



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

26 January 2017*

(Appeal — Agreements, decisions and concerted practices — Bathroom fittings and fixtures markets of Belgium, Germany, France, Italy, the Netherlands and Austria — Coordination of selling prices and exchange of sensitive business information — Regulation (EC) No 1/2003 — Article 23(2) — Ceiling of 10% of turnover — 2006 Guidelines on the method of setting fines — Principle of non-retroactivity — Exercise of unlimited jurisdiction — Excessive duration of the proceedings)

In Case C-604/13 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 25 November 2013,

Aloys F. Dornbracht GmbH & Co. KG, established in Iserlohn (Germany), represented by H. Janssen and T. Kapp, Rechtsanwälte,

appellant,

the other parties to the proceedings being:

European Commission, represented by F. Castillo de la Torre and L. Malferrari, acting as Agents, and by A. Böhlke, Rechtsanwalt, with an address for service in Luxembourg,

defendant at first instance,

Council of the European Union,

intervener at first instance,

THE COURT (First Chamber),

composed of A. Tizzano, Vice-President of the Court, acting as President of the First Chamber, M. Berger, E. Levits, S. Rodin (Rapporteur) and F. Biltgen, Judges,

Advocate General: M. Wathelet,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 10 September 2015,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* * Language of the case: German

Judgment

- 1 By its appeal, Aloys F. Dornbracht GmbH & Co. KG ('Aloys F. Dornbracht' or 'the appellant') asks the Court of Justice to set aside the judgment of the General Court of the European Union of 16 September 2013, *Dornbracht v Commission* (T-386/10, 'the judgment under appeal', EU:T:2013:450), by which the General Court dismissed its action for annulment of Commission Decision C(2010) 4185 final of 23 June 2010 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case COMP/39092 — Bathroom Fittings and Fixtures) ('the decision at issue'), in so far as that decision related to it, or, in the alternative, to reduce the amount of the fine imposed on it in that decision.

Legal context

Regulation (EC) No 1/2003

- 2 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) provides, in Article 23(2) and (3):

'2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article [101] or [102 TFEU]...

...

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

...

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.'

The 2006 Guidelines

- 3 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') state, in point 2, that, so far as concerns the setting of fines, 'the Commission must have regard both to the gravity and to the duration of the infringement' and that 'the fine imposed may not exceed the limits specified in Article 23(2), second and third subparagraphs, of Regulation No 1/2003'.

- 4 Points 19, 21, 23 and 37 of the 2006 Guidelines state:

'19. 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.

...

21. 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.

...

23. Horizontal price-fixing ... agreements ..., which are usually secret, are, by their very nature, among the most harmful restrictions of competition. As a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale.

...

37. Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in point 21.'

Background to the dispute and the decision at issue

- 5 The background to the dispute was set out in paragraphs 1 to 29 of the judgment under appeal and may be summarised as follows.
- 6 The appellant is a company governed by German law which manufactures, inter alia, taps and fittings.
- 7 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 submitted an application for immunity from fines under the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3) or, in the alternative, for a reduction of any fines that might be imposed on them.
- 8 On 9 and 10 November 2004, the Commission conducted unannounced inspections at the premises of various companies and national industry associations operating in the bathroom fittings and fixtures sector. Between 15 November 2005 and 16 May 2006, the Commission sent requests for information to those companies and associations, including the appellant. It then, on 26 March 2007, adopted a statement of objections. The statement of objections was notified, inter alia, to the appellant.
- 9 Following a hearing held from 12 to 14 November 2007, the sending, on 9 July 2009, of a letter of facts and, subsequently, further requests for information that were addressed to, amongst others, the appellant, the Commission, on 23 June 2010, adopted the decision at issue. By that decision, it found that there had been an infringement of Article 101(1) TFEU and Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) in the bathroom fittings and fixtures sector. That infringement, in which 17 undertakings had allegedly participated, was said to have taken place over various periods between 16 October 1992 and 9 November 2004 and to have taken the form of anticompetitive agreements or concerted practices covering the territory of Belgium, Germany, France, Italy, the Netherlands and Austria. According to the decision at issue, the products covered by the cartel were bathroom fittings and fixtures belonging to the following three product sub-groups: taps and fittings, shower enclosures and accessories, and ceramic sanitary ware (ceramics).
- 10 As regards, more specifically, the appellant, which manufactures items belonging to the first of those three product sub-groups, the Commission found, in Article 1(2) of the decision at issue, that the infringement consisted in the participation, 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.
- 11 On that ground, the Commission imposed a fine of EUR 12 517 671 on the appellant in Article 2(6) of the decision at issue.

- 12 For the purpose of calculating that fine, the Commission took into account the 2006 Guidelines, in particular points 20 to 24 thereof.

