



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 14 April 2016*

Case C-101/15 P

Pilkington Group Ltd and Others
v

European Commission

(Appeal — Competition — Cartels (Article 81 EC and Article 53 of the EEA Agreement) — Fines — 2006 Guidelines on the method of setting fines — Turnover to be taken into account — Exchange rate for calculating the 10% upper limit on fines under Article 23(2) of Regulation (EC) No 1/2003 — European market for automotive glass))

I – Introduction

1. The present appeal proceedings present the Court with the opportunity to adopt a position on two problem areas, the importance of which for the future administrative practice of the European Commission in its role as competition authority is not to be underestimated.
2. First, it is necessary to specify which turnover of cartel members is to be taken into account as the basis for calculating fines to be imposed. Second, it is necessary to clarify which exchange rate is to be used for currency conversion where an undertaking does not publish its turnover figures in euros. That can determine whether a fine imposed by the Commission exceeds the upper limit of 10% of the total turnover of the undertaking in question, and what expense is incurred by that undertaking in paying the fine.
3. In addition, the case concerns some questions of detail concerning the principles of equal treatment and proportionality when fines are imposed under antitrust law, and the unlimited jurisdiction of the General Court of the European Union in relation to such penalties.
4. The legal problems mentioned above arise in connection with the automotive glass cartel operating in the European Economic Area ('EEA') which the European Commission uncovered a few years ago and which was the subject of a decision imposing a fine on 12 November 2008 ('the decision at issue').** In the present proceedings, a number of companies in the Pilkington group (together, 'Pilkington'), seek legal protection from the Courts of the European Union against this decision.

* Original language: German.

** Decision by the Commission dated 12 November 2008 in proceedings under Article 81 of the Treaty establishing the European Community and Article 53 of the EEA Convention, C(2008) 615 final (COMP/39.125 — automotive glass, summarised at OJ 2009, C 173, p. 13); corrected by Decision C(2009) 863 final of 11 February 2009 and Decision C(2013) 1119 final of 28 February 2013.

5. At first instance, Pilkington's attacks on the decision at issue met with no success: by judgment dated 17 December 2014 ('the judgment under appeal', or 'the judgment of the General Court') the General Court refused its application for annulment.^{***} Now, Pilkington pursues its application for legal protection further in appeal proceedings before the Court of Justice.

6. A further appeal concerning the automotive glass cartel is currently pending before the Court of Justice.^{****} However, it does not challenge the same judgment of the General Court and raises entirely different legal issues.

II – Legal framework

7. The primary legal framework applicable to this case is set out in Article 81 EC (now Article 101 TFEU).^{*****} To the extent that the case concerns the territory of the European Economic Area, Article 53 of the EEA Agreement contains a provision corresponding to Article 81 EC. In terms of secondary EU law, Article 23(2) of Regulation (EC) No 1/2003^{*****} is also relevant.

8. Article 23(2) of Regulation (EC) No 1/2003 provides *inter alia*:

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

(a) they infringe Article 81 [EC] or Article 82 [EC] ...

...

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.

...'

9. In addition, it is necessary to refer to the 2006 Guidelines,^{*****} in which the Commission has set out its practice as regards setting fines. In points 4 to 6 and point 13 of those Guidelines there appears *inter alia* the following:⁴ The Commission's power to impose fines on undertakings or associations of undertakings which, intentionally or negligently, infringe Article 81 or 82 of the Treaty is one of the means conferred on it in order for it to carry out the task of supervision entrusted to it by the Treaty. ... For this purpose, the Commission must ensure that its action has the necessary deterrent effect... Accordingly, when the Commission discovers that Article 81 [EC] or 82 [EC] has

^{***} Judgment in *Pilkington Group and Others v Commission* (T-72/09, EU:T:2014:1094).

^{****} *AGC Glass Europe and Others v Commission* (C-517/15 P, OJ 2015 C 398, p. 20).

^{*****} As the decision at issue was adopted before 1 December 2009, the applicable legal position is that in force prior to the entry into force of the Treaty of Lisbon.

^{*****} Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003, L 1, p. 1, 'Regulation No 1/2003').

^{*****} 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').

been infringed, it may be necessary to impose a fine on those who have acted in breach of the law. Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 [EC] and 82 [EC] (general deterrence).

5. In order to achieve these objectives, it is appropriate for the Commission to refer to the value of the sales of goods or services to which the infringement relates as a basis for setting the fine. The duration of the infringement should also play a significant role in the setting of the appropriate amount of the fine. It necessarily has an impact on the potential consequences of the infringement on the market. It is therefore considered important that the fine should also reflect the number of years during which an undertaking participated in the infringement.

6. The combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement. Reference to these factors provides a good indication of the order of magnitude of the fine and should not be regarded as the basis for an automatic and arithmetical calculation method.

