JUDGMENT OF THE GENERAL COURT (Seventh Chamber)

6 December 2018 (*)

(Competition — Agreements, decisions and concerted practices — Retail food packaging market — Decision finding an infringement of Article 101 TFEU — Principle of personal liability — No economic continuity — Equal treatment)

In Case T-531/15,

Coveris Rigid France, formerly Coveris Rigid (Auneau) France SAS, established in Auneau (France), represented by H. Meyer-Lindemann, C. Graf York von Wartenburg and L. Stammwitz, lawyers,

applicant,

v

European Commission, represented by A. Biolan, F. Jimeno Fernández and L. Wildpanner, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for annulment of Commission Decision C(2015) 4336 final of 24 June 2015 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39563 — Retail food packaging) in so far as it applies to the applicant,

THE GENERAL COURT (Seventh Chamber),

composed of V. Tomljenović, President, E. Bieliūnas (Rapporteur) and A. Kornezov, Judges,

Registrar: E. Coulon,

gives the following

Judgment

Background to the dispute

1 The applicant, Coveris Rigid France, is a flexible packaging manufacturer that provides a range of packaging solutions. It was previously named Polarcup France S.A. until 2001, then Huhtamäki France S.A. until 21 December 2007, then Huhtamäki France SAS until 7 February 2011, then Paccor France SAS until 4 February 2014, then Coveris Rigid (Auneau) France SAS until 31 December 2015, the date on which it became Coveris Rigid France (‘Coveris’ or ‘the applicant’).

2 Coveris was a wholly owned, indirect subsidiary of Huhtamäki Oyj, the ultimate holding company of the Huhtamäki group, which manufactures and supplies various food packaging products.

3 On 19 June 2006 Coveris’s assets for the manufacture of plastic trays made from expanded or extruded polystyrene foam (‘polystyrene trays’) were sold to ONO Packaging SAS (‘ONO Packaging’). On 22 December 2010 Coveris was sold to Island Acquisitions S.à.r.l., a subsidiary of Sun European Partners LLP.

4 Huhtamäki Embalagens Portugal SA (‘Huhtamäki Embalagens’) was another subsidiary of the Huhtamäki group that was also a wholly owned, indirect subsidiary of Huhtamäki Oyj. Again on 19 June 2016, all the shares in Huhtamäki Embalagens were sold to ONO Développement SAS (‘ONO

Développement'), the parent company of ONO Packaging. On the same day, Huhtamäki Embalagens changed its name to ONO Packaging Portugal S.A. ('ONO Packaging Portugal').

5 On 18 March 2008 Linpac Group Ltd, the ultimate holding company of the Linpac group, which specialises in the supply of various food packaging products, filed an immunity application with the European Commission under the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17).

6 On 4 and 6 June 2008 the Commission, acting under Article 20(4) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1), carried out unannounced inspections at the premises of several companies operating in the retail food packaging sector.

7 On 21 September 2012 the Commission adopted a statement of objections, which was notified, inter alia, to the applicant. A hearing was held between 10 and 12 June 2013.

8 On 24 June 2015 the Commission adopted Decision C(2015) 4336 final relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39563 — Retail food packaging) ('the contested decision').

9 By the contested decision, the Commission found that companies working in the retail food packaging sector had been involved in five separate infringements during periods between 2000 and 2008. The five infringements were defined on the basis of their geographic scope: Italy, South-West Europe ('SWE'), North-West Europe ('NWE'), Central and Eastern Europe, and France.

10 The goods covered by the contested decision are retail polystyrene food packaging trays and, with regard to the cartel in NWE, rigid polypropylene plastic trays.

11 The present case relates to only one of the five infringements mentioned in paragraph 9 above, namely the infringement committed in France.

12 The enacting terms of the contested decision include the following provisions:

'*Article 1*

...