Proceedings before the General Court and the judgment under appeal

- 13 By application lodged at the General Court Registry on 8 September 2010, Aloys F. Dornbracht brought an action for annulment of the decision at issue before the General Court, relying on eight pleas in law.
- 14 The first plea alleged that the Commission had made an error of assessment, in the light of Article 23(3) of Regulation No 1/2003, in the finding of the infringement alleged to have been committed and the fixing of the amount of the fine imposed on Aloys F. Dornbracht. The second plea alleged infringement of Article 23(3) of that regulation, resulting from the misapplication of the 10% ceiling laid down in Article 23(2) of that regulation. The third plea alleged a failure to take into account the individual nature of Aloys F. Dornbracht's participation in the infringement found, in breach of the principle of equal treatment. The fourth plea alleged a failure to take into account other, earlier Commission decisions, in breach of the principle of equal treatment. The fifth plea alleged a failure to take into account Aloys F. Dornbracht's limited economic capacity, in breach of the principle of proportionality. The sixth plea alleged breach of the principle of non-retroactivity as a result of the application of the 2006 Guidelines. The seventh plea alleged breach by Article 23(3) of Regulation No 1/2003 of the principle *nullum crimen, nulla poena sine lege*. The eighth plea alleged that the 2006 Guidelines are unlawful, in that they afford the Commission too much discretion.
- 15 By the judgment under appeal, the General Court dismissed the action in its entirety.

The forms of order sought before the Court of Justice

- 16 The appellant claims that the Court should:
- set aside the judgment under appeal;
 - annul the decision at issue in so far as it concerns the appellant;
 - in the alternative, reduce in an appropriate manner the amount of the fine imposed on the appellant in the decision at issue; and
 - order the Commission to pay the costs.
- 17 The Commission contends that the Court should:
- dismiss the appeal; and
 - order the appellant to pay the costs.

The appeal

- 18 The appellant puts forward six grounds in support of its appeal. The first ground of appeal alleges infringement of Article 23(3) of Regulation No 1/2003 and breach of the principle *nullum crimen, nulla poena sine lege* and of the principles of equal treatment and of proportionality as a result of the misapplication of the ceiling provided for in Article 23(2) of that regulation. By its second ground of appeal, the appellant criticises the judgment under appeal in that the General Court wrongly, it claims, rejected the plea of illegality raised against the 2006 Guidelines. The third ground of appeal

alleges that the General Court failed to penalise the Commission's infringement of point 37 of the 2006 Guidelines. By its fourth ground of appeal, the appellant relies on a breach of the principle of non-retroactivity arising from the application of the 2006 Guidelines to the present case. The fifth ground of appeal alleges errors of law in the calculation of the amount of the fine imposed on the appellant. Lastly, the sixth ground of appeal alleges breach of the principle that the proceedings must be concluded within a reasonable time.

The first ground of appeal, alleging the misapplication of the 10% limit laid down in Article 23(2) of Regulation No 1/2003

Arguments of the parties

- 19 By its first ground of appeal, directed against paragraphs 213 to 227 of the judgment under appeal, the appellant complains that the General Court infringed Article 23(3) of Regulation No 1/2003, as well as the principle *nullum crimen, nulla poena sine lege* and the principles of equal treatment and of proportionality, when it held that the 10% limit laid down in Article 23(2) of that regulation imposes a ceiling which applies only to the final amount of the fine, thus denying that the determination of the amount of the fine imposed by the Commission in the present case was unlawful and making it impossible for the General Court itself to reduce it. Such an interpretation would mean that a fine of 10% of the total turnover of the undertaking concerned would be imposed in virtually every case, irrespective of the gravity and duration of the infringement at issue.
- 20 Referring, in particular, to a decision of the Kartellsenat of the Bundesgerichtshof (Cartel Panel of the Federal Court of Justice, Germany), the appellant submits that the 10% limit provided for in Article 23(2) of Regulation No 1/2003 imposes no such ceiling but sets the upper limit of the scale of fines, which should be applied only in respect of the most serious infringements. Such an approach would enable appropriate account to be taken of the gravity and duration of an infringement, as provided for in Article 23(3) of that regulation.
- 21 According to the Commission, the first ground of appeal must be rejected as inadmissible or, in any event, as entirely unfounded.

Findings of the Court

- 22 In so far as, on the one hand, by its first ground of appeal, the appellant essentially complains that the General Court misinterpreted Article 23(2) of Regulation No 1/2003 in holding that it imposes a ceiling, it must be noted that the General Court, without adopting that position, correctly stated in paragraph 216 of the judgment under appeal that it is apparent from the settled case-law of the Court of Justice that it is only the final amount of the fine imposed which must comply with that upper limit of 10% of turnover referred to in that provision, 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, in particular, judgments of 28 June 2005, *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 277 and 278; of 29 June 2006, *SGL Carbon v Commission*, C-308/04 P, EU:C:2006:433, paragraph 82; and of 12 July 2012, *Cetarsa v Commission*, C-181/11 P, not published, EU:C:2012:455, paragraph 80).
- 23 On the other hand, as regards the complaints that the General Court infringed Article 23(3) of Regulation No 1/2003 and, therefore, the principle *nullum crimen, nulla poena sine lege* and the principles of equal treatment and of proportionality on the ground that it failed to take into account in an appropriate manner the gravity and duration of the infringements, it should be borne in mind that the Court has consistently held that the fact that, owing to the application of the limit of 10% of

turnover referred to in the second subparagraph of Article 23(2) of that regulation, 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 upper limit to the final amount (see, in particular, judgments of 28 June 2005, *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 279, and of 12 July 2012, *Cetarsa v Commission*, C-181/11 P, not published, EU:C:2012:455, paragraph 81).

