Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

16 September 2013 *

(Competition — Agreements, decisions and concerted practices — Bathroom fittings and fixtures markets of Belgium, Germany, France, Italy, the Netherlands and Austria — Decision finding an infringement of Article 101 TFEU and Article 53 of the EEA Agreement — Coordination of price increases and exchange of sensitive business information — Attributability of unlawful conduct — Fines — 2006 Guidelines on the method of setting fines — Gravity of the infringement — Multipliers — Mitigating circumstances — Economic crisis — Pressure exerted by wholesalers — 2002 Leniency Notice — Reduction of the fine — Significant added value)

In Case T-411/10,

Laufen Austria AG, established in Wilhelmsburg (Austria), represented by E. Navarro Varona and L. Moscoso del Prado González, lawyers,

applicant,

v

European Commission, represented initially by F. Castillo de la Torre, A. Antoniadis and F. Castilla Contreras, and subsequently by F. Castillo de la Torre, A. Antoniadis and F. Jimeno Fernández, acting as Agents,

defendant,

APPLICATION for annulment in part of Commission Decision C(2010) 4185 final of 23 June 2010 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case COMP/39092 – Bathroom Fittings and Fixtures) and for reduction of the fines imposed on the applicant in that decision,

THE GENERAL COURT (Fourth Chamber),

composed of I. Pelikánová, President, K. Jürimäe (Rapporteur) and M. van der Woude, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 March 2013,

gives the following

* Language of the case: Spanish.

Judgment [1]

…

Procedure and forms of order sought

28 By application lodged at the Court Registry on 8 September 2010, the applicant brought the present action.

29 Upon hearing the Report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure pursuant to Article 64 of its Rules of Procedure, put written questions to the parties, to which the parties replied within the period prescribed.

30 At the hearing on 6 March 2013, the parties presented oral argument and replied to the Court's oral and written questions.

31 The applicant claims that the Court should:

— annul Articles 1 and 2 of the contested decision in so far as they relate to it;

— reduce the fines imposed on it both individually and jointly and severally with Roca Sanitario on the basis of the grounds stated by it or on such other ground as the Court may determine;

— order the Commission to pay the costs.

32 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

…

A – *The claim for annulment in part of the contested decision*

…

6. *Sixth plea, concerning the applicant's cooperation*

…

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

a) Manifest error of assessment in the application of the 2002 Leniency Notice and infringement of the principle of the protection of legitimate expectations

218 The applicant submits that the Commission infringed the principle of the protection of legitimate expectations and misapplied the 2002 Leniency Notice by withdrawing, in the contested decision, the conditional reduction in the fine, about which the Roca group had been informed by letter of 8 December 2006 in application of the notice. In that regard, the applicant maintains, in essence, that if the Court were to consider that it formed an economic entity with Roca Sanitario and Roca France, the errors made by the Commission in evaluating Roca France's request for a reduction of the fine would have to be taken into account in relation to the fine that was imposed on the applicant. It also submits that the Commission made a number of errors when assessing the information submitted by Roca France in support of its request for a reduction of the fine under the 2002 Leniency Notice.

219 The Commission disputes the merits of the applicant's arguments.

220 Consideration of whether the Commission infringed the principle of the protection of legitimate expectations and misapplied the 2002 Leniency Notice requires prior consideration of whether the applicant, which participated in the infringement in Austria, may – merely because it is a company with the same parent company as a subsidiary which participated in the infringement in France and on that basis submitted a request for a reduction of the fine – claim to be entitled to such a reduction of the fine under that notice.

221 In that regard, the applicant, in response to questions from the Court at the hearing, maintained, in essence, that the concept of a single undertaking implies that any advantage stemming from the 2002 Leniency Notice must benefit all the companies forming part of the single undertaking. The Commission disputed the merits of the applicant's arguments.

222 It should be recalled that in the 2002 Leniency Notice, the Commission set out the conditions under which undertakings cooperating with it during its investigation into a cartel may be exempted from fines, or may be granted a reduction of the fine which would otherwise have been imposed upon them.

223 Section A of the 2002 Leniency Notice, comprising points 8 to 19, concerns the conditions under which an undertaking may be granted immunity from fines, whilst Section B, comprising points 20 to 27, concerns the conditions under which the undertaking may be granted a reduction of the fine.

224 In accordance with point 20 of the 2002 Leniency Notice, '[u]ndertakings that do not meet the conditions [to obtain immunity from fines] may be eligible to benefit from a reduction of any fine that would otherwise have been imposed'.

225 Point 21 of the 2002 Leniency Notice provides that, '[i]n order to qualify [for a reduction of its fine under point 20 of this notice], an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence'.

