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 — Plea of illegality — Gravity of the infringement — Mitigating circumstances — Equal treatment — Proportionality — Principle of non-retroactivity)

In Case T-386/10,

**Aloys F. Dornbracht GmbH & Co. KG,** established in Iserlohn (Germany), represented initially by H. Janssen, T. Kapp and M. Franz, and subsequently by H. Janssen and T. Kapp, lawyers,

applicant,

v

**European Commission,** represented by F. Castillo de la Torre and A. Antoniadis, acting as Agents, assisted by A. Böhlke, lawyer,

defendant,

supported by

**Council of the European Union,** represented by M. Simm and F. Florindo Gijón, acting as Agents,

intervener,

APPLICATION for annulment in part 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) and, in the alternative, for reduction of the fine imposed on the applicant by that decision,

THE GENERAL COURT (Fourth Chamber),

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

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 29 February 2012,

gives the following

* Language of the case: German.

## Judgment

### Background to the dispute

1 By 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) ('the contested decision'), the European Commission found there to be an infringement of Article 101(1) TFEU and Article 53 of the Agreement on the European Economic Area (EEA) in the bathroom fittings and fixtures sector. It found that 17 undertakings had participated, over various periods between 16 October 1992 and 9 November 2004, in that infringement, which took the form of anti-competitive agreements or concerted practices spanning Belgium, Germany, France, Italy, the Netherlands and Austria (recitals 2 and 3 to the contested decision and Article 1 thereof).

2 More specifically, the Commission stated in the contested decision that the infringement found consisted in (i) the coordination, by those bathroom fittings and fixtures manufacturers, of annual price increases and other pricing elements within the framework of regular meetings of national industry associations; (ii) the fixing or coordination of prices on the occasion of specific events such as increases in raw material costs, the introduction of the euro and the introduction of road tolls; and, (iii) the disclosure and exchange of sensitive business information. The Commission also found that price setting in the bathroom fittings and fixtures industry followed an annual cycle. In that context, the manufacturers set price lists, which generally remained in force for a year and formed the basis for commercial relations with wholesalers (recitals 152 to 163 to the contested decision).

3 The products covered by the cartel are bathroom fittings and fixtures belonging to the following three product sub-groups: taps and fittings, shower enclosures and accessories, and ceramics ('the three product sub-groups') (recitals 5 and 6 to the contested decision).

4 The applicant, Aloys F. Dornbracht GmbH & Co. KG, which manufactures taps and fittings, so far as the three product sub-groups are concerned, is among the addressees of the contested decision (recitals 34 to 36 to the contested decision).

5 On 15 July 2004, Masco Corp. and its subsidiaries, including Hansgrohe AG, which manufactures taps and fittings, and Hüppe GmbH, which manufactures shower enclosures, informed the Commission of the existence of a cartel in the bathroom fittings and fixtures sector and requested immunity from fines under the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the 2002 Leniency Notice') or, in the alternative, the reduction of such fines. On 2 March 2005, the Commission granted Masco conditional immunity from fines pursuant to points 8(a) and 15 of the 2002 Leniency Notice (recitals 126 to 128 to the contested decision).

6 On 9 and 10 November 2004 the Commission, pursuant to 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), conducted unannounced inspections on the premises of various companies and national industry associations operating in the bathroom fittings and fixtures sector (recital 129 to the contested decision).

7 On 15 and 19 November 2004 Grohe Beteiligungs GmbH and its subsidiaries and American Standard Inc. ('Ideal Standard') and its subsidiaries each applied for immunity from fines under the 2002 Leniency Notice or, in the alternative, for a reduction in fines (recitals 131 and 132 to the contested decision).

8 Between 15 November 2005 and 16 May 2006, the Commission, pursuant to Article 18 of Regulation No 1/2003, sent requests for information to various companies and associations operating in the bathroom fittings and fixtures sector, including the applicant (recital 133 to the contested decision).

9 On 17 and 19 January 2006, Roca SARL and Hansa Metallwerke AG and its subsidiaries each applied for immunity from fines under the 2002 Leniency Notice or, in the alternative, for a reduction in fines. On 20 January 2006 the applicant also applied for such immunity or, in the alternative, a reduction in fines (recitals 135 to 138 to the contested decision).

10 On 26 March 2007, the Commission adopted a statement of objections, which was notified to the applicant (recital 139 to the contested decision).

11 A hearing took place from 12 to 14 November 2007, in which the applicant participated (recital 143 to the contested decision).

12 On 9 July 2009, the Commission sent certain companies, including the applicant, a letter of facts, drawing their attention to certain evidence on which the Commission was minded to rely when adopting a final decision (recitals 147 and 148 to the contested decision).

13 Between 19 June 2009 and 8 March 2010, the Commission, pursuant to Article 18 of Regulation No 1/2003, sent further requests for information to several companies, including the applicant (recitals 149 to 151 to the contested decision).

14 On 23 June 2010, the Commission adopted the contested decision.

15 In the contested decision, in the first place, the Commission found that the practices described in paragraph 2 above formed part of an overall plan to restrict competition among the addressees of that decision and had the characteristics of a single and continuous infringement, which covered the three product sub-groups referred to in paragraph 3 above and extended to Belgium, Germany, France, Italy, the Netherlands and Austria (recitals 778 and 793 to the contested decision) ('the infringement found'). In that regard, it highlighted, in particular, the fact that those practices had followed a recurring pattern which was consistent in each of the six Member States covered by the Commission's investigation (recitals 778 and 793 to the contested decision). The Commission also pointed to the existence of national industry associations concerning all three product sub-groups referred to in paragraph 3 above, which it termed 'umbrella associations', national industry associations with members active in at least two of those three product sub-groups, which it termed 'cross-product associations', as well as product-specific associations with members active in only one of those three product sub-groups (recitals 796 and 798 to the contested decision). Lastly, it found that a central group of undertakings participated in the cartel in several Member States and in cross-product associations and umbrella associations (recitals 796 and 797 to the contested decision).

16 As regards the applicant's participation in the infringement found, the Commission stated that, although the applicant was a manufacturer of taps and fittings, it was aware none the less of the various product ranges involved in the infringement found since it had participated in cartel meetings of the umbrella associations Arbeitskreis Sanitärindustrie ('ASI') in Austria and IndustrieForum Sanitär in Germany (recital 872 to the contested decision). However, as regards the geographic scope of the cartel, the Commission considered that the applicant should not be deemed to have been aware of the overall cartel, but only, through its participation in the meetings of the two abovementioned umbrella associations and of the German product-specific association for the taps and fittings sub-group, the Arbeitsgemeinschaft Sanitärindustrie ('AGSI'), of the collusive conduct which had taken place in Germany and Austria (recital 873 to the contested decision).

17 In the second place, for the purposes of setting the fine imposed on each undertaking, the Commission took as its basis the 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') (recital 1184 to the contested decision).

18 The Commission first determined the basic amount of the fine. The Commission explained in the contested decision that this calculation was based, for each undertaking, on its sales by Member State, multiplied by the number of years of participation in the infringement found in the Member State in question for the relevant product sub-group, so that account was taken of the fact that certain undertakings were active only in certain Member States or in only one of the three product sub-groups referred to in paragraph 3 above (recital 1197 to the contested decision).

19 After giving that explanation, the Commission set at 15% the rate connected with the gravity of the infringement found, as referred to in points 20 to 23 of the 2006 Guidelines. In that regard, it took account of four criteria for assessing the infringement: its nature, combined market shares, geographic scope and implementation (recitals 1210 to 1220 to the contested decision).

20 In addition, the Commission, under point 24 of the 2006 Guidelines, set the multiplier to be applied, to take account of the duration of the infringement, to the basic amount determined for the applicant, at 6.66 for Germany, the applicant having participated there in the infringement found from 6 March 1998 to 9 November 2004, and at 3.66 for Austria, the applicant having participated there in the infringement found from 2 March 2001 to 9 November 2004 (recital 1223 to the contested decision).

21 Finally, the Commission, on the basis of point 25 of the 2006 Guidelines, decided, in order to deter the undertakings at issue from participating in horizontal price-fixing agreements such as the agreements with which the contested decision was concerned and in view of the four criteria mentioned in paragraph 19 above, to increase the basic amount of the fine by an additional amount set at 15% (recitals 1224 and 1225 to the contested decision).

22 This resulted in the basic amount of the fine being EUR [*confidential*] [1] (recital 1226 to the contested decision).

23 Secondly, the Commission considered whether there were any aggravating or mitigating circumstances capable of justifying an adjustment to the basic amount of the fine. It did not find that any aggravating or mitigating circumstances applied in the applicant's case.

24 Thirdly, in order to determine the amount of the fine to be imposed, the Commission, under Article 23(2) of Regulation No 1/2003, applied the ceiling of 10% of the total turnover in the preceding business year (the 'the 10% ceiling'). Once the 10% ceiling had been applied, the fine imposed on the applicant stood at EUR 12 517 671 (recitals 1261 and 1264 to the contested decision).

25 Fourthly, the Commission held that the applicant was not entitled to any fine reduction under the 2002 Leniency Notice since the evidence which it provided could not be considered to represent significant added value within the meaning of point 21 of that notice (recital 1304 to the contested decision).

26 In view of the foregoing, the Commission held, in Article 1(2) of the contested decision, that the applicant had infringed Article 101 TFEU and Article 53 of the EEA Agreement by participating, from 6 March 1998 to 9 November 2004, in a continuing agreement or concerted practice in the bathroom fittings and fixtures sector covering the territory of Germany and Austria.

27 In Article 2(6) of the contested decision, the Commission imposed a fine of EUR 12 517 671 on the applicant in respect of the infringement found.

1 — Confidential data omitted.

28 In Article 3 of the contested decision, the Commission ordered the undertakings listed in Article 1 of that decision to bring to an end the infringement found, in so far as they had not already done so, and also to refrain from repeating any act or conduct described in Article 1 of the contested decision, and from any act or conduct having the same or similar object or effect.

29 Article 4 of the contested decision lists the addressees, among which the applicant is included.

## Procedure and forms of order sought

30 By application lodged at the Court Registry on 8 September 2010, the applicant brought the present action.

31 By document lodged at the Court Registry on 14 October 2010, the Council of the European Union requested leave to intervene in support of the form of order sought by the Commission. By order of 8 March 2011, the President of the Fourth Chamber of the Court granted that request.

32 On 7 April 2011, the Council submitted its statement in intervention. The main parties have submitted their observations on that statement.

33 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 pursuant to Article 64 of its Rules of Procedure, put questions in writing to the applicant. The latter replied to those questions within the prescribed period, by letter of 30 January 2012.

34 The parties presented oral argument and answered the oral questions put to them by the Court at the hearing on 29 February 2012.

35 The applicant claims that the Court should:

— annul the contested decision, in so far as it applies to the applicant;

— in the alternative, reduce the amount of the fine imposed on it;

— order the Commission to pay the costs.

36 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

37 The Council contends that the Court should:

— dismiss the plea of illegality raised against Article 23(3) of Regulation No 1/2003;

— make the appropriate order as to costs.

## Law

38 As a preliminary point, it should be recalled that the judicial review carried out by the Courts of the European Union ('Courts of the Union') of decisions adopted by the Commission to punish infringements of competition law is based on the review of legality, provided for in Article 263 TFEU,

which is supplemented, where an application for such review is made to them, by the unlimited jurisdiction conferred upon those Courts by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU (see, to that effect, Case C-386/10 P *Chalkor* v *Commission* [2011] ECR I-13085, paragraphs 53, 63 and 64). That jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, depending on the circumstances, to cancel, reduce or increase the fine or penalty payment imposed (see Case C-272/09 P *KME and Others* v *Commission* [2011] ECR I-12789, paragraph 103 and the case-law cited; see, to that effect, Case T-11/06 *Romana Tabacchi* v *Commission* [2011] ECR II-6681, paragraph 265).

39 In these proceedings, it is settled that in respect of the present action the applicant has submitted two main heads of claim to the Court: seeking (i) that it annul the contested decision in so far as it concerns the applicant and, in the alternative, (ii) that it reduce the applicant's fine.

