JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

16 June 2011 *

In Case T-211/08,

Putters International NV, established in Cargovil (Belgium), represented by K. Platteau, lawyer,

applicant,

v

European Commission, represented by A. Bouquet and F. Ronkes Agerbeek, acting as Agents,

defendant,

APPLICATION for the partial annulment of Commission decision C(2008) 926 final of 11 March 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.543 — International Removal Services), and, in the alternative, the annulment or reduction of the fine imposed on the applicant,

* Language of the case: Dutch.

THE GENERAL COURT (Eighth Chamber),

composed of S. Papasavvas, acting for the President, N. Wahl and A. Dittrich (Rapporteur), Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 6 May 2010,

gives the following

Judgment

Facts

1. *Subject-matter of the dispute*

1 According to Commission Decision C(2008) 926 final of 11 March 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.543 — International Removal Services) ('the Decision'), a summary of which is published in the *Official Journal of the European Union* of 11 August 2009 (OJ 2009 C 188, p. 16), the applicant, Putters International NV participated in a cartel on the international removal services market in Belgium, relating to the direct or

indirect fixing of prices, market sharing and the manipulation of the procedure for the submission of tenders. The European Commission states that the cartel operated for almost 19 years (from October 1984 to September 2003). Its members fixed prices, issued false quotes ('cover quotes') to customers and compensated each other for rejected offers by means of a financial compensation system ('commissions').

2. *Applicant*

2 Putters International ('Putters' or 'the applicant') has existed in the form of a company limited by shares since 9 January 1997. In the financial year ending 31 December 2006, Putters achieved a consolidated worldwide turnover of EUR 3 950 907.

3. *Administrative procedure*

3 According to the Decision, the Commission opened the procedure on its own initiative because it had information that certain Belgian companies operating in the international removals sector were party to agreements that might be caught by the prohibition in Article 81 EC.

4 Accordingly, investigations were carried out at the premises of Allied Arthur Pierre NV ('Allied Arthur Pierre'), Interdean NV ('Interdean'), Transworld International NV and Ziegler SA in September 2003, under 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). Following those investigations, Allied Arthur Pierre applied for immunity from fines or a reduction in the fine in accordance

with the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the 2002 Leniency Notice'). Allied Arthur Pierre admitted that it had participated in agreements on commissions and cover quotes, listed the competitors involved, inter alia a competitor previously unknown to the Commission's services, and submitted documents corroborating its oral statements.

5 In accordance with 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), several written requests for information were sent to the undertakings involved in the anti-competitive agreements, to some competitors and to a professional organisation. On 18 October 2006, the statement of objections was adopted and notified to several undertakings. All the addressees replied to it. Their representatives, with the exception of Amertranseuro International Holdings Ltd, Stichting Administratiekantoor Portielje, Team Relocations Ltd and Trans Euro Ltd, exercised their right of access to the documents contained in the Commission's file, which were accessible only on the Commission's premises. They were granted access between 6 and 29 November 2006. The hearing was held on 22 March 2007.

6 On 11 March 2008, the Commission adopted the Decision.

4. *Contested decision*

7 The Commission states that the addressees of the Decision, including the applicant, participated in a cartel in the international removal services sector in Belgium or are deemed responsible therefor. The participants in the cartel fixed prices, shared customers and manipulated the submission of tenders at least from 1984 to 2003. As a result, they have committed a single, continuous infringement of Article 81 EC.

8 According to the Commission, the services concerned include the removal of goods of both natural persons — private individuals or employees of an undertaking or a public institution — and undertakings or public institutions. Such removals are characterised by the fact that Belgium is either the starting place or the destination. Having regard also to the fact that the international removal companies in question are all located in Belgium and that the cartel's activity takes place in Belgium, the Commission therefore considered that the geographic centre of the cartel was Belgium.

9 The combined turnover of the participants in the cartel for international removal services in Belgium in 2002 was estimated by the Commission at EUR 41 million. As it estimated the size of the sector at approximately EUR 83 million, the combined market share of the undertakings involved was considered to be approximately 50 %.

