Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

22 January 2013*

(Competition — Agreements, decisions and concerted practices — European market for copper and copper alloy fittings — Liability of the parent company stemming solely from the unlawful conduct of its subsidiary — Principle of 'ne ultra petita' — Effect on the legal situation of the parent company of an annulment determined by a judgment concerning a subsidiary)

In Case C-286/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 6 June 2011,

European Commission, represented by F. Castillo de la Torre, V. Bottka and R. Sauer, acting as Agents, with an address for service in Luxembourg,

appellant,

the other party to the proceedings being:

Tomkins plc, established in London (United Kingdom), represented by K. Bacon, Barrister, instructed by S. Jordan, Solicitor,

applicant at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, M. Ilešič, G. Arestis, M. Berger and E. Jarašiūnas, Presidents of Chambers, E. Juhász (Rapporteur), A. Borg Barthet, J.-C. Bonichot, M. Safjan, D. Šváby and A. Prechal, Judges,

Advocate General: P. Mengozzi,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 2 May 2012,

after hearing the Opinion of the Advocate General at the sitting on 19 July 2012,

gives the following

* Language of the case: English.

Judgment

1 By its appeal, the European Commission seeks to have set aside the judgment of the General Court of the European Union of 24 March 2011 in Case T-382/06 *Tomkins* v *Commission* [2011] ECR II-1157 ('the judgment under appeal'), by which the General Court, on the one hand, partially annulled Commission Decision C(2006) 4180 of 20 September 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F-1/38.121 – Fittings) (summarised at OJ 2007 L 283, p. 63; 'the contested decision') and, on the other hand, reduced the fine imposed on Tomkins plc ('Tomkins').

The background to the dispute and the contested decision

2 At paragraphs 1 to 3 and 12 and 13 of the judgment under appeal, the General Court made the following findings:

> '1 By [the contested decision] the Commission ... found that a number of undertakings had infringed Article 81(1) EC and Article 53 of the Agreement on the European Economic Area (EEA) by participating, over various periods between 31 December 1988 and 1 April 2004, in a single, complex and continuous infringement of the Community competition rules taking the form of a complex of anti-competitive agreements and concerted practices in the market for copper and copper alloy fittings, which covered the territory of the EEA. The infringement consisted in fixing prices, agreeing on price lists, agreeing on discounts and rebates, agreeing on implementation mechanisms for introducing price increases, allocating national markets, allocating customers and exchanging other commercial information and also in participating in regular meetings and in maintaining other contacts intended to facilitate the infringement.
>
> 2 The applicant, [Tomkins], and its subsidiary at the material time, [Pegler] (formerly The Steel Nut & Joseph Hampton Ltd), are among the addressees of the contested decision.
>
> 3 Pegler, a copper fittings producer, was wholly owned by the applicant between 17 June 1986 and 31 January 2004. On 1 February 2004 Pegler was sold to its management team. On 26 August 2005 Pegler Holdings Ltd and Pegler were purchased by Aalberts Industries NV, another addressee of the contested decision.
>
> ...
>
> 12 In Article 1 of the contested decision, the Commission found that the applicant and its subsidiary Pegler had infringed Article 81 EC and Article 53 of the EEA Agreement between 31 December 1988 and 22 March 2001.
>
> 13 For that infringement, the Commission imposed on the applicant, jointly and severally with Pegler, a fine of EUR 5.25 million under Article 2(h) of the contested decision.'

The judgment under appeal

3 By application lodged at the Registry of the General Court on 15 December 2006, Tomkins claimed that the General Court should, inter alia:

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

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

4 Following a partial withdrawal of the pleas in law raised in its action, the applicant put forward only one plea in that action, alleging that the Commission had erred in the determination of the duration of Pegler's participation in the infringement.

5 It is apparent from the contested decision that the Commission imputed Pegler's infringement to the applicant, by whom Pegler was wholly owned between 17 June 1986 and 31 January 2004, and ordered the applicant, jointly and severally, to pay the fine imposed on its subsidiary. That imputation was based on the fact that Tomkins exercised decisive influence over Pegler during the period of the infringement.