40 Furthermore, it should be noted that in the defence the Commission maintains that, in essence, the first head of claim is inadmissible on the ground that it is not supported by any plea in the application.

41 In the light of the case-law cited above and the foregoing considerations, the Court will start by examining the admissibility of the first head of claim. Then it will examine, as part of the review of the legality of the contested decision, the merits of the claim for annulment in part of the contested decision and then, thirdly, the merits of the claim, submitted in the alternative, essentially for the Court to exercise its unlimited jurisdiction in order to adjust downwards the fine that the Commission imposed on the applicant.

I – *Admissibility*

42 The Commission contends, in essence, that the first head of claim is inadmissible since the pleas put forward by the applicant seek only the reduction of the fine. Moreover, it takes the view that the applicant's attempt in the reply to make up for the lack of reasoning in the application must be rejected as out of time.

43 The applicant responds, in essence, that it must be concluded from the facts set out in the application that the contested decision should be annulled. Moreover, in the reply it states that the nullity stems from the fact that it did not take part in the infringement found, since, as the Commission held in recital 873 to the contested decision, it was not aware of the geographic scope — namely six Member States — of that infringement.

44 First of all, with regard to assessment of the admissibility of the first head of claim, it should be noted that, according to settled case-law, where an applicant does not submit any plea in law in support of a head of claim, the requirement laid down in Article 44(1)(c) of the Rules of Procedure that there must be a summary of the pleas in law relied on is not satisfied and that head of claim must be rejected as being inadmissible (see, to that effect, Joined Cases T-339/94 to T-342/94 *Metsä-Serla and Others* v *Commission* [1998] ECR II-1727, paragraph 62, and Case T-310/02 *Theodorakis* v *Council* [2004] ECRSC I-A-95 and II-427, paragraphs 21 and 22).

45 Furthermore, again according to settled case-law, whilst it should be acknowledged that the statement of the pleas on which the application is based need not conform with the terminology and layout of the Rules of Procedure, and whilst the pleas may be expressed in terms of their substance rather than of their legal classification, the application must none the less set them out with sufficient clarity (orders of 28 April 1993 in Case T-85/92 *De Hoe* v *Commission* [1993] ECR II-523, paragraph 21, and of

20 January 2012 in Case T-315/10 *Groupe Partouche* v *Commission*, not published in the ECR, paragraph 20; and judgment of 25 October 2012 in Case T-161/06 *Arbos* v *Commission*, not published in the ECR, paragraph 22).

46 In the present case, in order to give a ruling on the admissibility of the first head of claim it is necessary, according to the case-law cited in paragraphs 44 and 45 above, to determine whether the applicant put forward pleas and, at least in summary form, the legal and factual particulars on which those pleas are founded, which, in essence, support that head of claim.

47 In that regard, it should be observed that the applicant puts forward eight pleas in support of its action. Those pleas are: (i) in essence, errors of assessment, in the light of Article 23(3) of Regulation No 1/2003, as regards the finding of the infringement which the applicant is alleged to have committed and the amount of the fine imposed upon it; (ii) infringement of Article 23(3) of Regulation No 1/2003 as a result of the application of the 10% ceiling laid down in Article 23(2) of that regulation; (iii) failure to take into account the applicant's individual participation in the infringement found, in breach of the principle of equal treatment; (iv) failure to take into account earlier Commission decisions, in breach of the principle of equal treatment; (v) failure to take into account the applicant's limited economic capacity, in breach of the principle of proportionality; (vi) infringement of the principle of non-retroactivity as a result of the application of the 2006 Guidelines, which lay down a method for setting fines which is stricter than that in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [ECSC] (OJ 1998 C 9, p. 3) ('the 1998 Guidelines'), to acts that predate the adoption of the 2006 Guidelines; (vii) infringement by Article 23(3) of Regulation No 1/2003 of the 'principle of precision'; and (viii) the unlawfulness of the 2006 Guidelines, in that they afford the Commission too much discretion. The last two pleas constitute pleas of illegality.

48 It should be pointed out that the applicant has put forward those eight pleas without making clear which of the first two heads of claim they support.

49 However, with the exception of the third plea, which, in essence, in so far as it is a request to the Court to adjust the parameters for calculating the amount of the fine imposed on the applicant in view of its particular situation compared with that of the other participants, is put forward in support of the second head of claim, the first, second and fifth pleas, in essence, seek a ruling from the Court that, in failing to take into account the various circumstances concerning the applicant's participation in the infringement found, the Commission made various errors of assessment which mean the contested decision is unlawful, in the light of which the Court should annul the contested decision or at least reduce the fine which was imposed on the applicant. As regards the sixth plea, it must be held that, in pleading infringement of the principle of non-retroactivity resulting from application of the 2006 Guidelines to the conduct alleged against the applicant, which pre-dates the adoption of those Guidelines, the applicant is requesting the Court, in essence, to find that the method for setting the fine adopted by the Commission in the contested decision is unlawful, and that in view of this the Court should annul the contested decision or at least reduce the amount of the fine imposed on the applicant, especially since if the Commission had applied the 1998 Guidelines the amount of that fine would not have been so high. As regards the seventh and eighth pleas, clearly, in pleading that both Article 23(3) of Regulation No 1/2003 and the 2006 Guidelines are unlawful, the applicant seeks to show that the contested decision, in so far as it is based, for the purposes of calculating the fine imposed upon the applicant, on that article and on those Guidelines, is flawed by illegalities, in the light of which the Court should annul the contested decision or at least reduce the amount of the fine that was imposed on the applicant.

50 It follows from the foregoing considerations that, with the exception of the third plea, the other pleas were raised in the application also in support of the first head of claim. Hence, contrary to what the Commission contends, the first head of claim must be declared admissible.

51 Next, with regard to the admissibility of the arguments put forward by the applicant in the reply in order to show that it did not participate in a single and continuous infringement covering six Member States, it follows from Article 44(1)(c), in conjunction with Article 48(2), of the Rules of Procedure that the originating application must indicate the subject-matter of the proceedings and contain a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. However, a submission or argument which may be regarded as amplifying a plea made previously, whether directly or by implication, in the originating application, and which is closely connected therewith, will be declared admissible (see Case T-94/98 *Alferink and Others* v *Commission* [2008] ECR II-1125, paragraph 38 and the case-law cited).

52 In the present case, as regards the geographic scope of the infringement found the Court notes that on two occasions in the application, in support of the first and the third plea, the applicant maintains that the Commission made an error of assessment in calculating the amount of the fine imposed on it, as a result of applying the same factors as those used for undertakings which were aware of the infringement found in its entirety, whereas, in recital 873 to the contested decision, the Commission found that the applicant's awareness of the geographic scope of that infringement was limited to the territories of two Member States (Germany and Austria) out of the six Member States covered by the infringement. Moreover, the applicant asserts on two occasions that its participation in the infringement was therefore limited to the territory of those two Member States.

53 However, as regards the other essential characteristics of the infringement found, it should be noted that, in the application, the applicant has not disputed those characteristics, in particular the fact that the infringement concerned the three product sub-groups referred to in paragraph 3 above, arguing merely that it was active only on the market for one of those three sub-groups.

54 In the light of the above findings, it must be held that the arguments put forward by the applicant in the reply, disputing the geographic scope of the infringement found, amplify a complaint made in the application and must therefore be declared admissible. However, the other arguments put forward in the reply, which contest the other essential characteristics of the infringement found, do not amplify a complaint made in the application and must be declared inadmissible because they are out of time.

II – *Substance*

55 As stated in paragraph 49 above, the applicant puts forward eight pleas in support of the action. The first, second, fourth, fifth and sixth pleas were put forward in support of both the claim for annulment in part of the contested decision and the claim for the Court to reduce the amount of the fine imposed on the applicant (first and second heads of claim). The third is put forward solely in support of the claim for the Court to reduce that amount (second head of claim). As regards the seventh and eighth pleas, as is also clear from paragraph 49 above, they must be held to constitute pleas of illegality.

56 Accordingly, it is appropriate initially to examine the two pleas of illegality raised in the context of the seventh and eighth pleas. Then, as stated in paragraph 41 above, the Court will examine the claim for annulment in part of the contested decision and also the claim for the Court to exercise its unlimited jurisdiction in order to adjust downwards the amount of the fine imposed.

A – *The pleas of illegality*

1. The plea alleging the illegality of Article 23(3) of Regulation No 1/2003

57 The applicant submits, in essence, in the plea alleging the illegality of Article 23(3) of Regulation No 1/2003 ('the first plea of illegality'), that that article, on which the contested decision is based, infringes 'the principle of precision', in so far as it mentions only the gravity and duration of the infringement as parameters for calculating the amount of the fine, without defining those concepts more precisely, which means that the Commission enjoys almost limitless discretion in so far as setting the amount of the fine is concerned.

58 The Commission, supported by the Council, challenges the arguments put forward by the applicant in support of the first plea of illegality.

59 Although the applicant pleads, in the present case, infringement of the 'principle of precision', it should be pointed out that, in essence, it is to the principle that penalties must have a proper legal basis and to the principle of legal certainty that it is referring when arguing that the concepts of gravity and duration of the infringement are not sufficiently precise (see, to that effect, Case C-352/09 P *ThyssenKrupp Nirosta* v *Commission* [2011] ECR I-2359, paragraph 80). It is therefore in the light of those two principles that the Court must examine the first plea of illegality.

60 In that regard, it is clear from case-law that the principle that penalties must have a proper legal basis, as it appears in Article 49 of the Charter of Fundamental Rights of the European Union (OJ 2010, C 83, p. 389) and was laid down inter alia in Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), is a corollary of the principle of legal certainty, which requires that EU rules define offences and penalties clearly (see *ThyssenKrupp Nirosta* v *Commission*, paragraph 59 above, paragraph 80 and the case-law cited; see also, to that effect, Cases T-279/02 *Degussa* v *Commission* [2006] ECR II-897, paragraph 66, and judgment of 19 May 2010 in Case T-11/05 *Wieland-Werke and Others* v *Commission*, not published in the ECR, paragraph 58).

61 Moreover, the principle of legal certainty requires that such rules enable those concerned to know precisely the extent of the obligations which are imposed on them, and that those persons must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly (*ThyssenKrupp Nirosta* v *Commission*, paragraph 59 above, paragraph 81 and the case-law cited).

62 In order to satisfy the requirements of the principle that penalties must have a proper legal basis and the principle of legal certainty, it is not necessary for the wording of the provisions pursuant to which penalties are imposed to be so precise that the consequences which may flow from an infringement of those provisions are foreseeable with absolute certainty. The existence of vague terms in the provision does not necessarily entail an infringement of those two principles and the fact that a law confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity (see, to that effect, *Degussa* v *Commission*, paragraph 60 above, paragraph 71, and *Wieland-Werke and Others* v *Commission*, paragraph 60 above, paragraphs 62 and 63).

63 In that connection, the Court has ruled that the clarity of a law is assessed having regard not only to the wording of the relevant provision but also to the clarification provided by settled, published case-law (judgment of 22 May 2008 in Case C-266/06 P *Evonik Degussa* v *Commission*, not published in the ECR, paragraph 40). It has also held that the criteria laid down by the case-law with regard to the method for calculating fines under EU competition law, were, inter alia, used by the Commission for the drafting of the Guidelines and enabled it to develop a practice with regard to taking decisions, which is well known and accessible (see, to that effect, *Evonik Degussa* v *Commission*, paragraph 61).

64 With regard to the validity of Article 23(3) of Regulation No 1/2003 in the light of the principles that penalties must have a proper legal basis and the principle of legal certainty, it should be noted that the Court has already held, in the light of arguments similar in essence to those put forward by the applicant in support of the first plea of illegality, that Article 23(2) and (3), which must be read in conjunction since they limit the Commission's discretion, satisfy the requirements deriving from those principles (*Wieland-Werke and Others* v *Commission*, paragraph 60 above, paragraphs 63 to 72).

65 It follows from all the foregoing considerations that the first plea of illegality must be rejected as unfounded.

2. The plea alleging the illegality of the 2006 Guidelines

66 It is clear from the application and from the letter of 30 January 2012 that the applicant maintains, in respect of the plea alleging the unlawfulness of the 2006 Guidelines ('the second plea of illegality'), that those Guidelines, in particular points 35 and 37 thereof, are unlawful since, in view of the almost limitless discretion that they confer on the Commission, they infringe the principle that penalties must have a proper legal basis and the principle of legal certainty.

