Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber, Extended Composition)

29 September 2021 *

(Competition – Agreements, decisions and concerted practices – Market for aluminium electrolytic capacitors and tantalum electrolytic capacitors – Decision finding an infringement of Article 101 TFEU and Article 53 of the EEA Agreement – Price coordination throughout the EEA – Statement of objections – 2006 Guidelines on the method of setting fines – Value of sales – Proportionality – Equal treatment – Gravity of the infringement – Mitigating circumstances)

In Case T-343/18,

Tokin Corp., established in Sendai (Japan), represented by C. Thomas, lawyer, and T. Yuen, Solicitor,

applicant,

v

European Commission, represented by A. Cleenewerck de Crayencour, F. van Schaik and L. Wildpanner, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for, primarily, annulment of Commission Decision C(2018) 1768 final of 21 March 2018 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.40136 – Capacitors), in so far as that decision imposes fines on the applicant, and, in the alternative, a reduction in the amount of those fines,

THE GENERAL COURT (Ninth Chamber, Extended Composition),

composed of M.J. Costeira (Rapporteur), President, D. Gratsias, M. Kancheva, B. Berke and T. Perišin, Judges,

Registrar: E. Artemiou, Administrator,

having regard to the written part of the procedure and further to the hearing on 12 October 2020,

gives the following

* Language of the case: English.

Judgment [1]

Background to the dispute

The applicant and the sector concerned

1 The applicant, Tokin Corp., is a company established in Japan which manufactures and sells tantalum electrolytic capacitors. It was known as NEC Tokin Corporation until 19 April 2017.

2 From 1 August 2009 until 31 January 2013, the applicant was fully owned by Nec Corp.

3 The infringement at issue concerns aluminium electrolytic capacitors and tantalum electrolytic capacitors. Capacitors are electrical components that store energy electrostatically in an electric field. Electrolytic capacitors are used in almost all electronic products, such as personal computers, tablets, telephones, air conditioners, refrigerators, washing machines, automotive products and industrial appliances. The customer base is therefore very diverse. Electrolytic capacitors, and more specifically aluminium electrolytic capacitors and tantalum electrolytic capacitors, are products in respect of which price is an important parameter of competition.

The administrative procedure

4 On 4 October 2013, Panasonic and its subsidiaries submitted an application for a marker to the European Commission under points 14 and 15 of the Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17; 'the 2006 Leniency Notice'), providing information regarding the existence of an alleged infringement in the electrolytic capacitors sector.

5 On 28 March 2014, under Article 18 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1), the Commission sent requests for information to a number of undertakings operating in the electrolytic capacitors sector, including the applicant.

6 On 21 May 2014, the applicant, together with Nec, applied to the Commission for a reduction in the amount of the fine under the 2006 Leniency Notice.

7 On 4 November 2015, the Commission adopted a statement of objections which was addressed to, inter alia, the applicant.

8 The addressees of the statement of objections, including the applicant, were heard by the Commission at the hearing which took place from 12 to 14 September 2016.

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

The contested decision

9 On 21 March 2018, the Commission adopted Decision C(2018) 1768 final relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.40136 – Capacitors) ('the contested decision').

The infringement

10 By the contested decision, the Commission found that there had been a single and continuous infringement of Article 101 TFEU and Article 53 of the Agreement on the European Economic Area (EEA) in the electrolytic capacitors sector, in which nine undertakings or groups of undertakings, namely Elna, Hitachi AIC, Holy Stone, Matsuo, Nichicon, Nippon Chemi-Con, Rubycon, Sanyo (designating Sanyo and Panasonic), and Nec and the applicant, jointly referred to as 'NEC Tokin' (collectively, 'the cartel participants'), participated (recital 1 of the contested decision, as well as Article 1 thereof).

11 The Commission stated, in essence, that the infringement at issue, covering the whole EEA, had taken place between 26 June 1998 and 23 April 2012 and had consisted of agreements and/or concerted practices that had as their object the coordination of pricing behaviour in relation to the supply of aluminium electrolytic capacitors and tantalum electrolytic capacitors (recital 1 of the contested decision).

12 The cartel was, in essence, organised through multilateral meetings, generally held in Japan every one or two months at senior sales manager level, and every six months at higher management level, including the presidents (recitals 63, 68 and 738 of the contested decision).

13 Initially, between 1998 and 2003, the multilateral meetings were held under the name 'Electrolytic Capacitor(s) Circle', 'Electrolytic Capacitor Conference', or 'ECC meetings'. Subsequently, between 2003 and 2005, they were held under the name 'Aluminium Tantalum Conference', 'Aluminium Tantalum Capacitors group', or 'ATC meetings'. Lastly, between 2005 and 2012, they were held under the name 'Market Study Group' or 'Marketing Group' ('MK meetings'). In parallel with the MK meetings, and complementing those meetings, 'Cost Up' or 'Condenser Up' meetings ('CUP meetings') were held between 2006 and 2008 (recital 69 of the contested decision).

