JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

24 March 2011 *

In Case T-382/06,

Tomkins plc, established in London (United Kingdom), represented by T. Soames, S. Jordan, Solicitors, and J. Joshua, Barrister,

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 for a reduction in the fine imposed on the applicant in that decision,

THE GENERAL COURT (Eighth Chamber),

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

Registrar: E. Coulon,

having regard to the written procedure,

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, Tomkins plc, and its subsidiary at the material time, Pegler Ltd (formerly The Steel Nut & Joseph Hampton Ltd), are among the addressees of the contested decision.

3 Pegler, a copper fittings producer, was wholly owned by the applicant between 17 June 1986 and 31 January 2004. On 1 February 2004 Pegler was sold to its management team. On 26 August 2005 Pegler Holdings Ltd and Pegler were purchased by 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 its subsidiary Pegler 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 Pegler, 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).

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 The applicant was 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 applicant's total turnover, 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 By letter lodged at the Registry of the Court on 22 December 2009, the applicant withdrew the first, second and third pleas mentioned in the application, all of which are linked to the issue of the imputability to a parent company of infringements by a subsidiary, and also the first part of the fourth plea, alleging an error of assessment with regard to the increase in the amount of the fine for the purpose of deterrence. The applicant also stated that it appeared not to be necessary for the Court to hold a hearing and that the Court could determine the dispute on the basis of the written procedure. By letter of 19 January 2010, the Commission stated that it would leave it for the Court to decide whether an oral hearing should be held in the circumstances of the case.

24 On 22 January 2010, the General Court (Eighth Chamber) decided to close the oral procedure without a hearing.

25 The applicant claims that the Court should:

— annul the contested decision in so far as it relates to the duration of Pegler's participation in the infringement;

— reduce the amount of the fine imposed on it jointly and severally with Pegler;

— order the Commission to pay the costs.

26 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

27 Following the partial discontinuance of its action, the applicant puts forward only a single plea in law, alleging an error in the determination of the duration of Pegler's participation in the infringement.

Arguments of the parties

28 The applicant claims that the Commission made a manifest error of assessment in finding that Pegler had participated in the cartel for a longer period than the evidence contained in the file permitted. Thus, the fine that was imposed on the applicant, jointly and severally with Pegler, is greater than that which ought to have been imposed on it.

29 First, the Commission made a manifest error of assessment in fixing the starting date of Pegler's participation in the infringement at 31 December 1988. As the Commission itself acknowledged, that was a finding based on an undated report obtained from Delta stating that Pegler participated in the infringement towards the end of 1988. The applicant contends that the file contains no other evidence that Pegler was involved in the cartel at issue before 7 February 1989, which is the earliest date from which it is possible to identify with a sufficient degree of certainty the starting point of Pegler's unlawful conduct.

30 Second, the Commission also erred with respect to the date on which Pegler's participation in the infringement ceased. Furthermore, the evidence in the file shows that the infringement did not cease on 22 March 2001 but rather on 3 May 2000, the only date corroborated by actual evidence, which corresponds to a cartel meeting in which Pegler participated.

31 The applicant concludes from this that the infringement period determined with respect to the applicant should be reduced by exactly one year, with a revised duration of 7 February 1989 to 3 May 2000.

32 The Commission maintains that it provided sufficient evidence to confirm that Pegler participated in the cartel during the period from 31 December 1988 to March 2001, when it carried out unannounced inspections.

33 As regards the starting date of the infringement, the Commission refers to an internal memorandum seized during an unannounced inspection at Delta's premises, which is dated 3 January 1989 and is reproduced at recital 183 to the contested decision. That memorandum clearly shows that the cartel at issue was already in place before 3 January 1989 and that Pegler was involved in it before that date.

34 As regards the date on which Pegler's participation in the cartel ceased, the Commission refers to recitals 702 and 721 to the contested decision, in which it had already examined the similar arguments put forward by the applicant in response to the statement of objections.

Findings of the Court

35 In the contested decision, the Commission imputed Pegler's infringement to the applicant, by whom Pegler was wholly owned between 17 June 1986 and 31 January 2004, and imposed a fine on the applicant, jointly and severally with its subsidiary. That imputation was based on the applicant's decisive influence over Pegler during the infringement period.

36 It is common ground that the applicant's subsidiary participated in the cartel at issue. The applicant challenges only the starting date and end date of that participation in the cartel, as determined by the Commission in the contested decision. The applicant's withdrawal of the first, second and third pleas in law implies that it does not deny that liability for the infringements committed by its subsidiary must be imputed to it.