10 The Commission states that the aim of the cartel was, inter alia, to establish and maintain high prices and to share the market contemporaneously or successively in various forms: agreements on prices, agreements on sharing the market by means of a system of providing cover ('cover quotes') and agreements on a system of financial compensation for rejected offers or for not quoting at all ('commissions').

11 The Commission considers that, between 1984 and the early 1990s, the cartel operated inter alia on the basis of written price-fixing agreements. At the same time the commissions and cover quotes were introduced. A commission is a hidden element in the final price which the customer had to pay without receiving a corresponding service. It is a sum of money that the removal company winning the contract for an international removal owed to the competitors that did not secure the contract, whether they submitted an estimate or abstained from doing so. It is therefore a sort of financial compensation for the removal companies that did not win the contract. The members of the cartel issued invoices to each other for commissions on the rejected offers or offers not made, referring to fictitious services, and the total for those

commissions was invoiced to customers. The Commission states that that practice must be deemed to be indirect fixing of prices for international removal services in Belgium.

12 The members of this cartel also cooperated in submitting cover quotes, which led customers, that is to say, employers paying for the removal, into the mistaken belief that they could choose according to competition-based criteria. A cover quote is a fictitious quotation submitted to the customer or the person who was moving by a removal company which did not intend to carry out the removal. Through the submission of cover quotes, the removal company that wanted the contract ('the requesting firm') ensured that the institution or undertaking received several quotes, either directly or indirectly via the person who was moving. To that end, the requesting firm indicated to its competitors the price, the rate of insurance and the storage costs that they were to quote. That price, which was higher than the price quoted by the requesting firm, was then indicated in the cover quotes. According to the Commission, since the employer will usually choose the removal company that offers the lowest price, the companies involved in the same international removal as a rule knew in advance which of them would secure the contract for that removal.

13 The Commission also observes that the price quoted by the requesting firm could be higher than it might otherwise have been because the other companies involved in that removal would have submitted cover quotes indicating a price stated by the requesting firm. By way of example, the Commission refers, in recital 233 of the Decision, to an internal Allied Arthur Pierre email message dated 11 July 1997 which stated: '[T]he customer has asked for two cover quotes, so we can ask for a high price.' Therefore, the Commission states that the submission of cover quotes to customers

was a manipulation of the tendering procedure so that the prices quoted in all the bids were deliberately higher than the price of the requesting firm, and at all events higher than they would have been in a competitive environment.

14 The Commission maintains that those arrangements were in place until 2003. Those complex activities had the same object of fixing prices, sharing the market, and thus of distorting competition.

15 In conclusion, the Commission adopted the operative part of the Decision, Article 1 of which is worded as follows:

'By directly and indirectly fixing prices for international removal services in Belgium, sharing part of the market, and manipulating the procedure for the submission of tenders, the following undertakings have infringed Article 81(1) [EC] … in the periods indicated:

…

(f) [Putters], from 14 February 1997 to 4 August 2003;

…'

16 Consequently, in Article 2(h) of the Decision, the Commission imposed a fine of EUR 395 000 on the applicant.

17 For the purposes of calculating the amount of the fines, the Commission applied, in the Decision, the methodology set out in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the 2006 Guidelines').

Procedure and forms of order sought by the parties

18 By application lodged at the Court Registry on 4 June 2008, the applicant brought the present action.

19 Upon hearing the report of the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral procedure. The parties presented their oral arguments and their replies to oral questions put by the Court at the hearing on 6 May 2010.

20 The applicant claims that the Court should:

— annul Article 1 of the Decision in so far as that provision states that the applicant breached Article 81(1) EC;

— annul Article 2 of the Decision, in so far as it imposes a fine on the applicant;

— if necessary, fix a fine which is significantly lower than that determined by the Commission;

— order the Commission to pay the costs.