14 In addition to those multilateral meetings, the cartel participants also engaged in ad hoc bilateral and trilateral contacts when necessary (recitals 63, 75 and 739 of the contested decision).

15 In the context of the anticompetitive exchanges, the cartel participants, in essence, exchanged information regarding pricing and future pricing, information regarding future price reductions and the ranges for those reductions, and information regarding supply and demand, including information in relation to future supply and demand, and, in some instances, concluded, implemented and monitored price agreements (recitals 62, 715, 732 and 741 of the contested decision).

16 The Commission considered that the cartel participants' conduct constituted a form of agreement and/or concerted practice which pursued a common objective, namely avoiding price competition and coordinating their future conduct with regard to the sale of electrolytic capacitors, thereby reducing uncertainty on the market (recitals 726 and 731 of the contested decision).

17 The Commission concluded that that conduct had a single anticompetitive aim (recital 743 of the contested decision).

The liability of the applicant and Nec

18 The Commission held the applicant liable on account of its direct participation in the cartel from 29 January 2003 to 23 April 2012, except with regard to the CUP meetings (recitals 944 and 1022 of the contested decision, as well as Article 1(e) thereof).

19 In addition, the Commission held Nec liable in its capacity as a parent company, holding the entirety of the capital of the applicant, for the period from 1 August 2009 to 23 April 2012, except with regard to the CUP meetings (recitals 945 and 1022 of the contested decision, as well as Article 1(e) thereof).

The fines imposed on the applicant

20 Article 2(f) and (g) of the contested decision imposes, first, a fine of EUR 5 036 000 on the applicant 'jointly and severally' with Nec and, second, a fine of EUR 8 814 000 on the applicant.

The calculation of the amount of the fines

21 In order to calculate the amount of the fines, the Commission applied the methodology set out in 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 980 of the contested decision).

22 In the first place, in order to determine the basic amount of the fines imposed on the applicant, the Commission took into account the value of sales during the last full business year of participation in the infringement, in accordance with point 13 of the 2006 Guidelines (recital 989 of the contested decision).

23 The Commission calculated the value of sales using sales of aluminium electrolytic capacitors and tantalum electrolytic capacitors invoiced to customers established in the EEA as a basis (recital 990 of the contested decision).

24 In addition, the Commission calculated the relevant value of sales separately for the two categories of products, namely aluminium electrolytic capacitors and tantalum electrolytic capacitors, and applied separate duration multipliers to each (recital 991 of the contested decision).

25 As regards the applicant, the Commission applied a duration multiplier of 9.23, corresponding to the period from 29 January 2003 to 23 April 2012 (recital 1007, Table 1, of the contested decision).

26 The Commission set the proportion of the value of sales to be taken into account in order to reflect the gravity of the infringement at 16%. In that regard, it considered that horizontal price coordination 'arrangements' were, by their very nature, among the most serious infringements of Article 101 TFEU and Article 53 of the EEA Agreement and that the cartel covered the whole EEA (recitals 1001 to 1003 of the contested decision).

27 The Commission applied an additional amount of 16% under point 25 of the 2006 Guidelines in order to ensure that the fine imposed would have a sufficiently deterrent effect (recital 1009 of the contested decision).

28 The Commission therefore set the basic amount of the fine to be imposed on the applicant at EUR 16 799 000, of which EUR 6 108 000 was the basic amount of the fine to be imposed on the applicant jointly and severally with Nec (recital 1010, Table 2, of the contested decision).

29 In the second place, as regards the adjustments to the basic amount of the fines, first, the Commission granted the applicant and Nec, on account of mitigating circumstances, a 3% reduction in the basic amount of the fine, on the ground that their participation in the CUP meetings was not established and there was no proof that they had been aware of those meetings (recital 1022 of the contested decision).

30 Second, the Commission found that, at the time the infringement at issue was committed, Nec had already been held liable for anticompetitive conduct which had been established by Commission Decision C(2011) 180/09 final of 19 May 2010 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case COMP/38.511 – DRAMs). The Commission therefore concluded that, for Nec, the basic amount of the fine should be increased by 50% on account of the aggravating circumstance of repeated infringement (recitals 1011 to 1013 of the contested decision).

31 In the third place, the Commission granted the applicant and Nec, for their cooperation under the 2006 Leniency Notice, a 15% reduction in the amount of any fine which would otherwise have been imposed on them for the infringement (recitals 1104 and 1105 of the contested decision).

32 Accordingly, the Commission set the total amount of the fines to be imposed on the applicant and Nec at EUR 16 445 000 (recital 1139, Table 3, of the contested decision).

