but also include a number of factors that may vary over time, including during the period after it ceased to be part of the Tomkins group, such as cooperation with the Commission in the investigation, termination of the infringement or various kinds of conduct capable of constituting aggravating circumstances.

115 According to the applicant, there are in reality 'potential differences' in the aggravating and attenuating circumstances applicable to the entities concerned, which the Commission failed to take into account. In that regard, even though that aspect was not taken into account in this case as a 'material factor' as regards the level of the fine, the applicant refers to recital 601 to the contested decision, where the Commission states that the leading manufacturers of fittings, including the applicant, had participated in the arrangements throughout the infringement period in a steady, continuous and more active fashion than the other participants. Since the applicant was, for the purposes of English company law, a dormant company during the first years of the cartel, its role was de facto limited to following the orders given to it. A further 'potential difference' arises from the fact that any financial benefit that might have resulted from the cartel benefited Tomkins and not the applicant, in view of the way in which the Tomkins group dealt with cash balances.

116 Last, as regards the application of the 1996 Leniency Notice, the applicant claims that the Commission's approach also raises serious 'potential difficulties' with respect to that notice, which concerns the position of undertakings at the time of the Commission's investigation rather than at the time of the infringement.

117 The Commission contends that this plea in law should be rejected. It notes that the applicant has established no breach of the principle of equal treatment, either in the context of the application of Article 23 of Regulation No 1/2003, or in that of the application of the 1998 Guidelines, or in that of the application of the 1996 Leniency Notice.

118 As concerns more particularly the deterrence aspect, the Commission refers to recitals 766 and 771 to the contested decision and maintains that it took two elements into account when calculating the increase in the fine for deterrence, namely the size of the Tomkins group and the legal and economic knowledge and infrastructures which enable large undertakings more readily to recognise the illegal nature of their conduct. The Commission states that, in the case of Tomkins, the decisive factor for determining the increase for deterrence was the first element, in particular its turnover of EUR 4 635 million. By contrast, the increase for deterrence applied to the applicant was based on its legal and economic knowledge and infrastructures, which means that, at the time of the infringement, the size, structure, turnover and organisation of the Tomkins group were taken into consideration. The multiplier of 1.25 arrived at is the same as that applied to the parent company Tomkins, since the legal and economic knowledge and infrastructures element relates to the period before the applicant was sold to another group.

Findings of the Court

119 In the context of the present plea, the applicant criticises the Commission's approach in relation to the calculation of fines where an undertaking has been split up in the period between the end of the infringement and the adoption of the decision imposing a fine.

120 First, with regard to the 10% limit for the purposes of Article 23(2) of Regulation No 1/2003, as the applicant itself admits, that limit was not exceeded in the present case. Consequently, the applicant's argument in that regard is ineffective. For the sake of completeness it must be observed that, if the maximum limit of the fine that could be imposed on the applicant individually had been attained, the applicant would have been entitled to have the limit in question applied (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 390).

121 Second, as regards the applicant's argument relating to the account taken of the duration of the infringement in the calculation of the fine in the context both of Article 23(3) of Regulation No 1/2003 and of the 1998 Guidelines, the applicant does not put forward any specific argument to demonstrate any breach of the principle of equal treatment. In so far as the applicant submits that any joint and several liability could not exceed the period of around seven and a half years between 29 October 1993 and 22 March 2001 and that there is, therefore, no justification for imposing on it joint and several liability with Tomkins for the same fine when the duration of their participation, and thus their potential liability for the infringement, is 'materially different', it is sufficient to refer to the Court's review of the first and second pleas in law, in the context of which it has been held that the applicant could not be held liable for the period before 29 October 1993.

122 Third, as regards the other objections put forward concerning the joint and several liability of the applicant and Tomkins, namely those relating to the assessment of the aggravating or attenuating circumstances and that relating to the application of the 1996 Leniency Notice where a parent company and a subsidiary no longer form part of the same undertaking for the purposes of Article 81 EC, it must be noted that they raise, in this instance, hypothetical issues that are entirely irrelevant. It must be noted that no aggravating or attenuating circumstance was taken into consideration in regard to the applicant and its parent company. Likewise, neither the applicant nor Tomkins made any request to the Commission for the application of the 1996 Leniency Notice.