21 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

22 The applicant puts forward five pleas for the annulment of the Decision and the cancellation or reduction of the fine. The first plea concerns the application of Article 81 EC whereas the other pleas relate to the calculation of the fine.

1. *The first plea, relating to the applicant's participation in a complex and systematic cartel*

Arguments of the parties

23 The applicant complains that the Commission committed a manifest error of appraisal in finding that it had participated in a complex and systematic cartel, whereas it was merely a party, on a sporadic basis, to practices relating to commissions and cover quotes.

24 First, the applicant submits that the agreement on prices, on the one hand, and the agreements on commissions and cover quotes, on the other, have completely different objectives. The agreements on commissions and cover quotes did not seek to fix prices, even indirectly. Second, the parties to the agreement on prices and the parties to the agreements on commissions and cover quotes were not the same. Third, the applicant submits that it was not a party to an overall plan. Although a complex cartel did exist in the form of a small group of undertakings, the applicant did not belong to that core and maintains that it was unaware of the agreements on prices. Fourth, the applicant stresses that there is an important qualitative difference between its involvement in certain practices and the existence of a complex cartel between a limited number of operators.

25 In the reply, the applicant states that the two different objectives pursued by the cartel were, first, maintaining high prices for the provision of international removal services in Belgium and, second, sharing the market for those services. However, the applicant's involvement on a sporadic basis in the practices relating to cover quotes and commissions could not have resulted in an increase in the general level of prices on the market.

26 The Commission disputes the applicant's arguments.

Findings of the Court

27 By this plea, the applicant denies that certain practices were anti-competitive and it submits that it was not a party to the single and continuous infringement described in the Decision. Therefore, it is appropriate, first of all, to examine whether the commissions and cover quotes were anti-competitive in nature, then, to consider the concept of a single and continuous infringement and, lastly, to apply those principles to the applicant's position.

Whether the commissions and cover quotes were anti-competitive

28 The applicant submits that the agreements on commissions and cover quotes did not seek to fix prices, even indirectly. That assertion cannot be accepted. As regards the commissions, their number and level were determined in advance, before the removal companies issued their quotes to the customers. The commissions therefore inevitably raised the level of prices, since the costs generated by them were passed on to customers. As regards the quotes, the price indicated in a 'false' quote was determined by the requesting company and accepted by the company drawing up the cover quote, which enabled the former to set its price at a higher level than would have resulted from the free play of competition, close to the 'false' price agreed by common accord. In recital 233 of the Decision, the Commission has demonstrated that effect which the cover quotes' practice had on prices (see paragraph 13 above).

29 As regards the arguments that the cover quotes were only submitted after the customer had made his selection, it must be emphasised that the person in contact with the supplier, for example, the Commission official, is not the true customer of the removal companies. It is for the undertaking or institution paying for the removal to select a removals company. It is precisely with the aim of securing a choice that many undertakings and public institutions require the submission of several quotes.

30 Lastly, as regards the argument that the applicant's involvement in the practices relating to cover quotes and commissions could not have resulted in an increase in the general level of prices on the market, it is settled case-law that, for the purpose of the application of Article 81(1) EC, there is no need to take account of the concrete effects of an agreement when it is clear, as in the present case, that it has as its object the restriction, prevention or distortion of competition within the common market (Joined

Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, 342, and Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 30).

The concept of a single and continuous infringement

31 In Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 82, the Court of Justice stated that it would be artificial to split up continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively manifested itself in both agreements and concerted practices.

32 Accordingly, an undertaking that has taken part in an infringement through conduct of its own which fell within the scope of an agreement or concerted practice having an anti-competitive object for the purposes of Article 81(1) EC and which was intended to help bring about the infringement as a whole is also responsible, throughout the entire period of its participation in that infringement, for conduct of other undertakings in the context of the same infringement (*Commission* v *Anic Partecipazioni*, cited in paragraph 31 above, paragraph 83).

33 It follows from that judgment that in order to establish that there has been a single and continuous infringement, the Commission must show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk (*Commission* v *Anic Partecipazioni*, cited in paragraph 31 above, paragraph 87).