(5) The following undertakings infringed Article 101 [TFEU] by participating, for the periods indicated, in a single and continuous infringement, which consisted of several separate infringements in the [polystyrene] trays for retail food packaging sector and covering the territory of France:

...

(d) [Coveris Rigid (Auneau) France SAS] and Huhtamäki Oyj, from 3 September 2004 to 24 November 2005;

...

Article 2

...

5. For the infringement referred to in Article 1.5, the following fines are imposed:

...

(d) [Coveris Rigid (Auneau) France SAS] and Huhtamäki Oyj, jointly and severally: EUR 4 756 000;

…’

Procedure and forms of order sought

13 By application lodged at the Court Registry on 11 September 2015, the applicant brought the present action.

14 In the context of measures of organisation of procedure laid down in Article 89 of the Rules of Procedure, the Court put written questions to the parties. The parties replied to the written questions within the prescribed period.

15 Under Article 106(3) of the Rules of Procedure, if no request for a hearing has been submitted by the main parties within three weeks after service of notification of the close of the written part of the procedure, the Court may decide to rule on the action without an oral part of the procedure. In the present case, the Court considers that it has sufficient information available to it from the material in the file and has decided, in the absence of such a request, to give a decision on the action without an oral part of the procedure.

16 The applicant claims that the Court should:

– annul Article 1(5) of the contested decision, in so far as it finds that Coveris infringed Article 101 TFEU by participating, for the period indicated at Article 1(5)(d) of that decision, in a single and continuous infringement consisting of several separate infringements in the [polystyrene] tray for retail food packaging sector and covering the territory of France;

– annul Article 2(5) of the contested decision in so far as it imposes a fine of EUR 4 756 000 on Coveris;

– order the Commission to pay the costs.

17 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

18 The applicant puts forward two pleas in support of its action. The first plea alleges that the principle of personal liability was erroneously applied and the second plea alleges that the principle of equal treatment was infringed.

The first plea: erroneous application of the principle of personal liability

19 The applicant claims, in essence, that the Commission erroneously applied the principle of personal liability in holding the applicant liable for a single and continuous infringement in respect of polystyrene trays covering the territory of France. It submits that the Commission should have held ONO Packaging liable for the infringement in France, either on the basis of a holistic approach encompassing the two transactions of 19 June 2006, that is to say, first, the sale of some of Coveris’s assets and, second, the sale of the shares in ONO Packaging Portugal (see paragraphs 3 and 4 above), or on the basis of the principle of economic continuity.

20 The Commission contests the applicant’s arguments.

21 In that regard, it should be noted that it is settled case-law that EU competition law concerns the activities of undertakings and that the concept of an undertaking covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed. When such an entity infringes competition rules, it falls, according to the principle of personal responsibility, to that

entity to answer for that infringement (see judgment of 18 December 2014, *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraph 39 and the case-law cited).

22 In the present case, Coveris is not challenging the finding in the contested decision that it participated directly in the single and continuous infringement in France during the infringement period from 3 September 2004 until 24 November 2005.

23 Further, it is apparent from the documents before the Court that, on 19 June 2006, ONO Packaging purchased assets from Coveris used for the manufacture in France of polystyrene trays (see paragraph 3 above).

24 It is also apparent from the documents before the Court that, even though, as the applicant points out, subsequent to the transfer of some of its assets to ONO Packaging, Coveris ceased its operations on the polystyrene tray market, it still existed both in law and economically.

25 Thus, in the light of the case-law recalled in paragraph 21 above, the Commission was entitled, in accordance with the principle of personal liability, to hold Coveris liable for the infringement committed in France.

26 None of the arguments submitted by the applicant is capable of calling into question that finding.

27 In the first place, the applicant submits that, from the perspective of company law, Coveris and ONO Packaging Portugal were both subsidiaries controlled by the ultimate holding company Huhtamäki Oyj. Accordingly, the two transactions of 19 June 2006, namely the sale of Coveris's assets and the sale of the shares in ONO Packaging Portugal, constituted two parts of one and the same transaction and one and the same concentration. It would therefore be artificial to make a distinction between them.