67 The Commission challenges the arguments put forward by the applicant in support of the second plea of illegality.

68 In that regard, in the first place, it should be noted that in essence, according to the case-law, adoption by the Commission of Guidelines contributes to ensuring observance of the principle that penalties must have a proper legal basis. In that regard, it should be observed that the Guidelines determine, generally and abstractly, the method which the Commission has bound itself to use in setting the amount of fines and, consequently, ensure legal certainty on the part of undertakings (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 211 and 213).

69 In the second place, as can be seen from point 2 of the 2006 Guidelines, the latter fall within the statutory limits laid down by Article 23(2) and (3) of Regulation No 1/2003. It was found in paragraphs 59 to 64 above that that article meets the requirements deriving from the principle that penalties must have a proper legal basis and the principle of legal certainty.

70 In the third place, it must be held that, in adopting the 2006 Guidelines, the Commission did not exceed the limits of the discretion afforded it by Article 23(2) and (3) of Regulation No 1/2003 (see, to that effect and by analogy, *Dansk Rørindustri and Others* v *Commission*, paragraph 68 above, paragraph 250).

71 Article 23(3) of Regulation No 1/2003 provides that in fixing the amount of the fine the Commission must have regard both to the gravity and to the duration of the infringement. Point 19 of the 2006 Guidelines provides that the basic amount of the fine will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement.

72 More specifically, with regard to taking into account the gravity of the infringement, according to points 21 to 23 of the 2006 Guidelines, the proportion of the value of sales taken into account ('the "gravity of the infringement" multiplier') will be set at a level of up to 30%, on the basis of a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented, the point being made that price-fixing, market-sharing and output-limitation agreements are, by their very nature, among the most harmful restrictions of competition. Point 25 of the 2006

Guidelines states that, as a deterrent, the Commission will include in the basic amount a proportion for calculating an additional amount ('the "additional amount" multiplier'), comprising between 15% and 25% of the value of sales, taking the above factors into account.

73 As regards taking into account the duration of the infringement, point 24 of the 2006 Guidelines provides that the amount determined on the basis of the value of sales is multiplied by the number of years of participation in the infringement and also that periods of less than six months will be counted as half a year and periods longer than six months but shorter than one year are counted as a full year.

74 Under points 27 to 31 of the 2006 Guidelines, the basic amount may then be adjusted in order to take into account aggravating and mitigating circumstances and to ensure that fines have a sufficiently deterrent effect. According to point 34 of the Guidelines, it may also be reduced to take into account the 2002 Leniency Notice.

75 It is also stated in point 32 of the 2006 Guidelines that, as laid down in Article 23(2) of Regulation No 1/2003, for each undertaking or association of undertakings participating in the infringement, the final amount of the fine must not, in any event, exceed 10% of the total turnover in the preceding business year.

76 Lastly, in point 35 of the 2006 Guidelines, the Commission provides that, in exceptional cases, the Commission may, for purposes of setting the amount of the fine, take account of an undertaking's inability to pay. Contrary to what is maintained by the applicant, that provision does not give the Commission limitless discretion, since the conditions for reducing the amount of the fine on account of inability to pay are very clearly set out in that point. Thus, it is clearly stated there that no reduction in a fine will be granted on the mere finding of an adverse or loss-making financial situation and also that a reduction can be granted solely on the basis of objective evidence that imposition of a fine would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.

77 Also, in point 37 of the 2006 Guidelines, the Commission states that the particularities of a case or the need to achieve deterrence in a particular case may justify departing from the methodology described in the 2006 Guidelines. Since the provisions of that point do not allow the Commission to depart from the principles laid down by Article 23(2) and (3) of Regulation No 1/2003, it must be held that, contrary to what the applicant contends, they do not give the Commission almost limitless discretion and that, hence, point 37 does not derogate from the principle that penalties must have a proper legal basis.

78 It follows that the adoption by the Commission of the 2006 Guidelines, inasmuch as it fell within the statutory limits laid down by Article 23(2) and (3) of Regulation No 1/2003, contributed to defining the limits within which the Commission exercises its discretion under that provision (*Degussa* v *Commission*, paragraph 60 above, paragraph 82) and did not infringe the principle that penalties must have a proper legal basis but was conducive to observance of it.

79 It follows from all the foregoing considerations that the second plea of illegality must be rejected as unfounded.

B – *Principal head of claim: application for partial annulment of the contested decision*

80 As was stated in paragraph 49 above, the first, second, fourth, fifth and sixth pleas have been put forward, inter alia, in support of the claim for annulment in part of the contested decision.

81 Since the Commission applied the 2006 Guidelines in the contested decision and since, as has been found in paragraph 78 above, the second plea of illegality is to be rejected, it is necessary for the Court to examine first of all the sixth plea, alleging infringement of the principle of non-retroactivity as a result of application of those Guidelines to the conduct alleged against the applicant, which predates their adoption. The Court will then examine the first, second, fourth and fifth pleas raised, in so far as they seek to show that the contested decision contains irregularities stemming from various errors of assessment on the part of the Commission.

1. Sixth plea: infringement of the principle of non-retroactivity

82 The applicant submits that as the cartel relates to a period between 1992 and 2004 the Commission should have applied the 1998 Guidelines. In its view, since the Commission calculated the fines on the basis of the 2006 Guidelines it infringed the principle of non-retroactivity. It adds that application of the 1998 Guidelines would have led to a lower fine.

83 The Commission challenges the arguments put forward by the applicant in support of the sixth plea.

84 In that regard, first, it should be noted that, according to settled case-law, the principle that criminal-law provisions may not have retroactive effect, as it appears in Article 49 of the Charter of Fundamental Rights and was enshrined, inter alia, in Article 7 of the ECHR, whose observance is assured by the Courts of the Union, may preclude the retroactive application of a new interpretation of a rule establishing an offence, where the result of that interpretation was not reasonably foreseeable at the time when the offence was committed (see, to that effect and by analogy, Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraphs 87 to 89 and the case-law cited, and judgment of 2 February 2012 in Case T-83/08 *Denki Kagaku Kogyo and Denka Chemicals* v *Commission*, not published in the ECR, paragraph 120).

85 Secondly, it is also settled case-law that, although Article 23(5) of Regulation No 1/2003 provides that decisions imposing fines for infringement of competition law are not of a criminal-law nature, the Commission is none the less required to observe the principle of non-retroactivity, in any administrative procedure capable of leading to fines under the Treaty rules on competition (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 68 above, paragraph 202; see *Denki Kagaku Kogyo and Denka Chemicals* v *Commission*, paragraph 84 above, paragraph 122). That is the case, inter alia, where the Commission decides to make a change in an enforcement policy, in this instance its general competition policy in the matter of fines. Such a change, especially where it comes about as a result of the adoption of rules of conduct such as the Guidelines, may have an impact from the aspect of the principle of non-retroactivity (*Dansk Rørindustri and Others* v *Commission*, paragraph 68 above, paragraph 222).

86 Thirdly, in order to ensure observance of the principle of non-retroactivity, the Court has held that it is necessary to ascertain whether the change in question was reasonably foreseeable at the time when the infringements concerned were committed (*Dansk Rørindustri and Others* v *Commission*, paragraph 68 above, paragraph 224). The scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such an activity entails (*Dansk Rørindustri and Others* v *Commission*, paragraph 68 above, paragraph 219).

87 On this point, it should be observed that the proper application of the competition rules, as they follow from Regulation No 1/2003, requires that the Commission may, within the limits of the ceiling fixed by Article 23(2) of that regulation, at any time raise the level of fines if that is necessary to ensure the implementation of competition policy. It follows that undertakings involved in an administrative procedure in which fines may be imposed cannot acquire a legitimate expectation either in the fact that the Commission will not exceed the level of fines previously imposed or in a method of calculating the fines; on the contrary, those undertakings must take account of the possibility that the Commission may decide at any time to raise the level of the fines by reference to that applied in the past, either by raising the level of the amounts of fines when imposing fines in individual decisions or by applying, in particular cases, rules of conduct of general application, such as guidelines (*Groupe Danone* v *Commission*, paragraph 84 above, paragraphs 90 and 91, and *Dansk Rørindustri and Others* v *Commission*, paragraph 68 above, paragraphs 227 to 230).

88 In the present case it should be noted that the Court has already held in paragraphs 69 and 78 above that the 2006 Guidelines formed part of the statutory framework laid down by Article 23(2) and (3) of Regulation No 1/2003 and that they contributed to defining the limits within which the Commission exercises its discretion under that provision. The Court found, in particular, in paragraph 75 above that, in accordance with Article 23(2) of Regulation No 1/2003, point 32 of the 2006 Guidelines limits the final amount of the fine for each undertaking or association of undertakings participating in the infringement at 10% of the total turnover in the preceding business year.

89 It should also be observed that even in the absence of any express provision relating to a periodic revision of the 1998 Guidelines, the applicants ought, in the light of the existing case-law, to have taken into account the possibility that, after the infringement had been committed, the Commission would decide to adopt and apply new Guidelines on the method of setting fines (*Denki Kagaku Kogyo and Denka Chemicals* v *Commission*, paragraph 84 above, paragraph 116).

90 In the light of all the foregoing considerations, it must be concluded that the 2006 Guidelines and, in particular, the new method of setting fines contained therein, on the assumption that this new method had the effect of increasing the level of the fines imposed as compared with the method laid down in the 1998 Guidelines, were reasonably foreseeable for undertakings such as the applicant at the time when the infringement found was committed and that in applying the 2006 Guidelines in the contested decision to an infringement committed before they were adopted, the Commission did not breach the principle of non-retroactivity (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 175 above, paragraphs 231 and 232, and Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 25).

91 The sixth plea must therefore be rejected as unfounded.

2. First plea: errors of assessment made by the Commission with regard to the finding of the infringement alleged against the applicant and the calculation of the amount of the fine imposed upon the latter

92 As a preliminary point, it should be noted that the wording of the first plea, as it appears in the application, namely 'the defendant fails to take into account a number of mitigating circumstances in the applicant's favour, in breach of Article 23(3) of Regulation No 1/2003', might imply that the applicant contends that the contested decision is flawed by several instances of illegality stemming from the Commission's failure to take into account mitigating circumstances, on the basis of which it should have reduced the fine it imposed on the applicant.

93 However, the circumstances relied on by the applicant, numbering thirteen in all, set out in a corresponding number of parts within the first plea, refer, in essence, to various errors of assessment made by the Commission, first, in the case of some of them, with regard to the finding of the

infringement which it alleges against the applicant (fourth, sixth, seventh, eighth and eleventh parts) and, secondly, in the case of the others, with regard to the calculation of the fine it imposed on the applicant (first, second, third, fifth, ninth, tenth, twelfth and thirteenth parts).

a) Errors of assessment with regard to the finding of the infringement alleged against the applicant

94 It is appropriate to examine initially the sixth, seventh and eighth parts of the first plea, in so far as they seek, in essence, to show that the Commission made an error of assessment in finding that the applicant had participated in Austria in the infringement found, so that the applicant's potential participation in that infringement is limited to Germany.

95 The Court will then examine the fourth and the eleventh parts of the first plea in so far as they seek, in essence, to demonstrate the incorrect application of Article 101 TFEU, since some aspects of the conduct alleged against the applicant do not amount to infringement of competition law.

The sixth, seventh and eighth parts of the first plea: error of assessment with regard to the applicant's participation in Austria in the infringement found

96 It is necessary to examine first of all the seventh part of the first plea, and then the sixth part and, finally, the eighth part.

– The seventh part of the first plea: error of assessment with regard to alignment by the applicant of prices in Austria with prices in Germany

97 The applicant states that, contrary to the Commission's contention in recital 351 to the contested decision, it aligned its prices in Austria with prices in Germany not under an agreement with its competitors but on the basis of an independent decision. In addition, it maintains that the evidence supplied in that regard by the Commission, in footnote 404 of the contested decision, either dates to a time when it was not yet a member of the umbrella association ASI or relates to shower enclosures, a product sub-group which it did not manufacture.