34 Restrictive practices can be regarded as constituent elements of a single anti-competitive agreement only if it is established that they form part of an overall plan pursuing a common objective. In addition, only where the undertaking knew, or ought to have known, when it participated in those practices, that it was taking part in the single agreement, can its participation in them constitute the expression of its accession to that agreement (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraphs 4027 and 4112).

35 Thus, it is apparent from that case-law that three conditions must be met in order to establish participation in a single and continuous infringement, namely the existence of an overall plan pursuing a common objective, the intentional contribution of the undertaking to that plan, and its awareness (proved or presumed) of the offending conduct of the other participants.

36 The Decision must therefore be examined in the light of those conditions.

The characterisation of the offending conduct

— The existence of an overall plan pursuing a common objective

37 As regards, first, the existence of an overall plan pursuing a common objective, the Commission submits that the undertakings in question pursued the economic aim of distorting the normal movement of prices.

38 However, the concept of a common objective cannot be determined by a general reference to the distortion of competition in the market concerned by the infringement, since an impact on competition, as object or effect, constitutes a constituent element of any conduct covered by Article 81(1) EC. Such a definition of the concept of a common objective is likely to deprive the concept of a single and continuous infringement of a part of its meaning, since it would have the consequence that different types of conduct which relate to a particular economic sector and are prohibited by Article 81(1) EC would have to be systematically characterised as constituent elements of a single infringement.

39 In the present case, it is clear from the Decision that the common objective, pursued by different means which formed part of an overall plan, was to establish and maintain a high price level for the provision of international removal services in Belgium and to share this market. That common objective is described in detail in recitals 314 and 322 to 344 of the Decision.

40 The two practices in which the applicant participated, like the written price-fixing agreement, pursued a common objective, namely restricting competition between the cartel participants by establishing a higher level of prices than would have existed in the absence of the agreements. The commissions paid to the competitors that did not secure the contract strongly discouraged them from quoting a competitive price and, by exchanging information on their bids in the context of the cover quotes, the cartel participants restricted price competition. In addition, the agreement on cover quotes enabled the participants to maintain prices at a level higher than would have existed in the absence of that agreement.

41 Lastly, a single and continuous infringement may well pursue the twofold objective of influencing prices and sharing the market. The applicant's argument cannot call in question the existence of such an infringement, just like its argument that the parties to the agreement on prices and the parties to the agreements on commissions and cover quotes are not the same. The mere fact that each undertaking participates

in the infringement in forms specific to it does not affect the categorisation of the infringement as a single and continuous infringement (Case T-53/03 *BPB* v *Commission* [2008] ECR II-1333, paragraph 260).

— The applicant's intentional contribution to the overall plan

42 As regards, second, the applicant's contribution to the infringement, it is not disputed that it participated in two of the three practices described in the Decision, that is the agreement on commissions and the agreement on cover quotes.

43 By contrast, the applicant never participated in the written price agreements. Although an undertaking that has taken part in an infringement through conduct of its own may also be held responsible for conduct of other undertakings in the context of the same infringement, that applies only to the period of its participation in that infringement (*Commission* v *Anic Partecipazioni*, cited in paragraph 31 above, paragraph 83). Consequently, the applicant cannot be held responsible for conduct which had ceased more than five years before its accession to the cartel.

44 However, in the Decision, the Commission found that the applicant had infringed Article 81(1) EC only from 14 February 1997 to 4 August 2003, the period in which the applicant participated in all the manifestations of the cartel. Therefore, the Commission correctly took into account the fact that the applicant participated in the cartel only as from 1997.

45 In addition, the applicant's assertions that the agreements on commissions and cover quotes were not applied at the same time and that the commission arrangements were ad hoc are irrelevant in so far as, contrary to what that applicant contends, both those practices had the same objective.

