JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

24 March 2011 *

In Case T-377/06,

Comap SA, established in Paris (France), represented initially by A. Wachsmann and C. Pommiès, subsequently by A. Wachsmann and D. Nourissier, and finally by A. Wachsmann and S. de Guigné, lawyers.

applicant,

v

European Commission, represented by A. Nijenhuis and V. Bottka, acting as Agents, and by N. Coutrelis, lawyer,

defendant,

APPLICATION for annulment in part of Commission Decision C(2006) 4180 of 20 September 2006 relating to a proceeding under Article 81 [EC] and Article 53 of

* Language of the case: French.

the EEA Agreement (Case COMP/F-1/38.121 — Fittings), and also for a reduction in the fine imposed on the applicant in that decision,

THE GENERAL COURT (Eighth Chamber),

composed of M.E. Martins Ribeiro, President, N. Wahl (Rapporteur) and A. Dittrich, Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 4 February 2010,

gives the following

Judgment

Background to the dispute and the contested decision

1 By 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) (summary published in OJ 2007 L 283, p. 63; 'the contested decision'), the

Commission of the European Communities 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, Comap SA, a copper fittings producer, and its parent company at the material time, the holding company Legris Industries SA, are among the addressees of the contested decision.

3 On 9 January 2001, Mueller Industries Inc., another producer of copper fittings, informed the Commission of the existence of a cartel in the fittings sector and in other related industries in the copper tubes market, and expressed its willingness to cooperate with the Commission under the terms of the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the 1996 Leniency Notice') (recital 114 to the contested decision).

4 On 22 and 23 March 2001, in the framework of an investigation concerning copper tubes and fittings, the Commission, pursuant to Article 14(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87), carried out unannounced inspections at the premises of a number of undertakings (recital 119 to the contested decision).

5 Following those first inspections, the Commission, in April 2001, split the investigation relating to copper tubes into three different proceedings, namely the proceedings relating to Case COMP/E-1/38.069 (Copper Plumbing Tubes), Case COMP/F-1/38.121 (Fittings) and Case COMP/E-1/38.240 (Industrial Tubes), respectively (recital 120 to the contested decision).

6 On 24 and 25 April 2001, the Commission carried out further unannounced inspections at the premises of Delta plc, a company at the head of an international engineering group whose 'Engineering' division encompassed a number of fittings manufacturers. Those inspections related solely to fittings (recital 121 to the contested decision).

7 From February/March 2002, the Commission sent the parties concerned a number of requests for information pursuant to Article 11 of Regulation No 17, and then pursuant to Article 18 of 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) (recital 122 to the contested decision).

8 In September 2003, IMI plc submitted an application for leniency under the 1996 Leniency Notice. That application was followed by applications from the Delta group (March 2004) and FRA.BO SpA (July 2004). The final leniency application was submitted in May 2005 by Advanced Fluid Connections plc (recitals 115 to 118 to the contested decision).

9 On 22 September 2005, the Commission initiated an infringement proceeding in the framework of Case COMP/F-1/38.121 (Fittings) and adopted a statement of objections, which was then notified to the applicant (recitals 123 and 124 to the contested decision).

10 On 20 September 2006 the Commission adopted the contested decision.

11 In Article 1 of the contested decision, the Commission found that the applicant had infringed Article 81 EC and Article 53 of the EEA Agreement between 31 January 1991 and 1 April 2004.

12 For that infringement, the Commission imposed on Legris Industries, under Article 2(g) of the contested decision, a fine of EUR 46.8 million, for which the applicant was held jointly and severally liable as to EUR 18.56 million.

13 For the purposes of setting the amount of the fine imposed on each undertaking, the Commission applied, in the contested decision, the method set out in 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').

14 As regards, first of all, the fixing of the starting amount of the fine by reference to the gravity of the infringement, the Commission characterised the infringement as very serious, on account of its nature and its geographic scope (recital 755 to the contested decision).

15 Taking the view, next, that there was considerable disparity between the undertakings concerned, the Commission applied differentiated treatment, taking as its basis their relative importance on the relevant market as determined by their market shares. On that basis, the Commission divided the undertakings concerned into six categories (recital 758 to the contested decision).

16 The applicant was placed in the fourth category, for which the starting amount of the fine was set at EUR 14.25 million (recital 765 to the contested decision).

17 On account of the duration of the applicant's participation in the infringement (13 years and 2 months), the Commission then increased the fine by 130 % (recital 775 to the contested decision), which resulted in the basic amount of the fine being set at EUR 32.7 million (recital 777 to the contested decision).

18 Next, the continued participation in the infringement after the Commission's inspections was considered to be an aggravating circumstance justifying an increase of 60 % in the basic amount of the fine imposed on the applicant (recital 785 to the contested decision).

19 Applying the 10 % ceiling on fines imposed in accordance with Article 23(2) of Regulation No 1/2003, the Commission reduced the amount of the fine imposed on the applicant to EUR 18.56 million.

Procedure and forms of order sought by the parties

20 By application lodged at the Registry of the Court on 14 December 2006, the applicant brought the present action.

21 Upon hearing the Report of the Judge-Rapporteur, the General Court (Eighth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure of the General Court, the applicant and the Commission were requested to reply in writing to certain questions, to which they replied on 19 and 26 November 2009, respectively.

22 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 4 February 2010.