98 The Commission challenges the arguments put forward by the applicant in support of the seventh part of the first plea.

99 In that regard, in the first place, it must be held that the applicant is wrong to interpret recital 351 to the contested decision as meaning that the Commission accused it of aligning prices in Austria with prices in Germany. Recital 351 to the contested decision is in fact one of the recitals in which the Commission refuted the line of argument put forward by the applicant during the administrative procedure. The applicant claimed that, despite its sustained participation at meetings of the umbrella association ASI since 2001, it had never used the pricing information exchanged during those meetings and had set its prices on the Austrian market with reference to the pricing policy of its parent company on the German market and that, in any event, the exchange of information had had no effect on the market.

100 In response to the line of argument put forward by the applicant during the administrative procedure, the Commission took the view in essence, in recital 350 to the contested decision, that, in view of the applicant's participation in meetings of the umbrella association ASI since 2001, the latter could not fail to have taken into account, directly or indirectly, pricing information disclosed by its competitors. In recital 351 to that decision it explained that the fact that the price coordination might not have had an effect on the market or on end-consumer prices did not alter the finding that such coordination had an anti-competitive purpose. In the same recital, the Commission stated that it had never asserted that the applicant had discussed application of the pricing policy in Germany within Austria; on the contrary it had taken the view that the members of the umbrella association ASI discussed their

pricing policies having regard to developments in those policies on the German market. It follows from the foregoing considerations that the Commission's finding with regard to the alignment of prices in Austria with prices in Germany is not specifically addressed to the applicant, but concerns, generally, the price coordination plan already put in place by all the bathroom fittings and fixtures manufacturers within the umbrella association ASI before the applicant became a member of it. In addition, it should be noted that the umbrella association ASI was a national industry association for producers of the three product sub-groups referred to in paragraph 3 above. Hence, the applicant's submission that the evidence given by the Commission in footnote 404 to the contested decision concerns products which it did not manufacture is ineffective.

101 In the second place, with regard to the complaint that the Commission wrongly took the view that the applicant had aligned prices in Austria with those in Germany on the basis of an agreement with its competitors, it must be stated that the applicant merely asserts, without substantiating that assertion, that such alignment was the result of an independent decision. Consequently, that complaint must be rejected.

102 In the third place, it must be noted, as the Commission did in recital 350 to the contested decision, that the applicant confirmed in its response to the statement of objections that it had participated in the exchange of information on price increases at meetings of the umbrella association ASI since 2001, but stated that it never actually used the price information exchanged during those meetings. In answer to a question put by the Court at the hearing, the applicant confirmed that statement. That acknowledgment of participation is moreover corroborated by the Commission's findings, duly substantiated by specific, consistent evidence not disputed by the applicant, made in recitals 325 to 339 to the contested decision, which show that the applicant participated consistently, from 2001, in meetings of the umbrella association ASI at which bathroom fittings and fixtures manufacturers coordinated their prices on the Austrian market. It follows from the foregoing considerations that the Commission established to a sufficient legal standard the applicant's participation in anti-competitive arrangements consisting in the coordination of price increases.

103 That finding is not affected by the fact that footnote 404 of the contested decision contains information relating to a period prior to the applicant becoming a member of the umbrella association ASI. That footnote is intended to support the finding made in recital 351 to the contested decision concerning the alignment of Austrian prices with prices in Germany. The Court has explained in paragraph 100 above that that finding concerned, generally, the price coordination plan already put in place by all the bathroom fittings and fixtures manufacturers within the umbrella association ASI before the applicant became a member of it.

104 Nor is the application of Article 101 TFEU and Article 53 of the EEA Agreement excluded by virtue of the applicant's alleged failure to implement the arrangements at issue, inasmuch as the applicant claims to have aligned its prices with those of its German parent company and not to have used the information exchanged at meetings of the umbrella association ASI.

105 It follows from the foregoing considerations that the seventh part of the first plea must be rejected as unfounded.

– The sixth part of the first plea: error of assessment with regard to the applicant's participation in the exchange of information in Austria

106 The applicant asserts that it did not take part in the exchange of sensitive business information, other than price information, in Austria. In support of that assertion it explains that none of the documents cited by the Commission in footnote 387 of the contested decision proves that it participated in an unlawful exchange of information in Austria.

107 The Commission challenges the arguments put forward by the applicant in support of the sixth part of the first plea.

108 From the outset, it should be stated that, were all or even some of those arguments well founded, the error that would then affect the finding in the contested decision concerning the applicant's participation in an exchange of sensitive business information in Austria would not lead to annulment of Article 1 of the contested decision in so far as it concerns the applicant. It has been established, in the context of the examination of the seventh part of the first plea, that the Commission had properly concluded that the applicant had participated in the coordination of price increases on the Austrian market from 2 March 2001 to 9 November 2004. It is clear from recital 341 to the contested decision that the Commission took the view that that information exchange supported the primary price coordination plan. It is therefore by reference to the plan for coordination of price increases that the Commission found, in recital 395 to the contested decision, that collusive arrangements had been put in place by bathroom fittings and fixtures manufacturers in Austria.

109 It follows from the foregoing considerations that, in the light of the conclusion reached in respect of the seventh part, there is no need to rule on the sixth part.

– The eighth part of the first plea: error of assessment with regard to the scope of the applicant's participation in the cartel

110 In the eighth part of the first plea the applicant contends, inter alia, that the finding made by the Commission in recitals 796 and 834 to the contested decision — namely that multinational groups made possible the coherent organisation of the cartel across boundaries and product groups, through centralised pricing and the efficient flow of information among those groups — does not concern the applicant, since its participation in the infringement found was not multinational in scope, because the branch in Austria had no independence in the matter of price setting in relation to the company's headquarters in Germany, and also because it was present on the market in only one of the three product sub-groups referred to in paragraph 3 above.

111 The Commission challenges the arguments put forward by the applicant in support of the eighth part of the first plea.

112 In that regard, it is appropriate to place in context the Commission's findings, in recitals 796 and 834 to the contested decision, that multinational groups coherently organised the cartel across boundaries and product sub-groups through centralised pricing. Those findings form part of the Commission's reasoning, in recitals 793 to 849 to the contested decision, by which the Commission sought to establish that the collusive arrangements put in place by bathroom fittings and fixtures manufacturers in six Member States and covering the three product sub-groups referred to in paragraph 3 above showed the characteristics of a single and continuous infringement. Those findings were not therefore intended to apply specifically as such to the applicant.

113 Also, it should be observed that, having found in recital 850 to the contested decision that there was a single and continuous infringement, the Commission explained that, in order to attribute liability for such an infringement to an undertaking which had personally participated only in a part of anti-competitive arrangements, it was sufficient to show that the undertaking intended to contribute, by its own conduct, to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives, or that it could reasonably have foreseen it and that it was prepared to take the risk. In recitals 872 and 873 to the contested decision, the Commission took the view that the applicant had participated in the single and continuous infringement in so far as, in view of its participation in meetings of the umbrella associations ASI in Austria and IndustrieForum Sanitär in Germany, it could reasonably

have been aware of the various ranges of products forming the subject of the infringement found. However, as regards the geographic scope of that infringement, the Commission held that the applicant could have been aware only of the collusive conduct in Austria and in Germany.

114 In the present action, the applicant has not disputed the existence of the infringement found, namely a single and continuous infringement, as was described in recitals 793 to 849 of the contested decision. In addition, as was established in paragraphs 53 and 54 above, it delayed in disputing its awareness of one of the essential characteristics of that infringement, namely the fact that the infringement concerned three product sub-groups.

115 Thus, the circumstance, referred to by the applicant, that the Commission's findings, inter alia in recitals 793 and 834 to the contested decision, concerning centralised pricing and the product sub-groups covered by the cartel, are not applicable to it cannot invalidate the Commission's reasoning concerning the existence of a single and continuous infringement and the applicant's participation in such an infringement and, hence, lead to annulment of the contested decision.

116 It follows from the foregoing considerations that the eighth part of the first plea must be rejected as ineffective.

117 In the light of the conclusions drawn in paragraphs 105, 109 and 116 above, it must be held that, contrary to what the applicant contends, the Commission was entitled, without committing an error of assessment, to find that the applicant's participation in the infringement found was not limited to Germany but also covered Austria.

The fourth and eleventh parts of the first plea: misapplication of Article 101 TFEU

118 It should be observed that the fourth part of the first plea is based, in essence, on assertions that the coordination of price increases was in response to demand from customers, namely the wholesalers, and also that the fact of responding to that demand did not constitute an infringement of Article 101 TFEU. With regard to the eleventh part of the first plea, the applicant argues that market transparency is not bad for competition.

119 Before examining the fourth and eleventh parts of the first plea, alleging infringement of Article 101 TFEU, it is appropriate to recall the case-law concerning the existence of an infringement of Article 101(1) TFEU.

120 In that regard, Article 101(1) TFEU provides that the following are prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

121 In order for there to be an agreement within the meaning of Article 101(1) TFEU, it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 256, and Case T-9/99 *HFB Holding and Others* v *Commission* [2002] ECR II-1487, paragraph 199).

122 An agreement within the meaning of Article 101(1) TFEU can be regarded as having been concluded where there is a concurrence of wills on the very principle of a restriction of competition, even if the specific features of the restriction envisaged are still under negotiation (see, to that effect, *HFB Holding and Others* v *Commission*, paragraph 121 above, paragraphs 151 to 157 and 206).

123 The concept of a concerted practice refers to a form of coordination between undertakings which, without being taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 115, and Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 158).

124 In this respect, Article 101(1) TFEU precludes any direct or indirect contact between economic operators of such a kind as either to influence the conduct on the market of an actual or potential competitor or to reveal to such a competitor the conduct which an operator has decided to follow itself or contemplates adopting on the market, where the object or effect of those contacts is to restrict competition (see, to that effect, *Commission* v *Anic Partecipazioni*, paragraph 123 above, paragraphs 116 and 117).

125 An exchange of information is incompatible with the EU rules on competition if it reduces or removes the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted (see, to that effect, Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 81 and the case-law cited).

126 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). Each trader must therefore determine independently the policy which he intends to adopt within the internal market and the conditions which he intends to offer to his customers (see *Thyssen Stahl* v *Commission*, paragraph 125 above, paragraph 82 and the case-law cited).

127 While it is true that this requirement of independence does not deprive traders of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, however, strictly preclude any direct or indirect contact between such traders, the object or effect of which is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market (see *Thyssen Stahl* v *Commission*, paragraph 125 above, paragraph 83 and the case-law cited).

– The fourth part of the first plea: price coordination was in response to demand from customers

128 In the fourth part of the first plea, the applicant contends, in essence, that, contrary to the Commission's finding in the contested decision, Article 101 TFEU has not been infringed, since the coordination of future price increases was in response to demand from customers, namely wholesalers, which exerted significant pressure on bathroom fittings and fixtures manufacturers. The applicant also contends that the Commission failed, in calculating the applicant's fine, to take into account, as a mitigating circumstance, the pressure which wholesalers had exerted on bathroom fittings and fixtures manufacturers, although that pressure constituted one of the causes of the infringement found.

129 The Commission challenges the arguments put forward by the applicant in support of the fourth part of the first plea.

130 In that regard, in the first place, concerning the applicant's contention that the coordination between producers, since it sought to respond to demand from customers, namely wholesalers, did not constitute an infringement of Article 101 TFEU, first, it should be observed that the Commission analysed the role of wholesalers in the present case in the contested decision. In recital 740 to the contested decision, it stated that at the time of the introduction of road tolls in Austria wholesalers had asked bathroom fittings and fixtures manufacturers, in the context of the umbrella association

ASI, to apply a 0.6% surcharge, and not a 0.2% surcharge as had been decided by the manufacturers. Similarly, in recitals 657 and 658 to the contested decision, the Commission stated that some Austrian manufacturers explained coordination of the price increase on the occasion of the introduction of the Euro by the pressure exerted by the wholesalers. Lastly, in recitals 931 to 934 to the contested decision, the Commission stated, generally, that bathroom fittings and fixtures manufacturers had relied on the buyer power of, and pressure from, the wholesalers to justify the collusive arrangements and as a mitigating circumstance. It none the less refused to uphold those arguments.

