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 — Regulation (EC) No 1/2003 — Article 23(2) — Ceiling of 10% of turnover — Obligation to state reasons — Protection of legitimate expectations)

In Case C-611/13 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 26 November 2013,

Hansa Metallwerke AG, established in Stuttgart (Germany),

Hansa Nederland BV, established in Nijkerk (Netherlands),

Hansa Italiana Srl, established in Castelnuovo del Garda (Italy),

Hansa Belgium, established in Asse (Belgium),

Hansa Austria GmbH, established in Salzburg (Austria),

represented by S. Cappellari, H.-J. Hellmann and C. Malz, Rechtsanwälte,

appellants,

the other parties to the proceedings being:

European Commission, represented by L. Malferrari and R. Sauer, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

Council of the European Union,

intervener 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,

* * Language of the case: German.

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, Hansa Metallwerke AG, Hansa Nederland BV, Hansa Italiana Srl, Hansa Belgium and Hansa Austria GmbH ask the Court of Justice to set aside the judgment of the General Court of the European Union of 16 September 2013, *Hansa Metallwerke and Others* v *Commission* (T-375/10, not published, 'the judgment under appeal', EU:T:2013:475), 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'), and, in the alternative, to reduce the amount of the fine imposed on the appellants in that decision.

Legal context

Regulation (EC) No 1/2003

2 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 [EC] (OJ 2003 L 1, p. 1) provides, in Article 23(2) and (3):

'2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article 81 or 82 [EC] ...

…

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

…

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.'

The 2006 Guidelines

3 The 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') state, in point 2, that, as regards the setting of fines, 'the Commission must have regard both to the gravity and to the duration of the infringement' and that 'the fine imposed may not exceed the limits specified in Article 23(2), second and third subparagraphs, of Regulation No 1/2003'.

4 Point 37 of the 2006 Guidelines states:

‘Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in point 21.’

Background to the dispute and the decision at issue

5 The background to the dispute was set out in paragraphs 1 to 34 of the judgment under appeal and may be summarised as follows.

6 The appellants are manufacturers of taps and fittings.

7 On 15 July 2004, Masco Corp. and its subsidiaries, including Hansgrohe AG, which manufactures taps and fittings, and Hüppe GmbH, which manufactures shower enclosures, informed the Commission of the existence of a cartel in the bathroom fittings and fixtures sector and submitted an application for immunity from fines under the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3, ‘the 2002 Leniency Notice’), or, in the alternative, for a reduction of any fines that might be imposed on them.

8 On 9 and 10 November 2004, the Commission conducted unannounced inspections at the premises of various companies and national industry associations operating in the bathroom fittings and fixtures sector. Between 15 November 2005 and 16 May 2006, the Commission sent requests for information to those companies and associations, including the appellants. It then, on 26 March 2007, adopted a statement of objections, which was also notified to the appellants.

9 Following a hearing held from 12 to 14 November 2007, the sending, on 9 July 2009, of a letter of facts and further requests for information that were subsequently addressed to, amongst others, the appellants, the Commission, on 23 June 2010, 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. That infringement, in which 17 undertakings had allegedly participated, was said to have taken place over various periods between 16 October 1992 and 9 November 2004 and to have taken the form of anticompetitive agreements or concerted practices covering the territory of Belgium, Germany, France, Italy, the Netherlands and Austria. According to the decision at issue, the products covered by the cartel were bathroom fittings and fixtures belonging to the following three product sub-groups: taps and fittings, shower enclosures and accessories, and ceramic sanitary ware (ceramics).

10 As regards the appellants’ participation in the infringement identified, first, the Commission noted that, despite being primarily manufacturers of taps and fittings throughout the period of the infringement, they had nevertheless been aware of the entire product scope of the infringement, because of their participation in cartel meetings of various umbrella associations of which they were members. Secondly, so far as concerns the geographic scope of the cartel, the Commission found that the appellants had participated in meetings in five of the six Member States in which an infringement had been found up to 2002, namely Belgium, Germany, Italy, the Netherlands and Austria. As regards France, the Commission acknowledged that, notwithstanding the fact that there was an infringement as from 2002, the appellants ceased to participate in the national industry association concerned in that year. However, in the light of a variety of information and evidence, the Commission found that the appellants could reasonably have foreseen that the anticompetitive practices which characterised the infringement identified were having effects in France. Accordingly, the Commission concluded that the appellants could not have been unaware of the general scope and the essential characteristics of the infringement at issue.

