JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

16 June 2011 *

In Case T-210/08,

Verhuizingen Coppens NV, established in Bierbeek (Belgium), represented by J. Stuyck and I. Buelens, lawyers,

applicant,

v

European Commission, represented by A. Bouquet and S. Noë, acting as Agents,

defendant,

APPLICATION for the annulment of Commission decision C(2008) 926 final of 11 March 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.543 — International Removal Services), and, in the alternative, the annulment or reduction of the fine imposed on the applicant,

* Language of the case: Dutch.

THE GENERAL COURT (Eighth Chamber),

composed of S. Papasavvas, acting as President, N. Wahl and A. Dittrich (Rapporteur), Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 5 May 2010,

gives the following

Judgment

Facts

Subject-matter of the dispute

1 According to Commission Decision C(2008) 926 final of 11 March 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.543 — International Removal Services) ('the Decision'), a summary of which is published in the *Official Journal of the European Union* of 11 August 2009 (OJ 2009 C 188, p. 16), the applicant, Verhuizingen Coppens NV, participated in a cartel on the international removal services market in Belgium, relating to the direct

or indirect fixing of prices, market sharing and the manipulation of the procedure for the submission of tenders. The European Commission states that the cartel operated for almost 19 years (from October 1984 to September 2003). Its members fixed prices, issued false quotes ('cover quotes') to customers and compensated each other for rejected offers by means of a financial compensation system ('commissions').

Applicant

2 The applicant's predecessor was formed about 30 years ago by Mr Coppens. Verhuizingen Coppens ('Coppens') was set up in May 1998 when that predecessor was contributed in kind to its capital. The Decision states that Mr Coppens takes all decisions concerning the company. Before May 1998 he did so in his capacity as sole proprietor and since May 1998 he does so in his capacity as managing director. In the financial year ending 31 December 2006, Coppens achieved a consolidated worldwide turnover of EUR 1 046 318.

Administrative procedure

3 According to the Decision, the Commission opened the procedure on its own initiative because it had information that certain Belgian companies operating in the international removals sector were party to agreements that might be caught by the prohibition in Article 81 EC.

4 Accordingly, investigations were carried out at the premises of Allied Arthur Pierre NV, Interdean NV, Transworld International NV and Ziegler SA in September 2003, under 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). Following those investigations, Allied Arthur Pierre applied for immunity from fines or a reduction in the fine in accordance with the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3). Allied Arthur Pierre admitted that it had participated in agreements on commissions and cover quotes, listed the competitors involved, inter alia a competitor previously unknown to the Commission's services, and submitted documents corroborating its oral statements.

5 In accordance with 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), several written requests for information were sent to the undertakings involved in the anti-competitive agreements, to some competitors and to a professional organisation. On 18 October 2006, the statement of objections was adopted and notified to several undertakings. All the addressees replied to it. Their representatives, with the exception of Amertranseuro International Holdings Ltd, Stichting Administratiekantoor Portielje, Team Relocations Ltd and Trans Euro Ltd, exercised their right of access to the documents contained in the Commission's file, which were accessible only on the Commission's premises. They were granted access between 6 and 29 November 2006. The hearing was held on 22 March 2007.

6 On 11 March 2008, the Commission adopted the Decision.

Decision

7 The Commission states that the addressees of the Decision, including the applicant, participated in a cartel in the international removal services sector in Belgium or are deemed responsible therefor. The participants in the cartel fixed prices, shared customers and manipulated the submission of tenders at least from 1984 to 2003. As a result, they have committed a single, continuous infringement of Article 81 EC.

8 According to the Commission, the services concerned include the removal of goods of both natural persons — private individuals or employees of an undertaking or a public institution — and undertakings or public institutions. Such removals are characterised by the fact that Belgium is either the starting place or the destination. Having regard also to the fact that the international removal companies in question are all located in Belgium and that the cartel's activity takes place in Belgium, the Commission therefore considered that the geographic centre of the cartel was Belgium.

9 The combined turnover of the participants in the cartel for international removal services in Belgium in 2002 was estimated by the Commission at EUR 41 million. As it estimated the size of the sector at approximately EUR 83 million, the combined market share of the undertakings involved was considered to be approximately 50 %.

10 The Commission states that the aim of the cartel was, inter alia, to establish and maintain high prices and to share the market contemporaneously or successively in various forms: agreements on prices, agreements on sharing the market by means of false quotes (cover quotes) and agreements on a system of financial compensation for rejected offers or for not quoting at all (commissions).

11 The Commission considers that, between 1984 and the early 1990s, the cartel operated inter alia on the basis of written price-fixing agreements. At the same time the commissions and cover quotes were introduced. A commission is a hidden element in the final price which the customer had to pay without receiving a corresponding service. It is a sum of money that the removal company winning the contract for an international removal owed to the competitors that did not secure the contract, whether they submitted an estimate or abstained from doing so. It is therefore a sort of financial compensation for the removal companies that did not win the contract.