...

13. In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement ...'

III – Background to the dispute

A – Facts and administrative proceedings

10. Pilkington is one of the leading global manufacturers of glass, and in particular of automotive glass.

11. According to the findings of the General Court, Pilkington, along with other undertakings operating in this sector, was guilty of entering into a cartel which consisted of agreements relating to contracts for the supply of automotive glass parts to all the large vehicle manufacturers in the EEA. It consisted of agreed pricing and supply strategies of the cartel participants, which were aimed at maintaining an overall stability for each undertaking's position on the market concerned. In that regard the cartel participants monitored the decisions taken during these meetings and contacts, and agreed correcting measures with each other.

12. The automotive glass cartel operated in the EEA from 10 March 1998 to 11 March 2003, although individual undertakings in the cartel participated for differing periods — in Pilkington's case it was from 10 March 1998 to 3 September 2002. It was a single and continuous infringement.

13. On 18 April 2007, in the course of the administrative procedure, the Commission issued a Statement of Objections to a number of cartel participants, including Pilkington. The oral hearing conducted by the Commission took place on 24 September 2007. After consulting the Advisory Committee on Restrictive Agreements and Dominant Positions, on 12 November 2008 the Commission issued the decision at issue.

14. In Article 1 of the decision at issue it finds that various undertakings — including Pilkington (Article 1(c)) — had infringed Article 81 EC and Article 53 of the EEA Agreement, in that they participated in a number of agreements and/or courses of conduct in the automotive glass sector in the EEA.

15. The fines imposed on individual undertakings for their participation in the cartel are set out in Article 2 of the decision at issue. In the case of Pilkington, this was 370 million euros, for which the appellants are jointly and severally liable (Article 2(1)(c)). By amending Decision dated 28 February 2013, which corrected certain calculation errors, this amount was reduced to 357 million euros.***** In accordance with Article 2(2) of the decision at issue the fine was payable within three months of publication of that decision, in euros.

B – Proceedings at first instance

16. Several of the addressees of the decision at issue sought legal protection at first instance by way of actions for annulment before the General Court.

17. As regards the Pilkington group of companies, at first instance Pilkington Group Ltd, Pilkington Automotive Ltd, Pilkington Automotive Deutschland GmbH, Pilkington Holding GmbH and Pilkington Italia SpA ('applicants' or 'appellants') brought an action before the General Court jointly against the Commission, by application dated 18 February 2009.

18. In its judgment of 17 December 2014, the General Court dismissed this action, but ordered the Commission to pay 10% of Pilkington's costs.***** Apart from that, the Court ordered all the costs of the proceedings at first instance to be borne by the applicants.

IV – Proceedings before the Court of Justice

19. By document dated 27 February 2015 the appellants jointly lodged the present appeal against the judgment of the General Court.

20. The appellants claim that the Court should:

- set aside the judgment in Case T-72/09, to the extent that it dismisses the action raised against Article 2(1)(c) of the decision at issue,
- reduce the fine imposed on the appellants by Article 2(1)(c) of the decision at issue, and
- order the Commission to pay the costs incurred by the appellants in these proceedings.

21. For its part, the Commission contends that the Court should:

- dismiss the appeal, and
- order the appellants to pay the costs of these proceedings.

22. The appeal was examined before the Court on the basis of written pleadings and, on 2 March 2016, at a hearing.

***** Hereafter also 'EUR'.

***** The General Court justified this decision on costs by the fact that it was only in the course of the first instance proceedings that the Commission issued its amending Decision of 28 February 2013 (see above, point 15 and footnote 2), by which it corrected two errors in calculating the fine (paragraphs 448 and 449 of the judgment appealed against).

V – Analysis of the pleas in law

23. In its appeal Pilkington does not pursue all the issues which formed the subject matter of the proceedings at first instance. Instead, the legal debate in the appeal is restricted to questions concerning the calculation of the fine. In this regard, the appellants rely on three pleas in law, of which the first concerns the turnover to be taken into account (see directly below, section A), the second the applicable euro exchange rate in determining the 10% upper limit (under section B), and the third a variety of general legal principles and considerations based on the rule of law (section C).

A – Turnover to be taken into account in calculating the fine (first ground of appeal)

24. The first ground of appeal is directed against paragraphs 201 to 227 (and in particular paragraphs 217 to 227) of the judgment under appeal. Its subject is the type of turnover which may form the basis for calculating a fine within the meaning of point (a) of paragraph 1 of Article 23(2) of Regulation No 1/2003. The appellants complain that the General Court wrongly agreed with the Commission's approach, under which supplies by Pilkington under contracts concluded in the period before the infringement started could also be taken into account, even if these contracts were not re-negotiated during the period of the infringement. Thus, they claim, the General Court relied on an interpretation of point 13 of the 2006 Guidelines which was erroneous in law.