6 The General Court pointed out, at paragraph 38 of the judgment under appeal, that Tomkins was held liable for the infringement only as Pegler's parent company and by virtue of the latter's participation in the cartel and that, therefore, its liability could not exceed that of Pegler. Article 1 of the contested decision, in so far as the Commission there found that Pegler had participated in the cartel at issue in the period from 31 December 1988 to 29 October 1993, was annulled by the judgment of the General Court of 24 March 2011 in Case T-386/06 *Pegler* v *Commission* [2011] ECR II-1267. Given that the applicant at first instance had disputed Pegler's participation in the infringement with respect to that period, the General Court examined the consequences of that annulment for Tomkins.

7 After having drawn attention, at paragraph 40 of the judgment under appeal, to the Court's case-law to the effect that the Courts of the European Union cannot rule *ultra petita*, in particular that they cannot rule on aspects concerning addressees other than those covered by the applicant's application (Case C-310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363), the General Court, at paragraph 42 of the judgment under appeal, nevertheless took the view that, under competition law, the applicant and its subsidiary – which was partially successful in its action for annulment brought in the case which gave rise to the judgment in *Pegler* v *Commission* – constituted a single entity. Consequently, the General Court took the view that the Commission's imputation of liability to the applicant meant that the applicant had the benefit of the partial annulment of the contested decision in that case.

8 The General Court concluded, at paragraph 44 of the judgment under appeal, that, in actions for annulment brought separately by a parent company and by its subsidiary, it is not ruling *ultra petita* if it takes account of the outcome of the action brought by the subsidiary, if the form of order sought in that action has the same object as that in the action brought by the parent company.

9 Given that the liability of the parent company was strictly linked to that of its subsidiary, since the payment of a fine jointly and severally by Tomkins could not have occurred were Pegler's unlawful conduct not to have been imputed to Tomkins, the General Court annulled the contested decision with respect to the starting date of the applicant's participation in the infringement, namely from 31 December 1988 to 29 October 1993, and, consequently, reduced the amount of the fine imposed on Tomkins from EUR 5.25 million to EUR 4.25 million, in respect of which it was jointly and severally liable with Pegler as to EUR 3.4 million.

10 As regards the date on which the infringement ceased, the General Court held, at paragraph 53 of the judgment under appeal, that the Commission had acted correctly in concluding that Pegler had not demonstrated that it had distanced itself from the agreement entered into on 10 June 2000, the object of which was a price increase with effect from 14 August 2000, and that Pegler had therefore continued to participate in the cartel until the date on which the Commission regarded the cartel as having come to an end, namely the date on which it carried out unannounced inspections in March 2001.

Forms of order sought

11 The Commission claims that the Court should:

— set aside the judgment under appeal, and

— dismiss in its entirety the action brought by Tomkins before the General Court.

12 Tomkins contends that the Court should:

— dismiss the appeal in its entirety as unfounded, and

— order the Commission to pay the costs of the proceedings at first instance and on appeal.

The appeal

Arguments of the parties

13 The Commission raises five grounds in support of its appeal, alleging, respectively, a breach of the rule on *ultra petita*, an erroneous finding that the applications by the parent company and its subsidiary had the same object, a failure by the General Court to take account of the fact that Tomkins was part of an undertaking which admitted having committed an infringement, a failure to state reasons and contradictions in the judgment under appeal and, finally, a breach of the right to a fair hearing.

First ground of appeal

14 By its first ground of appeal, the Commission claims that, by annulling the contested decision in so far as it concerned part of the duration of the participation in the infringement established in that decision, on the basis of elements never raised by Tomkins, the General Court infringed the rule prohibiting a court from ruling *ultra petita*. The Court's case-law, in particular *Commission* v *AssiDomän Kraft Products and Others* and Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others* [2011] ECR I-2239, does not recognise exceptions to this rule on the basis that two applicants belong to the same undertaking and have been declared jointly and severally liable. The annulment sought by each applicant to which a decision is addressed is necessarily limited to the pleas in law raised by each of them in its own case and there are no exceptions to be made for addressees belonging to a single undertaking.