The members of the cartel issued invoices to each other for commissions on the rejected offers or offers not made, referring to fictitious services, and the total for those commissions was invoiced to customers. The Commission states that that practice must be deemed to be indirect fixing of prices for international removal services in Belgium.

12 The members of this cartel also cooperated in submitting cover quotes, which led customers, that is to say, employers paying for the removal, into the mistaken belief that they could choose according to competition-based criteria. A cover quote is a fictitious quotation submitted to the customer or the person who was moving by a removal company which did not intend to carry out the removal. Through the submission of cover quotes, the removal company that wanted the contract ('the requesting firm') ensured that the institution or undertaking received several quotes, either directly or indirectly via the person who was moving. To that end, the requesting firm indicated to its competitors the price, the rate of insurance and the storage costs that they were to quote. That price, which was higher than the price quoted by the requesting firm, was then indicated in the cover quotes. According to the Commission, since the employer will usually choose the removal company that offers the lowest price, the companies involved in the same international removal as a rule knew in advance which of them would secure the contract for that removal.

13 The Commission also observes that the price quoted by the requesting firm could be higher than it might otherwise have been because the other companies involved in that removal would have submitted cover quotes indicating a price stated by the requesting firm. By way of example, the Commission refers, in recital 233 of the Decision, to an internal Allied Arthur Pierre email message dated 11 July 1997 which stated: '[T]he customer has asked for two cover quotes, so we can ask for a high price.'

Therefore, the Commission states that the submission of cover quotes to customers was a manipulation of the tendering procedure so that the prices quoted in all the bids were deliberately higher than the price of the requesting firm, and at all events higher than they would have been in a competitive environment.

14 The Commission maintains that those arrangements were in place until 2003. Those complex activities had the same object of fixing prices, sharing the market, and thus of distorting competition.

15 In conclusion, the Commission adopted the operative part of the Decision, Article 1 of which is worded as follows:

'By directly and indirectly fixing prices for international removal services in Belgium, sharing part of the market, and manipulating the procedure for the submission of tenders, the following undertakings have infringed Article 81(1) [EC] … in the periods indicated:

…

(i) [Coppens], from 13 October 1992 to 29 July 2003;

…'

16 Consequently, in Article 2(k) of the Decision, the Commission imposed a fine of EUR 104 000 on the applicant.

17 For the purposes of calculating the amount of the fines, the Commission applied, in the Decision, the methodology set out in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the 2006 Guidelines').

Procedure and forms of order sought by the parties

18 By application lodged at the Court Registry on 4 June 2008, the applicant brought the present action.

19 Upon hearing the report of the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral procedure. The parties presented their oral arguments and their replies to questions put by the Court at the hearing on 5 May 2010.

20 The applicant claims that the Court should:

— annul Article 1 of the Decision in so far as it relates to the applicant;

— annul Article 2 of the Decision in so far as it relates to the applicant;

— in the alternative, substantially reduce the fine and set it at an amount not exceeding 10 % of the applicant's turnover on the international removal services market;

— in any event, order the Commission to pay the costs.

21 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

22 The applicant relies on two main pleas and one alternative plea for the cancellation or reduction of the fine.

23 The first plea alleges infringement of Article 81(1) EC.

24 This plea is divided into three limbs. First, by referring to its reduced role, the applicant disputes the finding that it participated in a complex cartel. Second, it challenges the calculation of the duration of its participation in the cartel. Third, it complains that the Commission failed to assess the relative weight of its participation.

Arguments of the parties

25 As regards the first limb of the plea, the applicant notes that it is accused only of issuing cover quotes. The Commission states expressly, in recital 296 of the Decision, that Coppens is the only company not to have participated in the agreement on commissions. Nor has the Commission established that the applicant was aware of that agreement. Consequently, the Commission's conclusion, in recital 345 of the Decision, that the applicant participated in all of the conduct at issue is incorrect. In addition, the applicant submits that the agreements on cover quotes do not in themselves have the object or effect of restricting competition. It is impossible for the applicant to know all its competitors from whom a customer might request a quote, so that the applicant is not in a position to know whether it could invoice higher prices. Thus, the removal was actually carried out by the applicant in only about 23 % of the cases in which it requested cover quotes from other members of the cartel.

26 In the reply, the applicant also relies on the judgments in Case 56/65 *LTM* [1966] ECR 235, Case 5/69 *Völk* [1969] ECR 295, and Case C-234/89 *Delimitis* [1991] ECR I-935, in order to challenge whether Article 81 EC is applicable.

27 The Commission contends that it is of little consequence whether competition is distorted by the cover quotes or by the commissions, because in both cases the distortion of competition generally leads to an increase in prices for the customer. That means that the various forms of the cartel could be considered to be a single and continuous infringement of Article 81 EC. The Commission observes that the applicant does not deny that it was aware of the existence of the agreement on commissions. The infringement established in the present case is not caught by the *de minimis* rule, because the participants' combined position on the international removals market is very significant.