25. Under point 13 of the 2006 Guidelines, in determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA.

26. Thus, point 13 of the 2006 Guidelines is intended to set as a starting point for calculating the fine to be imposed on an undertaking an amount which reflects the economic importance of the infringement and the relative weight of the undertaking (according to the settled case-law of the Court, ***** which in turn draws heavily on the wording of point 6 of the Guidelines). By contrast, turnover which does not have any real connection to the scope of the cartel's operation in the EEA is to be excluded. *****

27. In the present case, the core of the dispute revolves around whether there must be some type of causal connection between the cartel's machinations and the individual elements of turnover taken into account in calculating the fine. The appellants are of the view that at least sales of automotive glass on which, the cartel necessarily had no influence should be disregarded as those sales took place pursuant to contracts which were concluded prior to the start of the infringement — supposedly under normal competition conditions — and were not re-negotiated during the period of the infringement. They consider that taking such sales into account overstates the importance of the cartel.

28. This is by no means a theoretical issue or a technical detail: if such sales by Pilkington were left out of the basis for calculating the fine, according to the appellants the fine imposed by the Commission would have to be reduced by around 49 million euros.

29. As attractive as this reasoning of the appellants regarding the interpretation of point 13 of the 2006 Guidelines may at first glance appear, it does not stand up to closer consideration.

***** Judgments in *Team Relocations and Others v Commission* (C-444/11 P, EU:C:2013:464, paragraph 76); *Guardian Industries and Guardian Europe v Commission* (C-580/12 P, EU:C:2014:2363, paragraphs 57 and 59); *Dole Food and Dole Fresh Fruit Europe v Commission* (C-286/13 P, EU:C:2015:184, paragraphs 148 and 149); *LG Display and LG Display Taiwan v Commission* (C-227/14 P, EU:C:2015:258, paragraphs 53 and 55); *InnoLux v Commission* (C-231/14 P, EU:C:2015:451, paragraph 50); *AC-Treuhand v Commission* (C-194/14 P, EU:C:2015:717, paragraph 64); and *Toshiba Corporation v Commission* (C-373/14 P, EU:C:2016:26, paragraph 85).

***** Judgments in *Team Relocations and Others v Commission* (C-444/11 P, EU:C:2013:464, paragraph 77); *Guardian Industries and Guardian Europe v Commission* (C-580/12 P, EU:C:2014:2363, paragraph 58); *LG Display and LG Display Taiwan v Commission* (C-227/14 P, EU:C:2015:258, paragraph 54); and *InnoLux v Commission* (C-231/14 P, EU:C:2015:451, paragraph 62).

30. This is because the wording of point 13 of the 2006 Guidelines is itself drawn as widely as possible: it concerns all goods or services supplied by the relevant cartel member to which the infringement *directly or indirectly relates* in the relevant geographic area within the EEA. Point 5 of the same Guidelines uses similar general wording, by stating that the fine must be determined on the basis of the value of the goods or services which have been supplied and to which *the infringement relates*.

31. As the Court has already made clear, if one included in the term ‘turnover’ in point 13 of the 2006 Guidelines only sales in respect of which it is established that they were actually affected by the cartel, that would be to interpret the provision too narrowly. ***** Therefore, according to the case-law in setting the basic amount of a fine it is not necessary positively to prove that the elements of turnover individually brought into account as the basis of calculation were actually affected by the infringement. *****

32. Admittedly, the concept of turnover in point 13 of the 2006 Guidelines cannot be extended so far as to encompass sales outside the scope of the relevant cartel. ***** However, to the extent that, as in the present case, it concerns sales which have in any event taken place on the relevant market, these are automatically part of the basis of calculation for the basic amount of the fine. ***** Contrary to what Pilkington submits, such sales are by no means outside the scope of the cartel.

33. The sales referred to are a useful reference point for the damage to competition in the EEA inflicted by the cartel, and in particular by Pilkington, because they give an indication of the economic importance of the cartel on the relevant market and the relative weight of Pilkington within the cartel, just as points 6 and 13 of the 2006 Guidelines and the case-law of the Court in relation thereto requires. *****

34. If one were to exclude part of the sales made on the relevant market from the calculation of the fine, as the appellants submit, this would in many cases artificially reduce the economic effect of the cartel and therefore run diametrically opposite to the purpose of points 6 and 13 of the 2006 Guidelines ***** (for completeness see also points 4 and 5 of those Guidelines). This is because the full scope of a cartel cannot reasonably be depicted by selectively having regard to only individual elements of the turnover achieved by the cartel participants on the relevant market.