131 Secondly, in the light of the case-law cited in paragraphs 120 to 127 above, it should be noted that it was established in paragraph 102 above that the applicant had taken part in anti-competitive arrangements consisting in the coordination of future price increases on the Austrian market. It should also be noted, in the context of the present action and as was confirmed in answer to a question raised by the Court at the hearing, that the applicant does not deny its participation in the collusive arrangements put in place by bathroom fittings and fixtures manufacturers on the German market, as found by the Commission in recitals 246 to 252 to the contested decision.

132 Contrary to what the applicant argues and as was correctly pointed out by the Commission in recital 657 to the contested decision, the fact that the wholesalers may have requested a certain conduct of manufacturers cannot relieve the latter of the responsibility of engaging in anti-competitive conduct. Moreover, as the Commission correctly states in recital 934 to the contested decision, although market conditions upstream and downstream from the market covered by the cartel may influence the behaviour of players on that market, that cannot in any circumstances justify those players cooperating with their competitors, instead of responding independently to market conditions (see, to that effect, *HFB Holding and Others* v *Commission*, paragraph 121 above, paragraph 178, and Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 423).

133 Therefore, in the present case, the alleged buyer power of wholesalers, even if established, can by no means justify the collusive arrangements put in place by the bathroom fittings and fixtures manufacturers.

134 In the second place, in so far as the applicant criticises the Commission for not taking into account as mitigating circumstances, when calculating the amount of the fine, the pressure exerted by wholesalers, suffice it to note that, according to the case-law, pressure, whatever the extent, does not constitute a mitigating circumstance. The existence of such pressure does nothing to alter the reality and the gravity of the infringement committed. The applicant could have reported the pressure to the competent authorities and lodged a complaint with the Commission rather than participate in the cartel (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 68 above, paragraph 370, and Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 339).

135 Hence, it must be held that, in the present case, the Commission was entitled to decide not to take into account pressure from the wholesalers as a mitigating circumstance.

136 It follows from the foregoing considerations that the fourth part of the first plea must be rejected as unfounded.

– The eleventh part of the first plea: benefits for competition from transparency in the market

137 The applicant maintains, in essence, that the Commission's statement, in recital 991 to the contested decision that harmonising the dates on which prices are set confirms the way the price cycles functioned, since it makes the market transparent, disregards the fact that, on the one hand, market transparency is not in itself bad for competition and, on the other, that harmonisation and transparency related to timing and not to prices.

138 The Commission challenges the arguments put forward by the applicant in support of the eleventh part of the first plea.

139 In that regard, in the light of the case-law referred to in paragraphs 120 to 127 above, it should be observed that in recital 991 to the contested decision the Commission replied to arguments put forward by the applicant during the administrative procedure concerning the alleged benefits of harmonising the timing of the price increases. In that respect, the Commission took the view that those arguments confirmed the transparency of the market and the functioning of the price cycles, as described in the contested decision.

140 As in connection with the fourth part of the first plea, it should be noted that it was established in paragraph 102 above that the applicant had taken part in anti-competitive arrangements consisting in the coordination of price increases on the Austrian market. Also, in the context of the present action, the applicant has not denied its participation in the collusive arrangements put in place by bathroom fittings and fixtures manufacturers on the German market, as found by the Commission in recitals 246 to 252 to the contested decision. It should also be stated that, contrary to what the applicant claims in the present part of the first plea, it is clear from recitals 152 to 163 to the contested decision, set out, in essence, in paragraph 2 above, that the coordination of future price increases found by the Commission on the German and Austrian markets concerned both the timing and the proportion of those increases.

141 According to the case-law, while every producer is free to change his prices, taking into account in so doing the present or foreseeable conduct of his competitors, it is nevertheless contrary to the rules on competition contained in the FEU Treaty for a producer to cooperate with his competitors, in any way whatsoever, in order to determine a coordinated course of action relating to a price increase and to ensure its success by prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action, such as the amount, subject-matter, date and place of the increases (Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 118).

142 The Commission was therefore entitled to take the view that the collusive arrangements put in place on the Austrian and German markets constituted infringements of competition law. It follows that the applicant's argument concerning transparency on the market cannot succeed.

143 It follows from all the foregoing considerations that the eleventh part of the first plea must be rejected as unfounded.

b) Errors of assessment with regard to the calculation of the amount of the fine imposed on the applicant

144 In the first, second, third, fifth, ninth, tenth, twelfth and thirteenth parts of the first plea, the applicant, in essence, criticises the Commission for making various errors of assessment by failing to take into account, in breach of Article 23(3) of Regulation No 1/2003, a number of what it describes as mitigating circumstances, in the light of which the amount of the fine that it imposed on the applicant should have been reduced.

145 The Commission challenges the arguments put forward by the applicant.

146 As a preliminary point, it should be noted, first, as was found in paragraphs 69 and 78 above, that adoption of the 2006 Guidelines fell within the statutory limits laid down by Article 23(2) and (3) of Regulation No 1/2003 and that hence they contributed to defining the limits within which the Commission exercises its discretion under that provision and did not infringe the principle that penalties must have a proper legal basis, but were conducive to observance of that principle.

147 Next, it should be noted that, as is clear from the 2006 Guidelines, the Commission's methodology when calculating fines comprises two stages. First, the Commission determines a basic amount for each undertaking or association of undertakings. That basic amount makes it possible to reflect the gravity of the infringement at issue, by taking into account, in accordance with point 22 of those Guidelines, a number of factors specific to it, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented. Second, the Commission may adjust that basic amount upwards or downwards and, in that regard, take account of aggravating or mitigating circumstances which characterise the participation of each of the undertakings concerned (see, to that effect, Case T-348/08 *Aragonesas Industrias y Energía* v *Commission* [2011] ECR II-7583, paragraphs 260 and 264 and the case-law cited).

148 As regards, more specifically, the first stage of the methodology for calculating fines according to points 13 to 25 of the 2006 Guidelines, the basic amount of the fine is related to the 'gravity of the infringement' multiplier, which reflects the degree of gravity of the infringement as such and which may, in general, as stated in paragraph 72 above, be set at a level of up to 30% of the value of sales to be taken into account, regard being had to the factors referred to in point 22 of the 2006 Guidelines (see, to that effect, *Aragonesas Industrias y Energía* v *Commission*, paragraph 147 above, paragraph 261). However, from that first stage, account is also taken of objective factors relating to the specific, individual circumstances of each of the undertakings participating in that infringement. The 'gravity of the infringement' multiplier applies in conjunction with two individual, objective parameters, namely, the value of the sales of goods or services achieved by each of them, to which the infringement directly or indirectly relates in the relevant geographic area within the EEA, and the duration of the participation of each undertaking in the infringement as a whole (see, to that effect, *Aragonesas Industrias y Energía* v *Commission*, paragraph 147 above, paragraph 269).

149 Furthermore, under point 25 of the 2006 Guidelines, the basic amount of the fine may be supplemented by an additional amount, the purpose of which is to deter undertakings from entering into, inter alia, horizontal price-fixing agreements. As stated in paragraph 72 above, the 'additional amount' multiplier, which applies irrespective of the duration of an undertaking's participation in the infringement, is determined, on a scale of between 15% and 25% of the value of sales to be taken into account, in the light of the factors referred to in point 22 of the 2006 Guidelines (*Aragonesas Industrias y Energía* v *Commission*, paragraph 147 above, paragraph 261).

150 It is appropriate to examine initially the first, third, fifth, ninth and tenth parts of the first plea, alleging errors of assessment made by the Commission as regards the gravity of the infringement found. Then the Court will examine the second, twelfth and thirteenth parts of the first plea, alleging errors of assessment by the Commission as regards the failure to take into account mitigating circumstances.

The first, third, fifth, ninth and tenth parts of the first plea: errors of assessment as regards the gravity of the infringement found

– The first part of the first plea: failure to take into account the fact that the applicant manufactured articles in only one of the three product sub-groups covered by the infringement found

151 The applicant argues that it manufactures only high-range bathroom taps and fittings and that the Commission did not take into account the fact that its activity was limited to part of only one of the three product sub-groups covered by the infringement found.

152 The Commission challenges the arguments put forward by the applicant in support of the first part of the first plea.

153 In that regard, it should be observed, as was noted in paragraph 112 above, that the Commission established, in recitals 793 to 849 to the contested decision, that the collusive arrangements put in place by bathroom fittings and fixtures manufacturers in six Member States and covering three product sub-groups showed the characteristics of a single and continuous infringement and, in recital 872 to that decision, that the applicant could reasonably have been aware of the fact that that infringement covered three product sub-groups. Moreover, as was stated in paragraph 54 above, the applicant was, in the context of the present action, out of time in challenging those findings.

154 In those circumstances, it should be observed that the applicant's limited participation in the infringement found, namely with regard to only one of the three product sub-groups, indeed to only part of the taps and fittings sub-group, was taken into account by the Commission when calculating the basic amount of the fine. According to the case-law referred to in paragraph 148 above, as was stated in paragraph 18 above, that basic amount is calculated, for each undertaking, on the basis of the value of its sales by Member State and for the relevant product sub-group.

155 It follows from the foregoing considerations that the first part of the first plea must be rejected as unfounded.

– The third part of the first plea: failure to take into account the fact that the applicant was not aware of the infringement found and participated in it only in two of the six Member States it covered

156 The applicant criticises the Commission, in essence, for failing to take into account, when calculating the basic amount of the fine, the fact that, as was held in recital 873 to the contested decision, the applicant participated in the infringement found only in two of the Member States out of the six it covered. In the light of that circumstance, it submits that, provided the 2006 Guidelines are applicable in the present case, the Commission, when calculating the basic amount of the fine, on the basis of those Guidelines, should have applied a 'gravity of the infringement' multiplier and an 'additional amount' multiplier of less than 15%.

157 The Commission challenges the arguments put forward by the applicant in support of the third part of the first plea.

158 In that regard, in the first place, it should be observed that, first, in recitals 872 and 873 to the contested decision, the Commission found that the applicant had participated in the infringement found, namely, in a single and continuous infringement, secondly, as was held in paragraphs 53 and 54 above, the applicant contested the material scope of that infringement before the EU Court out of time and, thirdly, the Commission held the applicant liable for committing that infringement.

159 In the second place, according to settled case-law, an infringement of Article 101(1) TFEU may result not only from an isolated act but also from a series of acts or from continuous conduct, even if one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of that provision. Accordingly, when the different actions form part of an 'overall plan', because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (*Commission* v *Anic Partecipazioni*, paragraph 123 above, paragraph 81, and 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, paragraph 258).

160 An undertaking which has participated in a single and continuous infringement of that kind, by its own conduct, which met the definition of an agreement or concerted practice having an anti-competitive object within the meaning of Article 101(1) TFEU and was intended to help bring about the infringement as a whole, may thus also be responsible for the conduct of other undertakings followed in the context of the same infringement throughout the period of its participation in the infringement. That is the case where it is established that that undertaking intended to contribute by its own conduct

to the common objectives pursued by all the participants and that it was aware of the unlawful conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk (*Commission* v *Anic Partecipazioni*, paragraph 123 above, paragraphs 87 and 203, and *Aalborg Portland and Others* v *Commission*, paragraph 159 above, paragraph 83).

161 An undertaking may thus have participated directly in all the forms of anti-competitive conduct comprising the single and continuous infringement, in which case the Commission is entitled to attribute liability to it in relation to that conduct as a whole and, therefore, in relation to the infringement as a whole. Equally, an undertaking may have participated directly in only some of the forms of anti-competitive conduct comprising the single and continuous infringement, but have been aware of all the other unlawful conduct planned or put into effect by the other participants in the cartel in pursuit of the same objectives, or could reasonably have foreseen that conduct and have been prepared to take the risk. In such cases, the Commission is also entitled to attribute liability to that undertaking in relation to all the forms of anti-competitive conduct comprising such an infringement and, accordingly, in relation to the infringement as a whole.