…

Procedure and forms of order sought

34 By application lodged at the Court Registry on 3 June 2018, the applicant brought the present action.

35 On 26 September 2018, the Commission's defence was lodged at the Court Registry.

36 The reply and the rejoinder were lodged at the Court Registry on 22 November 2018 and 29 January 2019 respectively.

37 On a proposal from the Second Chamber, the General Court decided, pursuant to Article 28 of its Rules of Procedure, to assign the case to a Chamber sitting in extended composition.

38 Following a change in the composition of the Chambers of the General Court, pursuant to Article 27(5) of the Rules of Procedure, the Judge-Rapporteur was assigned to the Ninth Chamber (Extended Composition), to which the present case was consequently allocated.

39 On a proposal from the Judge-Rapporteur, the General Court (Ninth Chamber, Extended Composition) decided to open the oral part of the procedure and, by way of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, put written questions to the parties, asking them to provide answers to those questions at the hearing. The parties presented oral argument and answered the questions put to them by the Court at the hearing on 12 October 2020.

40 Following the death of Judge Berke on 1 August 2021, the three Judges whose signatures are affixed to the present judgment continued the deliberations, in accordance with Article 22 and Article 24(1) of the Rules of Procedure.

41 The applicant claims that the Court should:

– primarily, annul Article 2(f) and (g) of the contested decision, in so far as those provisions impose fines on the applicant;

– in the alternative, reduce the amount of the fines imposed on the applicant;

– order the Commission to pay the costs.

42 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

43 The applicant puts forward two pleas in law in support of its primary head of claim, seeking annulment of the fines imposed on it, and its alternative head of claim, seeking a reduction in the amount of those fines. Those pleas allege various errors and infringements on the Commission's part relating, as regards the first plea, to the reference period chosen to determine the value of sales for the purpose of calculating the basic amount of the fines, and, as regards the second plea, to the Commission's failure to apply a lower gravity percentage on account of the applicant's non-participation in the CUP meetings.

The head of claim seeking annulment of the contested decision

…

The first plea in law, relating to the reference period chosen to determine the value of sales for the purpose of calculating the basic amount of the fines

…

– The first part of the first plea, alleging a failure to have regard to the limits imposed on the Commission's discretion by Article 23(3) of Regulation No 1/2003 and an infringement of the principle of proportionality

51 In connection with the first part of the first plea, the applicant claims that the Commission disregarded the limits imposed on its discretion by Article 23(3) of Regulation No 1/2003 and infringed the principle of proportionality, inasmuch as it used, in calculating the basic amount of the fine, the value of the applicant's sales during the last full business year of participation in the infringement.

…

79 In the third place, the Court must reject the applicant's argument based on the fact that the Commission changed the end date of the infringement while knowing that that change would have the effect of multiplying the value of the applicant's sales and, consequently, the amount of the fine.

80 In the present case, it is true that the statement of objections sent by the Commission indicated that the applicant had participated in the infringement until 11 December 2013 (see paragraph 310 of the statement of objections), whereas, in the contested decision, the Commission states, first, that the duration of the infringement at issue is established until 23 April 2012 and, second, that the applicant participated in it until that date (see recital 971 of the contested decision, as well as Article 1(e) thereof).

81 However, it must be borne in mind that, with a view to observance of the rights of the defence in the conduct of administrative procedures relating to competition policy, Article 27(1) of Regulation No 1/2003 provides that the parties are to be sent a statement of objections. It is settled case-law that the statement of objections must set forth clearly all the essential facts upon which the Commission is relying at that stage of the procedure. This may be done summarily and the decision is not necessarily required to be a replica of the statement of objections, since that statement is a preparatory document containing assessments of fact and of law which are purely provisional in nature (see judgment of 5 December 2013, *SNIA* v *Commission*, C-448/11 P, not published, EU:C:2013:801, paragraphs 41 and 42 and the case-law cited).

82 Since the assessment of the facts set out in the statement of objections can, by definition, only be provisional, a subsequent decision of the Commission cannot be annulled solely on the ground that the definitive conclusions drawn from those facts do not correspond precisely to that provisional assessment (see, to that effect, judgment of 5 December 2013, *SNIA* v *Commission*, C-448/11 P, not published, EU:C:2013:801, paragraph 43).

83 In that context, the Commission is required to hear the addressees of a statement of objections and, where necessary, to take account of any observations made in response to the objections by amending its analysis specifically in order to respect their rights of defence. The Commission must therefore be able to qualify its assessment in its final decision, taking account of the information that emerges from the administrative procedure, either withdrawing objections or allegations that have turned out to be unfounded, or structuring and supplementing in fact and in law its arguments in support of the allegations relied on – on condition, however, that it relies only on facts that the interested parties have had the opportunity to take a position on and that,

during the administrative procedure, it provided the necessary information for their defence (see judgment of 5 December 2013, *SNIA* v *Commission*, C-448/11 P, not published, EU:C:2013:801, paragraph 44 and the case-law cited).