35. In particular, the approach favoured by the appellants overlooks the fact that one of the main purposes of many cartels — including the one at issue in the present case — is to divide the market among the cartel participants or to maintain their market shares at an agreed level. This *stabilisation effect*, which the Court has very rightly emphasised, ***** naturally benefits the whole activity of the cartel participants on the relevant market. In this connection, as the Commission very

***** Judgments in *Team Relocations and Others v Commission* (C-444/11 P, EU:C:2013:464, paragraph 76); *Guardian Industries and Guardian Europe v Commission* (C-580/12 P, EU:C:2014:2363, paragraph 57); *Dole Food and Dole Fresh Fruit Europe v Commission* (C-286/13 P, EU:C:2015:184, paragraph 148); and *LG Display and LG Display Taiwan v Commission* (C-227/14 P, EU:C:2015:258, paragraph 53).

***** See, to this effect, judgment in *LG Display and LG Display Taiwan v Commission* (C-227/14 P, EU:C:2015:258, paragraph 57).

***** Judgments in *Team Relocations and Others v Commission* (C-444/11 P, EU:C:2013:464, paragraph 76); *Guardian Industries and Guardian Europe v Commission* (C-580/12 P, EU:C:2014:2363, paragraph 57); *Dole Food and Dole Fresh Fruit Europe v Commission* (C-286/13 P, EU:C:2015:184, paragraph 148); *LG Display and LG Display Taiwan v Commission* (C-227/14 P, EU:C:2015:258, paragraph 53); and *InnoLux v Commission* (C-231/14 P, EU:C:2015:451, paragraph 55).

***** See, to this effect, judgment in *LG Display and LG Display Taiwan v Commission* (C-227/14 P, EU:C:2015:258, paragraph 57), in which the Court made it clear that point 13 of the 2006 Guidelines, ‘covers, in fact, sales in the relevant market, which is the market concerned by the infringement’.

***** On this point, see again point 26 of this Opinion, and footnote 10.

***** Judgments in *Team Relocations and Others v Commission* (C-444/11 P, EU:C:2013:464, paragraph 77); *Guardian Industries and Guardian Europe v Commission* (C-580/12 P, EU:C:2014:2363, paragraph 58); *LG Display and LG Display Taiwan v Commission* (C-227/14 P, EU:C:2015:258, paragraph 54); and *InnoLux v Commission* (C-231/14 P, EU:C:2015:451, paragraph 62).

***** Paragraphs 224 and 226 of the judgment under appeal.

persuasively emphasises, even the manipulation of a few transactions can be enough to achieve the effect sought by the cartel participants on the whole market. If, however, the unlawful object of the cartel and thus the ‘criminal energy’ of the cartel participants encompasses the entire market, then all sales made on that market must also be taken as a basis for calculating the fines.

36. Accordingly, the conclusive factor is not whether the undertakings concerned are proved to have — or even may possibly have — acted collusively in relation to each individual transaction carried out. Nor is the decisive factor whether and to what extent the anti-competitive result pursued by these undertakings by means of the cartel in fact came about. ***** Instead, it is sufficient that a *distortion of competition* on the relevant market, within the meaning of Article 81 EC (now Article 101 TFEU) was the object or effect. ***** In such a case, in principle the whole of the turnover achieved on that market by the cartel participants is to be included in calculating the basic amount of the fine.

37. In addition, the administrative effort that would be involved in assessing each of the sales made on the relevant market by the cartel participants would be completely disproportionate. In most cases the amount of turnover to be taken into account in calculating fines comes from numerous transactions in relation to which it appears hardly practicable to assess each one as regards whether it was — actually or potentially — affected by the collusive practices of the cartel participants. This applies all the more so because cartels are characterised by a culture of secrecy among the participating undertakings which ought not to be ‘rewarded’ when it comes to calculating fines. *****

38. Accordingly, all in all the only thing that is material is that the sales to be taken into account in calculating the basic amount of fines were *made on the relevant market*. ***** This is because it is precisely this turnover, deriving from the sale of goods in respect of which the infringement was committed, that is best able to reflect the economic importance of that infringement. ***** In this way it can be ensured that an appropriate punishment is imposed which contributes to the effective enforcement of the competition rules in the European Economic Area (on this point see points 4 and 5 of the 2006 Guidelines).

39. It follows from this that the first ground of appeal must be rejected.

***** Even cartel agreements which are ultimately not carried out by the participating undertakings, or which do not have the desired effect on the market, are and remain infringements of the competition provisions which can and should be pursued by the competition authorities.

***** As regards the relevant of the criterion of a distortion of the market, see also the judgments in *LG Display and LG Display Taiwan v Commission* (C-227/14 P, EU:C:2015:258, paragraph 63), and *InnoLux v Commission* (C-231/14 P, EU:C:2015:451, paragraph 61).