23 The applicant claims that the Court should:

— annul the contested decision in so far as the Commission censures the applicant for periods other than that between December 1997 and March 2001;

— amend Articles 1 and 2 of the contested decision by reducing the amount of the fine imposed on the applicant;

— order the Commission to pay the costs.

24 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

25 At the hearing, following a question asked by the Court, the applicant stated that it did not deny that it participated in the cartel during the period from 1995 to 1997.

Law

26 The applicant puts forward two series of pleas in law, the first relating to the duration of its participation in the infringement, and the second being pleas specific to the calculation of the amount of the fine.

Duration of the applicant's participation in the infringement

Arguments of the parties

27 The applicant denies that it participated in the cartel in the period after the Commission's on-the-spot investigations in March 2001. It also submits that the alleged infringement ceased during the period from September 1992 to December 1994 (27 months) and that, therefore, the limitation period has expired in respect of acts committed prior to December 1994.

— The period after March 2001

28 After outlining the case-law relating to the burden of proof and standard of proof required, the applicant submits that the Commission contradicted itself with regard to the alleged continuation of the infringement after the inspections carried out at the premises of some of its competitors in March 2001. The applicant refers in that regard to recital 590 to the contested decision, in which the Commission stated that the cartel experienced a 'period of decreased intensity … with limited contacts' after March 2001 (and at least until June 2003), whilst claiming in recital 600 to the contested decision that, until April 2004, the 'participants did not have to set up a new scheme or a new form of coordination', even though there is no reference to the European Fittings Manufacturers Association (EFMA) — the 'pivot' upon which the organisation of the anti-competitive practices challenged by the Commission turned — in the contested decision in respect of the period after April 2001.

29 According to the applicant, all contact between the relevant competitors in that period was bilateral, except for contacts made at the meetings of the Logistics Committee of the Fédération Française des Négociants en Appareils Sanitaires, Chauffage, Climatisation et Canalisations (FNAS), which were entirely legitimate or sporadic and which concerned geographic areas unrelated to the area covered by the pan-European arrangements of the preceding period. Likewise, those contacts involved individuals who were not mentioned during the preceding period and, above all, their existence was based only on the alleged evidence adduced by FRA.BO and on the official minutes of meetings organised and chaired by FNAS.

30 In the contested decision, the Commission identified three separate sets of facts, namely the bilateral contacts with FRA.BO, the Essen (Germany) trade fair episode and the meetings of the FNAS Logistics Committee; in the applicant's submission, there is no link of continuity between them.

31 With regard to the bilateral contacts with FRA.BO, the applicant submits, first of all, that the allegations contained in FRA.BO's leniency application are unfounded; they are vague and uncorroborated and/or are not credible in relation to the actual situation as described by the applicant and set out in the documents provided in its response to the statement of objections and its observations of 20 February and 15 March 2006.

32 Next the applicant submits, first, that those bilateral contacts are legitimate on industrial and commercial grounds. It refers to the cross-supply which warranted such contacts and to the precise figures in that respect for the period from 2001 to 2005 mentioned in its response to the statement of objections.

33 Second, contact with FRA.BO also related to possible industrial cooperation, since FRA.BO wished to sell part of its surplus of copper fittings and gas boxes from its Meteor factory in the Lyons area (France), which generated a series of telephone and direct contacts.

34 Third, there was repeated contact also in relation to FRA.BO's intention to launch a new type of fitting on the European market, the 'mixed water/gas fitting'. Although this new type of fitting had already been approved in Italy, the European Committee for Standardisation (CEN) refused to extend that approval to 'the whole of Europe' on safety grounds. For that reason, FRA.BO had contacted its competitors in order to try to compile a joint dossier in support of that type of fitting and to lobby in Brussels (Belgium). Notwithstanding the fact that it was ultimately unsuccessful, its action involved contacts. The contact on 4 and 5 June 2003 between Ms P. (FRA.BO) and Mr Le. (member of the applicant's staff) should be seen in that light.

35 Last, FRA.BO's allegations, as relayed by the Commission, are unsubstantiated. In that regard, first, the applicant challenges FRA.BO's assertion that the applicant had informed it in advance, during a telephone conversation between Mr Le. and Ms P. on 5 February 2004, of its decisions on pricing for 2004 with regard to France and Spain and to its Greek subsidiary. The applicant emphasises that the announcement of its price increase by its Greek subsidiary was made on 12 January 2004 and that it was therefore already public when that telephone conversation occurred. In France, the copper fittings price increase was 14% in 2004, not 8% as FRA.BO claims. Furthermore, contrary to FRA.BO's assertion that the applicant had indicated that it was not planning to announce price increases for Spain, it introduced an increase of 2.5% in 2004.

36 Second, the applicant submits that, in recital 514 to the contested decision, the Commission accepted the vaguest parts of FRA.BO's statements by mentioning '[m]eetings at industrial fairs and airports'. It is critical of the fact that FRA.BO does not give any specific example of anti-competitive exchanges. The only meeting between FRA.BO's representatives and the applicant occurred at a trade fair in Padua (Italy) in April 2003, during which the situation on the Italian market was discussed only in general terms. The applicant takes the view that, in the absence of corroboration and in view of their extreme vagueness, FRA.BO's statements cannot be acknowledged and used by the Commission as admissible evidence against the applicant.