28 First, it should be noted in that regard that it is apparent from the contested decision that Coveris was the direct participant in the infringement committed in France. Throughout the duration of that infringement Coveris was, indirectly, a wholly owned subsidiary of Huhtamäki Oyj. Accordingly, the Commission held Coveris and Huhtamäki Oyj jointly and severally liable for the infringement committed in France.

29 Second, it is apparent from the contested decision that ONO Packaging Portugal was the direct participant in the infringement committed in SWE during the infringement period from 7 December 2000 until 18 January 2005. Throughout the duration of the infringement ONO Packaging Portugal was, indirectly, a wholly owned subsidiary of Huhtamäki Oyj. Accordingly, the Commission held ONO Packaging Portugal and Huhtamäki Oyj jointly and severally liable for the infringement committed in SWE.

30 Consequently, ONO Packaging Portugal was not part of the undertaking found liable for the infringement committed in France.

31 Accordingly, contrary to what is claimed by the applicant, it is irrelevant that, from the perspective of company law, Coveris and ONO Packaging Portugal were part of the Huhtamäki group.

32 The mere fact that the share capital of two separate commercial companies is held by the same ultimate holding company is insufficient, in itself, to establish that those two companies are an economic unit with the result that, under EU competition law, the actions of one company can be attributed to the other and that one can be held liable to pay a fine for the other (see, to that effect, judgment of 2 October 2003, *Aristrain* v *Commission*, C-196/99 P, EU:C:2003:529, paragraph 99).

33 Last, the fact that, from the perspective of company law, the two transactions, that is to say the sale of Coveris's assets and the sale of the shares in ONO Packaging Portugal, could constitute one and the same transaction and the fact that, according to the rules on the control of concentrations, those transactions were treated as being one and the same concentration, as the applicant claims, are also

irrelevant in the light of the fact that, for the purposes of applying EU competition law rules, all that is important is determining the undertaking liable for the infringement committed in France. It is apparent from the case-law that the objective and the economic reasons for such transactions are irrelevant for the purposes of the assessment of personal liability (see, to that effect, judgment of 14 July 2016, *Parker Hannifin Manufacturing and Parker-Hannifin* v *Commission*, T-146/09 RENV, EU:T:2016:411, paragraph 47).

34 Consequently, the applicant's argument that the distinction between the two transactions of 19 June 2006 is artificial must be rejected.

35 In the second place, the applicant claims that the two transactions constitute one mixed transaction containing both share transfer and asset transfer elements. This therefore, would justify a holistic approach as regards the legal consequences of prior conduct of the companies concerned. The applicant claims that such an approach would preclude the undertaking from being split up on the basis of purely formal criteria.

36 The applicant concludes that the liability for the alleged infringements committed by the Huhtamäki group's polystyrene tray business in SWE should not have been split between two legal entities — that is to say Coveris and ONO Packaging Portugal — belonging to separate undertakings, but should rather have been fully imputed to the legal entities that, subsequent to the transactions of 19 June 2006, continued to form one undertaking controlled by ONO Développement, namely ONO Packaging and ONO Packaging Portugal.

37 In that regard, it should be noted that the applicant's argument that it is necessary, in the present case, to adopt a holistic approach is based on the premiss that the two transactions occurred in the context of a transfer of one and the same undertaking, composed of Coveris and ONO Packaging Portugal, and that, both before and after that transfer, those two companies formed only one and the same undertaking, that is to say one that was initially in the Huhtamäki group and subsequently in the ONO group.

38 For the purposes of attributing liability for the infringement committed in France, the circumstances surrounding the sale of the shares in ONO Packaging Portugal, formerly Huhtamäki Embalagens, are irrelevant, given that that company was not part of the undertaking found liable for that infringement, as has already been concluded in paragraph 30 above. Further, Coveris sold only certain assets to ONO Packaging, but as a company Coveris continued to form part of the Huhtamäki group (see paragraph 3 above).