- 24 That upper limit 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 (judgments of 28 June 2005, *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 280, and of 12 July 2012, *Cetarsa v Commission*, C-181/11 P, not published, EU:C:2012:455, paragraph 82).
- 25 The 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. That upper limit thus has a distinct and autonomous objective by comparison with the criteria of gravity and duration of the infringement (judgments of 28 June 2005, *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 281 and 282, and of 12 July 2012, *Cetarsa v Commission*, C-181/11 P, not published, EU:C:2012:455, paragraph 83).
- 26 It follows that the arguments to the effect that insufficient account was taken of the gravity and duration of the infringements, owing to the application of the upper limit provided for in Article 23(2) of Regulation No 1/2003, must be rejected.
- 27 In those circumstances, the first ground of appeal must be rejected as unfounded.

The second ground of appeal, raising a plea of illegality against the 2006 Guidelines

Arguments of the parties

- 28 By its second ground of appeal, the appellant submits that the General Court infringed Article 23(3) of Regulation No 1/2003 by rejecting the plea of illegality raised against the 2006 Guidelines on the basis that they do not take into consideration the criteria of the duration and gravity of infringements committed by ‘mono-product’ undertakings.
- 29 In that regard, referring to the arguments set out in the application at first instance, the appellant maintains that the 2006 Guidelines are unlawful on the ground that they breach the principles of legality and of legal certainty and that, in any event, they make no special provision for ‘mono-product’ undertakings.
- 30 The appellant observes that, unlike the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3; ‘the 1998 Guidelines’), the 2006 Guidelines result, as a general rule, in the 10% limit being exceeded, particularly in the case of non-diversified ‘mono-product’ undertakings. The application of the method of setting fines described by the 2006 Guidelines means that the criteria of the duration and gravity of infringements committed by those undertakings, to which Article 23(3) of Regulation No 1/2003 refers, are not, therefore, taken into account in an appropriate manner. The virtually automatic imposition of fines amounting to 10% of turnover is also contrary to the principle of equal treatment.
- 31 According to the Commission, the second ground of appeal must be rejected as inadmissible or, in any event, as unfounded.

Findings of the Court

- 32 According to the settled case-law of the Court of Justice, it follows from Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) and Article 169(2) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment or order which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal. Where, without even including an argument specifically identifying the error of law allegedly vitiating the judgment under appeal, an appeal merely reproduces verbatim the pleas in law and arguments previously submitted to the General Court, including those based on facts expressly rejected by that Court, it fails to satisfy the requirement to state reasons under those provisions. In reality, such an appeal amounts to no more than a request for re-examination of the application submitted to the General Court, which falls outside the jurisdiction of the Court of Justice (see, in particular, judgments of 30 June 2005, *Eurocermex v OHIM*, C-286/04 P, EU:C:2005:422, paragraphs 49 and 50, and of 12 September 2006, *Reynolds Tobacco and Others v Commission*, C-131/03 P, EU:C:2006:541, paragraphs 49 and 50).
- 33 It must be held that, in so far as the second ground of appeal advanced by the appellant is a complaint that the General Court rejected the plea of illegality raised against the 2006 Guidelines, it merely reproduces the arguments already put forward at first instance.
- 34 Consequently, this ground of appeal must be rejected as inadmissible.

The third ground of appeal, alleging that, by fixing set amounts, the Commission failed to take account of the appellant's individual participation, contrary to the principle of equal treatment

- 35 By the third ground put forward in support of its appeal, the appellant complains that the General Court, in essence, erred in law in its examination of the exercise by the Commission of its discretion in the setting of fines, described in point 37 of the 2006 Guidelines.
- 36 It must be held that, by this ground of appeal, the appellant fails to identify the paragraphs of the judgment under appeal which are allegedly vitiated by such an error.
- 37 Consequently, in accordance with the case-law cited in paragraph 32 of the present judgment, this ground must also be rejected as inadmissible.

The fourth ground of appeal, alleging breach of the principle of non-retroactivity

Arguments of the parties

- 38 By its fourth ground of appeal, the appellant complains that the General Court infringed the principle of non-retroactivity, notably in paragraphs 87 and 90 of the judgment under appeal, when it held that the Commission's setting of the fine on the basis of the 2006 Guidelines was lawful, although the alleged infringement was committed under the 1998 Guidelines.
- 39 The appellant submits in this regard that it is true that the Court ruled in its judgment of 28 June 2005, *Dansk Rørindustri and Others v Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 231), that the Commission could, without disregarding the principle of non-retroactivity, calculate the amount of the fine on the basis of the 1998 Guidelines, even though they had been adopted after the infringement at issue in that case was committed, since those guidelines and the new method of calculation they contained were reasonably foreseeable at the time when that infringement was committed. However, according to the appellant,

in the case giving rise to that judgment, there were no guidelines at the time when the infringement was committed, and therefore the question that arose was whether or not the fine had to be calculated on the basis of the new guidelines which the Commission first adopted in 1998. Contrary to what the General Court found in the judgment under appeal, that situation should, in the appellant's submission, be distinguished from a situation in which guidelines were applicable at the time when the infringement was committed but have been replaced or amended by new guidelines since that infringement. In the latter situation, the question arises as to which guidelines, the old or the new, should be applied for the purposes of calculating the amount of the fine. The General Court's application in the second situation of the approach adopted in the judgment of 28 June 2005, *Dansk Rørindustri and Others v Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408), is, the appellant claims, contrary to the principles of equal treatment and of the protection of legitimate expectations.

