



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

16 September 2013 *

(Competition — Agreements, decisions and concerted practices — Bathroom fittings and fixtures markets of Belgium, Germany, France, Italy, the Netherlands and Austria — Decision finding an infringement of Article 101 TFEU and Article 53 of the EEA Agreement — Coordination of price increases and exchange of sensitive business information — Rights of the defence — 2002 Leniency Notice — Plea of illegality — Concept of agreements, decisions and concerted practices — Calculation of the fine — 2006 Guidelines on the method of setting fines — Gravity — Application of a multiplier to the additional sum)

In Case T-376/10,

Mamoli Robinetteria SpA, established in Milan (Italy), represented by F. Capelli and M. Valcada, lawyers,

applicant,

v

European Commission, represented by F. Castillo de la Torre, A. Antoniadis and L. Malferrari, acting as Agents, assisted initially by F. Ruggeri Laderchi and A. De Matteis, and subsequently by F. Ruggeri Laderchi, lawyers,

defendant,

APPLICATION for annulment of Commission Decision C(2010) 4185 final of 23 June 2010 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case COMP/39092 – Bathroom Fittings and Fixtures), in so far as it concerns the applicant, and, in the alternative, for cancellation or reduction of the fine imposed on the applicant,

THE GENERAL COURT (Fourth Chamber),

composed of I. Pelikánová, President, K. Jürimäe (Rapporteur) and M. van der Woude, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 September 2012,

gives the following

* Language of the case: Italian.

Judgment¹

...

Procedure and forms of order sought

- 22 By application lodged at the Court Registry on 7 September 2010, the applicant brought the present action.
- 23 On hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure as provided for in Article 64 of its Rules of Procedure, put written questions to the parties. The parties provided their answers to those questions within the prescribed period.
- 24 The parties presented oral argument and replied to the Court's oral questions at the hearing on 11 September 2012.
- 25 The applicant claims that the Court should:
- annul the contested decision in so far as it relates to it;
 - in the alternative, annul the fine imposed or reduce it to an amount corresponding to 0.3% of the applicant's turnover or, in any event, to such an amount as the Court may determine;
 - order the Commission to pay the costs.
- 26 The Commission contends that the Court should:
- dismiss the action as in part inadmissible and, in any event, unfounded;
 - order the applicant to pay the costs.

Law

...

The main head of claim, seeking partial annulment of the contested decision

...

The second plea in law, alleging that the 2002 Leniency Notice is unlawful

- 45 The applicant states that the contested decision is based entirely on information obtained pursuant to the request made by Masco under the 2002 Leniency Notice. However, that notice is, it submits, unlawful, inasmuch as there is no legal basis in either the EC Treaty or Regulation No 1/2003 authorising the Commission to grant, by virtue of an atypical act, full or partial immunity from fines to an undertaking which participated in an infringement for which other undertakings have been penalised because that undertaking reported the infringement. In addition, obtaining immunity as a result of reporting the conduct of other undertakings constitutes an infringement of the principle of

¹ — _ Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

equal treatment. Moreover, according to the applicant, since only the EU legislature is in a position, as is the case in the EU Member States, to decide on the adoption of a programme intended to reward the cooperation of undertakings, the Commission infringed the principle of separation of powers by adopting the 2002 Leniency Notice and the principles of transparency and of good administration provided for in the Charter of Fundamental Rights of the European Union (OJ 2010, C 83, p. 389).

46 The Commission contests that plea in law.

47 As a preliminary point it must be noted that, while the applicant does not formally put forward a plea of illegality, under Article 277 TFEU, against the 2002 Leniency Notice, the actual substance of its plea in law is that the contested decision should be annulled on the ground that it was based on the 2002 Leniency Notice, which the applicant maintains is unlawful. In those circumstances, it is first necessary to examine whether the applicant's plea of illegality is admissible and, if it is, to go on to assess whether that plea is well founded.

– Admissibility of the plea of illegality

48 First of all, it should be borne in mind that it is settled case-law that Article 277 TFEU expresses a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision addressed to that party or which is of direct and individual concern to it, the validity of previous acts of the institutions which, although they are not in the form of a regulation, form the legal basis of the decision under challenge, if that party was not entitled under Article 263 TFEU to bring a direct action challenging those acts by which it was thus affected without having been in a position to ask that they be declared void (see, to that effect, Case 92/78 *Simmmenthal v Commission* [1979] ECR 777, paragraphs 39 and 40, and Case T-23/99 *LR AF 1998 v Commission* [2002] ECR II-1705, paragraph 272).

49 Since Article 277 TFEU is not intended to enable a party to contest the applicability of any measure of general application in support of any action whatsoever, the general measure claimed to be illegal must be applicable, directly or indirectly, to the issue with which the action is concerned and there must be a direct legal connection between the contested individual decision and the general measure in question (Case 32/65 *Italy v Council and Commission* [1966] ECR 389, p. 409; Joined Cases T-6/92 and T-52/92 *Reinarz v Commission* [1993] ECR II-1047, paragraph 57, and Case T-64/02 *Heubach v Commission* [2005] ECR II-5137, paragraph 35).