37 With regard to the Essen trade fair, the applicant submits that, on the basis of chance encounters, the Commission is also arguing that contact between Mr K. (a member of the applicant's staff) and Mr H. (IBP Ltd) at that trade fair on 18 March 2004 demonstrates the continuity of the infringement after 2001 and its geographic scope. The applicant claims that this encounter was not anti-competitive and cannot be linked

to events before March 2001, and maintains that it was fully aware at the time of that encounter of its responsibilities under competition law.

38 The applicant recalls that, according to IBP's statement, Mr K. had asked Mr H. to give him information about changes in IBP's pricing policy in Germany. In fact, according to the applicant, the discussion was part of its policy of keeping a watchful eye on the competition, as it had heard its customers discuss IBP's next price increase. The applicant adds that Mr H. gave only a very vague reply to Mr K.'s question, and no indication of the percentage increase or the date of its announcement, although this was imminent. The applicant explains that IBP's new price list was published just over 10 days after that conversation. Furthermore, there was no bilateral exchange between Mr H. and Mr K. IBP's statement gives no indication that Mr K. gave any information to Mr H.

39 The applicant emphasises that that encounter at the Essen trade fair amounts to bilateral and occasional contact which was not anti-competitive in nature. Given that the existence of some bilateral contacts in a global competitive context is not sufficient to establish to the requisite legal standard the continuity of a cartel, the Commission should have removed details of the chance encounter in Essen from its file. According to the applicant, there is, in any event, no evidence that the applicant and IBP intended to engage in concerted action on the market, or that there was a concurrence of wills as regards particular behaviour on the German market in March 2004. Moreover, not only do the statements made by an undertaking in connection with its application for leniency constitute evidence that is of little probative value, but the applicant notes that there is nothing else in the Commission's file that amounts to the slightest proof of an infringement of the competition rules on the German market in March 2004.

40 The applicant also notes that the conversation referred to in IBP's statement is not directly related to the cartel censured by the Commission. In its view, there was

no anti-competitive exchange after the Commission's on-the-spot investigations in March 2001. Therefore, it would be artificial to seek to establish a 'link between the heart of the [contested decision] and a brief meeting in the corridors of a trade fair'. That meeting did not, moreover, have any connection with EFMA and the pricing structure in Europe, and took place between two people who are not alleged to have participated in the earlier practices at issue. Furthermore, it occurred up to three years after those practices had ceased, following the Commission's investigations. The applicant maintains that the Commission erred in law by seeking in this way to establish, on the basis of that very minor incident, continuity with the earlier infringement.

41 Likewise, the applicant submits that its President, Mr B., sent a letter to FNAS on 16 March 2004 in order to distance himself from the infelicitous language used at the meeting on 20 January 2004 and the telephone conference on 16 February 2004 of the FNAS Logistics Committee. That distancing showed that the applicant had no intention of participating in anti-competitive exchanges.

42 As regards the FNAS Logistics Committee, the applicant claims that the Commission committed errors of law, fact and assessment in finding that the meetings of the FNAS Logistics Committee mentioned in recitals 522 to 526 to the contested decision had an anti-competitive object which allowed them to be linked to events prior to the Commission's on-the-spot inspections in March 2001. In that regard, it notes that the subjects raised at those meetings were far removed from the context of an alleged 'pan-European cartel' organised around the EFMA meetings, which is central to the contested decision. In the alternative, it observes that the contested decision is vitiated by contradictory reasoning, in that the Commission rules out any liability on the part of FNAS and its members (the wholesalers), some of whom sat on the Logistics Committee, yet finds the applicant to be liable. The applicant states that FNAS was the organiser of the meetings and prepared the minutes. The fact that FNAS was

not censured as the forum for the participants in the alleged cartel proves, in the applicant's submission, that there is insufficient evidence of the alleged infringement.

43 After describing the purpose and organisation of FNAS, the applicant explains, first of all, that, unlike events before the investigations of March 2001, the meetings of the FNAS Logistics Committee were conducted entirely transparently, which is therefore at odds with the Commission's observation, in recital 548 to the contested decision, that it is normal for cartel behaviour to take place in a clandestine fashion, for meetings to be held in secret and for the associated documentation to be reduced to a minimum.

44 Next, the applicant challenges the Commission's argument that the geographic scope of the meetings of the FNAS Logistics Committee was pan-European. None of the minutes of those meetings indicates that their purpose might have been anything other than to examine the issue of packaging for copper fittings in France. In the applicant's submission, where comparisons were made with the situation in other countries, they served only as examples and were not made in order to change the packaging of fittings in those other countries.

45 With regard to the meetings at issue, the applicant states that it is apparent from the minutes of the first meeting of the FNAS Logistics Committee, on 25 June 2003, that both the wholesalers and the manufacturers expressed their concerns about the decline in the market and that the wholesalers asked the manufacturers to change their packaging to enable them better to compete with other distribution networks, such as mail order. The manufacturers responded with their concerns about the impact on the costs of raw materials resulting from implementation of the new type of packaging. The associated discussions were not, in any event, anti-competitive.

46 The same applies to the second meeting, which was held on 15 October 2003.

47 As regards the meeting on 3 November 2003, this related mainly to negotiations between wholesalers and French manufacturers in relation to the list of products whose packaging was to be changed. Contrary to the allegations of Oystertec plc, which are referred to by the Commission, it was not in any event, according to the applicant, a question of the manufacturers organising any common pricing of copper fittings in the European Union.