84 As the Court of Justice has already held, in merger control proceedings, the Commission is not required to maintain the factual or legal assessments made in the statement of objections. On the contrary, it must give as reasons for its ultimate decision its final assessments based on the results of the whole of its investigation as they stand at the time the formal investigation procedure is closed. Furthermore, the Commission is not required to explain any differences with respect to its provisional assessments in the statement of objections (see, to that effect and by analogy, judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraphs 64 and 65). That case-law can be applied to a proceeding under Article 101 TFEU, such as the proceeding at issue in the present case.

85 In the present case, it should be noted that the end date of the infringement indicated in the statement of objections was purely provisional and that the Commission could still change that date after issuing that statement of objections, until such time as a final decision was adopted. The Commission cannot therefore be criticised for having taken account, in the contested decision, of an end date of the infringement which was different from the end date it had mentioned in the statement of objections. Accordingly, the contested decision cannot be annulled solely on the ground that, in that decision, the Commission used an end date for the infringement which was different from the end date which it provisionally used at the stage of the statement of objections.

86 In any event, first of all, it is apparent from the applicant's pleadings and from its reply to a question put to it at the hearing that the applicant does not dispute the end date of the infringement indicated in the contested decision. Similarly, it does not call into question the fact that it participated in that infringement from 29 January 2003 to 23 April 2012 and that, consequently, the last full business year of its participation in the infringement corresponds to the period from 1 April 2011 to 31 March 2012.

87 Next, it must be observed that the Commission's decision concerning the fixing of the end date of the infringement is necessarily based on matters relating to the infringement itself and not on the rules applicable to the setting of fines. Consequently, such a decision cannot in itself result in an infringement of those rules.

88 Lastly, in the present case, assuming that the amount of the fine imposed on the applicant is higher on account of the Commission's use of the last full business year of participation in the infringement as the reference year for the calculation of the value of sales, it must be observed that that increase is, in any event, the result of the Commission's application of the rule in point 13 of the 2006 Guidelines and, accordingly, of the method of calculating the amount of the fine provided for in those guidelines.

89 As the Commission contends, the Court has already held that reducing the duration of the infringement may result in a higher fine, where this is the result of the application by that institution of the method of calculating the amount of the fine provided for in the 2006 Guidelines (see, to that effect, judgment of 20 May 2015, *Timab Industries and CFPR* v *Commission*, T-456/10, EU:T:2015:296, paragraphs 81 and 82).

90 Moreover, it must be noted that the applicant has not put forward any detailed argument in support of the alleged infringement of the principle of proportionality. In any event, it does not follow from the foregoing that the Commission infringed the principle of proportionality, within the meaning of the case-law cited in paragraph 63 above, by applying the rule in point 13 of the 2006 Guidelines to the present case and by setting the end date of the infringement as a date prior to that indicated in the statement of objections.

91 The first part of the first plea must therefore be rejected.

– *The second part of the first plea, alleging an infringement of the principles of non-discrimination and equal treatment*

92 In connection with the second part of the first plea, the applicant submits that the Commission infringed the principle of equal treatment and created a likelihood of discrimination. First, it used the last full business year of participation in the infringement in order to determine the value of the applicant's sales, while knowing that this would give rise to a considerably higher fine. Second, it applied three different methodologies to choose the reference year, which resulted in seven different reference years. The Commission used different reference years for several addressees of the contested decision, namely Nippon, Hitachi, Nichicon, Elna and Sanyo.

…

99 As a preliminary point, it should be borne in mind that, according to settled case-law, the principle of equal treatment is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such treatment is objectively justified (see judgments of 5 December 2013, *Solvay* v *Commission*, C-455/11 P, not published, EU:C:2013:796, paragraph 77 and the case-law cited, and of 11 July 2014, *Esso and Others* v *Commission*, T-540/08, EU:T:2014:630, paragraph 101 and the case-law cited).

100 It should also be borne in mind that, to the extent to which reliance is to be placed on the turnover of the undertakings involved in the same infringement for the purpose of determining the proportions between the fines to be imposed, the period to be taken into consideration must be ascertained in such a way that the resulting turnovers are as comparable as possible. Consequently, an individual undertaking cannot compel the Commission to rely, in its case, upon a period different from that used for the other undertakings, unless it proves that, for reasons peculiar to it, its turnover in the latter period does not reflect its true size and economic power or the scale of the infringement which it committed (see judgment of 11 July 2014, *Sasol and Others* v *Commission*, T-541/08, EU:T:2014:628, paragraph 334 and the case-law cited).