37 Thus, the duration of Pegler's participation in the infringement is decisive as regards the extent of the applicant's liability.

38 It must be borne in mind that the applicant was not held liable for the cartel on account of its direct participation in the cartel's activities. It was held liable for the

infringement only as parent company by virtue of Pegler's participation in the cartel. Therefore, the applicant's liability cannot exceed that of Pegler.

39 By judgment of today's date in Case T-386/06, the Court annulled Article 1 of the contested decision in so far as the Commission found that Pegler had participated in the cartel at issue in the period from 31 December 1988 to 29 October 1993. In its written pleadings, the applicant explicitly contested Pegler's participation in the infringement only with respect to the period before 7 February 1989. Accordingly, it is necessary to consider the consequences of that annulment for the applicant.

40 It must be borne in mind in that regard that, as has consistently been held, since the Courts of the European Union ('the Courts of the Union') cannot rule *ultra petita* (Joined Cases 46/59 and 47/59 *Meroni* v *High Authority* [1962] ECR 411, 419, and Case 37/71 *Jamet* v *Commission* [1972] ECR 483, paragraph 12), the scope of the annulment which they pronounce may not go further than that sought by the applicant (Case C-310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363, paragraph 52).

41 Furthermore, if the addressee of a decision decides to bring an action for annulment, the matter to be decided by the Courts of the Union relates only to those aspects of the decision which concern that addressee. Unchallenged aspects concerning other addressees, on the other hand, do not form part of the matter to be tried by the Courts of the Union (*Commission* v *AssiDomän Kraft Products and Others*, paragraph 53).

42 However, in the present case, notwithstanding the case-law cited above, particularly *Commission* v *AssiDomän Kraft Products and Others*, it must be noted that, under competition law, the applicant and its subsidiary — which was partially successful following the action against annulment brought in Case T-386/06 — constituted a single entity. Therefore, the Commission's imputation of liability to the applicant means that the applicant has the benefit of the partial annulment of the contested decision in that case. The applicant has brought an action for annulment of the contested decision and

submitted that if that decision were to be annulled with respect to Pegler, it should also be annulled in so far as it relates to the applicant. Furthermore, the applicant puts forward a single plea challenging the duration of Pegler's participation in the infringement and claims in that respect that the contested decision should be annulled.

43 That claim is consistent with the fact that the fine imposed under Article 2(h) of the contested decision was imposed jointly and severally on the applicant and on Pegler and is in line with the applicant's request for a reduction in the amount of the fine in the present case.

44 It follows from this that the Court, which has before it actions for annulment brought separately by a parent company and by its subsidiary, is not ruling *ultra petita* if it takes into account the outcome of the action brought by the subsidiary, if the form of order sought in the action brought by the parent company has the same object.

45 Finally, it must be observed that, in the circumstances of the present case, the joint and several liability of the parent company and of its subsidiary for payment of the fine imposed on them puts them in a special position, with any annulment or alteration of the contested decision having consequences for the parent company to which the subsidiary's infringement was imputed. If there had been no infringement on the part of the subsidiary, there could not have been any imputation to the parent company of its subsidiary's conduct or any imposition of a fine, jointly and severally, on the parent company and its subsidiary.

46 Consequently, since the applicant's liability is strictly linked to that of Pegler, the contested decision must be annulled with respect to the starting date of the applicant's participation in the infringement and, accordingly, there must be a reduction in the fine imposed on the applicant.

47 As regards the date on which Pegler's participation in the cartel ceased, the applicant takes the view that the latest evidence of a connection between Pegler and the cartel is that relating to the meeting on 3 May 2000 in which Pegler participated, which means that that ought to be the relevant date, rather than 22 March 2001, when unannounced inspections were carried out by the Commission. It is apparent from recital 716 to the contested decision that, although the evidence of the last anti-competitive arrangement in which Pegler took part dates from 14 August 2000, the Commission took the view that it was justified in finding that the date on which Pegler's participation in the infringement ceased was 22 March 2001, given that it had participated in the cartel from the outset, that it had regularly taken part in the arrangements and their implementation and that it had not openly distanced itself from the arrangements during the period between the arrangement of 14 August 2000 and the unannounced inspections in March 2001.