48 With regard to the meeting on 20 January 2004 and the telephone conference on 16 February 2004, the applicant emphasises its firm reaction to the two 'slips' on the part of Mr La. (the applicant's representative on the FNAS Logistics Committee), the first at the meeting on 20 January 2004, when he mentioned a 'surcharge of 13 % (instead of 10 % which was initially foreseen)', and the second, recorded in the minutes of the telephone conference on 16 February 2004, regarding the reference to a 5 % increase in suppliers' prices in April 2004. It had distanced itself from that type of discussion, first in a meeting with the President of FNAS on 3 March 2004, and subsequently in a letter addressed to FNAS. In the applicant's submission, according to the case-law, that letter constitutes a public distancing. Furthermore, contrary to the Commission's contention, the terms of that letter are not vague and it was quickly distributed to all the members of FNAS.

49 In the reply, the applicant queries certain dates included in the chronological table drawn up by the Commission in connection with its defence, which the applicant claims do not relate to it and which should therefore be disregarded.

— The period between 1992 and 1994

50 The applicant submits that, as regards the period, at least, between 10 September 1992 and 13 December 1994 (27 months), there is no evidence of anti-competitive behaviour on the part of the applicant. Accordingly, the legal effect of that 27-month interruption should have been the expiry of the limitation period.

51 As regards the fax of 14 June 1993 concerning its price list for the period beginning on 1 July 1993, referred to in recital 218 to the contested decision, the applicant maintains that there is nothing to suggest that that list was obtained by IMI before being distributed to its customers. First of all, it had already been printed before that date and, second, it had already been distributed to its customers before it came into effect.

52 The applicant also observes that there were four EFMA sessions during that period, yet the Commission does not allege that anti-competitive or 'Super EFMA' meetings took place when the official meetings were held.

53 Furthermore, in the applicant's view, it is apparent from the contested decision that, during the period at issue, it acted as an independent competitor on the market and did not in any way go along with any concerted action with competitors. Referring to Case T-56/02 *Bayerische Hypo- und Vereinsbank* v *Commission* [2004] ECR II-3495, paragraphs 71 to 77, the applicant submits that, so far as concerns the period at issue, the finding in that case can be applied in this instance. In support of that proposition, it claims that the fax from Mueller Industries to Viega GmbH & Co. KG of 12 May 1992, referred to by the Commission in recital 217 to the contested decision, the note from Mr P. (IMI Italia), mentioned in recital 221 to that decision, and the fax from

IMI's Greek distributor of 6 September 1994, mentioned in recital 229 to the decision, demonstrate its competitive and autonomous behaviour.

54 Given that it cannot be accused of any anti-competitive behaviour in respect of the period between 10 September 1992 and 13 December 1994, the applicant complains that the Commission did not observe the rules applicable to the interruption of an infringement and limitation periods. It refers in that regard to the case-law according to which the Commission must adduce 'evidence of facts sufficiently proximate in time' in order to establish the continuity of the infringement alleged. A period of 27 months between two meetings involving the applicant cannot be regarded as being 'proximate in time' within the meaning of Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441. As a result of the interruption of the alleged infringement, the Commission ought to have found, at the very least, that more than five years had elapsed between the end of the first period, on 10 September 1992, and the beginning of the Commission's investigation in 2001, following the first application for leniency submitted by Mueller Industries on 9 January 2001.

55 The Commission contends that this plea should be rejected.

Findings of the Court

56 First of all, the Court observes, as regards proof of an infringement of Article 81(1) EC, that the Commission must provide sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place (see, to that effect, Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 20). Any doubt in the mind of the Court must operate to the advantage of

the undertaking to which the decision finding the infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment of a decision imposing a fine (Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 215).

57 It has also consistently been held that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement (see Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 180 and the case-law cited).

58 Furthermore, it is normal for the activities which anti-competitive agreements entail to take place clandestinely, for meetings to be held in secret and for the associated documentation to be reduced to a minimum. It follows that, even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of meetings, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. Accordingly, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (Joined Cases 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 *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraphs 55 to 57, and Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel* v *Commission* [2007] ECR I-729, paragraph 51).

59 It must be noted in that regard that the statements made in the context of the leniency policy play an important role. Those statements made on behalf of undertakings

have a probative value that is not insignificant, since they entail considerable legal and economic risks (see, to that effect, *JFE Engineering and Others* v *Commission*, cited in paragraph 57 above, paragraphs 205 and 211, and *Sumitomo Metal Industries and Nippon Steel* v *Commission*, cited in paragraph 58 above, paragraph 103). However, an admission by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence (see *JFE Engineering and Others* v *Commission*, cited in paragraph 57 above, paragraph 219 and the case-law cited).

60 It is also for the Commission to prove the duration of the infringement, since duration is a constituent element of the concept of an infringement under Article 81(1) EC. The principles referred to above are applicable in that regard (see, to that effect, Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraphs 94 to 96). In addition, according to the case-law, if there is no evidence directly establishing the duration of an infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates (see Case T-120/04 *Peróxidos Orgánicos* v *Commission* [2006] ECR II-4441, paragraph 51 and the case-law cited).

— The period after March 2001

61 It must be noted that the applicant does not deny that it participated in the cartel before the Commission's inspections in March 2001.

62 It must also be noted that the events alleged by the Commission with regard to the applicant — the participation in FNAS meetings, the contacts between the applicant and FRA.BO and the contacts made at the trade fair in Essen — are not, in themselves, disputed by the applicant. By contrast, the applicant disputes the anti-competitive nature of those events and the fact that they form part of the single, complex and continuous infringement identified in relation to the period before March 2001.