- 40 In any event, if the guidelines could be amended at any time with retroactive effect, as the General Court held, they would be unable to fulfil the function which, according to the case-law of the Court of Justice, has been conferred on them of ensuring legal certainty on the part of undertakings.
- 41 The Commission contends that the fourth ground of appeal should be rejected. It maintains, in particular, that the proper application of EU competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy.

Findings of the Court

- 42 It should be noted that it follows from well-established case-law that the application, for the purpose of calculating fines imposed for competition infringements, of new guidelines, such as the 2006 Guidelines, and in particular of a new method of calculating the amount of a fine contained therein, even to infringements committed before the adoption or the amendment of those guidelines, does not breach the principle of non-retroactivity in so far as those new guidelines and that new method were reasonably foreseeable at the time when the infringements in question were committed (see, to that effect, in particular, judgments of 28 June 2005, *Dansk Rørindustri and Others v Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 217, 218, and 227 to 232; of 18 May 2006, *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*, C-397/03 P, EU:C:2006:328, paragraph 25; of 18 July 2013, *Schindler Holding and Others v Commission*, C-501/11 P, EU:C:2013:522, paragraph 75; and of 14 September 2016, *Ori Martin and SLM v Commission*, C-490/15 P and C-505/15 P, not published, EU:C:2016:678, paragraphs 82 to 94).
- 43 In holding, in paragraph 90 of the judgment under appeal, that the Commission had not breached the principle of non-retroactivity by applying the 2006 Guidelines in order to calculate the fine for the infringement committed by the appellant before those guidelines were adopted, the General Court did not, therefore, make any error of law.
- 44 It follows that the fourth ground of appeal must be rejected as unfounded.

The fifth ground of appeal, relating to errors of law in the calculation of the amount of the fine

Arguments of the parties

- 45 By its fifth ground of appeal, which is in three parts, the appellant submits that the General Court made errors of law in the calculation of the amount of the fine imposed on the appellant.

- 46 By the first part of that ground of appeal, the appellant submits, in the first place, that, having found in paragraphs 165 to 168 of the judgment under appeal that the Commission ought, when calculating the amount of the fine imposed on the appellant, to have taken into account the fact that the geographic scope of the infringement covered the territories of two Member States and not of six, the General Court was not entitled to apply, in paragraphs 249 and 250 of the judgment under appeal, the same multipliers for the ‘gravity of the infringement’ and for the ‘additional amount’ as those set by the Commission in the decision at issue and as those applied to other members of the present cartel who participated in the infringement in three to six Member States. In so doing, the General Court failed to make the penalties imposed on the undertakings concerned specific to the offender.
- 47 In the second place, the appellant argues that the General Court made an error of assessment in paragraph 249 of the judgment under appeal by taking into account the duration of the infringement in the context of the assessment of its gravity, even though it would have been appropriate to take into account the gravity and the duration of the infringement separately. In so doing, the General Court had attributed excessive significance to the criterion of the duration of the infringement.
- 48 In the third place, the matters taken into account by the General Court in determining the amount of the fine imposed did not appear in the judgment under appeal, thus preventing any review of that amount; therefore, the judgment under appeal is, in the appellant’s submission, vitiated by a failure to state reasons.
- 49 By the second part of the fifth ground of appeal, the appellant complains that the General Court failed to identify a number of errors of assessment on the part of the Commission and failed to take certain matters into account in relation to the setting of the amount of the fine, including the fact that the products of the appellant covered by the infringement belong to only one of the three groups of products covered by the agreements at issue. Accordingly, the General Court should, in paragraphs 168 to 179 of the judgment under appeal, have taken into account the fact that an infringement is less serious if the undertaking participates in it only in respect of products belonging to just one of the three groups concerned. Furthermore, the finding in paragraph 114 of the judgment under appeal that the appellant delayed in disputing its awareness of the fact that the infringement concerned three product groups is inaccurate.
- 50 By the third part of that ground of appeal, concerning paragraphs 192 to 200 of the judgment under appeal, the appellant complains that the General Court failed, contrary to the requirements of the 1998 Guidelines, to take into account the fact that the appellant played only a ‘follow-my-leader’ role in bringing about the infringement.
- 51 The Commission contests the merits of the fifth ground of appeal.

Findings of the Court

- 52 As a preliminary point, it must be noted that the system of judicial review of Commission decisions relating to proceedings under Articles 101 and 102 TFEU consists in a review of the legality of the acts of the institutions for which provision is made in Article 263 TFEU, which may be supplemented, pursuant to Article 261 TFEU and at the request of applicants, by the General Court’s exercise of unlimited jurisdiction with regard to the penalties imposed in that regard by the Commission (see, to that effect, judgments of 10 July 2014, *Telefónica and Telefónica de España v Commission*, C-295/12 P, EU:C:2014:2062, paragraph 42, and of 21 January 2016, *Galp Energía España and Others v Commission*, C-603/13 P, EU:C:2016:38, paragraph 71).
- 53 The scope of that unlimited jurisdiction of the General Court is strictly limited, unlike the review of legality provided for in Article 263 TFEU, to determining the amount of the fine. It concerns solely the assessment by that Court of the fine imposed by the Commission, to the exclusion of any

alteration of the constituent elements of the infringement lawfully determined by the Commission in the decision under examination by the General Court (see, to that effect, judgment of 21 January 2016, *Galp Energía España and Others v Commission*, C-603/13 P, EU:C:2016:38, paragraphs 76 and 77).