***** Judgments in *Team Relocations and Others v Commission* (C-444/11 P, EU:C:2013:464, paragraph 77); *Guardian Industries and Guardian Europe v Commission* (C-580/12 P, EU:C:2014:2363, paragraph 58); and *LG Display and LG Display Taiwan v Commission* (C-227/14 P, EU:C:2015:258, paragraph 54).

***** Again, on this point see judgment in *LG Display and LG Display Taiwan v Commission* (C-227/14 P, EU:C:2015:258, paragraph 57) and the reference to ‘sales in the relevant market, which is the market concerned by the infringement’.

***** Judgments in *Team Relocations and Others v Commission* (C-444/11 P, EU:C:2013:464, paragraphs 75 to 78); *Guardian Industries and Guardian Europe v Commission* (C-580/12 P, EU:C:2014:2363, paragraphs 57 to 59); *Dole Food and Dole Fresh Fruit Europe v Commission* (C-286/13 P, EU:C:2015:184, paragraphs 148 and 149); *LG Display and LG Display Taiwan v Commission* (C-227/14 P, EU:C:2015:258, paragraphs 53 to 58 and 64); and *InnoLux v Commission* (C-231/14 P, EU:C:2015:451, paragraph 51).

B – The applicable exchange rate for calculating the 10% upper limit on the fine (second ground of appeal)

40. The second ground of appeal is directed against paragraphs 410 to 423 of the judgment under appeal, and concerns the upper limit applicable under EU law on the fine (also called the ‘ceiling’), as laid down by the second paragraph of Article 23(2) of Regulation No 1/2003. According to that provision, the fine imposed on an undertaking is not to exceed 10% of its total turnover in the preceding business year.

41. In the opinion of the appellants, the judgment under appeal infringes this provision because the Court determined the exchange rate for converting pounds sterling***** into euros in a manner that was wrong in law. If the Court had not, like the Commission before it, taken the average exchange rate of the European Central Bank (‘ECB’) during Pilkington’s last full business year preceding the decision at issue, and had instead used the actual daily exchange rate at the time the Decision was adopted (as Pilkington preferred), the 10% upper limit, and therefore the fine on Pilkington, would have been lower.

1. Preliminary remarks

42. The background to the complaints being made here is that Pilkington’s parent company is established in the United Kingdom and for that reason the turnover of the whole Pilkington group, which provides the basis of calculation in the present case, was determined in pounds sterling. By contrast, fines imposed by the Commission under EU law to punish cartel activity are expressed in euros. There is therefore a need to convert between currencies in order to ascertain whether the fine imposed exceeds the 10% ceiling of Pilkington’s total turnover in its last full business year preceding the adoption of the decision at issue.

43. The appellants submit, without being contradicted, that Pilkington’s total turnover in its business year from 1 April 2007 to 31 March 2008 was GBP 2.614 billion. Accordingly, the starting point for calculating the 10% ceiling for the purposes of the second paragraph of Article 23(2) of Regulation No 1/2003 was a value of GBP 261.4 million (10% of GBP 2.614 billion).

44. If, like the Commission and the General Court, one takes the European Central Bank’s published average exchange rate for that period (GBP 1 = EUR 1.415), this produces a ceiling of EUR 370.1 million. If, by contrast, one takes the actual exchange rate of the European Central Bank for 12 November 2008, the day on which the Commission adopted the decision at issue (GBP 1 = EUR 1.2149, or EUR 1 = GBP 0.82310),***** this would produce a significantly lower ceiling, namely EUR 317.5 million.

45. Thus, on the former approach the fine imposed by the Commission in the amount of EUR 357 million is clearly below the 10% ceiling,***** but on the latter approach, by contrast, it would exceed the 10% ceiling by almost EUR 40 million. Thus, it is precisely this difference of around EUR 40 million which is at stake when the parties are in dispute as regards the choice of the correct exchange rate in the context of the second ground of appeal. It is necessary to decide whether the fall in value of the pound sterling in comparison with the euro as recorded in the period up to the adoption of the decision at issue goes to Pilkington’s benefit or, on the contrary, is an exchange rate risk which Pilkington has to bear.

***** Hereafter also ‘GBP’.

***** OJ 2008 C 290, p. 6.

***** The original amount fixed of 370 million euros also stays under — albeit only just — the 10% upper limit, if one assumes the average exchange rate.

2. The complaints put forward by Pilkington

46. Whereas the appellants expressly recognise the Commission's right to set the fines it imposes under antitrust law pursuant to Article 23 of Regulation No 1/2003 in euros, they regard the General Court's analysis in relation to the relevant exchange rate for calculating the 10% cap as erroneous in law.