63 Finally, it must be noted that the applicant casts doubt on the reliability of FRA.BO's statements.

64 Accordingly, it is necessary to determine whether the conduct identified after the Commission's inspections in March 2001 must be characterised as anti-competitive contact and whether it shows that there was an extension of the same infringement.

65 As regards, first, the bilateral contacts, it is apparent from the statement made by FRA.BO in connection with its leniency application and from certain documentary evidence which it provided during the administrative procedure that there were exchanges of sensitive information between competitors after the Commission's inspections.

66 The evidence relied on with regard to the applicant consists of FRA.BO's telephone records and some handwritten notes in the diary of Ms P. (FRA.BO).

67 The applicant's argument that these were lawful contacts relating, inter alia, to cross-supply, proposed industrial cooperation or a common strategy sought by FRA.BO vis-à-vis CEN in relation to the approval of a particular type of fitting do not alter the fact that exchanges of sensitive information, price coordination and price increases

took place. Furthermore, those arguments are unsubstantiated by any evidence, such as invoices or order forms, in relation to the period at issue. Apart from the fact that several invoices relating to cross-supply were provided by the applicant for the first time at the stage of the reply, and thus belatedly, it must be pointed out that those documents cover only the period after 2004.

68 The Court also observes that the Commission did not rely exclusively on FRA.BO's statements. It is apparent from the handwritten notes of Ms P. (FRA.BO) that, during the conversation that occurred on 5 June 2003, the applicant and FRA.BO discussed IBP's pricing in France, which has no bearing on the question of the approval of a new type of fitting. Similarly, it is apparent from handwritten notes in Ms P.'s diary concerning a telephone conversation on 5 February 2004 that the planned price increases in France and in Greece were discussed. Furthermore, contrary to what is alleged by the applicant, the fact that the actual increases may have differed from those mentioned in Ms P.'s diary does not in any way alter the fact that those two undertakings exchanged information about their prices.

69 Second, as regards the meeting between Mr H. (IBP) and the applicant's representative at the Essen trade fair on 18 March 2004, it is apparent from Mr H.'s statement that he answered a question in connection with prices and that IBP had planned a price increase at the end of March 2004. Since the applicant has not proved that that information was already public and IBP's official letter concerning that increase was not sent until 30 March 2004, it must be noted that, whether or not it was an isolated incident, this contact was linked to pricing policy on the German market.

70 Furthermore, the argument that that exchange was not anti-competitive owing to the lack of reciprocity or the fact that the applicant itself had already decided to increase prices is not relevant. According to the case-law, an exchange of information does not have to be reciprocal for the principle of autonomous conduct on the market to be undermined. It follows from the case-law that the disclosure of sensitive information removes uncertainty as to the future conduct of a competitor and thus directly or indirectly influences the strategy of the recipient of the information (see, to that effect, Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 51 and the case-law cited).

71 Third, as regards the applicant's participation in the FNAS meetings, it is apparent, in particular, from the minutes of those meetings that issues relating to pricing, such as sales margins and price increases for fittings, were discussed at the meetings of the FNAS Logistics Committee.

72 It must be noted that the minutes of 25 June 2003 refer to the competitors' resolve that 'the objective would be to ensure, as a minimum, that prices stabilise'. It is apparent from the minutes of 15 October 2003 that Aquatis France SAS, IBP and the applicant provided the other manufacturers with information concerning the distribution of their sales between certain product categories and relating to their margins. At the meeting on 3 November 2003, there was an exchange of information relating to future price increases. Similarly, it is apparent from the minutes of 20 January 2004 that, after some discussion, Mr La. suggested that 'the manufacturers inform their clients of the eventuality of a 6% increase linked to the increase in costs of materials, in order to test the reaction of the market, and improve, at the same time, the cost of packaging'. According to those minutes, '[t]his increase in costs of materials [was to] occur throughout the entire range' and '[t]he unit price of the new packaging [would] therefore be 5.3% or 5.4% higher'. Last, following that meeting, a telephone

conference call was held on 16 February 2004 during which each manufacturer commented on the proposed price increase.

73 Although the discussions with suppliers concerning their request for a change in packaging was of no consequence in terms of competition law and such a request involved additional production costs, the fact remains that concerted action in relation to the percentage that would be passed on to suppliers or to the proportion of costs that would be absorbed by the manufacturers cannot, in itself, be said to have no effect on the market. That is an issue that an undertaking must resolve autonomously. The same applies in relation to sales margins and price increases for fittings.

74 As regards the geographic scope of the discussions held in the context of the FNAS meetings, it must be noted that, contrary to the view taken by the Commission in recitals 575 and 584 to the contested decision, those discussions related only to the French market. It is not at all apparent from the minutes of those meetings that they related also 'to Spain, Italy, the United Kingdom, Germany and the European market in general'. Consequently, it must be held that the collusion in the framework of the FNAS meetings was not pan-European. The fact that the FNAS meetings took place between the representatives of undertakings with a pan-European presence, as the Commission observed, does not alter that finding.