54 Thus, in so far as the fifth ground of appeal relates to errors of law which the General Court is said to have made in calculating the amount of the fine imposed on the appellant, it concerns the exercise by the General Court of its unlimited jurisdiction as regards the setting of that fine, in particular in paragraphs 244 to 251 of the judgment under appeal.

– The second and third parts of the fifth ground of appeal

55 With regard to the second and third parts of the fifth ground of appeal, which it is appropriate to examine first, and by which the appellant complains that the General Court failed to take into account, for the purposes of setting the amount of the fine, the fact that the appellant had participated in the infringement only in respect of products in just one of the three groups concerned and had merely played a ‘follow-my-leader’ role in bringing about that infringement, it must be noted that, in its review of the legality of the decision at issue, notably in paragraphs 114, 169 to 173 and 192 to 200 of the judgment under appeal, the General Court rejected the arguments put forward by the appellant on that basis.

56 It follows that the General Court cannot be criticised for having failed to assess those circumstances when, in the exercise of its unlimited jurisdiction, it set the amount of the fine to be imposed.

57 In any event, in so far as the fifth ground of appeal, or the second and third parts thereof, concerns the findings of the General Court in the context of its review of the legality of the decision at issue, culminating in the rejection of the appellant’s arguments relating to those very circumstances, it cannot succeed.

58 As regards, first, the argument put forward in the second part of that ground of appeal, alleging that the General Court made an error of assessment as to the product groups to which the infringement the appellant is said to have committed related, it must be noted, as the General Court stated in paragraph 51 of the judgment under appeal, that, in accordance with Article 44(1)(c) of the Rules of Procedure of the General Court, in the version in force at the date of the judgment under appeal, the subject matter of the dispute and a summary of the pleas in law relied on constitute two essential elements which must be included in the application initiating proceedings, and that, under Article 48(2) of those rules of procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or fact which have come to light in the course of the procedure (see, to that effect, judgments of 12 November 2009, *SGL Carbon v Commission*, C-564/08 P, not published, EU:C:2009:703, paragraph 21, and of 3 April 2014, *France v Commission*, C-559/12 P, EU:C:2014:217, paragraph 38). As the General Court found, however, the appellant disputed its awareness of the fact that the infringement covered three product sub-groups only in its reply before the General Court, and that argument did not amplify a complaint made in the application at first instance. Consequently, the General Court was fully entitled to reject it as being out of time, in paragraphs 53, 54, 114 and 171 of the judgment under appeal.

59 In those circumstances, the appellant cannot put that argument forward at the stage of the appeal before the Court of Justice.

60 In so far as, by the second part of its fifth ground of appeal, the appellant maintains that the General Court should have taken into account the fact that its activity was limited to only one of the three product sub-groups, suffice it to note that the General Court did in fact take that into account. Thus,

in paragraph 154 of the judgment under appeal, the General Court stated that that fact had been taken into account by the Commission when calculating the value of sales on the basis of which the fine was calculated.

61 Accordingly, the second part of the fifth ground of appeal is, in part, inadmissible and, in part, unfounded.

62 Secondly, with regard to the complaint raised in the third part of this ground of appeal, according to which the General Court did not draw the appropriate conclusions from the appellant's exclusively 'follow-my-leader' role when it set the fine to be imposed, it must be noted that that complaint is based on the premiss that the 1998 Guidelines, not those of 2006, were required to be applied in the present case. Since, in this case, the Commission applied the 2006 Guidelines, on which the General Court decided to draw in paragraph 246 of the judgment under appeal, and those guidelines do not provide for account to be taken of an exclusively passive or 'follow-my-leader' role in bringing about the infringement, that complaint must be rejected.

63 Thus, the General Court was fully entitled to consider, in paragraph 194 of the judgment under appeal, that the exclusively passive or 'follow-my-leader' role of an undertaking no longer constituted a mitigating circumstance according to those guidelines, and to find, in paragraph 197 of that judgment, that, in the light of the third indent of point 29 of the 2006 Guidelines, in order to be given the benefit of mitigating circumstances, the appellant would have been required to prove that it had refrained from applying the offending agreements, which, however, it had failed to do.

64 It follows from the foregoing that the third part of the fifth ground of appeal is unfounded.

– The first part of the fifth ground of appeal

65 As regards, in the first place, the appellant's arguments alleging that the General Court made errors of assessment in relation in particular to the geographic scope of the infringement when determining, in the exercise of its unlimited jurisdiction, the amount of the fine, it should be noted at the outset that the General Court alone has jurisdiction to examine how in each particular case the Commission assessed the gravity of unlawful conduct. In an appeal, the purpose of review by the Court of Justice is, first, to examine to what extent the General Court took into consideration, in a legally correct manner, all the essential factors to assess the gravity of particular conduct in the light of Article 101 TFEU and Article 23 of Regulation No 1/2003 and, secondly, to consider whether the General Court responded to a sufficient legal standard to all the arguments raised in support of the claim for cancellation or reduction of the fine (see, *inter alia*, judgments of 17 December 1998, *Baustahlgewebe v Commission*, C-185/95 P, EU:C:1998:608, paragraph 128; of 28 June 2005, *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 244; and of 5 December 2013, *Solvay Solexis v Commission*, C-449/11 P, not published, EU:C:2013:802, paragraph 74).