11 On those grounds, the Commission imposed fines of a total of EUR 14 758 220 on the appellants in Article 2(5) of the decision at issue.

12 For the purpose of setting those fines, the Commission took as a basis the 2006 Guidelines.

The proceedings before the General Court and the judgment under appeal

13 By application lodged at the General Court Registry on 8 September 2010, the appellants brought an action for annulment of the decision at issue before the General Court, relying on six pleas in law. The first plea alleged an error of law and of assessment as to the maximum amount of the fine imposed pursuant to the second subparagraph of Article 23(2) of Regulation No 1/2003; the second, breach of the principle of protection of legitimate expectations; the third, infringement of Article 23(2) of that regulation, read in conjunction with the 2002 Leniency Notice, resulting from the error made in calculating the amount of the fine; the fourth, breach of the principle of non-retroactivity; the fifth, breach of the principle *nullum crimen, nulla poena sine lege*, resulting from Article 23(2) of that regulation; and, the sixth, breach of the principles of the lawfulness of administrative action and of legal certainty.

14 In the alternative, the appellants sought a reduction of the fine imposed.

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

The forms of order sought

16 The appellants claim that the Court should:

— set aside the judgment under appeal;

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

— in the alternative, reduce the amount of the fine;

— order the Commission to pay the costs; and

— in the further alternative, set aside the judgment under appeal and refer the case back to the General Court for determination.

17 The Commission contends that the Court should:

— dismiss the appeal;

— in the alternative, in the event that the judgment under appeal is set aside in part, dismiss the action; and

— order the appellants to pay the costs.

The appeal

18 The appellants put forward three grounds in support of their appeal. The first ground of appeal alleges that the General Court breached the principle that penalties must be specific to the offender. The second ground of appeal alleges infringement of the obligation to state reasons. The third ground of appeal alleges breach of the principle of protection of legitimate expectations.

The first ground of appeal, alleging breach of the principle that penalties must be specific to the offender

Arguments of the parties

19 By their first ground of appeal, the appellants claim that, notably in paragraph 87 of the judgment under appeal, the General Court breached the principle that penalties must be specific to the offender.

20 They maintain that, in the decision at issue, the Commission made an error of law in exercising the power to set fines conferred on it by Article 23(2) of Regulation No 1/2003, by applying the 2006 Guidelines in order to determine the amount of the fine imposed on the appellants.

21 In their submission, the general method of setting fines established by those guidelines leads, in situations such as that at issue here, to the 10% ceiling laid down in Article 23(2) of Regulation No 1/2003 being regularly exceeded, particularly in the case of non-diversified 'mono-product' undertakings. The application of that method means, therefore, that the criteria of the duration and gravity of infringements committed by those undertakings, to which Article 23(3) of Regulation No 1/2003 refers, are not taken into account in an appropriate manner. Thus, the application of those guidelines undermines, even more than the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3, 'the 1998 Guidelines'), the principle that penalties must be specific to the offender.

22 The appellants submit that the General Court has unlimited jurisdiction under Article 31 of Regulation No 1/2003, which empowers it, inter alia, to substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine imposed by the Commission. It is, they maintain, also apparent from the judgment of 16 June 2011, *Putters International* v *Commission* (T-211/08, EU:T:2011:289), and from the Commission Decision of 28 March 2012 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case COMP/39.452 — Mountings for windows and window doors) ('the Decision of 28 March 2012'), that when the Commission has made an error in the exercise of its power to set the amount of the fine, the General Court is itself obliged, in the context of its unlimited jurisdiction, to carry out an autonomous assessment of the fine, based on the particular circumstances of the case.

23 However, in paragraph 87 of the judgment under appeal, the General Court failed, they submit, to carry out such an assessment, and merely referred, wrongly, to the case-law relating to the compatibility of the 1998 Guidelines with the principle that penalties must be specific to the offender, taking the view that that case-law was equally applicable, in exactly the same way, to the application of the 2006 Guidelines.

