Grounds of appeal and main arguments

The appellants put forward six grounds in support of their appeal.

First, the appellants argue that the General Court disregarded its obligation to state reasons in failing to address the second part of the plea alleging infringement by the Commission of its obligation to open the formal investigation procedure provided for in Article 108(2) TFEU relating to the conclusions inferred from the commitments undertaken by the French authorities, indicating serious difficulties encountered by the Commission and on the basis of which the Commission was required to open the formal investigation procedure.

Second, they complain that the General Court erred in law in calculating the duration of the preliminary investigation procedure conducted by the Commission. They submit that the notification by France could not be considered to have been completed within the prescribed periods and it accordingly should not have been taken into account. They further submit that the General Court erred in law in treating a request for 'any' observations from the Commission to the French authorities as a request for additional information within the meaning of Regulation (EC) No 659/1999. ([1])

Third, they rely on public policy grounds in alleging an error of law by the General Court in failing to note of its own motion that the Commission could not declare the disputed aid to be compatible with the Treaty when the notification of that aid ought to have been deemed to have been withdrawn, pursuant to Article 5 of Regulation No 659/1999. As the French authorities failed to respond to the request for additional information within the prescribed periods, the notification at issue ought to have been withdrawn pursuant to Article 5(3) of that regulation. Consequently, the Commission was not competent to rule on the notified measure, which the General Court should have held of its own motion in the judgment under appeal.

Fourth, the General Court erred in law in the assessment of the market failure. That error of law results from the fact that the Court applied the universality test of market failure from the *Olsen* line of case-law, consisting in ascertaining whether competitors were providing a similar service and not a universal service.

Fifth, the General Court erred in law with respect to the temporal application of the European Union law rules in assessing market failure. The error in law results from limiting the examination of the market failure to the years 2004 and 2005, and from the lack of prospective market analysis to determine whether the market failure can be established for the entire duration of application of the service of general economic interest.

Sixth, the appellants submit that the General Court's reasons were self-contradictory.

([1]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

Appeal brought on 29 November 2013 by Villeroy & Boch AG against the judgment of the General Court (Fourth Chamber) of 16 September 2013 in Joined Cases T-373/10, T-374/10, T-382/10 and T-402/10 Villeroy & Boch AG and Others v European Commission

(Case C-625/13 P)

(2014/C 39/17)

Language of the case: German

Parties

Appellant: Villeroy & Boch AG (represented by: M. Klusmann, Rechtsanwalt, S. Thomas)

Other party to the proceedings: European Commission

Form of order sought by the appellant

Whilst maintaining the submissions made at first instance, the appellant claims that the Court should:

1. Set aside in its entirety the judgment of the General Court (Fourth Chamber) of 16 September 2013 in Joined Cases T-373/10, T-374/10, T-382/10 and T-402/10 in so far as it dismisses the action and concerns the applicant;

2. In the alternative, annul Article 1 of Decision C(2010) 4185 final of the defendant of 23 June 2010 in the form of the judgment under appeal in so far as it concerns the applicant;

3. In the alternative, reduce appropriately the amount of the fine imposed on the applicant under Article 2 of the contested decision of the defendant of 23 June 2010;

4. In the further alternative, refer the case back to the General Court for a fresh decision;

5. Order the defendant to pay the costs of the proceedings.

Pleas in law and main arguments

The first to sixth grounds of appeal complain of errors of law committed by the General Court in connection with the assessment of the evidence. The General Court considered evidence in the present case concerning an alleged infringement in France to be sufficient to condemn the applicant, whereas the assessment of the same question in parallel proceedings ([1]) was diametrically opposite. That runs counter to the principle of the benefit of the doubt and the laws of logic because the same assessment cannot be made with contrary results which are to the applicant's detriment.

The second ground of appeal complains that the General Court attributed infringements of non-competitors (fittings manufacturers) in Italy to the applicant as a sanitary ceramics manufacturer although the applicant had not once attended their association meetings which were allegedly contrary to competition law. At the same time, the General Court held, with regard to the applicant's competitors in parallel judgments ([2]) and on the same point, that there was no anti-competitive conduct amongst non-competitors even where they were present at the alleged infringements of the fittings manufacturers. Also in this respect there is an infringement of the principle of the benefit of the doubt and the laws of logic in the judgment, in addition to a blatantly discriminatory difference in treatment to the applicant's detriment. Where two different assessments of the same facts are possible from the point of view of the General Court, only the less drastic alternative for the recipient of a penalty may be assumed in the law on penalties and not — as in this case — the unfavourable alternative.

The third ground of appeal complains of the illegitimacy of a decision that refers to time-barred facts concerning events in the Netherlands, as well as the lack of congruence between the findings of the General Court in the grounds of its judgment and those in its operative part. The latter is broader than the actual findings of the General Court in the grounds of its judgment, which is a serious lack of reasoning of the judgment, whose operative part was not supported by the grounds in this respect. That infringes Article 101 TFEU and Article 81 of the Rules of Procedure of the General Court.

The fourth ground of appeal contests, with regard to Belgium, essentially the non-consideration of facts relevant to the decision, which the General Court itself raised at the hearing.

The fifth ground of appeal contests the findings of an infringement in Germany. It complains of mischaracterisation or distortion of the applicant's submissions as well as the legal untenability of various findings of an allegedly unlawful exchange of information within the meaning of Article 101(1) TFEU.

The sixth ground of appeal concerns errors of law relating to the assessments of the General Court with regard to Austria.

The seventh ground of appeal complains that the attribution to the applicant of infringements of other legally autonomous undertakings infringes the fault principle.

The eighth ground of appeal contests the combination in law of factually and legally unrelated conduct into an allegedly single, complex and continuous infringement (SCCI), which in the applicant's view should not have legally taken place because of the lack of complementarity between the conduct that was assessed together. In the way it was used in this case, the concept of the SCCI infringes the principle of a right to a fair trial.

The ninth ground of appeal complains that the lack of entitlement to impose joint and several liability for payment of the fine in the group in the absence of direct participation in the offence infringes the principle of legality and the principle of personal responsibility.

The 10th ground of appeal complains of a legally deficient 'light review' of the General Court, which did not adequately carry out its task of examination and thereby undermined the Community law guarantee of legal protection.

Finally, the 11th ground of appeal complains that the confirmed fine is, in any case, disproportionate. As incriminating findings of fact were set aside in the judgment and will be set aside owing to legal errors in reasoning, an unchanged imposition of the statutory maximum penalty of 10 % of the group turnover, which the General Court declared, cannot be proportionate and thus cannot be lawful. Where the findings of fact used to establish the infringement are to a large extent not valid, then, in view of glaring gaps in causality and evidence as well as the absence of attribution links, there cannot be any SCCI which covered six countries, three product groups and 10 years, but at most punctual, local infringements, which would far from justify the level of penalty imposed in this case. The facts under examination in this case are a long way from constituting a serious or by no means most serious case imaginable, a matter which the General Court — in gross disregard of the discretionary criteria which it had to interpret — did not consider.

([1]) Joined Cases T-379/10 and T-381/10 *Keramag Keramische Werke AG and Others* and *Sanitec Europe Oy* v *Commission* (2013) ECR.

([2]) Joined Cases T-379/10 and T-381/10 *Keramag Keramische Werke AG and Others* and *Sanitec Europe Oy* v *Commission* (2013) ECR, and Case T-380/10 *Wabco Europe and Others* v *Commission* (2013) ECR.