— The applicant's awareness of the offending conduct

46 As regards, third, the issue of whether the applicant was aware of the offending conduct of the other cartel participants, it is true that, during the applicant's participation, there were no anti-competitive meetings. However, the fact that the applicant never attended such a meeting is not decisive, since the functioning of the cartel shows that its members did not need to participate in meetings to be aware of or involved in the agreements on commissions and cover quotes. Agreements were usually reached over the phone, or by email and/or fax.

47 In addition, the applicant could not fail to have been aware of the offending conduct of the other participants, since the commission and cover quote practices were based on mutual cooperation, with the partners alternating on each occasion. That system was based on the concept of quid pro quo, in so far as each undertaking which paid a commission or issued a cover quote expected to be able, in the future, to benefit itself from that system and obtain commissions or cover quotes. Therefore, contrary to what the applicant claims, those arrangements were not ad hoc but displayed a link of complementarity.

48 The applicant's assertion that it was unaware of the written agreements and that it had not been aware of the commission practice until 1997 is irrelevant, since the Decision

does not hold the applicant responsible for the infringement until that date. In 1997 at the latest, when it accepted its first commission, the applicant became aware of the fact that not all the undertakings were competing under the normal terms of competition. It was therefore aware of the offending conduct and of the anticompetitive aim pursued by the other undertakings.

49 Consequently, the Commission was entitled to conclude that the applicant was aware or ought to have been aware of the offending conduct of the other cartel participants.

50 It follows from all the foregoing that the Commission was fully entitled to find that the applicant had been a party to the single and continuous infringement described in the Decision. The first plea must therefore be rejected.

2. *The second plea, relating to the calculation of the basic amount*

Arguments of the parties

51 By its second plea, the applicant submits that the Commission infringed the principles of proportionality and equal treatment in the calculation of the basic amount of the fine.

52 The applicant submits that the basic amount has been calculated too broadly, because the applicant's turnover to which the infringement directly or indirectly relates is significantly lower than the EUR 1 441 149 established by the Commission. Indeed, only 1 % of the international removal cases handled by the applicant in 2002 were affected by the infringement. The applicant submits that it is not the total turnover for international removal services that must be taken into account, but rather the turnover relating to those services which may reasonably be linked, either directly or indirectly, to the infringements it committed.

53 The applicant states that the disproportionate and unequal nature of the method followed by the Commission is apparent also from the ratios of the turnovers taken into account to the number of infringements established (EUR 18 476 for the applicant as opposed to approximately EUR 7 000 for Allied Arthur Pierre, Interdean and Ziegler). That amount of EUR 18 476 is, moreover, out of all proportion to the average value of an international removal service carried out by the applicant (EUR 4 650).

54 The Commission considers that the applicant's arguments are unfounded or ineffective. Once the Commission has ascertained the goods or services to which the infringement directly or indirectly relates, the value of the sales of all those goods or services can be taken into consideration in order to determine the basic amount of the fine.

Findings of the Court

55 The applicant disputes the turnover figure established by the Commission as directly or indirectly relating to the infringement.

56 Contrary to the Commission's assertions, the present plea is not ineffective. If, in order to calculate the basic amount of the fine, the Commission had taken just the value of the sales allegedly affected by the infringement — which, according to the applicant, is 1 % of EUR 1 441 149, namely EUR 14 411.49 — instead of EUR 1 441 149, the basic amount would be EUR 18 374.65, which would therefore be well below the 10 % ceiling applied to the applicant in the present case.

57 However, the argument that only the value of the sales actually affected by the infringement should be taken into account is based on a misinterpretation of point 13 of the 2006 Guidelines. Point 13 provides as follows:

'In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates …'.

58 Contrary to the applicant's assertions, it does not follow from that provision that only the value of sales for moves actually affected by the infringement may be taken into account in order to determine the relevant value of sales.

59 Thus, point 13 of the 2006 Guidelines refers to 'sales … to which the infringement directly or indirectly relates' and not to 'sales affected by the infringement'. The wording of point 13 therefore covers sales in the relevant market. That is very clear, moreover, from the German-language version of point 6 of the 2006 Guidelines, which is concerned with the 'Umsatz auf den vom Verstoß betroffenen Märkten' (sales in the markets concerned by the infringement). *A fortiori*, point 13 of the 2006 Guidelines does not relate solely to the cases for which the Commission has documentary evidence of the infringement.