47. Their complaints in this regard against the judgment under appeal can be categorised essentially by reference to two themes: first, the Court misunderstood the purpose of the 10% ceiling (see below, section a), and second, it did not meet the requirements of equal treatment and legal certainty (see further below, section b).

a) The purposes of the 10% upper limit

48. The 10% ceiling which is laid down by the second paragraph of Article 23(2) of Regulation No 1/2003 brings into the calculation of fines an element which has a distinct and autonomous objective by comparison with the basic criteria of gravity and duration of the infringement. ***** It is appropriate to take into account the ability of the undertakings concerned to pay, and to prevent the imposition of fines which are excessive or disproportionate. *****

49. Within the framework of the second paragraph of Article 23(2) of Regulation No 1/2003, the decisive factor is the capacity of an undertaking to make payment at the time when it is identified as responsible for the infringement and a financial penalty is imposed on it by the Commission. *****

50. Undoubtedly, the capacity of an undertaking to make payment would best be taken into account by assessing it as at the particular date on which the Commission adopted the decision imposing a fine. However, this would cause the Commission entirely insurmountable practical difficulties: first, at the time the decision imposing a fine is adopted it is normally the case that there are no published up-to-date turnover figures for the undertaking concerned, or they are in any event not available in certified, and thus reliable, form. Second, the Commission's internal decision-making procedures — in particular consulting the Advisory Committee, as required by the legislation, ***** but also the need for internal reflection on the appropriateness, method of calculation and amount of the penalty in the individual case ***** — mean that it is inevitably impossible to present and process new figures up to the last day.

51. The EU legislature took this fact into account and in the second paragraph of Article 23(2) of Regulation No 1/2003 provided that the reference value for capacity to make payment was to be one-tenth of the total turnover of the undertaking concerned in the business year preceding the decision imposing the fine. ***** In a way, for the purpose of calculating the

***** Judgment in *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 282).

***** Judgments in *Musique diffusion française and Others v Commission* (100/80 to 103/80, EU:C:1983:158, paragraphs 119 and 121); *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 280 and 281); *Britannia Alloys & Chemicals v Commission* (C-76/06 P, EU:C:2007:326, paragraph 24); and *YKK and Others v Commission* (C-408/12 P, EU:C:2014:2153, paragraph 63).

***** Judgment in *YKK and Others v Commission* (C-408/12 P, EU:C:2014:2153, paragraph 63).

***** Article 14 of Regulation No 1/2003.

***** Decisions by the Commission to impose fines under Article 23(2) of Regulation No 1/2003 are made under the principle of collective responsibility (see Article 1 of the Rules of Procedure of the European Commission, as well as Article 17(6)(b) TEU and Article 250 TFEU).

***** See to this effect also judgment in *YKK and Others v Commission* (C-408/12 P, EU:C:2014:2153, paragraph 64, last sentence).

fine the legislation deems an undertaking's capacity to pay to correspond to that indicated by its audited turnover figures for the last full business year preceding the adoption of the decision imposing the fine. Normally, it may be expected that the capacity of an undertaking to make payment which has been assessed in this way in the weeks or months up to the adoption of the decision imposing the fine has not significantly changed, and the turnover figures of its last full business year thus retain their usefulness.

52. However, if a particular fraction (10%) of the total turnover of the undertaking concerned in its last full business year constitutes the legislative reference amount for its capacity to make payment, the average exchange rate applicable during the reference period must also be determinative for the currency conversion. It is only this exchange rate which permits an assessment of the turnover figures in the context from which they emerge, given that this best reflects the economic realities which prevailed at the time. ***** That was rightly pointed out by the General Court. *****

53. If one wanted to convert at a different exchange rate from a later period, this could significantly undermine the usefulness of such turnover figures: the application of a new exchange rate to old figures would ultimately be nothing other than comparing apples and pears.

54. Nor do the judgments of the Court cited by the appellants reveal anything that might indicate that it is necessary to apply a later exchange rate — namely the up-to-date exchange rate as at the time the decision imposing the fine is adopted.

55. Admittedly, in some cases the Court has in fact recognised that the 10% ceiling was also able to protect the undertakings concerned from exchange rate fluctuations to a certain extent. ***** However, this is not an independent purpose of the ceiling, but rather a feature of the protection offered by the second paragraph of Article 23(2) of Regulation No 1/2003 to the undertakings concerned against excessive and disproportionate fines. *****

56. Apart from that, the cases analysed in the case-law to date concerned changes in currency exchange rates *before* the end of the reference period to which the 10% ceiling under paragraph 2 of Article 23(2) of Regulation No 1/2003 is linked. ***** Thus, the Court was also looking back to earlier periods and not, as Pilkington submits in the present case, forward to the weeks and months *after* the end of the last business year before the decision imposing the fine was adopted.