101 In addition, it should be borne in mind that, in the calculation of the amount of fines imposed on undertakings which have participated in a cartel, differentiated treatment of the undertakings concerned is inherent in the exercise of the Commission's powers in that area. In exercising its discretion, the Commission is required to fit the penalty to the individual conduct and specific characteristics of those undertakings in order to ensure that, in each case, the rules of EU competition law are fully effective (see judgment of 5 December 2013, *Caffaro* v *Commission*, C-447/11 P, not published, EU:C:2013:797, paragraph 50 and the case-law cited).

102 In the present case, it is apparent from recital 989 of the contested decision that, in order to determine the basic amount of the fines to be imposed, the Commission, relying on the rule in point 13 of the 2006 Guidelines, used the last full year (more specifically the last full business year) of participation in the infringement as the reference period for calculating the value of sales of all the cartel participants, with the exception of Elna and Nippon Chemi-Con.

103 In addition, it is apparent from recital 991 of the contested decision that the Commission calculated the value of sales separately for the two categories of products, namely aluminium electrolytic capacitors and tantalum electrolytic capacitors (see paragraph 24 above).

104 Furthermore, it follows from recital 1007, Table 1, of the contested decision that, taking into account the different periods of infringement and the different business years of the undertakings concerned, the last full year (or even the last full business year) of participation in the infringement was not always the same for the undertakings concerned.

105 In particular, it is apparent from, inter alia, recitals 987 to 991 and 1007 of the contested decision that, as regards the applicant, the Commission found that the applicant had participated in the infringement until 23 April 2012 and that its last full business year of participation before the end of the infringement was April 2011 to March 2012.

106 As regards Nichicon, the Commission found that it had participated in the infringement concerning tantalum electrolytic capacitors until 9 March 2010 and that its last full business year of participation before the end of the infringement concerning those capacitors was April 2008 to March 2009. In addition, the Commission found that Nichicon had participated in the infringement concerning aluminium electrolytic capacitors until 31 May 2010 and that its last full business year of participation before the end of the infringement concerning those capacitors was April 2009 to March 2010.

107 As regards Hitachi, the Commission found that it had participated in the infringement until 18 February 2010 and that its last full business year of participation before the end of the infringement was April 2008 to March 2009.

108 As regards Sanyo, the Commission found that they had participated in the infringement until 19 April 2011 and that their last full business year of participation before the end of the infringement was April 2010 to March 2011.

109 Moreover, as regards Elna and Nippon Chemi-Con, the Commission found that, since Elna and Nippon Chemi-Con had ceased to sell tantalum electrolytic capacitors before the end of their participation in the infringement, account should be taken, as regards those capacitors, of the value of sales during the last full business year in which those undertakings sold them in order to avoid the value of sales from underestimating the economic significance of the infringement. Thus, as regards Elna, the Commission found that, in view of the fact that it had ceased to sell tantalum electrolytic capacitors on 1 August 2010, it was necessary to take 2009 into account in order to determine the value of sales. As regards Nippon Chemi-Con, the Commission found that it was necessary to take into account, as the reference year, first, the last full business year of participation in the infringement as regards the value of sales of aluminium electrolytic capacitors, namely 2011/2012, and, second, the last full business year in which that undertaking sold tantalum electrolytic capacitors, as regards the value of sales of those capacitors, namely 2003/2004 (see recitals 9 and 34 of the contested decision, as well as footnote 1643 thereto).

110 It follows from all of the foregoing that, in the first place, in order to determine the basic amount of the fines to be imposed, first, for all the cartel participants, with the exception of Elna and Nippon Chemi-Con, the Commission used the criterion set out in point 13 of the 2006 Guidelines, taking into account the value of sales achieved during the last full business year of their participation in the infringement. Second, the Commission calculated separately, for all the cartel participants, the relevant value of sales of the two categories of products concerned, namely aluminium electrolytic capacitors and tantalum electrolytic capacitors (see paragraphs 102 and 103 above).

111 It is true that the application of the criterion set out in point 13 of the 2006 Guidelines did not result in the use of the same annual period for the seven undertakings concerned by that criterion, in view of the different infringement periods applied to them (see paragraphs 105 to 108 above).

112 However, it should be noted that the criterion of the last full business year of participation in the infringement was applied by the Commission in a consistent and objective manner to the seven undertakings concerned. The difference observed between the annual periods applied to them is merely the result of the application of that criterion, which takes into account the different periods of participation in the infringement and the different business years of the undertakings concerned (see paragraphs 105 to 108 above).

113 Furthermore, even if the annual periods in question do not correspond to the same calendar year or to the same business year, the fact remains that the turnover achieved by each undertaking during those years is comparable. First, as regards all the cartel participants, with the exception of Elna and Nippon Chemi-Con, those annual periods were chosen according to the same objective criterion, namely the last full business year of their participation in the infringement. Second, as regards all the cartel participants, the Commission followed the same method of calculation, taking into account separately the value of sales of each of the two types of capacitor concerned.

