Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

26 January 2017*

(Appeal — Competition — Agreements, decisions and concerted practices — Bathroom fittings and fixtures markets of Belgium, Germany, France, Italy, the Netherlands and Austria — Coordination of selling prices and exchange of sensitive business information — Single and continuous infringement — Obligation to state reasons)

In Case C-614/13 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 27 November 2013,

Masco Corp., established in Taylor (United States),

Hansgrohe AG, established in Schiltach (Germany),

Hansgrohe Deutschland Vertriebs GmbH, established in Schiltach,

Hansgrohe Handelsgesellschaft mbH, established in Wiener Neudorf (Austria),

Hansgrohe SA/NV, established in Brussels (Belgium),

Hansgrohe BV, established in Westknollendam (Netherlands),

Hansgrohe SARL, established in Antony (France),

Hansgrohe Srl, established in Villanova d'Asti (Italy),

Hüppe GmbH, established in Bad Zwischenahn (Germany),

Hüppe GesmbH, established in Laxenburg (Austria),

Hüppe Belgium SA/NV, established in Woluwé Saint-Étienne (Belgium),

Hüppe BV, established in Alblasserdam (Netherlands),

represented by D. Schroeder and S. Heinz, Rechtsanwälte, and by B. Fischer, advocate, instructed by J. Temple Lang, Solicitor,

appellants,

the other party to the proceedings being:

* Language of the case: English.

European Commission, represented by L. Malferrari and F. Ronkes Agerbeek, acting as Agents, and by B. Kennelly, Barrister,

defendant at first instance,

THE COURT (First Chamber),

composed of A. Tizzano, Vice-President of the Court, acting as President of the First Chamber, M. Berger, E. Levits, S. Rodin (Rapporteur) and F. Biltgen, Judges,

Advocate General: M. Wathelet,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 10 September 2015,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By their appeal, Masco Corp., Hansgrohe AG, Hansgrohe Deutschland Vertriebs GmbH, Hansgrohe Handelsgesellschaft mbH, Hansgrohe SA/NV, Hansgrohe BV, Hansgrohe SARL, Hansgrohe Srl, Hüppe GmbH, Hüppe GesmbH, Hüppe Belgium SA/NV and Hüppe BV ask the Court of Justice to set aside the judgment of the General Court of the European Union of 16 September 2013, *Masco and Others* v *Commission* (T-378/10, 'the judgment under appeal', EU:T:2013:469), by which the General Court dismissed their action 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) ('the decision at issue').

Background to the dispute and the decision at issue

2 The background to the dispute was set out in paragraphs 1 to 9 of the judgment under appeal and may be summarised as follows.

3 The appellants, namely Masco Corp., a US undertaking, and some of its European subsidiaries, including Hansgrohe AG and Hüppe GmbH, manufacture taps and fittings as well as shower enclosures and accessories.

4 On 15 July 2004, the appellants informed the European Commission of the existence of a cartel in the bathroom fixtures and fittings sector and submitted an application for immunity from fines under the Commission notice on immunity from fines and reductions of fines in cartel cases (OJ 2002 C 45, p. 3) or, in the alternative, for a reduction of any fines that might be imposed on them. On 2 March 2005, the Commission adopted a decision granting the appellants conditional immunity from fines pursuant to points 8(a) and 15 of that notice.

5 On 23 June 2010 the Commission adopted the decision at issue, by which it found that there had been an infringement of Article 101(1) TFEU and Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) in the bathroom fittings and fixtures sector. According to the decision, that infringement, in which 17 undertakings, including the appellants, had participated, took

place over various periods between 16 October 1992 and 9 November 2004 and took the form of anticompetitive agreements and concerted practices covering the territory of Belgium, Germany, France, Italy, the Netherlands and Austria.

6 The Commission considered that the anticompetitive practices in question formed part of an overall plan to restrict competition between the undertakings concerned and had the characteristics of a single and continuous infringement which covered bathroom fittings and fixtures belonging to the following three product sub-groups: taps and fittings, shower enclosures and accessories, and ceramic sanitary ware (ceramics) ('the three product sub-groups').

7 On those grounds, the Commission, in Article 2 of the decision at issue, considered the 17 undertakings concerned to have participated in a single infringement and accordingly to have infringed Article 101(1) TFEU and Article 53 of the Agreement on the European Economic Area of 2 May 1992.