57. Unlike with 'looking forward', there are good reasons for 'looking back': first, the period between the cessation of the infringement and the last business year preceding the adoption of the decision imposing a fine is normally several years, and thus is naturally more likely to be affected by exchange rate fluctuations causing changes in the capacity of undertakings to make payment than the weeks

***** The question as to the exchange rate at which turnover of individual companies in a group is brought into account in determining the group's consolidated turnover — the average rate for the relevant accounting year or the rate applicable on a particular date — is not the subject of the present proceedings, and was not considered by either of the two parties. Therefore, I too will not discuss this issue in the present Opinion.

***** Paragraph 415 of the judgment under appeal.

***** Judgments in *Enso Española v Commission* (C-282/98 P, EU:C:2000:628, paragraph 59); *Sarrió v Commission* (C-291/98 P, EU:C:2000:631, paragraph 89); and *Limburgse Vinyl Maatschappij and Others v Commission* (C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 606).

***** On this point, see point 48 of this Opinion and footnote 28.

***** This is particularly clear from the judgment in *Limburgse Vinyl Maatschappij and Others v Commission* (C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 605).

and months in dispute in the present case which directly precede the decision imposing a fine. Second, it is only in ‘looking back’ that one can find reliable figures which, along with the exchange rates applicable to them for currency conversion, are available in sufficient time to be taken into account by the Commission in making its decision.

58. The only basis in the case-law which might point to a ‘looking forward’ approach, and thus to some sort of relevance of up-to-date exchange rates, is to be found in the relatively old judgment of the Court of First Instance in *Sarrió v Commission*. Specifically, in that case the Court ensured ‘that the amount of the fine converted into national currency at the rate of exchange prevailing at the time when the Decision was published does not exceed 10% of the applicant’s total turnover in [the last business year preceding the Decision]’. *****

59. So far as can be seen, however, this approach has not been followed. Nor do I believe that that is a route the Court should take now.

60. Apart from the fundamental objection, already mentioned, that if one applies an up-to-date exchange rate then old turnover figures are converted using a new exchange rate which does not emanate from the same period, it appears to me that the reference by the Court of First Instance in *Sarrió v Commission* to the time of *publication* of the decision is wholly unsuitable and impracticable. Normally, publication of the decision in cartel cases occurs long after they are adopted, sometimes even years later. Thus, the Commission would have to have clairvoyant powers indeed if it wanted to take into account such a future exchange rate at the time it made its decision. Nor is it apparent how the exchange rate which happens to prevail on the day the decision is published is supposed to give any indication as to the capacity of the undertaking concerned to make payment at the much earlier time at which the Commission imposes a fine on it and collects it.

61. To my mind, the solution to the problem about which the appellants complain is to be sought at a different level altogether, namely in the budgetary law of the European Union: if it should prove that the capacity of an undertaking to make payment — whether owing to exchange rate fluctuations or other reasons — has reduced significantly between the end of its last business year and the time the decision imposing the fine is adopted by the Commission, budgetary law provides suitable mechanisms for dealing with any risk that the undertaking might be overburdened when the fine imposed by the Commission is collected. ***** These mechanisms enable solutions tailored to the particular case to be worked out, and range from allowing generous periods of time for payment to complete or partial waiver, while always taking proper account of potential distortions of competition (on this point see in particular Articles 89 and 91 of the rules of application for the general budget of the Union *****).

***** Judgment in *Sarrió v Commission* (T-334/94, EU:T:1998:97, paragraph 403).

***** To this effect see also judgments in *Musique diffusion française and Others v Commission* (100/80 to 103/80, EU:C:1983:158, paragraph 135).

***** Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ 2012 L 362, p. 1).

62. Nor, contrary to the submission made by Pilkington at the oral hearing, does the fact that the mechanisms provided for by the general budget of the Union apply only in extreme cases militate in any way against this solution. This is because all ‘normal’ risks connected with capacity to make payment, including in particular the normal exchange rate risk, must be borne by the undertakings concerned themselves. ***** I will return to this later. *****

63. Against this background, the appellants’ arguments based on the purpose of the 10% ceiling do not hold up.

b) The requirements of equal treatment and legal certainty

64. In addition, in the present case the appellants also raise the principles of equal treatment and legal certainty. In their opinion, these principles too mean that the currency conversion should take place not at the average exchange rate for Pilkington’s last full business year before the decision at issue but at the up-to-date exchange rate as at the time the decision was adopted.

i) The principle of equal treatment

65. First, the appellants consider that the General Court’s appraisal is contrary to the principle of equal treatment. According to them, all undertakings must be treated equally, independently of the currency of their accounts. The General Court allegedly misunderstood this.

66. The principle of equal treatment is a general principle of EU law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights. ***** It cannot be interpreted and applied differently depending on the area of law in question.