123 Finally, as regards the applicant's argument concerning the setting of the fine at a sufficiently deterrent level, it will be recalled, first of all, that the 1998 Guidelines provide that, in addition to the nature of the infringement, its actual impact on the market and the size of the relevant geographic market, it is necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect (Section 1A, fourth paragraph, of the 1998 Guidelines).

124 Account may also be taken of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law (Section 1A, fifth paragraph, of the 1998 Guidelines).

125 In relation to the first factor, the financial resources of the undertaking must be assessed on the date on which the fine is imposed. As regards the second factor, the turnover on the basis of which the Commission determines the size of the undertakings concerned must relate to their situation at the time of the infringement (see, to that effect, Case T-410/03 *Hoechst* v *Commission* [2008] ECR II-881, paragraphs 379

and 382). Notwithstanding that those two factors are closely linked to the size of the undertaking, they constitute two separate grounds for an increase in the starting amount of the fine.

126 In the present case, the Commission referred, by way of introduction in recital 766 to the contested decision, to its power to apply a multiplier to adjust the starting amount in order to ensure a sufficient deterrent effect (within the meaning of the fourth paragraph of Section 1A of the 1998 Guidelines) and in order to take into consideration the fact that large undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise the illegal nature of their conduct (for the purposes of the fifth paragraph of Section 1A of the 1998 Guidelines). The Commission also stated that it intended to take those two factors into account.

127 With regard, more particularly, to the economic entity Tomkins-Pegler, it must be observed that, in setting the fine to be imposed on the applicant as the author of the infringement and on Tomkins as the parent company liable for the infringement committed by its subsidiary, the Commission relied on the applicant's market share, since the relative importance of the share of the fittings market was the relevant criterion for setting the initial starting amount for the undertakings concerned. As a result, the applicant, and consequently its parent company, were placed in the sixth category, for which a starting amount of EUR 2 million was set. Next, the Commission increased that initial starting amount for the economic entity concerned by applying a multiplier of 1.25 for deterrence, which was determined by reference to Tomkins' turnover.

128 In the rejoinder, the Commission explained that it had applied the fourth paragraph of Section 1A of the 1998 Guidelines in the case of Tomkins, and the fifth paragraph of Section 1A of the 1998 Guidelines in the case of the applicant, in order to justify the increase in the starting amount of the fine.

129 It cannot be denied that, of those two factors, the Commission is entitled to choose the one which it regards as being the most important for its assessment.

130 However, first, it must be observed that it is apparent from recital 771 to the contested decision that the Commission relied solely on Tomkins' turnover in 2005, that is to say, the year before the year in which the contested decision was adopted, and took the view that that turnover justified an increase in the initial starting amount of the fine for deterrence.

131 It must also be noted that, in the contested decision, the Commission makes no mention of having applied the criterion of legal and economic knowledge and infrastructures with respect to the applicant, nor does it specify the size of the undertaking concerned at the time of the infringement, which is a relevant criterion for the purposes of justifying the increase on the basis of the fifth paragraph of Section 1A of the 1998 Guidelines. Nor, moreover, could it have done so in the present case, in view of the fact that the factors mentioned in the fourth and fifth paragraphs of Section 1A of the 1998 Guidelines are assessed at different times, namely, the date on which the fine is imposed and the date of the infringement, respectively.

132 In any event, second, to divide those two factors and apply them separately to two companies forming part of the same economic entity, one of which is the parent company of the other and for that reason alone is held liable for the infringement, is contrary to the concept of undertaking within the meaning of Article 81 EC.

133 Admittedly, the Commission is permitted, when calculating the starting amount of the fine, to take into consideration the turnover in the year preceding the adoption of the decision finding that infringement (when applying the first criterion) or at the time of the infringement (when applying the second criterion). However, the

Commission cannot proceed on the basis of a criterion applied only to one of the two entities that previously formed the economic entity which committed the infringement. Where a parent company and its subsidiary no longer form an economic entity for the purposes of Article 81 EC at the date of the decision imposing the fine on them for the infringement committed, the Commission cannot rely on the turnover of the former parent company in the year preceding the adoption of that decision in order to determine the deterrence aspect applicable to two companies which formed a single undertaking at the material time but which have since been separated. That turnover does not reflect the effective economic capacity of that undertaking to cause damage to other operators at the time of the infringement.