60 That interpretation is confirmed by the objective of the Community rules on competition. The interpretation put forward by the applicant would mean that, in order to determine the basic amount of the fines to be imposed in cartel cases, the Commission would be obliged in each case to ascertain the individual sales which were affected by the cartel. An obligation of that kind has never been imposed by the Courts of the European Union and there is no indication that the Commission intended to assume such an obligation in the 2006 Guidelines.

61 Lastly, it is settled case-law that the proportion of the turnover accounted for by the goods in respect of which the infringement was committed gives a proper indication of the scale of the infringement on the relevant market (Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 121). In particular, the turnover in the products which were the subject of a restrictive practice constitutes an objective criterion giving a proper measure of the harm which that practice does to normal competition (Case T-151/94 *British Steel* v *Commission* [1999] ECR II-629, paragraph 643, and judgment of 8 July 2008 in Case T-50/03 *Saint-Gobain Gyproc Belgium* v *Commission*, not published in the ECR, paragraph 84). That principle was reproduced in the 2006 Guidelines.

62 It follows that the figures put forward by the applicant, namely the ratio of the turnovers taken into account to the number of infringements established, are irrelevant. That is all the more the case given that in cartel cases, which by their very nature are secret, it is inevitable that some of the documents showing manifestations of anti-competitive practices will not be discovered. In the present case, it would indeed have been impossible to find evidence in relation to each of the removals affected.

63 Consequently, the second plea must be rejected.

3. *The third plea, relating to the failure to draw a distinction*

Arguments of the parties

64 In its third plea, the applicant alleges an infringement of the principles of proportionality and equal treatment by reason of the uniform application of the rate of 17 % to reflect the gravity of the infringement in accordance with point 19 of the 2006 Guidelines.

65 The applicant complains that the Commission calculated the fine by applying to all the undertakings concerned the same rate of 17 % for the gravity of the infringement and for the additional amount for deterrence, without examining the role which the undertakings played in the cartel or the nature of the practices to which they were a party. The fact that all the undertakings are thus treated identically, while their situations were significantly different, has the effect of penalising the applicant relatively more heavily than an undertaking which has been proven to have played a significant role in the cartel. Thus, the ratio of the basic amount of fine to the number of infringements established amounts to EUR 23 462 for the applicant but only EUR 6 736 for Allied Arthur Pierre. Where an infringement has been committed by a number of parties, the Commission is, however, required to take into account the relative gravity of the participation of each of them. The applicant submits that the difference in the parties' roles in the cartel requires the Commission to draw a distinction.

66 The Commission contends that the fine ultimately imposed on the applicant is already 'extremely low', because of the ceiling applied to the fine. Thus, even if the calculation of the fine were adjusted for the reasons put forward by the applicant, the fine would not be reduced. In addition, the Commission disputes the applicant's assertions.

Findings of the Court

67 First of all, it must be observed that the idea that there should be a linear relationship between the amount of written evidence of the infringement committed by the applicant and the percentage that reflects the gravity of that infringement is mistaken. In cartel cases, which by their very nature are secret, it is inevitable that some of the documents showing manifestations of anti-competitive practices will not be discovered, in particular if the Commission has not carried out investigations at the applicant's premises.