66 On the other hand, it must be borne in mind that it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the General Court exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of EU law (judgments of 28 June 2005, *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 245, and of 11 July 2013, *Gosselin Group v Commission*, C-429/11 P, not published, EU:C:2013:463, paragraph 87).

67 It should also be recalled that, according to the settled case-law of the Court, in setting the amount of fines, regard must be had to the duration of the infringement and to all the factors capable of affecting the assessment of the gravity of that infringement (judgments of 28 June 2005, *Dansk Rørindustri and*

Others v Commission, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 240, and of 11 July 2013, *Team Relocations and Others v Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 98).

- 68 The factors capable of affecting the assessment of the gravity of the infringements include the conduct of each of the undertakings, the role played by each of them in the establishment of the cartel, the profit which they were able to derive from it, their size, the value of the goods concerned and the threat that infringements of that type pose to the objectives of the European Union (judgments of 28 June 2005, *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 242, and of 11 July 2013, *Team Relocations and Others v Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 100).
- 69 In the present case, so far as concerns the application by the General Court of the same multipliers for the ‘gravity of the infringement’ and for the ‘additional amount’ as those set by the Commission in the decision at issue (15%), even though the General Court found that the geographic scope of the infringement covered two, not six, Member States, it should be noted that, having identified, in paragraphs 156 to 168 of the judgment under appeal, the errors made by the Commission in its assessment of that geographic scope, the General Court, in the exercise of its unlimited jurisdiction (as is apparent, in particular, from paragraphs 242 and 244 to 251 of that judgment), assessed the conclusions to be drawn from the Commission’s errors as regards the setting of the amount of the fine imposed.
- 70 First of all, in paragraph 246 of the judgment under appeal, the General Court found that it was appropriate in the present case to draw on the 2006 Guidelines in recalculating the fine.
- 71 Next, the General Court considered, in paragraph 247 of that judgment, that the Commission’s errors of assessment, which lay in the fact that the Commission had set the ‘gravity of the infringement’ and the ‘additional amount’ multipliers at 15% on the basis that the geographic scope of the infringement covered the territories of six Member States, required only that it substitute its own assessment for the Commission’s in so far as setting those multipliers was concerned, in the light, in particular, of the geographic scope of the infringement, which had to be limited to the territories of two Member States. In the light of paragraphs 57 to 64 of the present judgment, the General Court was fully entitled, however, not to take into account for that purpose the appellant’s assertion that the infringement concerned only one of the three product sub-groups or the ‘follow-my-leader’ role of the appellant.
- 72 In order to calculate the fine, the General Court considered, in paragraph 248 of the judgment under appeal, that the Commission was fully entitled to find, in Article 1(2) and recitals 872 and 873 of the decision at issue, that the appellant 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 at issue, in the territories of Germany and Austria.
- 73 Lastly, in paragraph 249 of the judgment under appeal, in view not only of the very nature of that infringement, but also its geographic scope — the territory of two Member States — and its long duration, the General Court found that the infringement was among the most harmful restrictions and considered that, having regard to point 23 of the 2006 Guidelines, for such an infringement, the proportion of the value of sales of 15% corresponded to a minimum.
- 74 Consequently, in paragraph 250 of the judgment under appeal, the General Court considered it appropriate, for the calculation of the basic amount of the fine imposed on the appellant, to set both the ‘gravity of the infringement’ multiplier and the ‘additional amount’ multiplier at 15%.

- 75 It follows from the foregoing that, contrary to what is claimed by the appellant, the General Court did take into account the fact that the geographic scope of the infringement covered only two Member States and not six. However, the General Court found that, despite the more limited geographic scope, a rate of 15% was appropriate in the light, *inter alia*, of the nature of the infringement. It should be pointed out in that respect that, having regard to point 23 of the 2006 Guidelines, on which the General Court decided to draw in this case, the 15% multipliers for the ‘gravity of the infringement’ and for the ‘additional amount’ were warranted in view of the very nature of the infringement at issue, since, as the General Court noted, it is among the most harmful restrictions of competition for the purpose of point 23 of the 2006 Guidelines and that rate is the lowest rate on the scale of penalties prescribed for such infringements under those guidelines (in that regard, see, to that effect, judgments of 11 July 2013, *Ziegler v Commission*, C-439/11 P, EU:C:2013:513, paragraphs 124 and 125, and of 11 July 2013, *Team Relocations and Others v Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 125). Accordingly, the appellant is wrong to criticise the General Court for having failed to take into account the geographic scope of the infringement when determining the multipliers for the ‘gravity of the infringement’ and the ‘additional amount’, and for having set those multipliers at 15%.
- 76 That conclusion cannot be called into question on the ground that the rate is the same as that set for other undertakings whose participation in the infringement covered a larger geographic area than that established in the appellant’s case, which, according to the appellant, is contrary to the principle of equal treatment.
- 77 It will be recalled that that principle is a general principle of EU law enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union. According to settled case-law, that principle requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified (see, *inter alia*, judgment of 12 November 2014, *Guardian Industries and Guardian Europe v Commission*, C-580/12 P, EU:C:2014:2363, paragraph 51).
- 78 Observance of that principle is binding, in particular, on the General Court not only in the exercise of its review of the legality of the Commission’s decision imposing fines but also in the exercise of its unlimited jurisdiction. When the amount of the fines imposed is determined, the exercise of such jurisdiction cannot result in discrimination between undertakings which have participated in an agreement or concerted practice contrary to Article 101(1) TFEU (see, to that effect, judgment of 18 December 2014, *Commission v Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraph 77).
- 79 It follows from the case-law of the Court of Justice, however, that the taking into account, by virtue of the principle of equal treatment, of differences between the undertakings that have participated in a single cartel (in particular with regard to the geographic scope of their respective involvement) need not necessarily occur when the multipliers for the ‘gravity of the infringement’ and for the ‘additional amount’ are set but may occur at another stage in the setting of the fine, such as when the basic amount of the fine is adjusted in the light of mitigating and aggravating circumstances under points 28 and 29 of the 2006 Guidelines (see, to that effect, judgments of 11 July 2013, *Gosselin Group v Commission*, C-429/11 P, not published, EU:C:2013:463, paragraphs 96 to 100, and of 11 July 2013, *Team Relocations and Others v Commission*, C-444/11 P, not published, EU:C:2013:464, paragraphs 104 and 105).
- 80 As the Commission has observed, such differences may also be reflected by means of the value of sales that is used in calculating the basic amount of the fine inasmuch as that value reflects, for each participating undertaking, the scale of its involvement in the infringement in question, in accordance with point 13 of the 2006 Guidelines, under which it is possible to take as a starting point for the calculation of the fines an amount which reflects the economic significance of the infringement and the size of the undertaking’s contribution to it (see, to that effect, judgment of 11 July 2013, *Team Relocations and Others v Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 76).