15 The Commission takes the view that the General Court has confused the notion of an undertaking, as an economic entity in competition law, in accordance with Article 101 TFEU and 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), and the procedural notion of a legal person which files an application before the Courts of the European Union, in accordance with Article 263 TFEU and Regulation No 1/2003. According to the Commission, which relies on *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg*, a case lodged by one entity of a group does not affect the legal position of the other entities within the group. It is up to the addressee of the decision to decide on the scope of its application before the Courts of the European Union as well as on the pleas which it wishes to raise. If the partial annulment of the decision concerning the subsidiary indicates a substantive error in the Commission's findings which could potentially benefit the parent company, the latter must itself raise that error before the General Court.

16 The Commission notes that the fines imposed on legal entities which are part of a single undertaking can vary even if, for a certain part of those fines, a finding of joint and several liability is upheld. Consequently, the joint and several liability of two entities belonging to the same undertaking makes no difference for the purposes of applying the case-law flowing from the judgment in *Commission* v *AssiDomän Kraft Products and Others* on the *ultra petita* rule. There is no strict link between the liability of Tomkins and that of Pegler in the present case.

17 According to the Commission, the General Court erred in law in deciding on the plea concerning the duration of participation in the infringement without assessing the legal arguments of Tomkins itself in regard to the date on which the infringement began, and in merely referring, in this respect, to the outcome of the judgment in *Pegler* v *Commission*. The General Court, it contends, thereby reinterpreted and reclassified the object of the action.

18 The Commission further claims that, by reducing the amount of the fine imposed on Tomkins, on the basis of a separate judgment, the General Court improperly encroached on the Commission's responsibilities. It is for the Commission, and not the General Court, to draw the appropriate conclusions from that judgment, if necessary by reducing or annulling the amount of that fine, in order to comply with that judgment for annulment.

19 According to Tomkins, the first ground of appeal raised is inadmissible because the Commission is seeking to re-open the General Court's appraisal of the facts, in particular its findings as to the duration of the infringement imputed to Tomkins, which is contrary to the nature of an appeal.

20 In the alternative, Tomkins submits that the General Court did not rule *ultra petita* and did not depart from the case-law on that matter. It points out that the reduction of the duration of Pegler's participation in the infringement and of the amount of the fine on the ground that the Commission had erred in determining that duration constituted one of its heads of claim expressly referred to in its application before the General Court. Moreover, the judgments in *Commission* v *AssiDomän Kraft Products and Others* and in *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others* are not, it contends, relevant.

21 Tomkins submits that the General Court did not create an exception to the procedural rule that a court may not rule *ultra petita*, but rather that it correctly assessed the facts of the present case, in particular so far as concerns the joint and several liability of the two companies in question belonging to the same group. In its analysis of the facts, the Commission, in its appeal, conflates the plea in law made by Tomkins, seeking to reduce the duration of the infringement committed by Pegler and the fine payable, with the factual submissions made in support of its claim as to the precise dates of the start and end of the infringement. The Commission, it argues, cannot maintain that Tomkins should bear the burden of imputed liability but not be entitled to the benefit of the General Court's reduction of the primary and direct liability of the subsidiary company in question, which would result in a liability which could not be joint and several in nature.

22 In respect of the confusion between the substantive competition rules, based on the notion of an undertaking, and rules of procedure, the basis of which consists in the notion of the legal entity, Tomkins states that the Commission has relied on a mis-characterisation of European Union law. The General Court recognised correctly that there is an 'inextricable' and strict link between the judgments in *Pegler* v *Commission* and in *Tomkins* v *Commission* which, in the proper administration of justice, justifies the cross-references between the two cases.

Second ground of appeal

23 The Commission claims that the General Court erred in law in finding that the forms of order sought by Tomkins and its subsidiary Pegler in support of their respective actions for annulment had the 'same object'. According to the Commission, those two legal persons are challenging different periods of participation in the infringement; from 31 December 1988 until 7 February 1989 for Tomkins, a period of 38 days, and from 31 December 1988 until 29 October 1993 for Pegler, a period of four years, nine months and 29 days. The Commission submits that these divergences and those resulting from the fact that different pleas and arguments were put forward by those two entities constitute forms of order which have different objects.