24 The Commission contends that that ground of appeal is inadmissible and in any event unfounded.

Findings of the Court

25 By their first ground of appeal, the appellants complain, in essence, that the General Court infringed EU law in paragraph 87 of the judgment under appeal, notably the principle that penalties must be specific to the offender, by failing to carry out an autonomous assessment of the fine and concluding that the ceiling of 10% of turnover provided for in Article 23(2) of Regulation No 1/2003 and also the case-law of the Court in relation to that ceiling, developed in connection with the 1998 Guidelines, applied to the setting of fines imposed under the 2006 Guidelines. The General Court thus allegedly failed to have regard to the fact that the effect of applying the 2006 Guidelines is (i) that the gravity and duration of the infringements are not taken sufficiently into account when calculating the fine, and (ii) that the 10% ceiling is regularly exceeded in the case of non-diversified 'mono-product' undertakings.

26 It must be held that, in so doing, the General Court did not make any error of law.

27 As the General Court correctly noted in paragraph 87 of the judgment under appeal, it is apparent from the settled case-law of the Court of Justice that the fact that, owing to the application of the ceiling of 10% of turnover referred to in the second subparagraph of Article 23(2) of Regulation No 1/2003, certain factors such as the gravity and duration of the infringement are not actually reflected in the amount of the fine imposed is merely a consequence of the application of that upper limit to the final amount (see, in particular, judgments of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 279, and of 12 July 2012, *Cetarsa* v *Commission*, C-181/11 P, not published, EU:C:2012:455, paragraph 81).

28 That upper limit seeks to prevent fines being imposed which it is foreseeable that the undertakings, owing to their size, as determined, albeit approximately and imperfectly, by their total turnover, will not be able to pay (judgments of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 280, and of 12 July 2012, *Cetarsa* v *Commission*, C-181/11 P, not published, EU:C:2012:455, paragraph 82).

29 The limit is therefore one which is uniformly applicable to all undertakings and arrived at according to the size of each of them, and seeks to ensure that the fines are not excessive or disproportionate. That upper limit thus has a distinct and autonomous objective by comparison with the criteria of gravity and duration of the infringement (judgments of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 281 and 282, and of 12 July 2012, *Cetarsa* v *Commission*, C-181/11 P, not published, EU:C:2012:455, paragraph 83).

30 It follows that both the arguments to the effect that insufficient account was taken of the gravity and duration of the infringements, owing to the application of the upper limit provided for in Article 23(2) of Regulation No 1/2003, and those to the effect that that limit is, on account of the 2006 Guidelines and unlike what happens under the 1998 Guidelines, regularly exceeded in the case of non-diversified 'mono-product' undertakings, must be rejected as unfounded.

31 Even on the assumption that, when the fines to be imposed on undertakings offering few products are being set, the intermediate amounts do more frequently exceed the upper limit laid down in Article 23(2) of Regulation No 1/2003 if the 2006 Guidelines are applied by the Commission than under the 1998 Guidelines, that circumstance cannot call into question the legality of the application of that limit referred to by the Court of Justice, as regards both fines that are imposed under the former guidelines and those imposed under the latter.

32 The General Court cannot, therefore, be criticised for having adopted, in paragraph 87 of the judgment under appeal, the Commission's assessment regarding the amount of the fine imposed on the appellants, which was based on the 2006 Guidelines, without carrying out an autonomous assessment of that fine.

33 It follows from the foregoing that the first ground of appeal must be rejected.

The second ground of appeal, concerning the obligation to state reasons

Arguments of the parties

34 By their second ground of appeal, the appellants claim that the General Court's explanations with regard to the principle that penalties must be specific to the offender are vitiated by a failure to state reasons. Notwithstanding the fact that, in paragraph 80 et seq., and in particular in paragraph 87, of

the judgment under appeal, the General Court examined certain arguments put forward by the appellants in relation to that issue, it did not mention those relating to the judgment of 16 June 2011, *Putters International* v *Commission* (T-211/08, EU:T:2011:289), in particular the considerations in paragraph 75 of that judgment, despite the importance which the appellants attached to those arguments. Similarly, the judgment under appeal did not refer to the relevant grounds of the Decision of 28 March 2012, with the result that the General Court did not rule on those points.