114 Consequently, the method used by the Commission to calculate the value of sales is not arbitrary and does not, in itself, lead to an infringement of the principles of non-discrimination and equal treatment.

115 Moreover, as has been pointed out in paragraph 78 above, the applicant has not shown that the reference year which was applied to it, through the application of that uniform criterion, is not representative either of its true size and its economic power on the market or of the scale of its infringement.

116 In the second place, it follows that the fact that the Commission did not use the last full business year of participation in the infringement as a criterion for determining the value of sales of the tantalum electrolytic capacitors of Elna and Nippon Chemi-Con (see paragraph 109 above) is objectively justified in this case by the difference between the situation of those two undertakings and that of the seven other cartel participants. Unlike the latter undertakings, the first two undertakings had ceased to sell that type of capacitor before the end of their participation in the infringement, which, moreover, is not disputed by the applicant.

117 As is apparent from the case-law of the Court of Justice, where, for a given undertaking, the turnover relating to the reference year adopted in respect of the other parties to the cartel does not constitute a useful and reliable indication of that undertaking's true economic situation

during the infringement period the Commission is entitled to take account of the turnover of that undertaking in a year other than the common reference year in order to be able to assess its financial resources correctly and to ensure that the fine has a sufficiently deterrent effect, provided, however, that the choice of year is made in accordance with a consistent and objectively justified criterion (see judgment of 5 December 2013, *Caffaro* v *Commission*, C-447/11 P, not published, EU:C:2013:797, paragraph 52 and the case-law cited).

118 In that context, the Commission did not err in finding that it would be appropriate to take account of the value of sales during the last full business year in which those two undertakings sold tantalum electrolytic capacitors in order, first, to take account of the true economic situation of those undertakings during the infringement period and, second, to avoid the value of sales from underestimating the economic significance of the infringement.

119 Furthermore, it must be noted, as the Commission did, that the fact that the determination of the value of sales may have been more advantageous for some of the cartel participants than it was for the applicant does not in itself constitute discrimination. The applicant's argument assumes that the determination of the amount of the fine to be imposed by the Commission is the result of a precise arithmetical exercise, likely to lead to the imposition of the lowest possible fine, an assumption which is erroneous in the light of point 6 of the 2006 Guidelines and the case-law of the Court (see, by analogy, judgment of 16 February 2017, *H&R ChemPharm* v *Commission*, C-95/15 P, not published, EU:C:2017:125, paragraph 78 and the case-law cited).

120 Accordingly, contrary to the applicant's assertions, the Commission neither created a likelihood of discrimination nor infringed the principle of equal treatment inasmuch as, first, it chose the general criterion of the last full business year of participation in the infringement to determine the value of the sales of the cartel participants and, second, by considering separately the value of sales of the two types of electrolytic capacitor at issue, it applied a different criterion with regard to two undertakings which, unlike the other participants, had stopped selling one of those types of capacitor several years before the end of their participation in the cartel.

…

126 In those circumstances, it must be held that the applicant has failed to show either that the Commission exceeded the limits of its discretion in setting the amount of the fines or that it infringed the principles of non-discrimination and equal treatment in setting the reference year for the determination of the amount of sales to be taken into account for the purpose of calculating the basic amount of the fines.

127 The second part of the first plea must therefore be rejected, and, accordingly, the first plea in law must be rejected in its entirety.

The second plea in law, concerning the Commission's failure to apply a lower gravity percentage

…

129 The Commission disputes those arguments.

…

131 In that regard, it should be borne in mind that, in accordance with points 19 to 22 of the 2006 Guidelines, one of the two factors on which the basic amount of the fine is to be based is the proportion of the value of the sales concerned, depending on the degree of gravity of the infringement. The assessment of the gravity of the infringement is to be made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case. In order to decide on the level of the proportion of the value of sales to be considered in a given case, the Commission is to have regard to 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 the infringement has been implemented.

132 Furthermore, according to settled case-law, the gravity of the infringement must be assessed on an individual basis. Thus, in order to determine the amount of a fine, it is necessary to take account of the duration of the infringement and of all the factors capable of affecting the assessment of its gravity, such as the conduct of each of the undertakings, the role played by each of them in the establishment of the concerted practices, the profit which they were able to derive from those practices, their size, the value of the goods concerned and the threat that infringements of that type pose to the European Union (see judgments of 8 December 2011, *KME Germany and Others* v *Commission*, C-272/09 P, EU:C:2011:810, paragraph 96 and the case-law cited, and of 26 September 2018, *Infineon Technologies* v *Commission*, C-99/17 P, EU:C:2018:773, paragraph 196 and the case-law cited). Those factors also include the number and intensity of the incidents of anti-competitive conduct (see judgment of 26 September 2018, *Infineon Technologies* v *Commission*, C-99/17 P, EU:C:2018:773, paragraph 197 and the case-law cited).