162 In the third place, in the present case, first, as was found in paragraph 79 above, the second plea of illegality put forward by the applicant, which concerns the 2006 Guidelines, must be rejected as unfounded. Hence, it is necessary to assess the arguments put forward by the applicant as regards the Commission's failure to take into account the geographic scope — limited to two Member States — of its participation in the infringement found, when calculating the basic amount of the fine, on the basis of those Guidelines.

163 Secondly, as was stated in paragraphs 19 and 21 above, the Commission calculated the basic amount of the fine, inter alia by setting the 'gravity of the infringement' multiplier and the 'additional amount' multiplier at 15%, in the light of the four criteria for assessing the infringement found: its nature, combined market shares, geographic scope and implementation. As regards the geographic scope of the infringement found, the Commission took into consideration the fact that the single and continuous infringement at issue covered at least six Member States (recital 1213 to the contested decision).

164 However, as stated in paragraph 16 above, the Commission concluded, in recital 873 to the contested decision, that as regards the geographic scope of the infringement found, the applicant could not be deemed to have been aware of the overall infringement found, but only of the respective collusive conduct in Austria and Germany.

165 In the light of the case-law referred to in paragraphs 158 to 161 above, it follows from the conclusion drawn by the Commission in recital 873 to the contested decision that, since the applicant was not aware of the overall geographic scope of the single and continuous infringement at issue, the Commission could not take issue with it for participating in the infringement thus found and, hence, it could not hold it liable for that infringement overall. In those circumstances, when calculating the amount of the fine imposed on the applicant, the Commission should have set the 'gravity of the infringement' and 'additional amount' multipliers in the light of that conclusion.

166 It is common ground that, in the contested decision, those two multipliers were set at 15% in the light only of the essential characteristics of the infringement found namely, inter alia, of its geographic scope, in so far as it covered the territories of six Member States.

167 Hence, in failing to take into account, when calculating the amount of the fine imposed on the applicant, that the geographic scope — of which it was aware — of the infringement in which it participated was limited to two Member States, the Commission made two errors of assessment.

168 It follows from the foregoing considerations that the third part of the first plea must be upheld as well-founded.

– The fifth part of the first plea: failure to take into account the lesser degree of intensity of the agreements relating to taps and fittings

169 The applicant points out that the Commission considered, in the contested decision, that the arrangements between manufacturers of shower enclosures had been particularly intense. It argues, *a contrario*, that the arrangements were less intense as regards the two other product sub-groups, which the Commission failed to take into account.

170 The Commission challenges the arguments put forward by the applicant in support of the fifth part of the first plea.

171 In that regard, as was noted in paragraph 16 above, the Commission found in the contested decision that the applicant had participated in the infringement found, namely in a single and continuous infringement relating inter alia to the three product sub-groups referred to in paragraph 3 above, and, as was held in paragraphs 53 and 54 above, the applicant challenged that essential characteristic of the infringement, namely its substantive scope, out of time. Therefore, in the light of point 22 of the 2006 Guidelines and in accordance with the case-law cited in paragraph 147 above, the Commission was entitled to calculate the basic amount of the fine on the basis, inter alia, of the gravity of the infringement taken overall. It cannot therefore be held that the Commission was obliged to take into account the particular intensity, if it were to be proven, of the collusive arrangements regarding one of the product sub-groups at issue.

172 Also, with regard to the applicant's argument that the collusive arrangements covering taps and fittings were less intense than those covering shower enclosures, clearly, so far as those two product sub-groups are concerned, the Commission obtained evidence showing that bathroom fittings and fixtures manufacturers had participated in restrictions of competition which were among the most harmful, namely coordination of future annual price increases and coordination of future price increases on the occasion of specific events. In addition, in Germany, the schedule of collusive meetings was no less regular and more sporadic with regard to taps and fittings than with regard to shower enclosures, as is clear from Annexes 2 and 3 to the contested decision. In Austria, collusive meetings concerning the three product sub-groups took place within a single association, the umbrella association ASI, which means that there can be no differentiation between the product sub-groups as regards the frequency of meetings.

173 It follows from the foregoing considerations that the fifth part of the first plea must be rejected as unfounded.

– The ninth part of the first plea: failure to take into account the fact that the cartel was not liable to harm downstream markets

174 The applicant considers that the Commission failed to take into account the fact that the cartel concerned only gross prices and not the decisive parameters for competition, namely rebates and bonuses, which means that the cartel could have only a minor impact on downstream markets. It adds that, in any event, the exchange of information concerning basic rebates, at a meeting of the product-specific association AGSI on 6 March 1998, conflicted with its interests and was only an isolated case. As regards the discussion concerning rebates and margins, at the meeting of the umbrella association ASI on 7 November 2002, referred to by the Commission in footnote 403 to the contested decision, it constitutes at most an attempt to coordinate, in an exceptional case, a single and insignificant rebate which is not covered by Article 101 TFEU.

175 The Commission challenges the arguments put forward by the applicant in support of the ninth part of the first plea.

176 In that regard, first, it should be borne in mind that it is clear from the wording of Article 101(1)(a) TFEU that concerted practices have an anti-competitive object if, inter alia, they 'directly or indirectly fix purchase or selling prices or any other trading conditions'. Therefore, taking into account the fact that Article 101 TFEU, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of competitors or consumers but also to protect the structure of the market and thus competition as such, the Court has held that it was not possible on the basis of that wording to conclude that only concerted practices which have a direct effect on the prices paid by end users are prohibited (see, to that effect, Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraphs 36 to 38). Moreover, according to settled case case-law, in deciding whether a concerted practice is prohibited by Article 101(1) TFEU, there is no need to take account of its actual effects once it is apparent that its object is to prevent, restrict or distort competition within the common market (see *T-Mobile Netherlands and Others*, paragraph 29 and the case-law cited).

177 Secondly, the system of penalties for infringement of the competition rules, as established by Regulations No 17 and No 1/2003 and interpreted by settled case-law, shows that, by reason of their very nature, cartels merit the severest fines. Their possible concrete impact on the market, particularly the question to what extent the restriction of competition resulted in a market price higher than would have obtained without the cartel, is not a decisive factor for determining the level of fines (judgment of 19 May 2010 in Case T-25/05 *KME Germany and Others* v *Commission*, not published in the ECR, paragraph 82 and the case-law cited).

178 Thirdly, moreover, it should be noted that although contrary to the 2006 Guidelines, point 1 A of the 1998 Guidelines provided that, in principle, in assessing the gravity of an infringement, account was to be taken, in so far as it could be measured, of the actual impact of that infringement on the market. However, according to those Guidelines, agreements or concerted practices involving in particular, as in the present case, coordination of price rises could be classified as 'very serious' on the basis of their very nature, without it being necessary for such conduct to have a particular impact or cover a particular geographic area. That conclusion is supported by the fact that, whilst the description of 'serious' infringements in the 1998 Guidelines expressly mentions market impact and effects over extensive areas of the common market, the description of 'very serious' infringements made no mention of a requirement that there be a particular impact or that there be effects in a particular geographic area (see *KME Germany and Others* v *Commission*, paragraph 177 above, paragraph 83 and the case-law cited).

179 It follows from the considerations and observations in paragraphs 176 to 178 above that, where an infringement is among the most harmful restrictions of competition, its very nature alone makes it possible not only to find that the infringement constitutes conduct prohibited under Article 101 TFEU, but also to assess its degree of gravity, for the purpose of setting the fine to be imposed on the undertakings which participated in it, in accordance with Article 103 TFEU and Regulation No 1/2003.

180 In the present case, although in the context of the present part of the first plea the applicant denies having set end-consumer prices, it does not deny taking part in collusive arrangements concerning gross prices. Moreover, in the light of the considerations and observations in paragraphs 176 to 178 above, the applicant is wrong to contend that as the cartel mainly concerned gross prices it could not have an impact on markets downstream. Even if that had been the main purpose of the practices implemented in the context of the cartel, it is gross prices that constitute the basis with reference to which sales prices for customers are calculated. Therefore, it must be held that coordination of gross prices between competitors may distort competition within the common market and, hence, constitute a concerted practice within the meaning of Article 101 TFEU. In the light of that same case-law, the applicant is also wrong to claim that the collusive discussions were isolated in nature, or, so far as it was concerned, were not followed up, for want of interest.

181 The Commission was therefore entitled to take the view, in recital 1211 to the contested decision, that the collusive arrangements at issue, in so far as they covered the coordination of future price increases, constituted, by their very nature, an infringement that was among the most harmful infringements of the competition rules. In the light of the very nature of the infringement found, the Commission was also entitled to use the same degree of gravity in order to determine the amount of the fine to be imposed.

182 It follows from the foregoing considerations that the ninth part of the first plea must be rejected as unfounded.

– The tenth part of the first plea: failure to take into account the fact that the cartel did not harm the economy

183 The applicant contends that the cartel could not harm the economy, in particular consumers, since, first, a cartel cannot be effective with a market share as low as that found by the Commission in recital 1212 to the contested decision, secondly, the fact that there were significant trade flows between the Member States does not promote the solidity of the cartel and, thirdly, the total absence of a retaliatory mechanism in the present case would tend to denote occasional cooperation, a low degree of organisation and, hence, the absence of any impact on the economy.

184 The Commission challenges the arguments put forward by the applicant in support of the tenth part of the first plea.

185 In that regard, suffice it to note, as was held in paragraph 179 above, where an infringement, such as that at issue in the present case, is among the most harmful restrictions of competition, its very nature alone makes it possible to assess its degree of gravity, for the purposes of setting the fine to be imposed on the undertakings which participated in it, in accordance with Article 103 TFEU and Regulation No 1/2003.

186 Moreover, the Court has held that in assessing an agreement under Article 101(1) TFEU no account should be taken of the actual conditions in which it functioned if it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets (Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 136).

187 In the present case, the practices in which the applicant is alleged to have taken part entailed obvious restrictions of competition. In paragraph 102 above, it was held that the Commission had established to a sufficient legal standard the applicant's participation in anti-competitive arrangements consisting in the coordination of price increases. In those circumstances, the Commission was not required to prove anti-competitive effects.

188 The Commission was therefore entitled to take the view, in recital 1211 to the contested decision, that the collusive arrangements in the present case were among the most harmful restrictions of competition. Accordingly, the fact that the agreements at issue did not harm the economy, assuming it to be proven, does not in any way constitute a mitigating circumstance.

189 That finding cannot be undermined by the applicant's argument that there was no retaliatory mechanism. Although the existence of measures to monitor the implementation of a cartel can be taken into account as an aggravating factor, the absence of such measures does not, of itself, constitute a mitigating factor (*Groupe Danone* v *Commission*, paragraph 132 above, paragraph 393).

190 The same is true as regards the applicant's argument that, in view of the low market share, referred to in recital 1212 to the contested decision, of the undertakings participating in it, the infringement found would not have harmed the economy. It appears from that recital that the market share at issue was

evaluated by the Commission at 54.3%. Such a market share, if established, cannot be described as low. In addition, the applicant does not establish in what way that share was not sufficient to harm the economy. That argument must therefore be rejected as unfounded.

191 It follows from the foregoing considerations that the tenth part of the first plea must be rejected as unfounded.

The second, twelfth and thirteenth parts of the first plea: errors of assessment as regards mitigating circumstances for the applicant

– The second part of the first plea: failure to take into account the 'follow-my-leader' role of the applicant

192 The applicant contends that it was never part of the central group of undertakings identified by the Commission, on the contrary, it merely had a 'follow-my-leader' role, which justifies a reduction in the amount of its fine, as follows by contrary inference from Joined Cases T-117/07 and T-121/07 *Areva and Others* v *Commission* [2011] ECR II-633, paragraph 308. In addition, it points out that it did not take part in meetings in Austria from the beginning.

193 The Commission challenges the arguments put forward by the applicant in support of the second part of the first plea.

194 In that regard, it should be noted that, although the exclusively passive or 'follow-my-leader' role of an undertaking constituted a mitigating circumstance under point 3, first indent, of the 1998 Guidelines, that is no longer the case in the 2006 Guidelines. Point 29, third indent, of the 2006 Guidelines provides that a mitigating circumstance may be found by the Commission where the undertaking provides evidence that its involvement in the infringement found is substantially limited and thus demonstrates that it actually avoided applying offending agreements by adopting competitive conduct in the market. It is stated that the mere fact that an undertaking participated in an infringement for a shorter duration than the others will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount of the fine.