134 It follows from the foregoing that the present plea is, in part, well founded as regards the complaint relating to the deterrence aspect.

Sixth plea in law: calculation error and breach of the principle of equal treatment in the calculation of the fine

Arguments of the parties

135 In the alternative, the applicant claims, in the first place, that the Commission failed to comply with the principle of equal treatment when calculating the fine (whether or not jointly and severally with Tomkins) and, in the second place, that the Commission in any event erred in calculating the amount of the fine which it imposed on the applicant (whether or not jointly and severally with Tomkins).

136 The applicant takes the view, for the reasons already stated, that the appropriate amount of the fine for the applicant, taken in isolation, is a starting amount of EUR 1 million, with no increase for deterrence and an increase of 70 % for the duration of its participation in the infringement, that is to say, a total fine of EUR 1.7 million.

137 In addition, the applicant asserts that the contested decision contains an error in the calculation of the amount of the fine. According to recital 777 to the contested decision, the fine comes to EUR 5.2 million after the application of the increases for deterrence and for the duration of the infringement, but the fine imposed is EUR 5.25 million. No reason is given for that increase of EUR 50 000 in the amount of the fine.

138 The Commission contends that this plea in law should be rejected.

Findings of the Court

139 With regard, first of all, to the alleged error in the calculation of the fine, it must be observed that, in recital 777 to the contested decision, the Commission rounded down the basic amount of the fine. Recital 877 and the operative part of the decision make quite clear that the fine imposed on Tomkins, jointly and severally with the applicant, is EUR 5.25 million.

140 Furthermore, in recital 765 to the contested decision, the Commission distinctly indicated a starting amount of EUR 2 million and, in recital 771 to that decision, it clearly established the multiplier for deterrence at 1.25, bringing the starting amount to EUR 2.5 million. Finally, in recital 775 to the contested decision, the Commission

explicitly set out the amounts added to that basic amount to take account of the duration of the applicant's participation in the infringement, that is to say, an increase of 5 % of the basic amount for each of the years 1989 and 1990 (EUR 125 000) and 10 % for each of the remaining 10 years up to and including 2000 (EUR 250 000). It follows from this that the applicant was fully capable, without any further explanation and by using simple arithmetic, of understanding the reasons for the level of the fine being set as stated in recital 877 to the contested decision and in Article 2(h) of that decision.

141 As regards the argument that the appropriate amount of the fine to be imposed on the applicant should have been EUR 1.7 million, suffice it to refer to the paragraphs below. Furthermore, there is no reason to reduce the starting amount of EUR 2 million. It must be borne in mind that that amount was set by reference to the gravity of the infringement and that the considerable disparity between the undertakings concerned justified differentiated treatment in setting the starting amount of the fines.

Determination of the final amount of the fine

142 As is apparent from paragraphs 46 to 60, 73 to 98 and 123 to 134 above, the contested decision must be varied in so far as it increases the fine by a multiplier of 1.25 for deterrence and by 110 % on the basis of the duration of participation in the infringement.

143 As to the remainder, the Commission's considerations as set out in the contested decision and the method of calculation of the fines that was applied in the present case are such that no further amendment by the Court is called for.

144 The final amount of the fine is, therefore, calculated as follows: since the duration of the infringement as regards the applicant is 7 years and 5 months (instead of the 12 years and 2 months determined in the contested decision), the starting amount (EUR 2 million), without any increase for deterrence, must be increased by 70 % (instead of by 110 %), resulting in a fine of EUR 3.4 million.

Costs

145 Pursuant to Article 87(3) of the Rules of Procedure of the General Court, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that each party bear its own costs. In the circumstances of this case, each party is to bear its own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Annuls Article 1 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) in so far as it finds that Pegler Ltd participated in the infringement in the period from 31 December 1988 to 29 October 1993;**

2. Sets the amount of the fine for which Pegler Ltd is jointly and severally liable under Article 2(h) of Decision C(2006) 4180 at EUR 3.4 million;

3. Dismisses the action as to the remainder;

4. Orders each party to bear its own costs.

Martins Ribeiro Wahl Dittrich

Delivered in open court in Luxembourg on 24 March 2011.

[Signatures]