8 However, so far as the appellants were concerned, the Commission indicated, in point 1 of the first subparagraph of Article 2 of that decision, that it was not imposing a fine on them.

Proceedings before the General Court and the judgment under appeal

9 By application lodged at the Registry of the General Court on 7 September 2010, the appellants brought an action before that Court for annulment of the decision at issue, relying on a single plea in law, which alleged that the Commission had erred in finding that they had participated in a single infringement in the bathroom fittings and fixtures sector.

10 By that plea, the appellants complained that the Commission had made errors, first, in establishing the constituent elements of a single infringement and the participation of undertakings in such an infringement and, second, in the assessment of the facts relied on for the purpose of finding a single infringement and the appellants' participation in that infringement.

11 By the judgment under appeal, the General Court dismissed the action in its entirety.

Forms of order sought by the parties

12 The appellants claim that the Court should:

— set aside the judgment under appeal;

— annul the decision at issue in so far as it concerns them;

— order the Commission to pay the costs; and

— take any other measures that the Court considers appropriate.

13 The Commission contends that the Court should:

— dismiss the appeal; and

— order the appellants to pay the costs.

The appeal

14 The appellants raise two grounds in support of their appeal. The first alleges that the finding that they participated in a single infringement is erroneous. The second is based on an alleged infringement of the obligation to state reasons.

The first ground of appeal, alleging that the finding that the appellants participated in a single infringement is erroneous

Arguments of the parties

15 By their first ground of appeal the appellants argue that the General Court erred in law in holding, first, that they had intended to contribute, through their own conduct, to the common objectives pursued by all the cartel participants, second, that they were aware of the offending conduct planned or put into effect by the other undertakings in pursuit of the same objectives and, third, that they were prepared to take the risk. This ground of appeal is divided into five parts.

16 By the first part of the first ground of appeal, the appellants complain that the General Court, in finding –– in paragraph 59 of the judgment under appeal –– that the unlawful practices in question were intended to permit the appellants to present a united front to the wholesalers for the three product sub-groups, including ceramics, manifestly distorted the evidence with respect to their intention to contribute by their own conduct to the common objective pursued by all the participants in the single infringement. They submit that recital 931 of the decision at issue to which the General Court referred to support its reasoning does not permit such a conclusion. Furthermore, contrary to what is stated in paragraph 59 of the judgment under appeal, the appellants did not acknowledge at the hearing before the General Court, in response to questions put by the latter, that the unlawful practices were intended to present a united front to the wholesalers.

17 By the second part of the first ground of appeal, the appellants maintain, in the alternative, that, if paragraph 59 of the judgment under appeal is considered not to be intended to show that the appellants sought to contribute by their own conduct to the common objective pursued by all the participants in the single infringement, then the General Court did not examine that issue and, consequently, since it did not apply the relevant legal test, erred in law.

18 By the third part of the first ground of appeal, the appellants complain that the General Court distorted the evidence relating to their awareness of the unlawful conduct planned or put into effect by the other undertakings in pursuit of that common objective. They argue in that regard that, in paragraph 61 of the judgment under appeal, the General Court incorrectly inferred from the appellants' membership of umbrella organisations and cross-product associations awareness of all unlawful practices. They submit that they could not have become aware through their membership of such organisations and associations in Belgium, France or Italy of price increase coordination concerning ceramics in those Member States.

19 By the fourth part of the first ground of appeal, the appellants complain that the General Court misapplied the legal test for establishing a single infringement as it did not examine whether they could reasonably have foreseen all the unlawful conduct relating to ceramics.

20 By the fifth part of the first ground of appeal, the appellants maintain that the General Court erred in law in failing to review whether they were prepared to take the risk relating to the conduct planned or put into effect by other undertakings in the ceramics business in pursuit of the common objective pursued by the cartel participants. According to the case-law of the Court of Justice, that condition

also applies in cases where an undertaking is aware of unlawful conduct planned or put into effect by other undertakings in pursuit of that objective and constitutes the element of intent required in order to establish the participation of that undertaking in the anticompetitive conduct in question.

21 The Commission contends that the first ground of appeal must be rejected as inadmissible or, in any event, unfounded.

Findings of the Court

22 As a preliminary point, it should be recalled that, according to settled case-law, an infringement of Article 101(1) TFEU can result not only from an isolated act, but also from a series of acts or from continuous conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that provision. Accordingly, if the different actions form part of an 'overall plan' because their identical object distorts competition in the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (judgments of 6 December 2012, *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 41, and of 24 June 2015, *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 156).