24 Furthermore, the General Court, at paragraph 42 of the judgment under appeal, relied on a factually inaccurate premiss, likely to constitute a distortion of the facts, to the effect that Tomkins claimed that 'if [the contested] decision were to be annulled with respect to Pegler, it should also be annulled in so far as it relates to the applicant'. Tomkins, however, made no such plea either in its application for annulment or in its reply, with the result that the General Court distorted the applicant's plea.

25 According to Tomkins, the General Court was correct to find that both its form of order and that of Pegler had the 'same object', since both parties made an express plea in their respective applications for the duration of Pegler's participation in the infringement, as it appears from the Commission's findings, to be reduced.

Third ground of appeal

26 According to the Commission, the General Court erred in law in reducing the liability of one entity within the 'Tomkins undertaking', on the ground that the duration of participation in the infringement had been reduced for another entity of that undertaking, namely the subsidiary Pegler. The reduction of Pegler's liability for the infringement was based on the status of a 'dormant company' which Pegler was recognised as having, and not because the group in question had not participated in the infringement. The fact that Pegler may not have been the correct addressee within the group, for a certain period, concerns only that subsidiary and does not exonerate the entire undertaking from liability for the infringement of the competition rules. Hence, it was not lawful for the General Court to annul the fine imposed on Tomkins for the period from 20 January 1989 to 29 October 1993 with the reasoning that Tomkins' 'liability is strictly linked to that of Pegler', relying on a link which did not exist.

27 Tomkins contends that the third ground of appeal is inadmissible because it seeks a re-examination of facts which have already been adjudicated on by the General Court and, moreover, because the Commission did not plead this ground at first instance.

Fourth ground of appeal

28 In the alternative, the Commission claims that the judgment under appeal is vitiated by a failure to state reasons, in that it fails to make clear in sufficient detail that it constitutes a departure from the *Commission* v *AssiDomän Kraft Products and Others* case-law. Furthermore, at paragraphs 56 and 57 of the judgment under appeal, which concern the multiplier for deterrence, the General Court was incoherent and unclear in so far as it invited the Commission to draw the appropriate conclusions from the joint and several liability with regard to payment of the fine by Tomkins, before itself determining the amount of the fine at paragraph 59 of that judgment.

29 Tomkins submits that this fourth ground of appeal is unfounded, submitting that the General Court's judgment sets out its reasoning with sufficient clarity, in such a way as to enable the parties concerned to understand the reasons for the decision taken and the Court of Justice to exercise its power of review.

Fifth ground of appeal

30 The Commission claims that the General Court breached the '*principe du contradictoire*' and the right to a fair hearing because it failed to give the Commission an opportunity to comment on its intention to reduce Tomkins' fine on the basis of pleas raised in a separate case by Pegler. In referring to a part of a judgment, even though that plea raised by Pegler in support of its action was not raised by Tomkins during the written procedure, the General Court breached the Commission's rights of defence.

31 Tomkins submits that this ground is unfounded, as the Commission was a party to the proceedings which gave rise to the judgment in *Pegler* v *Commission* and was thus fully appraised of the arguments as to the duration of the infringement. According to Tomkins, it is solely for tactical reasons that the Commission did not raise this ground in the proceedings which culminated in the judgment under appeal.

Findings of the Court

The first, second and third grounds of appeal

32 Given that the first, second and third grounds of the appeal overlap to a significant extent, it is appropriate to examine them together.

33 At paragraph 38 of the judgment under appeal, the General Court ruled that 'the applicant was not held liable for the cartel on account of its direct participation in the cartel's activities. It was held liable for the infringement only as parent company by virtue of Pegler's participation in the cartel. Therefore, the applicant's liability cannot exceed that of Pegler.'

34 It is common ground between the parties that Tomkins' liability results exclusively from the participation of its subsidiary Pegler in the cartel confirmed in the contested decision.