35 In response, the Commission contends that the General Court was obliged only to detail the essential reasons for its decision, not to refer to *obiter dictum* of a particular judgment or to a later Commission decision.

Findings of the Court

36 It should be borne in mind that, in accordance with the settled case-law of the Court, the General Court's obligation to state reasons does not require it to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case; the reasoning may therefore be implicit, on condition that it enables the persons concerned to know why the General Court has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review (see, to that effect, in particular, judgments of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 372, and of 9 September 2008, *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 96).

37 In particular, the obligation to state the reasons for its judgments does not in principle extend to requiring the General Court to justify the approach taken in one case as against that taken in another case before it, or, still less, as against a decision taken by the Commission in another case (see, to that effect, judgment of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 66, and order of 4 September 2014, *Metropolis Inmobiliarias y Restauraciones* v *OHIM*, C-509/13 P, not published, EU:C:2014:2173, paragraph 51).

38 Consequently, since the General Court has clearly set out in the judgment under appeal the reasons for its rejection of the appellants' arguments concerning breach of the principle that penalties must be specific to the offender, the second ground of appeal must be rejected as unfounded.

The third ground of appeal, alleging breach of the principle of the protection of legitimate expectations

Arguments of the parties

39 By their third ground of appeal, the appellants claim that there has been a breach of the principle of the protection of legitimate expectations.

40 The appellants claim, in particular, that, as is apparent from paragraph 104 of the judgment under appeal, it is common ground that the Commission has on a number of occasions infringed the procedural rules by disclosing their business secrets to other undertakings. They maintain that, in paragraphs 102 to 119 of that judgment, the General Court assessed the Commission's observance of the principle of protection of legitimate expectations in a very formalistic way, disregarding the essential nature of the appellants' expectations of the Commission's services in the context of the application of the 2002 Leniency Notice.

41 In the appellants' submission, undertakings which cooperate should be able to rely on the Commission's assurances when these are given in a consistent manner by the agents responsible in the team dealing with the case. To hold, as the General Court did in paragraph 115 of the judgment

under appeal, that such assurances do not give rise to such a legitimate expectation because they do not come from the competent service would, according to the appellants, run counter to the general interest objective of punishment of infringements and be in breach of the principle of protection of legitimate expectations.

42 According to the Commission, this ground of appeal must be rejected as unfounded.

Findings of the Court

43 It must be noted that, in paragraphs 110 to 116 of the judgment under appeal, the General Court considered whether the Commission had breached the principle of protection of legitimate expectations when it declined to grant the appellants a reduction in the amount of the fine imposed on them.

44 In that regard, the General Court correctly pointed out, in paragraph 111 of the judgment under appeal, that it is apparent from the settled case-law of the Court that the right to claim the protection of legitimate expectations presupposes that three cumulative conditions are satisfied, including the condition that precise, unconditional and consistent assurances must have been given by the EU administration (see, to that effect, judgments of 18 July 2007, *AER* v *Karatzoglou*, C-213/06 P, EU:C:2007:453, paragraph 33, and of 16 December 2008, *Masdar (UK)* v *Commission*, C-47/07 P, EU:C:2008:726, paragraph 81). The General Court went on, in paragraphs 113 to 116 of the judgment under appeal, to hold that those three conditions were not satisfied in the present case.

45 In so far as the arguments raised by the appellants relate, in particular, to paragraph 115 of the judgment under appeal, concerning the lack of authorisation of the Commission's agents or services concerned to give such assurances, it is sufficient to note that that paragraph is, in any event, included for the sake of completeness, and that those arguments are not, therefore, capable of leading to the judgment under appeal being set aside.

46 The third ground of appeal must, therefore, be rejected as ineffective.

47 Since none of the grounds of appeal raised by the appellants has been upheld, the appeal must be dismissed in its entirety.

Costs

48 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.

49 Under 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 against them, the appellants must be ordered to pay the costs relating to the present appeal.

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

1. **Dismisses the appeal;**

2. **Orders Hansa Metallwerke AG, Hansa Nederland BV, Hansa Italiana Srl, Hansa Belgium and Hansa Austria GmbH to pay the costs.**

[Signatures]