75 With regard to the letter of 16 March 2004 from the applicant's President to the President of FNAS, which, according to the applicant, constituted a public distancing from the infringements committed at the meeting on 20 January 2004 and during the subsequent telephone conference on 16 February 2004 of the FNAS Logistics Committee, in which, inter alia, Mr La. had participated, it must be pointed out that, according to the case-law, the notion of public distancing as a means of excluding liability must be

interpreted narrowly (see Case T-303/02 *Westfalen Gassen Nederland* v *Commission* [2006] ECR II-4567, paragraph 103 and the case-law cited).

76 It is apparent from the case-law that the communication that is intended to constitute a public distancing from an anti-competitive practice must be expressed firmly and unambiguously, so that the other participants in the cartel fully understand the intention of the undertaking concerned (Case C-510/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-1843, paragraph 120).

77 In this instance, it must be observed that the wording used by the applicant's President in his letter to the President of FNAS is too general to amount to a public distancing. The letter merely expresses concern in relation to the discussions on prices that might have taken place between the participants and contains a reminder of the applicant's internal policy in respect of competition law and, in that context, requests the President of FNAS to take steps to avoid such an anti-competitive practice; it does not, however, state that such a practice had actually occurred or that that letter was linked to the fact that its representative had initiated the concerted action in relation to pricing.

78 Furthermore, it must be noted that, in the first place, that letter was addressed only to the President of FNAS and not copied to the other participants by the applicant.

79 Nor, in the second place, does the letter contain a request to FNAS to that effect. Therefore, the fact that it was circulated, on 7 April 2004, to the members of the Logistics Committee of FNAS, on the latter's initiative, together with the reply of 31 March 2004 from the President of FNAS, in which he referred to the purpose of

the working group established in the framework of the FNAS Logistics Committee, does not support the inference that the applicant distanced itself from the cartel.

80 Finally, even if the letter from the applicant's President to the President of FNAS could be regarded as a public distancing, it must be noted, as the Commission correctly pointed out, that that letter arrived only towards the end of the period in respect of which the infringement was established, and the Commission's findings in relation to the applicant's participation in the cartel before 16 February 2004, the date of the last meeting, cannot therefore be called into question.

81 At this stage, it must therefore be held that the conduct alleged to have occurred after the Commission's inspections in March 2001 was anti-competitive and, furthermore, has been proved to the requisite legal standard.

82 As to whether the infringement was a continuation of the infringement that existed before March 2001, it must be noted that the latter consisted in the regular organisation over a number of years of multilateral and bilateral contacts between competing producers, the object of which was the establishment of unlawful practices by which the functioning of the fittings market was artificially affected, in particular in relation to prices.

83 Those contacts were made at meetings organised in connection with trade associations, more particularly in connection with EFMA (at the 'Super EFMA' meetings), trade fairs, ad hoc meetings and bilateral discussions. Generally, the initiative to discuss a price increase was often taken at a European level and the outcome implemented at national level, since each country's producers had their own processes for price

coordination and local arrangements complementing the arrangements adopted at European level.

84 The conduct in question that occurred after March 2001 also consisted of contacts made in connection with trade associations (FNAS meetings), bilateral contacts concerning competition parameters and contacts at trade fairs (Essen trade fair).

85 Since the objective of the anti-competitive practices remained the same, namely collusion on prices, the fact that certain characteristics or the intensity of those practices changed is not relevant to the continuation of the cartel in question. It may well be that the cartel became less structured after the Commission's inspections, and the intensity of its activities more variable. Nevertheless, the fact that a cartel might have experienced periods of activity of varying intensity does not mean that the cartel has come to an end.

86 In that regard, it must be noted that although the number of participants in the cartel dropped from nine to four after the inspections in March 2001, the main participants in the cartel before those inspections (the applicant, IBP and the former subsidiaries of IMI) were, as the contested decision shows, still involved in the cartel. Similarly, some of the persons who had already been involved in the cartel before March 2001 were also involved in the conduct in question after that date.

87 With regard to the geographic scope of the single and continuous infringement, although the FNAS meetings concerned only the French market (see paragraph 74 above), it appears that anti-competitive contacts between competitors after March 2001 also related to other national markets, such as the German, Greek, Spanish and

Italian markets, as the telephone contacts between the applicant and FRA.BO, or the contact between the applicant and IBP at the Essen trade fair, show.

88 Given that the conduct of each of the participants, including the applicant, was intended to pursue the same anti-competitive objective, that is to control and restrict competition in the fittings market by the coordination of prices and price increases and the exchange of sensitive information, the Commission was entitled to take the view that this was the continuation of an earlier infringement.

89 Finally, the other arguments raised by the applicant in connection with this plea, namely that FNAS was the organiser of the meetings and drew up the minutes, that FNAS itself was not an addressee of the contested decision or that the meetings were conducted entirely transparently, do not alter that finding.

90 In the first place, the argument that the minutes of the meetings were drawn up by FNAS is irrelevant inasmuch as it is common ground that the applicant was represented at those meetings. Therefore, given that the minutes were distributed to it, the applicant had the opportunity, either in writing or at the following meeting, to correct them or to indicate those points on which it disagreed.

91 In the second place, the argument that FNAS itself was not an addressee of the contested decision is also irrelevant. It is apparent from recital 606 to the contested decision that the Commission took the view that 'while there is evidence showing that the manufacturers reached an agreement which, according to Advanced Fluid Connections, they implemented, there is no evidence indicating that FNAS actively accepted

the task entrusted to it by the manufacturers or facilitated the implementation of the agreement'. Consequently, the Commission was entitled, in recital 607 to the contested decision, to conclude that FNAS had not been part of the agreement in question and could not, therefore, be included as one of the addressees of the contested decision.