226 It follows that an undertaking which applies for a reduction of the fine and which provides the Commission with evidence of the suspected infringement which represents significant added value may benefit from such a reduction under SectionB of the 2002 Leniency Notice.

227 Accordingly, it must be held that, as a rule, only the undertaking which has applied for a reduction of the fine ('the leniency applicant') and, where relevant, the entities on whose behalf the application was made and which cooperate with the Commission may be granted a reduction of the fine on that account.

228 It should also be observed that, according to the case-law, when the parent company has not actually participated in the cartel and is held liable solely on account of its subsidiary's participation therein, the parent's liability cannot exceed that of its subsidiary (see, to that effect, Case T-382/06 *Tomkins* v *Commission* [2011] ECR II-1157, paragraph 38, upheld on appeal by the Court of Justice in Case C-286/11 P *Commission* v *Tomkins* [2013] ECR, paragraph 39). In those circumstances, when the liability of a parent company derives solely from that of a subsidiary which has participated in the cartel, a reduction of the fine, which is granted to the subsidiary, following an application made by it under the 2002 Leniency Notice, must benefit the parent company.

229 By contrast, the Commission is not obliged to extend to another subsidiary ('the fellow subsidiary') the benefit of a reduction of the fine which has been granted to the first subsidiary, which has made an application under the 2002 Leniency Notice, merely because the two subsidiaries belong, together with their common parent company, to an undertaking within the meaning of the case-law cited in paragraphs 62 and 63 above. Indeed, unlike the parent company's liability, which, in the circumstances mentioned in paragraph 228 above, can be regarded as purely derivative, secondary and dependent upon that of its subsidiary (see, to that effect, *Commission* v *Tomkins*, paragraph 228 above, paragraph 39), a subsidiary's liability is not derived from that of a fellow subsidiary, as the liability arises as a result of its own participation in the cartel. In those circumstances, it is only when (i) an application for a reduction of the fine is made on behalf of the fellow subsidiary and (ii) that subsidiary has actually cooperated with the Commission, that the fellow subsidiary may benefit from a reduction of the fine upon the application of another subsidiary belonging to the same undertaking. That situation can thus be distinguished from the situation in which a parent company makes, on its own behalf and on behalf of its subsidiaries, an application for reduction of the fine, since, in such a situation, all the companies forming the undertaking within the meaning of the case-law cited in paragraphs 62 and 63 above are obliged to cooperate with the Commission.

230 In the present case, it is apparent from recital 1288 to the contested decision that, on 17 January 2006, the Commission received an application for a reduction of the fine from Roca France. In response to that application, the Commission, by letter of 8 December 2006, granted the Roca group a conditional reduction of the fine under the 2002 Leniency Notice (recital 1289 to the contested decision). After further examination of the evidence, the Commission, in the contested decision, refused to grant the Roca group a reduction of the fine for the reasons stated, in essence, in recitals 1291 to 1293, 1295, 1299 and 1300 to the decision.

231 In that regard, the documents on the file show unequivocally that, despite the doubts to which the terms used in the contested decision might give rise with regard to the leniency applicant and the scope of the application for a reduction of the fine, that application was made, not on behalf of the Roca group as a whole, but by Roca France on its own behalf and on behalf of the Laufen group. In that respect, the point should, however, be made that those documents also show unequivocally that that application concerned the 'Laufen group' solely to the extent that its activities in France had been integrated into Roca France. Furthermore, as is apparent from recitals 1291 and 1293 to the contested decision, the information submitted by Roca France related exclusively to the infringement committed, in relation to ceramics, in France in 2004. In particular, it is undisputed that no information or evidence was submitted concerning the infringement in Austria.

232 In those circumstances, it is clear that the application concerned was not made on behalf of the applicant. Although it is true that the applicant is part of the Laufen group referred to in that application, the fact remains that the application concerns the activities of that group in France and that the applicant is not active on the French market. In any event, the applicant did not cooperate with the Commission under the 2002 Leniency Notice. Moreover the evidence provided by Roca France is entirely unrelated to the applicant's activities and concerns the ceramics-related infringement in France in 2004.

233 In view of the foregoing, it must be concluded that, in any event, the Commission cannot have infringed the principle of the protection of legitimate expectations or misapplied the 2002 Leniency Notice, since, having regard to the findings made in paragraphs 230 to 232 above, it was not obliged to grant the applicant a reduction of the fine.

234 Having regard to all the foregoing considerations, the Court must reject the present plea, in so far as it concerns the application of the 2002 Leniency Notice, as unfounded, there being no need to consider the applicant's other arguments, as summarised in paragraph 218 above.

…

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. Dismisses the action;

2. Orders Laufen Austria AG to bear its own costs and to pay those of the European Commission.

Pelikánová Jürimäe Van der Woude

Delivered in open court in Luxembourg on 16 September 2013.

[Signatures]