Forms of order sought

— annul the judgment under appeal in so far as it adversely affects the appellant;

— annul, in so far as it concerns the appellant, Commission Decision C(2006) 4180 final 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 — Joints);

— ***in the alternative*** to the heads of claim appearing in points 1 and 2, refer the case back to the General Court for a ruling;

— order the defendant at first instance to pay the costs in relation to the whole dispute.

Pleas in law and main arguments

This appeal is directed against the judgment of the General Court whereby the latter dismissed the action by the appellant against Commission Decision C(2006) 4180 final 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 — Joints).

The appellant bases its appeal on the following grounds.

The General Court infringed the appellant's right to be heard, the principles governing the taking of evidence and the duty to state reasons for the decision given. In order to demonstrate the appellant's participation in the cartel, the judgment under appeal relied mainly on handwritten notes of a single witness and a plea for leniency without making any mention of the appellant's arguments on the subject of those documents. The appellant expressly cast doubt on the accuracy of those documents (the witness did not take part in the German meetings and did not speak German).

The appellant considers that the General Court should have ordered measures of inquiry in relation to the accuracy of the witness notes and the plea for leniency. By using those notes and the plea for leniency as evidence without verifying their accuracy, the General Court infringed the principles governing the taking of evidence.

The judgment under appeal infringed Article 81(1) EC inasmuch as the General Court held that the appellant had participated, on 30 April 1999, in a meeting 'of an anti-competitive nature'. Moreover, the judgment under appeal also infringed Article 23(1) of Regulation No 1/2003 insamuch as participation at that meeting was taken into account when determining the amount of the fine. As regards that meeting, the General Court merely held that the evidence pointed 'rather' to an anti-competitive purpose than to a purpose in accordance with the competition rules. The General Court thus infringed the criterion for assessing evidence that it itself had fixed, which requires that the infringement be proved certainly and beyond dispute.

The appellant argues that the finding that the meeting of 30 April 1999 was of an anti-competitive nature has an effect on the amount of the fine imposed. The taking into account of that meeting served as evidence of the appellant's participation in a pressfittings cartel. The appellant's turnover in the pressfittings sector was thus fixed, in the context of fixing the starting amount for the calculation of the fine, at an amount 11 times higher.

As regards the taking into account of turnover in pressfittings, the judgment further showed a defect in reasoning and offended the laws of logic. The imposition of a fine of more than EUR 50 million was, in the final analysis, based solely, in paragraph 85 of the judgment under appeal, on two meetings the relation of which to pressfittings is dealt with in two half-sentences and established without any assessment of the evidence. Moreover, the General Court assumed that the appellant had participated in anti-competitive agreements concerning pressfittings at the meeting of 30 April 1999, whereas it also held that the latter's competitors debated until June 2000 whether pressfittings (in which the appellant had a monopoly) should be the subject-matter of a cartel at all.

Finally, the judgment under appeal infringed the principle of proportionality. The Commission — with the approval of the General Court — applied the guidelines for the calculation of fines as follows: it first fixed a starting amount by taking account of the turnover for pressfittings, even though, according to the findings of the General Court itself, pressfittings could have been the subject-matter of an anti-competitive agreement only in 2000 and 2001. It then increased the starting amount by 90 % in order to reflect the alleged overall duration of the appellant's participation in the cartel (nine years and three months). The turnover figure for pressfittings having thus been taken into account for the whole of the period and not for the last part, of one year and three months, which was the most that could be relevant, the fixing of the amount of the fine infringed the principle of proportionality.

Appeal brought on 6 June 2011 by Council of the European Union against the judgment of the General Court (Third Chamber) delivered on 22 March 2011 in Case T-233/09: Access Info Europe v Council of the European Union

(Case C-280/11 P)

(2011/C 238/11)

Language of the case: English

Parties

Appellant: Council of the European Union (represented by: G. Maganza, B. Driessen, Cs. Fekete, Agents)

Other parties to the proceedings: Access Info Europe, Hellenic Republic, United Kingdom of Great Britain and Northern Ireland

Form of order sought

The appellant claims that the Court should:

— set aside the contested judgement by which the General Court annulled the Council's decision of refusing public access to the requested document;

— give a final judgment in the matters that are the subject of this appeal; and

— order the Applicant in Case T-233/09 to pay the costs of the Council arising from that case and from the present appeal.

Pleas in law and main arguments

At the outset, the Council would like to recall that the adoption of the contested decision, on 26 February 2009, pre-dates the entry into force of the Lisbon Treaty on 1 December 2009. Accordingly, the applicable Treaty framework for the purposes of the present action is the one established by the Treaty on European Union and Treaty establishing the European Community, prior to the entry into force of the Lisbon Treaty.

The Council respectfully submits that first, the General Court has erred in law in its interpretation and application of the exception laid down in Article 4(3) first subparagraph of Regulation 1049/2001 ([1]), since its findings are inconsistent with the applicable Treaty provisions, and in particular, disregard the limits of the principle of wider access of the institutions' legislative activities set by the Treaty and reflected by secondary law, on account of the preservation of the effectiveness of the institution's decision-making.

Second, the Council argues that the General Court's reasoning is inconsistent with the case-law of the Court which allows the institution to rely upon general considerations.

Third, the Council submits that the General Court has erred in law in applying the 'requisite legal and factual standard' to the present case in order to review the reasons the Council brought to justify invocation of the exception laid down in Article 4(3) first sub-paragraph of the Regulation. In its assessment, the General Court committed legal errors in so far as it required evidence of an adverse effect on the decision-making process, disregarded the importance of the early stage of the decision-making for appreciating the impact of full disclosure, and failed to take account of the sensitivity of the requested document.

([1]) Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents OJ L 145, p. 43

Reference for a preliminary ruling from the Varhoven Administrativen Sad na Republika Balgaria lodged on 8 June 2011 — EMS Bulgaria TRANSPORT OOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' pri Tsentralno Upravlenie na Natsionalnata Agentsia po Prihodite gr. Plovdiv

(Case C-284/11)

(2011/C 238/12)

Language of the case: Bulgarian

Referring court

Varhoven Administrativen Sad na Republika Balgaria

Parties to the main proceedings

Applicant: EMS Bulgaria TRANSPORT OOD

Defendant: Direktor na Direktsia'Obzhalvane i upravlenie na izpalnenieto' pri Tsentralno Upravlenie na Natsionalnata Agentsia po Prihodite gr. Plovdiv

Questions referred

1. Are Articles 179(1), 180 and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the principle of effectiveness in the field of indirect taxation, which is discussed in the judgment of the Court of Justice in Joined Cases C-95/07 and C-96/07 *Ecotrade,* to be interpreted as permitting an exclusion period such as that in the present case under Article 72(1) of the Law on value added tax (2008 version), which period was extended — under Section 18 of the transitional and concluding provisions of the Law amending and complementing the Law on value added tax — until the end of April 2009 only for recipients of supplies who became taxable before 1 January 2009, taking into account the circumstances of the dispute in the main proceedings, that is to say:

   — the requirement under national law that a person who has made an intra-Community acquisition and who is not registered under the Law on value added tax register voluntarily as a precondition for exercising the right to deduct input VAT, even though that person does not meet the conditions for compulsory registration;

   — the new rule under Article 73a of the Law on value added tax (in force since 1 January 2009) whereby the right to deduct input value added tax is to be granted irrespective of whether the time-limit under Article 72(1) of the Law on value added tax was complied with, if the tax is chargeable to the recipient of the supply, provided the supply was not concealed and is documented in the accounts;