195 In the present case, it should be observed that, in order to demonstrate that its participation in the infringement found was substantially limited, the applicant merely states that it was never part of the central group of undertakings.

196 First, it is apparent from paragraph 5.2.3.2 of the contested decision that the Commission's finding of the existence of a central group of undertakings, participating in the cartel in various Member States and belonging to at least one umbrella association covering the three product sub-groups, was intended to demonstrate that there was a single and continuous infringement. That finding in no way signified that undertakings not belonging to that central group of undertakings participated more sporadically in the infringement found.

197 Secondly, in the light of point 29, third indent, of the 2006 Guidelines, the applicant was required to prove that it had refrained from applying unlawful agreements, which it has failed to do. It is to be noted, however, that the Commission listed in Annexes 2 and 5 to the contested decision documents confirming the applicant's regular attendance of meetings of the product-specific association AGSI, in Germany, from 1996, and of the umbrella association ASI, in Austria, from 2001. As the applicant confirmed in answer to a question put by the Court at the hearing, it does not deny participating in those meetings. In addition, as mentioned in paragraph 102 above, the applicant acknowledged, in its response to the statement of objections, participating in the exchange of information concerning prices within the umbrella association ASI, in Austria. Likewise, it is apparent from the applicant's

response to the statement of objections that it participated in discussions concerning prices within the product-specific association AGSI. Those discussions were held to be of an anti-competitive nature by the Commission, which is not disputed by the applicant in the context of the present action.

198 Thirdly, as regards the argument concerning the applicant's entry at a late stage, in Austria, to the infringement found, it should be observed that, as was noted in paragraph 194 above, that does not constitute a mitigating circumstance; nor has the applicant put forward any argument to explain how that entry at a late stage, in Austria, to the infringement found demonstrates its passive role within that cartel.

199 Fourthly, no conclusion can be drawn in the present case from *Areva and Others* v *Commission*, paragraph 192 above. Although the judgment in that case confirms that an undertaking which has played the role of leader in a cartel may have its fine increased, the Court does not state in that judgment that the fact of not having played the role of leader of a cartel must be regarded as a mitigating circumstance. Moreover, with regard to paragraph 308 of that judgment, to which the applicant makes express reference, suffice it to say that no conclusion can be drawn, in the present case, from the fact that, in that paragraph 308, the Court found that the Commission had incorrectly imposed an identical increase in the basic amount of the fine on several undertakings, although those undertakings had played the role of leader during periods which were substantially different.

200 It follows from the foregoing considerations that the second part of the first plea must be rejected as unfounded.

– The twelfth part of the first plea: failure to take into account the applicant's medium size

201 The applicant contends that, although point 1 A of the 1998 Guidelines allowed it to do so, the Commission failed to take into account the fact that the applicant was a medium-size undertaking, had no legal department and had no experience in the area of competition law.

202 The Commission challenges the arguments put forward by the applicant in support of the twelfth part of the first plea.

203 In that regard, as is apparent from examination of the sixth plea in paragraphs 82 to 91 above, the 1998 Guidelines are not applicable in the present case. In any event, the Court has held that, although those Guidelines provided, in point 1 A, that it was possible for the Commission to take account of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law, that did not mean that the Commission was required to take account of the modest size of certain undertakings (Case T-18/03 *CD-Contact Data* v *Commission* [2009] ECR II-1021, paragraph 115).

204 Also, according to case-law, small or medium-sized undertakings are not exempt from their duty to comply with the competition rules (Joined Cases T-456/05 and T-457/05 *Gütermann and Zwicky* v *Commission* [2010] ECR II-1443, paragraph 281).

205 It follows from the foregoing considerations that the twelfth part of the first plea must be rejected as unfounded.

– The thirteenth part of the first plea: failure to take into account the applicant's cooperation

206 The applicant claims that the Commission disregarded the fact that it had cooperated in the investigation and had responded readily and within the period prescribed to all the requests for information and to other requests.

207 The Commission challenges the arguments put forward by the applicant in support of the thirteenth part of the first plea.

208 In that regard, it should be noted that, according to case-law, cooperation in the investigation which does not go beyond that which the undertakings are already obliged to provide under Article 18(3) and (4) of Council Regulation No 1/2003 does not warrant a reduction in the fine (Case T-347/06 *Nynäs Petroleum and Nynas Belgium* v *Commission* [2012] ECR, paragraph 62).

209 In the present case, the applicant merely contends that it responded to the requests for information which had been sent to it by the Commission within the prescribed period. Since that action is covered by the obligations referred to in paragraph 208 above it does not constitute a mitigating circumstance.

210 It follows from the foregoing considerations that the thirteenth part of the first plea must be rejected as unfounded.

211 In the light of the findings in paragraphs 105, 109, 116, 136, 143, 155, 168, 173, 182, 191, 200, 205 and 210 above, it is appropriate to uphold the third part of the first plea and to reject that plea as to the remainder.

212 The consequences which flow as regards the calculation of the amount of the fine imposed on the applicant from the finding that the third part of the first plea is well founded will be examined by the Court in the exercise of its unlimited jurisdiction in paragraph 245 et seq. below.

3. The second plea: infringement of Article 23(3) of Regulation No 1/2003 and of the principle of equal treatment, resulting from the application of the 10% ceiling laid down in Article 23(2) of that regulation.

213 The applicant contends, in essence, that the Commission infringed Article 23(3) of Regulation No 1/2003 in so far as, by interpreting the 10% ceiling laid down in the second subparagraph of Article 23(2) of that regulation as the maximum level of the amount of the fine to be imposed, applied at the end of the process of calculating the amount of the fine, with the result that it may be exceeded during the different stages of that calculation, and not as the upper level of a scale of penalties to be imposed, determined at the beginning of that process, it was impossible for the Commission to assess the gravity of the infringement which it accused the applicant of committing. Moreover, application of such a maximum level infringes the principle of equal treatment.

214 The Commission challenges the arguments put forward by the applicant in support of the second plea.

215 In that regard, it should be observed first of all that, contrary to what the applicant states, Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 are in substance the same.

216 Next, suffice it to note that, according to settled case-law, it is only the final amount of the fine imposed which must comply with the upper limit (ceiling) of 10% laid down in the second subparagraph of Article 23(2) of Regulation No 1/2003 and that that provision does not prohibit the Commission from arriving, during the various stages of calculation of the fine, at an intermediate amount higher than that limit, provided that the final amount of the fine does not exceed that limit (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 68 above, paragraphs 277 and 278, and Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 82).

217 Where it turns out, following the calculation, that the final amount of the fine must be reduced by the amount by which it exceeds that upper limit, the fact that certain factors such as the gravity and duration of the infringement are not actually reflected in the amount of the fine imposed is merely a consequence of the application of that limit to the final amount (*Dansk Rørindustri and Others* v *Commission*, paragraph 68 above, paragraph 279).

218 The upper limit of 10% seeks to prevent fines being imposed which it is foreseeable that the undertakings, owing to their size, as determined, albeit approximately and imperfectly, by their total turnover, will not be able to pay (*Dansk Rørindustri and Others* v *Commission*, paragraph 68 above, paragraph 280).

219 That limit is therefore one which is uniformly applicable to all undertakings and arrived at according to the size of each of them and seeks to ensure that the fines are not excessive or disproportionate. The limit thus has a distinct and autonomous objective by comparison with the criteria of gravity and duration of the infringement (*Dansk Rørindustri and Others* v *Commission*, paragraph 68 above, paragraphs 281 and 282).

220 The only possible consequence of that upper limit is that the amount of the fine calculated on the basis of those criteria will be reduced to the maximum permitted level. Its application implies that the undertaking concerned will not pay the fine which in principle would be payable if it were assessed on the basis of those criteria (*Dansk Rørindustri and Others* v *Commission*, paragraph 68 above, paragraph 283).

221 It is clear from the above citations from the case-law that, in the present case, contrary to what the applicant maintains, it cannot be held that the Commission infringed Article 23(3) of Regulation No 1/2003 by interpreting the second subparagraph of Article 23(2) of that regulation as the maximum level of the fine to be imposed, applied at the end of the process of calculating the amount of the fine, so that it may be exceeded during the different stages of that calculation, and not as the upper level of a scale of penalties to be imposed, determined at the beginning of that process.

222 That finding is not called in question by the applicant's arguments.

223 First, even if it were held that application of the 10% percentage as a limit conflicts with the aim of Regulation No 1/2003 to provide a deterrent, inasmuch as the amount of the fine actually imposed must be reduced in order to take that limit into account, such limitation is justified none the less by the obligation to respect the principle of proportionality (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 68 above, paragraph 281). Furthermore, it must be observed that the interpretation advocated by the applicant would conflict to an even greater extent with the aim of providing a deterrent, since the applicant proposes, in order to calculate the amount of the fine, initially, to apply the 10% ceiling and, subsequently, to take into account the gravity and duration of the infringement, which would inevitably lead to imposing a fine of an amount below the 10% ceiling. Therefore, the argument that the applicant derives from the aim of deterrence of Regulation No 1/2003 cannot succeed.

224 Secondly, although the operative part of the contested decision does not state expressly how the duration and gravity of the infringement found were taken into account in calculating the amount of the fine imposed on the applicant, it should be observed that, according to the case-law, the operative part of a decision must be read in the light of the terms of the reasons on which it is based (Case T-419/03 *Altstoff Recycling Austria* v *Commission* [2011] ECR II-975, paragraph 152). In the present case, the Commission took into account the gravity and duration of the infringement found, in recitals 1210 to 1220 and 1221 to 1223 to the contested decision, respectively. It follows that the applicant's argument concerning the absence of any reference in the operative part of the contested decision to the gravity and duration of the infringement found must be rejected as unfounded.

225 Thirdly, as regards the alleged infringement of the principle of equal treatment, as is apparent inter alia from the case-law cited in paragraph 217 above, the fact that, because of the application of the 10% ceiling provided for in Article 23(2) of Regulation No 1/2003, certain factors such as the gravity and duration of the infringement are not reflected effectively in the amount of the fine imposed on a participant in an infringement, unlike other participants which have not received a reduction on account of that ceiling, is merely a consequence of the application of that ceiling to the final amount of the fine imposed. Also, the Court has held that the mere fact that the fine ultimately imposed amounts to 10% of the applicant's turnover, while that percentage is lower for other participants in the cartel, does not constitute infringement of the principle of equal treatment. That consequence is inherent in the interpretation of the 10% ceiling merely as a maximum permitted level which is applied after any reduction in the amount of the fine on account of mitigating circumstances or the principle of proportionality (Case T-211/08 *Putters International* v *Commission* [2011] ECR II-3729, paragraph 74). That argument must therefore be rejected as unfounded.

226 Fourthly, the applicant's argument that the Commission itself is not certain of the legality of the 2006 Guidelines clearly does not contribute towards proving infringement of Article 23(3) of Regulation No 1/2003. That argument must therefore be rejected as ineffective.

227 It follows from all the foregoing considerations that the second plea must be rejected as unfounded in part and as ineffective in part.

4. The fourth plea: infringement of the principle of equal treatment in that the Commission failed to follow its practice in previous decisions

228 The applicant submits that the Commission infringed the principle of equal treatment since the comparison between, on the one hand, the present case and, on the other hand, the Commission decisions of 22 July 2009 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/39.396 — Calcium carbide and magnesium based reagents for the steel and gas industries), 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), of 7 October 2009 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/C.39129 — Power Transformers), and of 11 June 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.695 — Sodium Chlorate), shows that the Commission treated different situations similarly. According to the applicant, although the degree of gravity of the infringement found was very different from that of the infringements at issue in those earlier decisions, the Commission set, for the purposes of determining the basic amounts of the fine, an almost identical proportion of the value of sales, of between 15% and 19%.

229 The Commission challenges the arguments put forward by the applicant in support of the fourth plea.

230 In that regard, it should also be pointed out that the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters, as that framework is established by Article 23(2) and (3) of Regulation No 1/2003, as supplemented by the Guidelines (see, by analogy, Case T-329/01 *Archer Daniels Midland* v *Commission* [2006] ECR II-3255, paragraph 108 and the case-law cited).