92 It follows from all of the foregoing that the plea alleging the applicant's lack of participation in the cartel after March 2001 must be rejected.

— The period between 1992 and 1994

93 As a preliminary point, it must be noted that the applicant does not dispute the facts established with regard to its participation in the cartel in the period between 31 December 1991 and 10 September 1992 or the period between December 1997 and March 2001. Furthermore, it must be recalled that the applicant stated at the hearing that it did not deny that it participated in the cartel during the period from 1995 to 1997. Consequently, the Court must consider the contested decision only in so far as the Commission found that the applicant participated in the infringement in the period between 10 September 1992 and 13 December 1994.

94 It must be noted in that regard that, under Article 25(1) of Regulation No 1/2003, the powers of the Commission to impose fines for infringements of the provisions of competition law are to be subject, in principle, to a limitation period of five years. According to Article 25(2) of Regulation No 1/2003, 'in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases'. Under Article 25(3) and (5) of Regulation No 1/2003, any action taken by the Commission for the purpose of the investigation or proceedings in respect of

an infringement is to interrupt the limitation period and each interruption is to start time running afresh.

95 In the present case, the Commission's investigations commenced with its inspections on 22 March 2001. It follows from this that no fine can be imposed in respect of any offending conduct that ceased before 22 March 1996. Consequently, it is necessary to establish whether the various matters relied on in the contested decision demonstrate that the applicant's participation in the cartel continued or ceased during the period from 10 September 1992 to 13 December 1994.

96 In that regard, it must be observed that the evidence as a whole relied on in relation to the matters mentioned in recitals 214, 217, 218, 221, 224, 225, 229 and 232 to the contested decision is sufficient to support the inference that the applicant had not ceased to participate in the cartel during the period referred to.

97 It should, in particular, be noted that, in recital 214 to the contested decision, the Commission referred to the handwritten notes dating from the middle or end of 1992 and mentioning the applicant's name, which set out a list of prices due to be implemented in January 1993 (for all countries except France) and in April 1993 (for France). Likewise, in recital 217, reference is made to a fax of 12 May 1993, sent by Mueller Industries to Viega, in which the applicant is accused of having departed from the terms of the agreement to which it is a party. It can therefore be inferred from this that the applicant had not withdrawn from the agreement. The same applies in respect of the fax of 6 September 1994 sent by an importer and distributor to Mr W. (IMI) (recital 229 to the contested decision), stating that the applicant was not properly complying with the 'agreements'.

98 As regards the last point, suffice it to note that non-compliance with a cartel does not in any way alter the fact of its existence. In the present case, it cannot be concluded therefore that the applicant ended its participation in the infringement during the period at issue, merely because the applicant used the cartel for its own benefit, while failing to adhere fully to the prices that had been agreed.

99 Cartel members remain competitors, each of whom can be tempted, at any time, to profit from the discipline of the others in relation to the prices agreed by the cartel by lowering its own prices with the aim of increasing its market share, while maintaining a general level of pricing that is relatively high. In any event, the fact that the applicant did not entirely implement the agreed prices does not mean that, in so doing, it applied the prices that it would have charged in the absence of the cartel (see, to that effect, judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, not published in the ECR, paragraphs 74 and 75).

100 Finally, it is also apparent from Mr P.'s note of 15 March 1994, referred to in recital 221 to the contested decision, that the applicant was present during the discussions that took place on 11 and 13 March 1994 concerning the Italian market.

101 Even if the applicant did not participate in some of the meetings that were held between 10 September 1992 and 13 December 1994 in the framework of the cartel, or any of them, that does not mean that the applicant had withdrawn from the cartel, in view of the specific features of the cartel at issue, which is characterised by multilateral contacts, bilateral contacts — which took place at least once or twice a year — ad hoc contacts and the fact that it was not unusual for a member of the cartel not to participate regularly in every meeting.

102 Furthermore, it must also be held that the applicant did not distance itself publicly from the cartel. It has consistently been held that if there has been no clear distancing, the Commission can take the view that the infringement has not been brought to an end (see, to that effect, *Archer Daniels Midland* v *Commission*, cited in paragraph 76 above, paragraph 119 et seq. and the case-law cited).

103 It follows from this that the argument concerning the interruption of the applicant's participation in the infringement during the period from 10 September 1992 to 13 December 1994 must be rejected.

104 It follows from all of the above that this plea must be rejected as unfounded.

Calculation of the amount of the fine

Arguments of the parties

105 The applicant complains, in the alternative, that the Commission disregarded the rules on the method of setting fines. Neither the 1998 Guidelines nor the 1996 Leniency Notice have been observed. First, the starting amount of the fine imposed on the applicant is disproportionate by comparison with the starting amount of the fines imposed on the other undertakings. Second, it did not act as ringleader of the cartel. Third, the Commission should have varied the amount of the fine according to the geographic scope and the intensity of coordination. Last, the Commission was wrong

to refuse to reduce the fine in recognition of the applicant's non-contestation of a substantial proportion of the objections.