35 However, by these three grounds of its appeal, the Commission is essentially claiming that, whatever the liability of the undertaking constituted by those two companies of the same group in the light of the infringement confirmed in the contested decision, Tomkins was not entitled, in the proceedings initiated by its application before the General Court, to benefit from the reduction in the duration of the infringement upheld by the General Court, in the proceedings initiated by the separate action brought before the General Court by Pegler, on the basis of arguments which Tomkins did not raise in its own action.

36 In its third ground of appeal, the Commission relies on the distinction between the liability of the legally separate entities within a group of companies and notes, in particular, that, in the present case, the contested decision was addressed both to Tomkins and to Pegler and that the finding relating to the period from 31 December 1988 to 29 October 1993 was annulled on the ground that Pegler was, at the start, 'a dormant company within the meaning of English company law' and, subsequently, 'a dormant company acting as agent'.

37 However, those considerations are not sufficient to cast doubt on the General Court's finding at paragraph 38 of the judgment under appeal, since, in order to impute liability to any entity within a group, it is necessary to prove that one entity at least has committed an infringement of the European Union competition rules and that that fact be noted in a decision which has become definitive.

38 In the present case, however, no such proof has ultimately been furnished concerning the period from 31 December 1988 to 29 October 1993, since the General Court annulled in part the contested decision, so far as concerns that period, in its judgment in *Pegler* v *Commission*. The reason for which it was found that Pegler had not acted unlawfully is, in this respect, irrelevant.

39 Consequently, the General Court was correct to rely on the premiss that the liability of Tomkins as parent company is, in the present case, purely derivative and secondary and thus depends on that of its subsidiary, Pegler, those two companies, moreover, having been ordered jointly and severally to pay the fine in respect of which the reduction was sought.

40 It must also be added that the plea in law and arguments submitted by Tomkins at first instance did not, as is apparent from paragraphs 25 and 28 to 30 of the judgment under appeal, concern its own participation in the infringement, but only that of Pegler.

41 By its first ground of appeal, the Commission claims that, in reducing the duration of the infringement also for Tomkins, without any express claim to that end having been made by that company, the General Court ruled *ultra petita*, thereby infringing the Court's case-law expressed in particular by the judgments in *Commission* v *AssiDomän Kraft Products and Others* and in *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*.

42 The Commission acknowledges, in its second ground of appeal, that, like Pegler, Tomkins challenged before the General Court the period of the infringement confirmed in the contested decision. It points out, however, that that parent company did not call into question the same period as that cited by its subsidiary, but only a small part of that period, and that it invoked arguments different to those put forward by Pegler. The Commission concludes from this that the General Court erred in law in holding, at paragraph 44 of the judgment under appeal, that the actions brought separately by Pegler and by Tomkins had the same object.

43 However, in a situation in which the liability of the parent company is wholly derived from that of its subsidiary, and in which both of those companies have brought actions seeking, inter alia, that the General Court reduce the fine by reason of a reduction in the duration of the infringement committed by the subsidiary, the notion of the 'same object' does not require that the scope of the applications of those companies, and the arguments on which they relied to contest the duration of the infringement accepted by the Commission, must be identical.

44 Consequently, in so far as it is common ground that both Pegler and Tomkins disputed the duration of the infringement and that a part of that period was identical, the General Court did not err in law in reaching the findings set out in paragraph 44 of the judgment under appeal.

45 The Commission's argument that the General Court distorted the plea in law put forward by Tomkins must be rejected as irrelevant. It follows from the preceding paragraphs of the present judgment that the General Court was entitled to conclude that the object of the parent company's application was identical to that of its subsidiary, regardless of whether Tomkins had or had not made, in its action, the claim set out in the third sentence of paragraph 42 of the judgment under appeal and reproduced at paragraph 24 of the present judgment.

46 So far as concerns the case-law cited at paragraph 41 of the present judgment, it must be held that, contrary to the view taken by the Commission, that case-law cannot be transposed to the resolution of the present dispute.

47 In the case which gave rise to the judgment in *Commission* v *AssiDomän Kraft Products and Others*, by contrast to the facts of the present case, the company AssiDomän Kraft Products AB and six other Swedish companies had not brought an action against the Commission's decision, which was annulled in part by the Court following the action brought by other undertakings.