39 In any event, with regard to the applicant's argument that, if a holistic approach were adopted, it is ONO Packaging rather than Coveris that would have to be held liable for the infringement committed in France, it should be noted that, as to the circumstances in which an entity that is not responsible for the infringement can nevertheless be penalised for that infringement, it has to be held that this situation arises if the entity that has committed the infringement has ceased to exist, either in law or economically (judgment of 11 December 2007, *ETI and Others*, C-280/06, EU:C:2007:775, paragraph 40).

40 Consequently, when the assets of a legal entity that participated in an infringement are transferred to independent undertakings, liability follows those assets only in exceptional cases, where the legal entity that owned those assets has ceased to exist in law or has ceased all economic activities.

41 It is not in dispute that Coveris has not ceased to exist either in law or economically.

42 Admittedly, when an entity that has committed an infringement of the competition rules is subject to legal or organisational change, this change does not necessarily create a new undertaking that is free of liability for the conduct of its predecessor that infringed the competition rules, where, from an economic point of view, the two entities are identical. If undertakings could escape penalties by simply changing their identity through restructuring, sales or other legal or organisational changes, the objective of suppressing conduct that infringes the competition rules and preventing its reoccurrence by means of deterrent penalties would be jeopardised (see judgment of 18 December 2014,

Commission v *Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraph 40 and the case-law cited).

43 Accordingly, where two entities constitute one and the same economic entity, the fact that the entity that committed the infringement still exists does not as such preclude imposing a penalty on the entity to which its economic activities were transferred. In particular, applying penalties in this way is permissible where those entities have been under the control of the same person and have therefore, given the close economic and organisational links between them, carried out, in all material respects, the same commercial instructions (see judgment of 18 December 2014, *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraph 41 and the case-law cited).

44 The applicant provides no evidence that the transfer of Coveris's assets was an intra-group transfer. The transferor and the transferee, namely Coveris and ONO Packaging, were not structurally linked when the assets at issue were transferred.

45 Further, it is apparent from the case-law referred to above in paragraph 43 and, in particular, the words 'does not ... preclude' and 'permissible' that, even if Coveris and ONO Packaging were structurally linked when the assets were transferred, the Commission had a wide margin of discretion to establish liability in cases of intra-group economic succession.

46 Accordingly, the applicant's argument derived from a holistic approach cannot be upheld.

47 In the third place, the applicant claims that the exceptional circumstances of the case justify a derogation from the principle of personal liability and that, therefore, an assessment of the transfer of Coveris's assets to ONO Packaging in isolation should have led to the attribution to ONO Packaging of liability for the infringement committed in France, on the basis of the principle of economic continuity. The applicant submits that a situation such as that in the present case, namely a partial management buyout, could be treated as equivalent to an internal restructuring due to the continuity between the transferor and the transferee of the assets at issue.

48 In that regard, as to the application of the principle of economic continuity to the present case, it is sufficient to refer to paragraphs 39 to 45 above.

49 With regard to the argument that a partial management buyout could be treated as equivalent to an internal restructuring, it should be pointed out — without adjudicating on the matter of whether the circumstances of the present case, in which, in particular, two former employees of Coveris each owns 8% of the shares of ONO Développement, could be treated as equivalent to an internal restructuring, which does not prima facie appear to be the case — that the criterion of economic continuity is intended not to be a substitute for the principle of personal liability, but merely to supplement it so far as is necessary in order to punish cartels in a way that is proportionate to the fault and effectively, and thus to contribute to the effective enforcement of EU competition rules. Accordingly, reliance on the criterion of economic continuity must remain the exception (see, to that effect, Opinion of Advocate General Kokott in *ETI and Others*, C-280/06, EU:C:2007:404, point 81). Additionally, in the application of the principle of economic continuity, subjective factors, such as the applicant's view in the present case that a management buyout must be considered to be an internal restructuring, are incompatible with a transparent and predictable application of that principle (see, to that effect, judgment of 18 December 2014, *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraph 53).