23 An undertaking which has participated in a single and complex infringement of that kind by its own conduct, which fell within the definition of an agreement or concerted practice having an anticompetitive object within the meaning of Article 101(1) TFEU and was intended to help bring about the infringement as a whole, may thus be responsible also in respect of the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement. That is the position where it is shown that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participants and that it was aware of the offending conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to take the risk (judgments of 6 December 2012, *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 42, and of 24 June 2015, *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 157).

24 In the present case, the appellants, by the first part of the first ground of appeal, complain that the General Court distorted the evidence in finding, in paragraph 59 of the judgment under appeal, that the unlawful practices in question involved the appellants presenting a united front to the wholesalers with regard to the three product sub-groups.

25 It should be noted in this regard that, as is clear from that paragraph, the General Court took that finding into account in any event only for the sake of completeness in establishing the existence and nature of an overall plan showing there to be a single infringement. Indeed, that finding as to an overall plan followed, according to the General Court, from many other factors identified by the Commission in the decision at issue.

26 Accordingly, since the argument raised by the appellants in the first part of the first ground of appeal is not capable of calling into question the General Court's conclusion in paragraphs 58 and 62 of the judgment under appeal that the Commission was fully entitled to conclude that there was a single infringement, this part must be rejected as ineffective (see, to that effect, orders of 28 October 2004, *Commission* v *CMA CGM and Others*, C-236/03 P, not published, EU:C:2004:679, paragraphs 30 to 32, and of 21 October 2014, *Mundipharma* v *OHIM*, C-669/13 P, not published, EU:C:2014:2308, paragraph 36).

27 By the second, fourth and fifth parts of the first ground of appeal, the appellants in essence take issue with the General Court for failing to review whether the conditions set out in paragraph 22 of the present judgment were met and, more specifically, first, whether the appellants intended to contribute by their own conduct to the common objectives pursued by all the participants in the single infringement, second, whether they could reasonably have foreseen all anticompetitive conduct relating to ceramics and, third, whether they were prepared to take the risk.

28 It should be recalled in this regard that, as follows from settled case-law of the Court of Justice, the General Court cannot, as a general rule, be required to respond to pleas and arguments which have not been raised, or which have not been raised with sufficient clarity and precision, during the proceedings, in particular in the application initiating proceedings (see, to that effect, judgments of 6 March 2001, *Connolly* v *Commission*, C-274/99 P, EU:C:2001:127, paragraph 121, and of 20 March 2014, *Rousse Industry* v *Commission*, C-271/13 P, not published, EU:C:2014:175, paragraphs 17 to 19).

29 In the present case, it can be seen from an examination of the application initiating proceedings and the reply lodged at the Registry of the General Court –– in particular of the passages of those documents on which the appellants rely in support of the present appeal –– that, although the appellants denied being aware of the overall collusion concerning the three product sub-groups, they did not raise before the General Court any argument to the effect that they did not contribute by their conduct to the common objectives pursued by all the participants, owing to the fact that they could not reasonably have foreseen the offending conduct complained of and that they were not prepared to take the risk associated with that conduct.

30 In those circumstances the General Court cannot be criticised for not expressly examining those issues in the judgment under appeal. Concerning the argument that the General Court did not consider whether the appellants could reasonably have foreseen all the unlawful conduct complained of and whether they were prepared to take the risk, it should also be stated that, since the General Court, in paragraphs 61 and 82 of the judgment under appeal, held that the appellants had been aware of that conduct, it was not required to determine whether they could reasonably have foreseen that conduct and had taken the risk, as the two conditions are, as is clear from paragraph 23 of the present judgment, alternative.

31 As the arguments raised by the appellants seek to show that the conditions set out in paragraph 23 of the present judgment are not met, those arguments cannot be examined at the stage of the appeal.

32 As is clear from settled case-law, the jurisdiction of the Court of Justice in appeal proceedings is, as a general rule, confined to a review of the findings of law on the pleas argued at first instance (see, to that effect, judgments of 30 April 2014, *FLSmidth* v *Commission*, C-238/12 P, EU:C:2014:284, paragraph 42, and of 22 May 2014, *ASPLA* v *Commission*, C-35/12 P, EU:C:2014:348, paragraph 39).

33 It follows that the second, fourth and fifth parts of the first ground of appeal must be rejected as in part inadmissible and in part unfounded.