50 Next, so far as concerns the 2002 Leniency Notice, it must be observed (i) that the Commission lays down therein, in a general and abstract manner, the conditions which undertakings must meet in order to receive a total or partial reduction in the amount of fines in respect of infringements of Article 101 TFEU (points 8 to 27 of the 2002 Leniency Notice) and (ii) that that notice creates legitimate expectations on the part of undertakings (see point 29 of that notice).

51 Second, while it is true that the Commission did not adopt the contested decision on the basis of the 2002 Leniency Notice, since that decision is based on Article 7 of Regulation No 1/2003, it is none the less undisputed that it was on the basis of, on the one hand, the application made by Masco under the 2002 Leniency Notice (recital 128 to the contested decision) that the Commission received information enabling it to carry out inspections and, on the other, the applications for a reduction in fines made by other undertakings, including Grohe and Ideal Standard, that the Commission was able, at least in part, to gather information and evidence which led it to adopt the contested decision.

52 Consequently, there is, in the present case, a direct legal connection between the contested decision and the general measure (the 2002 Leniency Notice). Since the applicant was not in a position to ask that the 2002 Leniency Notice, as a general measure, be declared void, the notice may form the subject-matter of a plea of illegality.

53 It follows that the applicant's plea of illegality concerning the 2002 Leniency Notice is admissible.

– Substance

54 It should be borne in mind that, under Article 15(2) 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), now Article 23(2) of Regulation No 1/2003, '[t]he Commission may by decision impose on undertakings ... fines ... where, either intentionally or negligently ... they infringe Article [101 TFEU] or Article [102 TFEU]'.

55 According to the case-law, Article 15(2) of Regulation No 17 does not lay down an exhaustive list of the criteria which the Commission may take into account when setting the amount of the fine. For that reason, the conduct of the undertaking during the administrative procedure may therefore be one of the factors to be taken into account when setting that fine (see, to that effect, Case C-298/98 P *Finnboard [Metsä-Serla Sales Oy] v Commission* [1998] ECR I-10157, paragraph 56 and the case-law cited). In that regard, it must be noted that the purpose of reducing, in whole or in part, pursuant to the 2002 Leniency Notice, the amount of fines to be paid by undertakings is to enable the Commission to identify and penalise undertakings participating in secret cartels. That being so, it was in keeping with Article 15(2) of Regulation No 17 for the Commission, with a view to ensuring transparency and equal treatment, to set out the conditions under which undertakings cooperating with it could be granted a total or partial reduction in the amount of fines.

56 In the light of the foregoing finding, the applicant's argument that, in essence, the Commission had no legal basis for adopting the 2002 Leniency Notice must be rejected as unfounded.

57 Next, in so far as the applicant also claims that the 2002 Leniency Notice infringes the principle of separation of powers, such an argument must be rejected as unfounded. As stated in paragraph 55 above, the Commission has the power, under Article 15(2) of Regulation No 17, to issue a notice setting out the conditions which may be taken into account when calculating the amount of the fine that it is entitled to impose. In that regard, the applicant's argument that, in many EU Member States, existing programmes of the same nature were adopted by the legislature must be rejected as ineffective. Even if that were the case, it would not affect the finding that Article 15(2) of Regulation No 17 forms a valid legal basis for the Commission to adopt the 2002 Leniency Notice.

58 The Court must also reject as unfounded the applicant's arguments that the 2002 Leniency Notice infringes the principles of transparency and of good administration. First, since the 2002 Leniency Notice is a measure published in the *Official Journal of the European Union* which sets out the conditions under which the Commission undertakes to grant undertakings a total or partial reduction in the amount of fines, it does not impair, but rather contributes to, the transparency of the Commission's practice in taking decisions in that regard. Second, inasmuch as it sets out a framework for rewarding cooperation with the Commission's investigation by undertakings which are or have been party to secret cartels affecting the EU, the notice therefore not only complies with the principle of good administration, but also exemplifies it.

59 Lastly, so far as concerns the applicant's argument – the content of which was defined in its written observations submitted in response to the measures of organisation of procedure and in its oral replies to the Court's questions at the hearing – that the 2002 Leniency Notice infringes the principle of equal treatment in so far as it confers an advantage on large undertakings, it must be rejected as unfounded. It need merely be observed that the possibility of benefiting from the advantages provided for in that notice in return for the obligations it imposes is open to any undertaking wishing to cooperate with the Commission, without discrimination based on the size of the undertakings wishing

to participate. In that regard, the applicant has adduced no evidence that undertakings in the same situation are treated differently or that, on the contrary, undertakings in dissimilar situations are, wrongly, treated in the same way.

60 The second plea in law must therefore be rejected as in part unfounded and in part ineffective.

...

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Mamoli Robinetteria SpA to bear its own costs and to pay those of the European Commission.**

Pelikánová

Jürimäe

Van der Woude

Delivered in open court in Luxembourg on 16 September 2013.

[Signatures]