48 That conclusion must be upheld. The fact that Pegler did not participate in any meetings in the period between 3 May 2000 and 22 March 2001, according to the applicant, or between 14 August 2000 and 22 March 2001, according to the Commission, is irrelevant in the present case.

49 First of all, it must be recalled that it is for the Commission to prove the duration of each member's participation in a cartel, which implies that the starting date and the end date of that participation are known. It must also be observed that the period between the last meeting in which Pegler participated and the date on which the cartel was found to have ceased is sufficiently long for it to be necessary to consider whether the Commission has discharged its burden of proof.

50 In that regard, it must be noted that the lack of contact after 3 May 2000, according to the applicant, or after 14 August 2000, according to the Commission, could indicate that Pegler had withdrawn from the cartel.

51 Nevertheless, given the specific features of the cartel at issue, which is characterised by its multilateral contacts, generally at a pan-European level, by its bilateral contacts, generally at a national or regional level, which took place at least once or twice a year, and by ad hoc contacts, the period between the final contact and the date on which the cartel ceased is too short for the Commission to have been able to conclude that Pegler had, by that stage, withdrawn from the cartel.

52 The fact that Pegler did not participate in one or two meetings that were held after it last took part in a meeting relating to the cartel could not be interpreted by the other members of the cartel as Pegler's distancing of itself from the cartel's activities, since it was not unusual for a member of the cartel not to participate regularly in every meeting.

53 Consequently, in the absence of any proof or evidence capable of being interpreted as a declared intention on Pegler's part to distance itself from the object of the agreement entered into on 10 June 2000 — a price increase with effect from 14 August 2000 — the Commission was entitled to conclude that it had adequate evidence that Pegler's participation in the cartel had continued until the date on which the Commission regarded the cartel as having come to an end, namely the date on which it carried out unannounced inspections (see, to that effect, Case C-510/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-1843, paragraphs 118 to 120 and the case-law cited, and Case T-99/04 *AC-Treuhand* v *Commission* [2008] ECR II-1501, paragraph 134 and the case-law cited).

54 It follows from all of the foregoing that Article 1 of the contested decision must be annulled in so far as it included the Commission's finding of the infringement attributed to the applicant in respect of the period before 29 October 1993.

55 It is necessary, therefore, to vary the contested decision inasmuch as it applies an increase of 110 % to the starting amount of the fine on account of the duration of the participation in the infringement. Since the duration of Pegler's participation in the infringement and, consequently, that of the applicant as the parent company held liable for the actions of its subsidiary, is 7 years and 5 months (instead of the 12 years and 2 months determined in the contested decision), the starting amount of the fine must be increased by 70 % (instead of by 110 %).

56 In the contested decision, the Commission increased the initial starting amount by applying a multiplier of 1.25 for deterrence. In that regard, it must be noted that, in its judgment of today's date in Case T-386/06 *Pegler* v *Commission*, the Court concluded that the Commission had been wrong to apply that multiplier and that it had erred in that regard in the application of the criteria in the 1998 Guidelines on the method of setting fines (see paragraph 14 above).

57 Consequently, it falls to the Commission, in accordance with Article 266 TFEU, to draw the appropriate conclusions from that mistake and from the joint and several liability for the fine so far as concerns the applicant. As has been held in paragraph 38 above, the applicant's liability cannot exceed that of Pegler in the circumstances of the present case.

58 Since the applicant has withdrawn the complaint alleging an error of assessment with regard to the increase in the amount of the fine for the purpose of deterrence (see paragraph 23 above), the Court cannot rule on that point without going beyond the bounds of the dispute as defined by the parties in the present case.

59 Therefore, in the context of the present dispute, the starting amount of the fine remains EUR 2.5 million. That amount, together with an increase of 70 %, gives rise to a fine of EUR 4.25 million.

60 The application must be dismissed as to the remainder.

Costs

61 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 or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs.

62 In the present case, the applicant's claims have been declared, in part, well founded. However, the applicant withdrew certain pleas (see paragraph 23 above) at an advanced stage in the proceedings, that is to say, after the closure of the written procedure. The Court therefore considers on a fair assessment of the circumstances of the present case that each party must be ordered 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 relates to the period from 31 December 1988 to 29 October 1993 with respect to Tomkins plc;

2. **Sets the amount of the fine imposed on Tomkins plc under Article 2(h) of Decision C(2006) 4180 at EUR 4.25 million, in respect of which it is jointly and severally liable with Pegler Ltd as to 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]