133 In the present case, it should be noted that, in the contested decision, the Commission found that there was a single and continuous infringement covering the whole EEA consisting of agreements and/or concerted practices that had as their object the coordination of pricing behaviour in relation to the supply of aluminium electrolytic capacitors and tantalum electrolytic capacitors (see paragraphs 10 and 11 above). The Commission held the applicant liable for that single and continuous infringement, but without its liability extending to the CUP meetings, in respect of which the Commission found that the applicant's participation had not been established (see paragraph 18 above).

134 In the light of those circumstances and in particular of the nature and geographic scope of the infringement, the Commission set the proportion of the value of sales to be taken into consideration in order to reflect the gravity of the infringement at 16% (see paragraph 26 above).

135 In addition, the Commission granted the applicant and Nec a 3% reduction in the basic amount of the fine on account of the fact that their participation in the CUP meetings was not established and there was no proof that they had been aware of those meetings (see paragraph 29 above).

136 It follows that, in the present case, first, the Commission applied a gravity percentage of 16% for the infringement and, second, it assessed the applicant's individual conduct and granted it a 3% reduction in the basic amount of the fine on account of mitigating circumstances due to the fact that its participation in the CUP meetings had not been established.

137 That assessment by the Commission cannot be called into question by the applicant's arguments.

138 In the first place, contrary to the applicant's assertions, the Commission's approach of taking into account the fact that the applicant did not participate in the CUP meetings as a mitigating circumstance is not contrary to the case-law.

139 First, it should be noted at the outset that, according to the case-law of the Court of Justice, the Commission may take into account the relative gravity of the participation of an undertaking in an infringement and the particular circumstances of the case when assessing the gravity of the infringement within the meaning of Article 23 of Regulation No 1/2003, or when adjusting the basic amount of the fine in the light of mitigating and aggravating circumstances. Granting such an option to the Commission is consistent with the case-law referred to in paragraph 132 above, since the undertaking's individual conduct must, in any event, be taken into account when the amount of the fine is determined (see, to that effect, judgments of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraphs 104 and 105, and of 26 January 2017, *Laufen Austria* v *Commission*, C-637/13 P, EU:C:2017:51, paragraph 71 and the case-law cited).

140 Thus, even if paragraphs 135 to 138 of the judgment of 16 November 2011, *Sachsa Verpackung* v *Commission* (T-79/06, not published, EU:T:2011:674), and paragraphs 62, 63 and 65 to 67 of the judgment of 10 October 2014, *Soliver* v *Commission* (T-68/09, EU:T:2014:867), support the applicant's position that its non-participation in the CUP meetings should have been taken into account when determining the gravity percentage of the infringement and not as a mitigating circumstance, that approach is not supported by the case-law of the Court of Justice cited in paragraph 139 above, which was confirmed after the delivery of the abovementioned judgments of the General Court. It is apparent from that case-law that the Commission has a discretion to take account of the individual conduct of an undertaking which is specific to one or other of those stages in the calculation of the amount of the fine.

141 It should be added that, in accordance with the principle of equal treatment, within the meaning of the case-law referred to in paragraph 99 above, the taking into account, in assessing the gravity of an infringement, of differences between the undertakings which have participated in the same cartel, in particular in the light of the geographic scope of their respective participation, does not necessarily have to occur when setting the percentages for the 'gravity of the infringement' and for the 'additional amount'. It may also occur at a different stage in the calculation of the amount of the fine, such as when the basic amount is adjusted according to mitigating or aggravating circumstances, pursuant to points 28 and 29 of the 2006 Guidelines.

…

145 In the second place, it should be noted that the applicant's argument that the Commission held it liable for an infringement 'which it did not commit' cannot be accepted.

146 In that regard, it should first be borne in mind that the applicant is not seeking annulment of the contested decision in so far as it holds the applicant liable for the infringement at issue, but in so far as it imposes fines on the applicant.

147 Next, it should be noted that the fact that the applicant did not participate in the CUP meetings does not in any way alter the fact that the applicant participated in an infringement of the same nature and geographic scope as that participated in by the other cartel participants.

148 As is apparent from paragraphs 12 and 13 above, the cartel at issue was organised through multilateral meetings, held at senior sales manager level and higher management level, and through ad hoc bilateral and trilateral contacts between the parties. Those multilateral meetings, which took place every one or two months between 1998 and 2012, were held under a succession of names: 'ECC meetings', 'ATC meetings', 'MK meetings' and 'CUP meetings'. The CUP meetings

were carried out in parallel with and as a complement to the MK meetings, and were 'shadow meetings' of the MK meetings, since they were usually held one week after those meetings. Although the applicant's participation in the CUP meetings has not been established, it is not disputed that the applicant participated in the other meetings, including the MK meetings.