48 In the dispute which culminated in the judgment in *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, which concerned a different legal issue, namely the suspension of the limitation period for the enforcement of penalties, the case concerned three companies belonging to the same group. As the Court held at paragraph 149 of that judgment, the Commission's initial decision was directed exclusively against one of those companies, and that decision had been annulled by the General Court with regard to that company alone. Therefore, no effect with regard to the other two companies could be inferred from that annulment.

49 Thus, in a situation such as that in the present case, where the liability of the parent company is derived exclusively from that of its subsidiary and where the parent company and its subsidiary have brought parallel actions having the same object, the General Court was entitled, without ruling *ultra petita*, to take account of the outcome of the action brought by Pegler and to annul the contested decision in respect of the period prior to 29 October 1993 also in so far as Tomkins is concerned.

50 In this connection, the possibility raised by the Commission that it itself can amend or withdraw its decision taken with regard to the parent company in order to draw the appropriate conclusions from the General Court's judgment does not provide a sufficient guarantee that the rights of undertakings in the field of the application of European Union competition law will be protected.

51 It follows from the foregoing that the first, second and third of the Commission's grounds of appeal are unfounded.

The fourth ground of appeal

52 The fourth ground of appeal consists of two parts.

53 In the first part, the Commission criticises the General Court on the ground that it failed to provide sufficient and clear reasons in support of the partial annulment of the contested decision. It repeats to a significant extent the arguments already submitted in the context of the first, second and third grounds of appeal.

54 Suffice it to refer, in this connection, to the Court's considerations on those grounds of appeal, from which it is apparent that the Commission's criticisms are unfounded.

55 In the second part, the Commission alleges that the reasons set out in the judgment under appeal are incoherent or unclear in so far as, first, the General Court requests the Commission to take account of its judgment in *Pegler* v *Commission* in regard to the deterrence factor and, secondly, it itself fixes, at paragraph 59 of the judgment under appeal, the amount of the fine imposed on Tomkins.

56 It must be stated, however, that the judgment under appeal does not reveal any contradiction or lack of clarity. The General Court reduced the amount of the fine solely in so far as it annulled the contested decision in respect of the period prior to 29 October 1993 also as regards Tomkins. By contrast, the General Court, at paragraphs 56 to 58 of that judgment, drew the consequence from the fact that Tomkins' action was not directed at an error on the part of the Commission in the application of the deterrence factor.

57 It follows that the fourth ground of appeal is unfounded.

The fifth ground of appeal

58 By this ground of appeal, the Commission claims an infringement of the right to a fair hearing. In particular, it alleges that the General Court failed to give it the opportunity to express its point of view on the General Court's intention to rely on the pleas raised by Pegler.

59 It must immediately be pointed out that the Commission did not request that a hearing be held in this case. As stated by the General Court at paragraph 23 of the judgment under appeal, the Commission had, by letter, indicated that 'it would leave it for the Court to decide whether an oral hearing should be held in the circumstances of the case'.

60 The Commission's criticisms relating to the failure to observe the '*principe du contradictoire*' and to observe the right to a fair hearing are based on that institution's firm conviction that it is absolutely impossible to allow the parent company, Tomkins, to benefit from a reduction in the period of infringement established in respect of its subsidiary, Pegler, where the actions brought by those companies are not wholly identical.

61 However, as is apparent from the considerations and conclusions of the Court in the context of the first, second and third grounds of appeal, that possibility does exist in certain circumstances. The application of that possibility is the result of a legal assessment by the General Court which the latter is entitled to make, without notifying the parties, prior to the delivery of the judgment. To act in such a way does not constitute an infringement of the rights of the defence or of the right to a fair hearing.

62 It follows that the fifth ground of appeal is unfounded.

63 As none of the grounds of appeal raised by the Commission has been upheld, the appeal must be dismissed.

Costs

64 In accordance with Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. 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 Tomkins has applied for costs to be awarded against the Commission, and as the latter has been unsuccessful, the Commission must be ordered to pay the costs.

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

1. Dismisses the appeal;

2. Orders the European Commission to pay the costs.

[Signatures]