68 As regards the failure to draw a distinction, reference should be made to the Court's observations in the context of the third plea in the judgment in Joined Cases T-204/08 and T-212/08 *Team Relocations* v *Commission* (paragraphs 80 et seq.) and Gosselin's second plea in the judgment in Case T-208/08 *Gosselin* v *Commission* (paragraphs 124 et seq.). However, it is clear that, in the present case, the application of the 10 % ceiling has already given rise to a very significant reduction in the fine. While the basic amount of the fine was set at EUR 1.83 million, the fine imposed is EUR 395 000. In those circumstances, it cannot be envisaged that a different assessment of gravity, which would have to have been carried out before the ceiling was applied, could give rise to a reduction in the final fine. In the light of the nature of the applicant's infringement, the proportion of the value of sales, determined according to the degree of gravity of the infringement, should, in accordance with paragraph 23 of the 2006 Guidelines, be set 'at the higher end of the scale'. Even if the Court, in exercising its unlimited jurisdiction, considered that a rate of 15.1 % should be applied in determining gravity and for the additional amount, the basic amount of the fine would amount to EUR 1.63 million, which would therefore still far exceed the ceiling.

69 In so far as the applicant claims that the relative gravity of its participation is less than that of the other undertakings involved, in the present case the arguments put forward in support of that assertion cannot therefore influence the final amount of the fine imposed.

70 The third plea in law must therefore be rejected.

4. *The fourth plea, relating to the imposition of the maximum fine*

Arguments of the parties

71 By this plea, the applicant alleges an infringement of the principles of proportionality and equal treatment by reason of the fact that the Commission imposed on it the maximum fine provided for by Regulation No 1/2003, that is, 10 % of its turnover in the preceding year.

72 The applicant submits that the fact that the application of the ceiling gave rise to such a substantial reduction, that is, from EUR 1 830 000 to EUR 395 000, already shows in itself that the fine and the Commission's method of calculation are unreasonable and disproportionate. Furthermore, the Commission infringed the principles of proportionality and equal treatment by imposing the maximum authorised fine on a participant with a limited role in the cartel and a moderate influence on the market.

73 The Commission contends that this plea has no independent effect.

Findings of the Court

74 It must be stated that this plea, based on the imposition of the maximum fine, has no independent effect from the other pleas relating to the amount of the fine. The mere fact that the fine ultimately imposed amounts to 10 % of the applicant's turnover, while that percentage is lower for the other participants in the cartel, cannot constitute infringement of the principles of equal treatment or proportionality. That consequence is inherent in the interpretation of the 10 % ceiling as a capping ceiling which is applied after any reduction in the fine on account of mitigating circumstances or the principle of proportionality.

75 However, the multiplication of the amount determined on the basis of the value of sales by the number of years of participation in the infringement may mean that, in the context of the 2006 Guidelines, the application of the 10 % ceiling laid down in Article 23[2] of Regulation No 1/2003 is now the rule rather than the exception for any undertaking which operates mainly on a single market and has participated in a cartel for over a year. In that case, any distinction on the basis of gravity or mitigating circumstances will as a matter of course no longer be capable of impacting on a fine which has been capped in order to be brought below the 10 % ceiling. The failure to draw a distinction with regard to the final fine that results presents a difficulty in terms of the principle that penalties must be specific to the offender and to the offence, which is inherent in the new methodology. It may require the Court to exercise fully its unlimited jurisdiction in those specific cases where the application of the 2006 Guidelines alone does not enable an appropriate distinction to be drawn. In the present case, however, the Court finds that this is not the case (see also, in that regard, paragraphs 81 et seq. below).

76 Consequently, the fourth plea must be rejected.

5. *The fifth plea, relating to mitigating circumstances*

Arguments of the parties

77 By its final plea, the applicant submits that there has been an infringement by the Commission of the principles of the protection of legitimate expectations and equal treatment, together with misappraisal, inasmuch as it failed to establish any mitigating circumstances.

78 The applicant submits that it fulfils the conditions in order to benefit from some of the mitigating circumstances set out at point 29 of the 2006 Guidelines. In particular, it terminated all involvement in the infringements as soon as the Commission intervened; its involvement in the infringement was very limited; it cooperated and always submitted any necessary and useful information to the Commission. In addition, it did not contest the facts, and displayed great discretion in the course of the proceedings, by responding briefly to the statement of objections and by not taking part in the hearing. Its conduct is therefore consistent with that expected of undertakings wishing to benefit from a settlement pursuant to the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (OJ 2008 C 167, p.1) and Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (OJ 2008 L 171, p. 3).