106 The Commission contends that the plea should be dismissed.

Findings of the Court

107 As regards the first complaint, relating to the disproportionate nature of the starting amount of the fine, it must be observed that the Commission is entitled to divide the members of a cartel into categories on the basis, inter alia, of the market share held by each undertaking. The Commission explained, in its defence, that the turnover and market share of the Legris Industries group for fittings represented, in 2000, approximately triple the turnover and market share of FRA.BO and Mueller Industries, two and a half times that of Flowflex Holding Ltd and more than twice that of Sanha Kaimer GmbH & Co. KG. In that context, the Commission was entitled to determine a starting amount for the fine imposed on the applicant (EUR 14.25 million) that was between two and three times higher than that of the undertakings referred to above (EUR 5.5 million). Admittedly, the table annexed to the contested decision indicates the size and relative importance of the undertakings only in terms of broad ranges, for reasons of confidentiality, but it is apparent from the confidential version of that table and the underlying data that the Commission divided the members of the cartel into categories in a way that was consistent and objectively justified.

108 The applicant's argument that the starting amount of the fine imposed on it is, in any event, disproportionate, as it represents 77 % of the maximum amount of the fine that could have been imposed on it under Article 23(2) of Regulation No 1/2003, must be rejected.

109 First, it must be borne in mind that the applicant and its parent company formed a single undertaking at the material time, which, as the author of the infringement, committed the infringement alleged in the contested decision. Consequently, the Commission was entitled to rely on the figures for that undertaking when calculating the starting amount of the fine.

110 Second, it is essential that the starting amount of the fine should be proportional to the infringement seen as a whole, having regard, in particular, to its gravity. It must be noted that, in the context of setting the starting amount of the fine, the turnover of the undertaking is not a decisive criterion in assessing the gravity of an infringement. Furthermore, the infringement at issue is, by its very nature, among the most serious of the infringements covered by Article 81 EC, which may, according to the 1998 Guidelines, result in a starting amount of a fine of more than EUR 20 million.

111 Third, it must be noted that the 10 %-of-turnover ceiling provided for in Article 23(2) of Regulation No 1/2003 is applied at one of the final stages of the calculation of the fine, that is after the calculation of the fine according to the gravity and duration of the infringement and after any attenuating or aggravating circumstances have been taken into account. In that regard, it must be borne in mind that if several addressees constituted the 'undertaking' at the date when the decision was adopted, the ceiling can be calculated on the basis of the overall turnover of that undertaking. By contrast, if, as in the present case, that economic entity has been split to form two separate entities at the time when the decision is adopted, each addressee of that decision is

entitled to have that ceiling applied individually to it. That right is independent of the application of the criterion of proportionality in relation to the determination of the starting amount of the fine. Finally, it must be pointed out that, according to the case-law, only the final amount of the fine may not exceed the limit of 10 % of total turnover. By contrast, while the fine is in the process of being calculated, the intermediate amount is not precluded from exceeding that limit (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 277 and 278).

112 As regards the second complaint, relating to the fact that the applicant was not the ringleader of the cartel but that it had an allegedly passive or 'follow-my-leader' role, justifying a reduction in the amount of the fine, it is sufficient to note that, as the applicant itself admits, it was present at half of the 160 collusive meetings held in the period from 1991 to 2001. Admittedly, it is clear from the case-law that, among the factors likely to establish an undertaking's passive role, a significantly more sporadic participation in meetings than that of its competitors can be taken into account. However, the applicant cannot reasonably claim that the frequency of its participation in the meetings — eight times a year — must be described as 'significantly more sporadic' than that of the other participants or, therefore, that its role was exclusively passive or 'follow-my-leader'.

113 With regard to the third complaint, alleging that the Commission should have varied the amount of the fine according to the geographic scope and intensity of coordination, suffice it to note that the fact that the intensity of the cartel lessened after the Commission's inspections has no bearing on the classification of that cartel as very serious and of sufficiently long duration to justify an increase of 10 % per year of the infringement, as stated in the 1998 Guidelines. Furthermore, although the cartel initially had limited territorial scope, it subsequently became pan-European, and there

is therefore no reason to vary the rates of increase applied for duration on the basis of its geographic coverage.

114 Finally, the fourth complaint must also be rejected. It is clear from the case-law that a reduction in the fine on the ground of cooperation during the administrative proceeding is justified only if the conduct of the undertaking in question enabled the Commission to establish the existence of an infringement more easily and, where relevant, to bring it to an end (Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraph 36). It is equally apparent from the case-law that a reduction in the amount of the fine under the 1996 Leniency Notice can be justified only where the information provided and, more generally, the conduct of the undertaking concerned might be considered to demonstrate genuine cooperation on its part (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 111 above, paragraphs 388 to 403, in particular paragraph 395). However, it is apparent from the documents in the case that, in fact, the applicant's substantial non-contestation of the facts related only to the period from December 1997 to March 2001, that is three years out of a total period of participation in the infringement of more than 13. In that context, it must be observed that the arguments put forward contesting the applicant's participation in the infringement after the inspections and in respect of the period from 1992 to 1994 have been rejected. It follows from this that the Commission did not commit a manifest error of assessment by refusing to take into account the partial non-contestation of the facts by the applicant pursuant to the provisions set out in Section D of the 1996 Leniency Notice.

115 Accordingly the present plea in law must be rejected as unfounded.

116 It follows from all the foregoing considerations that the action must be dismissed in its entirety.

Costs

117 Under Article 87(2) of the Rules of Procedure, 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 applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Dismisses the action;

2. Orders Comap SA to pay the costs.

Martins Ribeiro Wahl Dittrich

Delivered in open court in Luxembourg on 24 March 2011.

[Signatures]