- 81 Consequently, since it is not disputed that the basic amount of the fine imposed on the appellant was determined by reference to the value of its sales, the General Court could, in paragraph 250 of the judgment under appeal, set the multipliers for the ‘gravity of the infringement’ and for the ‘additional amount’ at 15% of that value without infringing the principle of equal treatment.
- 82 As regards, in the second place, the argument that the General Court erred, in paragraph 249 of the judgment under appeal, in assessing the gravity of the infringement in the light of the duration of Aloys F. Dornbracht’s participation in the infringement, this must be rejected as ineffective, in view of the findings in paragraph 75 of the present judgment.
- 83 In any event, it cannot be inferred from the fact that the General Court mentioned in that paragraph, among other criteria such as the nature of the infringement at issue, the long duration of the infringement, that the General Court thus attributed excessive significance to the latter criterion.
- 84 As regards, in the third place, the complaint as to a failure to state reasons, it should be borne in mind that the obligation to state the reasons on which a judgment is based, to which the General Court is subject under Article 36 of the Statute of the Court of Justice of the European Union, which applies to the General Court by virtue of the first paragraph of Article 53 of the Statute, and Article 81 of the Rules of Procedure of the General Court, in the version in force at the date of the judgment under appeal, requires the General Court clearly and unequivocally to disclose its reasoning in such a way as to enable the persons concerned to ascertain the reasons for the decision taken and the Court of Justice to exercise its power of review (see, in particular, judgments of 26 September 2013, *Alliance One International v Commission*, C-679/11 P, not published, EU:C:2013:606, paragraph 98, and of 28 January 2016, *Quimitécnica.com and de Mello v Commission*, C-415/14 P, not published, EU:C:2016:58, paragraph 56).
- 85 As this Court has already held, the General Court is bound to comply with that obligation when exercising its unlimited jurisdiction (see, to that effect, judgment of 18 December 2014, *Commission v Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraph 77).
- 86 According to well established case-law, that obligation to state reasons does not, however, require the General Court to provide an account that follows exhaustively and one by one all the arguments articulated by the parties to the case. The reasoning may therefore be implicit, on condition that it enables the persons concerned to know why the General Court has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review (see, to that effect, in particular, judgments of 2 April 2009, *Bouygues and Bouygues Télécom v Commission*, C-431/07 P, EU:C:2009:223, paragraph 42, and of 22 May 2014, *Armando Álvarez v Commission*, C-36/12 P, EU:C:2014:349, paragraph 31).
- 87 In the present case, it must be observed that, in response to the appellant’s arguments in favour of a reduction of the amount of the fine imposed, the General Court ruled, first, in paragraphs 245 to 251 of the judgment under appeal, on the conclusions to be drawn from the errors made by the Commission in relation to the amount of the fine, and, secondly, in paragraphs 252 to 259 of that judgment, on the additional arguments put forward by the appellant in support of a reduction of the fine, before going on to conclude in the exercise of its unlimited jurisdiction, in paragraph 260 of that judgment, that it was appropriate to set the fine at the same amount as that set by the Commission in the decision at issue. Contrary to what is maintained by the appellant, the General Court listed, in paragraph 249 of the judgment under appeal, the factors it took into account in order to determine the multipliers for the ‘gravity of the infringement’ and for the ‘additional amount’ and stated that, under point 23 of the 2006 Guidelines and in view of the scale from 0% to 30% provided for therein, the infringement at issue, which was among the most harmful, warranted a rate of 15%.
- 88 In so doing, the General Court set out the reasons that caused it to decide on that rate and, consequently, to set a fine in the amount specified in paragraph 251 of the judgment under appeal.