34 In the third part of their first ground of appeal, the appellants claim that the General Court distorted the evidence inasmuch as it erred in holding, in paragraphs 61 and 82 of the judgment under appeal, that they had been aware of all the unlawful practices, including those relating to ceramics, in Belgium, France and Italy.

35 In that connection, it should be borne in mind that, in accordance with Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal lies on points of law only. The General Court thus has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of the facts and the assessment of the evidence thus do not, save where the facts and evidence have been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (see, to that effect, order of 24 September 2009,

Alcon v *OHIM* , C-481/08 P, not published, EU:C:2009:579, paragraph 18; judgment of 13 January 2011, *Media-Saturn-Holding* v *OHIM* , C-92/10 P, not published, EU:C:2011:15, paragraph 27; and order of 3 March 2016, *AgriCapital* v *OHIM* , C-440/15 P, not published, EU:C:2016:144, paragraph 32).

36 According to settled case-law law of the Court of Justice, there is such distortion where, without recourse to new evidence, the assessment of the existing evidence is manifestly incorrect. However, such distortion must be obvious from the documents in the case, without it being necessary to undertake a fresh assessment of the facts and the evidence. Moreover, where an appellant alleges distortion of the evidence by the General Court, he must indicate precisely the evidence alleged to have been distorted by that Court and show the errors of appraisal which, in his view, led to that distortion (see, to that effect, judgment of 3 December 2015, *Italy* v *Commission* , C-280/14 P, EU:C:2015:792, paragraph 52 and the case-law cited).

37 It must be stated that, as regards the findings in paragraphs 61 and 82 of the judgment under appeal relating to the appellants' awareness of the unlawful practices in question, the appellants have not, in their appeal, identified any evidence the assessment of which by the General Court is manifestly incorrect, for the purposes of that case-law.

38 Thus, the appellants, whilst purporting to advance arguments concerning an alleged distortion of the evidence, are in reality seeking to challenge the General Court's appraisal of the facts, according to which the Commission could –– in particular in view of the practices for coordinating price increases within the umbrella associations of which the appellants were members –– properly consider that the appellants had been aware of all the unlawful practices concerned, including those concerning ceramics. Such an appraisal is not subject to review by the Court in an appeal.

39 Consequently, the third part of the first ground of appeal must be rejected as inadmissible.

40 It follows from the foregoing that the first ground of appeal must be rejected in its entirety.

The second ground of appeal: alleged infringement of the duty to state reasons

Arguments of the parties

41 By their second ground of appeal, the appellants criticise paragraph 59 of the judgment under appeal, maintaining that, since the General Court failed to review certain relevant arguments concerning the appellants' alleged participation in a single infringement, the judgment under appeal is vitiated by a failure to state reasons.

42 The appellants submit that the General Court failed to review (i) whether they intended to contribute by their own conduct to the common objective pursued, (ii) whether they could reasonably have foreseen the unlawful conduct planned or put into effect in the ceramics business by other undertakings in pursuit of the common objectives pursued by all the participants and (iii) whether the appellants were prepared to take the risk with respect to such conduct.

43 In proceeding in that way the General Court failed in its obligation to state reasons.

44 The Commission contends that the second ground of appeal should be rejected as inadmissible or, in any event, unfounded.

Findings of the Court

45 It must be held that, inasmuch as the second ground of appeal is substantially the same as the second, fourth and fifth parts of the first ground, it must be rejected for the same reasons as those set out in paragraphs 28 to 33 of the present judgment.

46 As none of the grounds of appeal raised by the appellants has been successful, the appeal must be dismissed in its entirety.

Costs

47 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs.

48 Article 138(1) of those rules, which applies to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the appellants have been unsuccessful and the Commission has applied for costs to be awarded against them, the appellants must be ordered to pay the costs relating to the present appeal proceedings.

On those grounds, the Court (First Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders Masco Corp., Hansgrohe AG, Hansgrohe Deutschland Vertriebs GmbH, Hansgrohe Handelsgesellschaft mbH, Hansgrohe SA/NV, Hansgrohe BV, Hansgrohe SARL, Hansgrohe Srl, Hüppe GmbH, Hüppe GesmbH, Hüppe Belgium SA/NV and Hüppe BV to pay the costs.**

Tizzano Berger Levits

Rodin Biltgen

Delivered in open court in Luxembourg on 26 January 2017.

A. Calot Escobar
Registrar

K. Lenaerts
President