Findings of the Court

28 As regards the first limb of the plea, it is common ground that the applicant's active participation in the cartel was limited to issuing cover quotes (see recitals 173 and 296 of the Decision). According to the Commission's findings, Coppens is the only company not to have participated in the agreement on commissions.

29 The applicant denies, however, that it took part in a single and continuous infringement. In that connection, it should be observed that, according to the case-law, an undertaking which has participated in a multiform infringement of the competition rules by its own conduct, which met the definition of an agreement or concerted practice having an anti-competitive object within the meaning of Article 81(1) EC and was intended to help bring about the infringement as a whole, may also be responsible for the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement, where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct, and was prepared to accept the risk (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraphs 87 and 203). Thus, in order to hold a company liable for a single and continuous infringement, awareness (proved or presumed) of the offending conduct of the other participants in the cartel is required.

30 In addition, the mere fact that there is identity of object between an agreement in which an undertaking participated and a global cartel does not suffice to render that undertaking responsible for the global cartel. It is only if the undertaking knew or should have known when it participated in the agreement that in doing so it was joining in the global cartel that its participation in the agreement concerned can constitute the expression of its accession to that global cartel (Case T-28/99 *Sigma Tecnologie* v *Commission* [2002] ECR II-1845, paragraph 45).

31 It must be stated that the Commission has not shown that, when the applicant participated in the agreement on cover quotes, it was aware of the other companies' anti-competitive conduct concerning the commissions, or that it could reasonably have foreseen such conduct. The Commission expressly acknowledges that, as regards the applicant's awareness of the other participants' offending conduct, the Decision is not based upon specific evidence. It contends that the applicant does not deny that it was aware of the agreement on commissions and that it failed to state to what extent it knew of the conduct of the other participants in the infringement. However, the applicant is in no way required to state, on its own initiative, the extent to which it knew of the conduct of the other participants in the infringement, since the burden of proof is borne by the Commission. The Commission must first adduce proof of a fact before the applicant can dispute this. Moreover, at the hearing, the applicant expressly stated, at the request of the Court, that it was not aware of the agreements on commissions. Therefore, the Commission has not discharged the burden of proof.

32 Accordingly, the Commission was not entitled to find that the applicant had participated in a single and continuous infringement.

33 As regards the inferences which must be drawn from that conclusion, the fact that the operative part of the Decision does not refer to the single and continuous nature of the infringement is irrelevant. It must be observed, first, that the decisional practice of the Commission is not uniform in that regard. While the Commission has made express reference to the single and continuous nature of an infringement in the operative parts of some of its decisions (see, for example, Article 1 of 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), a summary of which is published in the *Official Journal of the European Union* of 27 October 2007 (OJ 2007 L 283, p. 63), it has not done so in other decisions, such as the Decision. The scope of the annulment cannot depend on whether or not the Commission includes a reference to a single and continuous infringement in the operative part of the Decision.

34 Second, it should be pointed out that the enacting terms of an act are inextricably linked to the statement of reasons for them, so that, if that act has to be interpreted, account must be taken of the reasons which led to its adoption (see order in Case T-387/04 *EnBW Energie Baden-Württemberg* v *Commission* [2007] ECR II-1195, paragraph 127 and the case-law cited). Although only the operative part of a decision is capable of producing legal effects, the fact remains that the assessments made in the grounds of a decision can be subject to judicial review by the judicature of the European Union to the extent that, as grounds of a measure adversely affecting the interests of those concerned, they constitute the essential basis for the operative part of that measure or if those grounds are likely to alter the substance of what was decided in the operative part (see Joined Cases T-81/07 to T-83/07 *KG Holding and Others* v *Commission* [2009] ECR II-2411, paragraph 46 and the case-law cited).

35 It is clear from the grounds of the Decision, and in particular from recitals 307 and 345, that the Commission regards the applicant as liable for participation in a single and continuous infringement. In addition, the fact that, notwithstanding the applicant's limited participation, the Commission applied a rate of 17 % of the value of sales — that is, the single percentage applied to all the companies in question — in order to take into account the gravity of the applicant's infringement, can be explained only by the fact that it considers the applicant to have participated in a single and continuous infringement. Lastly, the single and continuous nature of the infringement seems also to have influenced the assessment of the duration of its participation in the infringement (see recital 380 of the Decision and the judgment of the General Court of even date in Case T-208/08 *Gosselin* v *Commission* [2011] ECR II-3639, paragraph 167).

36 Therefore, although participation in the system of cover quotes may in itself constitute an infringement of Article 81 EC punishable by a fine, Article 1(i) and Article 2(k) of the Decision must be annulled, as the applicant requests.

37 In the light of the foregoing, there is no need to examine either the other limbs of this plea or the other pleas relied on by the applicant.

Costs

38 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Annuls Article 1(i) and Article 2(k) of Commission Decision C(2008) 926 final of 11 March 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.543 — International Removal Services);**

2. **Orders the European Commission to pay the costs.**

Papasavvas Wahl Dittrich

Delivered in open court in Luxembourg on 16 June 2011.

[Signatures]