149 In that context, since the applicant participated in the vast majority of the multilateral meetings through which the cartel at issue was organised, the mere fact that it did not participate in the CUP meetings cannot alter the nature or geographic scope of its infringement. Therefore, the applicant is wrong in stating that the scale of the infringement attributed to it is different from that of the infringement attributed to the other cartel participants.

150 Lastly, as regards the gravity percentage applied by the contested decision, it must be borne in mind that, as a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30% of the value of sales (see point 21 of the 2006 Guidelines). In addition, in order to decide on the proportion of the value of sales to be considered in a given case within that 30% limit, the Commission is to have regard to 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 (point 22 of the 2006 Guidelines). Since the most harmful restrictions of competition, such as horizontal price-fixing agreements, must be heavily fined, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale (point 23 of the 2006 Guidelines).

151 In the present case, the Commission set the gravity percentage at 16%, taking account of the fact, first, that horizontal price coordination 'arrangements' were, by their very nature, among the most serious infringements of Article 101 TFEU and, second, that the cartel covered the whole EEA (see paragraph 26 above). Thus, that rate was set at an amount slightly above the middle of the gravity percentage scale, which can go up to 30% of the value of sales. Accordingly, in view of the nature and geographic scope of the infringement, it cannot be held that the gravity percentage of 16% is inappropriate or is too high in the light of the gravity of the infringement committed by the applicant, on the sole ground that it did not participate in the CUP meetings.

152 It follows from all of the foregoing that the fact that, in the present case, the Commission applied a gravity percentage of 16% for all the cartel participants and took account of the applicant's non-participation in the CUP meetings by granting it a reduction in the basic amount of the fine on account of mitigating circumstances cannot constitute an infringement of either Article 23(3) of Regulation No 1/2003 or the principle of personal liability.

153 Consequently, the second plea in law must be rejected.

…

The head of claim seeking a reduction in the amount of the fines imposed on the applicant

156 In the alternative, the applicant asks the Court to exercise its unlimited jurisdiction to recalculate or reduce the amount of the fines imposed on it. The applicant submits that the fines should be recalculated, first, by using in that calculation the average of its sales in the EEA throughout the infringement period in respect of which figures are available and, second, by applying a reduction in the gravity percentage of at least 3%.

…

166 In the first place, as regards the applicant's request that the Court recalculate the value of sales relevant for the calculation of the basic amount of the fine, it should be noted at the outset that the applicant does not present a real alternative to the criterion set out in point 13 of the 2006 Guidelines, used by the Commission. The period indicated by the applicant in order to establish an 'average' value of sales, namely August 2007 to March 2012, appears to have been chosen by the applicant for the sole reason that it is the period for which figures are available.

167 Accordingly, the applicant's proposal for the application of a criterion for determining the value of sales which, first, provides no indication that the value of sales thus calculated will be representative either of its size and economic power or of the scale of the infringement and, second, does not make it possible to comply with the principle of equal treatment, as indeed the applicant itself admits (see paragraph 49 above), cannot be accepted.

168 As is apparent from paragraphs 112 and 113 above, the criterion of the last full business year of participation in the infringement was applied, in the present case, in a consistent and objective manner with regard to all the cartel participants in a comparable or identical situation. In addition, it is apparent that, in the case of Elna and Nippon Chemi-Con, they had ceased to sell tantalum electrolytic capacitors before the end of their participation in the infringement and were therefore in a different situation from that of the other seven participants in the infringement.

169 Consequently, the fact that the Commission used a different year to determine the value of sales of the tantalum electrolytic capacitors of Elna and Nippon Chemi-Con is objectively justified in the present case by the different situation of those two undertakings, which had ceased to sell that type of capacitor before the end of their participation in the infringement. In that context, neither the Commission nor the Court can apply identical criteria to different situations, otherwise the value of sales used would underestimate the economic significance of the infringement (see paragraphs 116 and 118 above).

170 Accordingly, there can be no justification, on the basis of, inter alia, equal treatment and proportionality, for altering the determination of the value of sales relevant for the calculation of the basic amount of the applicant's fine, as established in the contested decision.

…

182 The head of claim seeking a reduction in the amount of the fines imposed on the applicant must therefore be rejected and, consequently, the action must be dismissed in its entirety.

…

On those grounds,

THE GENERAL COURT (Ninth Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders Tokin Corp. to bear its own costs and to pay the costs incurred by the European Commission.

Costeira Gratsias Kancheva

Delivered in open court in Luxembourg on 29 September 2021.

[Signatures]