50 For the sake of completeness, it should be noted that, where there is a risk that the effective implementation of the EU competition rules might be being circumvented, an exception to the principle of personal liability could indeed, if closely circumscribed, be justified, including situations where assets are transferred between two independent undertakings and the legal entity responsible for the infringement has not ceased to exist in law or economically.

51 However, the criterion of economic continuity and, consequently, the attribution of liability for an infringement to such a transferee could be permissible only if the transaction had taken place between two independent undertakings acting in bad faith, in particular, with the intention of avoiding the penalties laid down by the EU competition rules (see, to that effect, Opinion of Advocate General Kokott in *ETI and Others*, C-280/06, EU:C:2007:404, points 82 and 83).

52 On the basis of the information provided to the Court in the present case, it cannot be concluded that there were specific machinations with the aim of avoiding penalties imposed for infringing competition rules.

53 Accordingly, in the present case, there is no exceptional circumstance that could justify a departure by the Commission from the principle of personal liability. When the contested decision was adopted, Coveris existed in law and economically. Accordingly, the Commission was entitled to find it liable for the infringement at issue.

54 The argument alleging the existence of exceptional circumstances, and the first plea in its entirety, must therefore be rejected as being unfounded.

The second plea in law: infringement of the principle of equal treatment

55 The applicant claims, in essence, that the Commission infringed the principle of equal treatment by distinguishing between the transfer of assets and the transfer of shares and therefore attributed liability for infringements to Coveris and ONO Packaging Portugal, two legal entities belonging to separate undertakings, despite the infringements in France and SWE having been committed, it claims, by one and the same undertaking, which remained intact following the two transactions of 19 June 2006.

56 The Commission contests the applicant’s arguments.

57 In that regard, it should be noted that the principle of equal treatment is a general principle of law that the Commission is obliged to observe in the context of proceedings brought under Article 101 TFEU and which prevents comparable situations from being treated differently and different situations from being treated in the same way, unless such difference in treatment is objectively justified (see, to that effect, judgment of 29 June 2012, *GDF Suez* v *Commission*, T-370/09, EU:T:2012:333, paragraph 386).

58 In the present case, it should be pointed out, first, that the applicant’s argument is not independent in so far as it is based on the premiss that Coveris and ONO Packaging Portugal constitute one and the same undertaking. As is apparent from paragraph 30 above, ONO Packaging Portugal was not part of the undertaking found liable for the infringement committed in France.

59 In addition, the fact that the transfer of shares and the transfer of assets were closely linked or that those two transactions had the same objective, namely to transfer the business activities in the polystyrene tray sector within the relevant region from the Huhtamäki group to ONO Développement, is irrelevant, given that the purpose of those transactions and their economic reasons cannot be taken into consideration when carrying out an objective comparison of those two transactions.

60 Last, the situations of Coveris and ONO Packaging Portugal cannot be considered to be comparable. First, those two entities were held liable for two separate infringements. Second, a transfer of assets and a transfer of shares are two transactions that are inherently different.

61 In any event, it should be noted that the Commission attributed liability to Coveris and ONO Packaging Portugal in accordance with the principle of personal liability. With regard to both the infringement committed in France and the infringement committed in SWE, the Commission held liable the entities directly implicated in each of the two infringements.

62 Consequently, the second plea in law must be rejected as being unfounded and, therefore, the action in its entirety must be dismissed as being unfounded.

Costs

63 Under Article 134(1) 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 their entirety in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Coveris Rigid France to pay the costs.**

Tomljenović Bieliūnas Kornezov

Delivered in open court in Luxembourg on 6 December 2018.

E. Coulon V. Tomljenović

Registrar President

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* Language of the case: English.