- 89 In those circumstances, the appellant's argument concerning an alleged failure to state reasons in the judgment under appeal must be rejected.
- 90 Accordingly, since none of the arguments raised in support of the first part of the fifth ground of appeal has been upheld, it must be held that that part is unfounded.
- 91 It follows from all the foregoing considerations that the fifth ground of appeal must be rejected as, in part, inadmissible and, in part, unfounded.

The sixth ground of appeal, alleging that the duration of the proceedings before the General Court was excessive

Arguments of the parties

- 92 By its sixth ground of appeal, the appellant claims that the General Court infringed its obligation to adjudicate on the cases before it within a reasonable time. It observes that the proceedings before the General Court commenced on 8 September 2010 and ended more than three years later, namely on 16 September 2013, the date on which the judgment under appeal was delivered. That period is, it claims, in the light of the relevant case-law and having regard to the particular circumstances of that case, particularly long and excessive.
- 93 The Commission contends that, even on the assumption that the duration of the proceedings was not reasonable, that ground cannot be upheld.

Findings of the Court

- 94 In so far as the appellant, by its sixth ground of appeal, asks the Court, in the first place, to set aside the judgment under appeal on account of the excessive duration of the proceedings before the General Court, it should be noted that, in the absence of any evidence that the excessive duration of those proceedings had an effect on the outcome of the dispute, failure on the part of the General Court to adjudicate within a reasonable time cannot lead to the judgment under appeal being set aside. Indeed, where failure to adjudicate within a reasonable time has no effect on the outcome of the dispute, the setting aside of the judgment under appeal would not provide a remedy for any infringement by the General Court of the principle of effective judicial protection (judgments of 26 November 2013, *Gascogne Sack Deutschland v Commission*, C-40/12 P, EU:C:2013:768, paragraphs 81 and 82; of 26 November 2013, *Kendrion v Commission*, C-50/12 P, EU:C:2013:771, paragraphs 82 and 83; and of 10 July 2014, *Telefónica and Telefónica de España v Commission*, C-295/12 P, EU:C:2014:2062, paragraph 64).
- 95 In the present case, the appellant has not provided any evidence to this Court from which it may be inferred that the excessive duration of the proceedings before the General Court could have had an effect on the outcome of the dispute before it.
- 96 It follows that the sixth ground of appeal cannot lead to the judgment under appeal being set aside in its entirety.
- 97 In so far as, by its sixth ground of appeal, the appellant seeks, in the second place and in the alternative, a reduction of the fine imposed on it, it should be noted that the sanction for a breach, by a court of the European Union, of its obligation under the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union to adjudicate on the cases before it within a reasonable time must be an action for damages brought before the General Court, since such an action constitutes an effective remedy. Accordingly, a claim for compensation for the damage caused

by the failure on the part of the General Court to adjudicate within a reasonable time may not be made directly to the Court of Justice in the context of an appeal, but must be brought before the General Court itself (judgments of 10 July 2014, *Telefónica and Telefónica de España v Commission*, C-295/12 P, EU:C:2014:2062, paragraph 66; of 9 October 2014, *ICF v Commission*, C-467/13 P, not published, EU:C:2014:2274, paragraph 57; and of 21 January 2016, *Galp Energía España and Others v Commission*, C-603/13 P, EU:C:2016:38, paragraph 55).

- 98 Where a claim for damages is brought before the General Court, which has jurisdiction under Article 256(1) TFEU, it must determine such a claim sitting in a different composition from that which heard the dispute giving rise to the procedure whose duration is criticised (see, to that effect, judgments of 10 July 2014, *Telefónica and Telefónica de España v Commission*, C-295/12 P, EU:C:2014:2062, paragraph 67; of 9 October 2014, *ICF v Commission*, C-467/13 P, not published, EU:C:2014:2274, paragraph 58; and of 21 January 2016, *Galp Energía España and Others v Commission*, C-603/13 P, EU:C:2016:38, paragraph 56).
- 99 Nonetheless, where it is evident, without it being necessary for the parties to adduce additional evidence in that regard, that the General Court has breached, in a sufficiently serious manner, its duty to adjudicate within a reasonable period, the Court of Justice can find accordingly (see, to that effect, judgments of 9 October 2014, *ICF v Commission*, C-467/13 P, not published, EU:C:2014:2274, paragraph 59; and of 21 January 2016, *Galp Energía España and Others v Commission*, C-603/13 P, EU:C:2016:38, paragraph 57).
- 100 However, in the present case, having regard in particular to the nature and the degree of complexity of the case and the number of actions brought against the decision at issue, it does not appear that the duration of the proceedings before the General Court — approximately three years — was manifestly unreasonable.
- 101 It follows from the foregoing considerations that the sixth ground of appeal must be rejected.
- 102 Since none of the grounds of appeal raised by the appellant has been upheld, the appeal must be dismissed in its entirety.

Costs

- 103 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs.
- 104 Under Article 138(1) of those rules, which applies to the procedure on appeal by virtue of Article 184(1) thereof, 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 appellant has been unsuccessful and the Commission has applied for costs against it, the appellant must be ordered to pay the costs relating to the present appeal.

On those grounds, the Court (First Chamber) hereby:

- 1. Dismisses the appeal;**
- 2. Orders Aloys F. Dornbracht GmbH & Co. KG to pay the costs.**

[Signatures]