231 Moreover, in view of the Commission's wide discretion in determining the amount of fines, the mere fact that it has found in its previous decisions that a type of conduct justified a fine of a certain amount in no way means that it is obliged to do so also in a subsequent decision (see, to that effect, *Archer Daniels Midland*, paragraph 230 above, paragraphs 109 and 110 and the case-law cited).

232 Thus, in the present case, it must be held that the mere reference by the applicant to the decisions listed in paragraph 228 above is in itself ineffective, since the Commission was not required to assess the present case in the same manner.

233 It follows from the foregoing considerations that the fourth plea must be rejected as ineffective.

5. The fifth plea: infringement of the principle of proportionality in that the Commission failed to take into account the applicant's limited economic capacity

234 The applicant states that in 2009 its sole production site was destroyed to a large extent by fire, rendering all production impossible for several months and having a significantly detrimental effect on its financial situation and its results. It also states that it asked the Commission to take account of its limited economic capacity when calculating the fine, but the latter did not mention that request or examine its arguments in the contested decision. The applicant submits that, in view of those circumstances, the fine should have been reduced, even though the turnover taken into account in calculating the fine took its limited economic capacity into account.

235 The Commission challenges the arguments put forward by the applicant in support of the fifth plea.

236 First, it should be observed at the outset that the amount of the fine imposed on the applicant takes account of any decline in turnover in 2009 that may have resulted from the fire which destroyed its sole production site in 2009. Although it is clear from recital 1200 to the contested decision that it was the value of sales in 2003 which was used to calculate the basic amount of the fine, it is stated in recital 1262 to that decision that it was, however, on the basis of the turnover figures relating to 2009, the year of the fire, that the 10% ceiling laid down in Article 23(2) of Regulation No 1/2003 was calculated.

237 Secondly, as regards the complaint alleging failure to take into account the applicant's economic capacity, it must be held that, during the administrative procedure, the applicant did not provide any evidence to prove, for the purposes of point 35 of the 2006 Guidelines, that its financial situation was such that its viability would be irretrievably jeopardised by the imposition of a fine.

238 It follows from the foregoing considerations that the fifth plea must be rejected as unfounded.

239 It is apparent from examination of the first, second, fourth, fifth and sixth pleas, put forward in support of the claim for annulment in part of the contested decision, that the third part of the first plea must be upheld, and that the other parts of that plea and the second, fourth, fifth and sixth pleas must be rejected as unfounded or ineffective.

240 So far as concerns the conclusions to be drawn in respect of the claim for annulment in part of the contested decision, first, it must be observed that, with regard to Article 1 of the contested decision, the Commission found, in paragraph 2 thereof, that the applicant had infringed Article 101 TFEU by participating in an infringement in the territories of Germany and Austria. In that regard, the Court finds that, since the Commission did not repeat in that article the errors it made at the stage of calculating the amount of the fine imposed on the applicant, with regard to the geographic scope of the infringement alleged against it, that article is not unlawful. The claim for annulment in part — so far as concerns Article 1(2) of the contested decision — must therefore be rejected.

241 Secondly, with regard to Article 2 of the contested decision, in view of the finding made in the preceding paragraph, from which it is apparent that the applicant infringed Article 101 TFEU, the Commission was fully entitled, on the basis of Article 23(2) of Regulation No 1/2003 referred to in

recital 1182 to the contested decision, to decide, in Article 2(6) of that decision, to impose a fine on the applicant. The claim for annulment in part of the contested decision in so far as it concerns Article 2(6) of that decision, must therefore be rejected.

242 Also, given that Article 2(6) of the contested decision sets the amount of the fine to be imposed on the applicant and that the applicant, under the second head of claim, requests the Court, in the alternative, to reduce the amount of the fine that was imposed on it, the Court will, in the context of the examination of that head of claim, draw conclusions from the errors of assessment found in paragraph 167 above as regards determining that amount.

243 It follows from the considerations in paragraphs 240 to 242 above that the claim for annulment in part of the contested decision must be rejected in its entirety.

C – *The claim, submitted in the alternative, for reduction of the amount of the fine imposed on the applicant*

244 In view of the second head of claim, in which the applicant requests the Court, in the alternative, to reduce the amount of the fine imposed on it, it is necessary for the Court, in the exercise of its unlimited jurisdiction, to examine the conclusions to be drawn from the errors made by the Commission, set out in paragraphs 156 to 168 above, as regards the calculation of the amount of the fine that it imposed on the applicant and also the other arguments which the applicant puts forward seeking to obtain from the Court a reduction of the amount of the fine imposed on it.

1. The conclusions to be drawn from the error made by the Commission as regards the amount of the fine

245 Taking account of the two errors of assessment made by the Commission, as noted in paragraph 167 above, the Court decides, under the unlimited jurisdiction conferred on it by Article 261 TFEU and Article 31 of Regulation No 1/2003, to substitute its own appraisal for the Commission's as regards calculation of the amount of the fine imposed on the applicant (see, to that effect, *KME and Others* v *Commission*, paragraph 38 above, paragraph 103 and the case-law cited, and *Romana Tabacchi* v *Commission*, paragraph 38 above, paragraph 265).

246 In that regard, although the 2006 Guidelines do not prejudge the assessment of the fine by the EU judicature, where it exercises its unlimited jurisdiction in this respect (see, to that effect, Joined Cases T-49/02 to T-51/02 *Brasserie nationale and Others* v *Commission* [2005] ECR II-3033, paragraph 169), the Court deems it appropriate in the present case to draw on them in recalculating the fine, in particular because they allow all the relevant elements of the case in point to be taken into account and proportionate fines to be imposed on all the undertakings that have participated in the infringement found.

247 In the present case, first, as is apparent from examination of the third part of the first plea in paragraphs 156 to 168 above, the two errors of assessment made by the Commission reside in the fact that, in order to calculate the amount of the fine imposed on the applicant, it set the 'gravity of the infringement' and the 'additional amount' multipliers at 15%, solely in the light of the essential characteristics of the infringement found, that is, amongst others, its geographic scope in that it covered the territories of six Member States. However, the applicant has not provided evidence that the Commission made errors in applying the other factors for calculating that fine. Hence, as regards the conclusions to be drawn from the errors made by the Commission in calculating the amount of the fine, it is for the Court to substitute its assessment for the Commission's solely in so far as setting the 'gravity of the infringement' and 'additional amount' multipliers is concerned.

248 Secondly, the Court considers that the Commission was fully entitled to hold, as is apparent from Article 1(2) of, and recitals 872 and 873 to, the contested decision, that the applicant had participated, from 6 March 1998 to 9 November 2004, in a single and continuous infringement, consisting of a secret cartel to coordinate future price increases in the three product sub-groups referred to in paragraph 3 above, in the territories of Germany and Austria.

249 In addition, in view not only of its very nature, but also of its geographic scope — the territory of two Member States — and its long duration — almost seven years — an infringement such as that at issue in the present case is among the most harmful restrictions. Having regard to the fact that, under point 23 of the 2006 Guidelines, such restrictions justify the proportion of the value of sales taken into account being set at the higher end of the scale from 0 to 30%, the Court is of the view that the proportion taken into account in the present case, namely 15%, corresponds to a minimum in view of the nature of the infringement at issue (see, to that effect, Joined Cases T-204/08 and T-212/08 *Team Relocations* v *Commission* [2011] ECR II-3569, paragraphs 94, 100 and 118).

250 Hence, in view of the 2006 Guidelines and the findings set out in the preceding paragraph, the Court considers it appropriate, for the calculation of the basic amount of the fine imposed on the applicant, to set both the 'gravity of the infringement' multiplier and the 'additional amount' multiplier at 15% of the value of its sales of the products at issue in the territories of Germany and Austria.

251 In the light of the considerations set out in paragraphs 245 to 249 above, the Court sets the total amount of the fine to be imposed on the applicant, so far as the single and continuous infringement in which it participated in Germany and in Austria is concerned, at EUR 12 517 671.

2. The additional arguments put forward by the applicant in support of the claim for adjustment of the amount of the fine imposed on it

252 It should be observed in this regard that, in the exercise of its unlimited jurisdiction, the Court must carry out its own assessment, taking all the circumstances of the case into account. First of all, that assessment must be made in compliance with the general principles of EU law, such as the principle of proportionality (see, to that effect, *Romana Tabacchi* v *Commission*, paragraph 38 above, paragraph 280) or the principle of equal treatment (Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraph 187).

253 Next, it is apparent from the case-law that the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, and that, in that regard, with the exception of grounds involving matters of public policy which the Courts of the Union are required to raise of their own motion, such as the failure to state reasons for a contested decision, it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas (see, to that effect, *Chalkor* v *Commission*, paragraph 38 above, paragraph 64).

254 In the present case, in the first place it must be held that, as was stated in paragraph 49 above, the third plea was put forward by the applicant in support of the second head of claim and, in that respect, is intended to support the applicant's claim for adjustment of the amount of the fine.

255 In support of the third plea, the applicant complains that the Commission calculated the basic amount of the fine by applying single 'gravity of the infringement' and 'additional amount' multipliers, without taking into account the following six circumstances, which are characteristics of its participation in the infringement found. In that respect, it contends that (i) it participated in that infringement in only two Member States, (ii) the complaint against it concerned only one of the three product sub-groups referred to in paragraph 3 above, (iii) that sub-group was the subject of less intense agreements than the shower enclosures sub-group, (iv) its participation was not multinational in scope, (v) it was not

one of the instigators of the cartel or of the central group of undertakings, or of the undertakings which had bilateral contacts before the setting up of the cartel in the context of meetings of the associations and (vi) it participated in meetings of only three associations.

256 The Commission challenges the arguments put forward by the applicant in support of the third plea.

257 In that regard, first, the Court finds that the six circumstances referred to by the applicant as characteristics of its participation in the infringement found reiterate, at least in essence, some of the arguments it has already put forward, in the context of the first plea, also raised in support of the first head of claim. It is apparent from the Court's examination of that plea that, with the exception of the argument alleging the error of assessment made by the Commission as regards the geographic scope of the infringement in which the applicant participated (third part of the first plea), those arguments must be rejected as unfounded or ineffective.

258 Secondly, the Court finds that the third part of the first plea is taken up again by the applicant in respect of the first circumstance referred to in the third plea. That circumstance, which is based on the geographic scope of the applicant's participation in the infringement — limited to Germany and Austria — alleged against it, was examined by the Court, in paragraphs 247 to 251 above, under its unlimited jurisdiction, for the purposes of possible adjustment of the amount of the fine.

259 The third plea must therefore be rejected.

260 In the second place, the Court finds, in the exercise of its unlimited jurisdiction, that none of the elements relied on by the applicant in any respect in the present case, nor any ground involving a matter of public policy, justifies it using that power to reduce in an appropriate manner the amount of the fine to be imposed on the applicant, as set in paragraph 251 above. Moreover, the Court considers that, in view of all the elements put forward before it, a fine of EUR 12 517 671 constitutes, in view of the duration and gravity of the infringement in which the applicant participated, an appropriate penalty to punish its anti-competitive conduct in a proportionate manner that would act as a deterrent.

261 It follows from all the foregoing considerations, as regards the claim, submitted in the alternative, for the reduction of the amount of the fine imposed on the applicant in Article 2(6) of the contested decision that, as that amount is the same as the amount set by the Court, under its unlimited jurisdiction, in paragraph 251 above, that claim must be rejected.

262 In the light of the findings in paragraphs 243 and 261 above, the action must be dismissed in its entirety.

**Costs**

263 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.

264 With regard to the costs incurred by the Council, under Article 87(4), first subparagraph, of the Rules of Procedure the institutions which have intervened in proceedings are to bear their own costs. The Council, as intervener, must therefore bear its own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

**1. Dismisses the action;**

**2. Orders Aloys F. Dornbracht GmbH & Co. KG to bear its own costs and to pay those of the European Commission;**

**3. Orders the Council of the European Union to bear its own costs.**

Pelikánová Jürimäe Van der Woude

Delivered in open court in Luxembourg on 16 September 2013.

[Signatures]

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