79 The Commission disputes the applicant's arguments. It also contends that this plea cannot in any event be of use to the applicant, since, owing to the application of the ceiling, the fine imposed on Putters is already 'extremely low'.

Findings of the Court

80 As in the third plea, the Commission calls in question the effectiveness of the plea relied on by the applicant. In that regard, it is clear that, in the present case, a reduction in the fine as a result of taking account of mitigating circumstances could not in fact give rise to a reduction in the final fine. Since the application of the 10 % ceiling has already led to a very significant reduction in the fine, and in view of the nature of the mitigating circumstances relied on by the applicant, the Court considers, in exercising its unlimited jurisdiction, that taking account of those circumstances — which must be done before the ceiling is applied — cannot lead to a reduction in the final fine. Thus, as the Commission correctly noted, even if the calculation of the fine were adjusted for the reasons put forward by the applicant, the fine would not, however, be reduced. Again that consequence is inherent in the interpretation of the 10 % ceiling as a cap which is applied after any reduction in the fine on account of mitigating circumstances.

81 For the sake of completeness, the Court will, however, examine the arguments raised by the applicant.

82 First, the applicant states that it terminated all involvement in the infringements as soon as the Commission intervened. Admittedly, the first indent of point 29 of the 2006 Guidelines states that the basic amount may be reduced where the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened. However, the following sentence makes clear that this 'will not apply to secret agreements or practices (in particular, cartels)'. Therefore, the Commission was fully entitled to conclude that the ground in question could not justify a reduction in the fine.

83 As regards, second, the applicant's assertion that its involvement in the infringement was very limited, it is noteworthy that the Commission has written evidence concerning 78 specific cases of commissions and cover quotes involving that company. It is true that the infringement at issue changed over time, and that the written agreements which were applied during the first stage of the infringement were subsequently abandoned. Consequently, the proportion of the value of sales to be taken into account under point 19 of the 2006 Guidelines could, in principle, be adjusted over time. That fact could also justify a reduction in the fine on account of mitigating circumstances.

84 However, it must be found that the conduct in which the applicant participated does not amount to a less serious infringement than the written price-fixing agreements or the ad hoc fixing of prices for specific moves. Contrary to what the applicant asserts, the cover quotes and commissions also had effects on prices (see paragraph 28 above). Similarly, in the circumstances of the present case, the fact that the applicant did not participate in the anti-competitive meetings is irrelevant for the purposes of assessing the gravity of the infringement, since the cartel operated through mechanisms which rendered such meetings pointless.

85 As regards, third, the alleged cooperation between the applicant and the Commission and the fact that the applicant did not contest the facts, it should be noted that, in accordance with the findings in recitals 592 and 594 of the Decision, the applicant's cooperation was confined to replying to requests for information regarding the structure of its undertaking and its financial data. The applicant did not voluntarily provide evidence regarding the infringement. In addition, unlike the Commission Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4), the 2002 Leniency Notice does not provide for a reduction simply for not substantially contesting the facts. Consequently, the Commission was entitled to conclude that none of those circumstances could justify granting a reduction in the amount of the fine.

86 Lastly, the applicant submits, fourth, that its conduct was consistent with that expected of undertakings wishing to benefit from a settlement. However, it is clear that Regulation No 622/2008, as regards the conduct of settlement procedures in cartel cases, entered into force only in July 2008, whereas the Decision dates from March 2008 and the statement of objections was notified to the applicant in October 2006. Therefore, that regulation was not applicable to the present case. In any event, the procedure laid down in that regulation was not followed.

87 It follows that the applicant's final plea must be rejected.

88 As all of the applicant's pleas in law have been rejected, it is necessary to dismiss the action in its entirety.

Costs

89 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Dismisses the action;

2. Orders Putters International NV to pay the costs.

Papasavvas Wahl Dittrich

Delivered in open court in Luxembourg on 16 June 2011.

[Signatures]

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