67. According to consistent 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. *****

68. It is nothing more than an application of the principle of equal treatment when the Court recognises specifically in relation to determining fines under antitrust law that the 10% ceiling under the second paragraph of Article 23(2) of Regulation No 1/2003 is a limit which is the same for all undertakings. *****

***** To this effect see judgments in *Enso Española v Commission* (C-282/98 P, EU:C:2000:628, paragraph 59); *Sarrió v Commission* (C-291/98 P, EU:C:2000:631, paragraph 89); and *Limburgse Vinyl Maatschappij and Others v Commission* (C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 604).

***** See below, point 73 of this Opinion.

***** Judgments in *Akzo Nobel Chemicals and Akcros Chemicals v Commission* (C-550/07 P, EU:C:2010:512, paragraph 54), and *Guardian Industries and Guardian Europe v Commission* (C-580/12 P, EU:C:2014:2363, paragraph 51); to the same effect see judgment in the early case *Ruckdeschel and Others* (117/76 and 16/77, EU:C:1977:160, paragraph 7).

***** Judgments in *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 23); *Akzo Nobel Chemicals and Akcros Chemicals v Commission* (C-550/07 P, EU:C:2010:512, paragraph 55); *Guardian Industries and Guardian Europe v Commission* (C-580/12 P, EU:C:2014:2363, paragraph 51); and *P and S* (C-579/13, EU:C:2015:369, paragraph 41).

***** Judgment in *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 281).

69. With regard to the problem which is of interest in the present case, it is first to be observed that the capacity of one of these undertakings to make payment may of course still be subject to certain fluctuations between the end of its last business year and the day a decision imposing the fine is adopted. Such fluctuations may derive for example from unexpected reductions in turnover, but they could also be caused by changes in currency conversion, especially where an undertaking — regardless of where it is established — makes a large proportion of its turnover in foreign currencies.

70. In this respect all undertakings find themselves in the same situation and are also treated equally by the EU legislature: this is because under paragraph 2 of Article 23(2) of Regulation No 1/2003 such fluctuations in capacity to make payment are *not* taken into account in relation to calculating the 10% ceiling, regardless of whether the undertakings concerned account for their turnover in euros or in another currency. Therefore, in this regard there can be no infringement of the principle of equal treatment.

71. Admittedly, for undertakings which account for their turnover not in euros but in a foreign currency the *cost* of paying a fine may be subject to more severe fluctuations due to variations in exchange rates between their last business year and the day of the Commission's decision imposing the fine than it is for those undertakings which maintain their accounts in euros. Therefore, in this respect the situation of undertakings established outside the euro area may differ from that of those established within the euro area.

72. However, one cannot infer, simply from the fact undertakings established outside the euro area may suffer more from fluctuations in their liquid assets caused by exchange rate movements than those established within the euro area, that they are entitled to a new, up-to-date assessment of their capacity to make payment at the time the Commission adopts its decision imposing a fine, on the basis of the up-to-date exchange rate applicable at that time.

73. This is because such currency-related fluctuations are the result of the exchange rate risk which every undertaking has to bear itself. ***** An undertaking which establishes itself outside the euro area knowingly assumes the risk of unfavourable currency movements just as much as it enjoys any advantages from favourable currency movements. It is unacceptable for such an undertaking to selectively transfer to the public only potential disadvantages of being established outside the euro area on the basis of the principle of equal treatment.

74. By way of aside it may be observed that even prior to the introduction of the euro not all undertakings operating in the internal market were subject to the same exchange rate risks. It is admittedly correct that, at that time, the Commission had to undertake a currency conversion for *all* undertakings before imposing fines on them, whereas today this is necessary only for undertakings established outside the euro area. Nonetheless, even before the introduction of the euro, depending on the Member State in which they were established undertakings had to deal with different degrees of currency fluctuations and therefore with different degrees of exchange rate risk.

ii) The principle of legal certainty

75. Second, the appellants claim that the General Court has misunderstood the principle of legal certainty. In their opinion, every undertaking must be able to predict in its own currency the financial consequences which are to be expected by a fine imposed by the Commission.

***** To this effect see judgments in *Enso Española v Commission* (C-282/98 P, EU:C:2000:628, paragraph 59); *Sarrió v Commission* (C-291/98 P, EU:C:2000:631, paragraph 89); and *Limburgse Vinyl Maatschappij and Others v Commission* (C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 604).

76. The principle of legal certainty is a general principle of EU law, which requires *inter alia* that rules involving negative consequences for individuals be clear and precise and their application predictable for those subject to them. ***** The persons concerned must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly. *****

77. In the same vein, the Court has explained specifically in relation to the second paragraph of Article 23(2) of Regulation No 1/2003 that fines imposed by the Commission under this provision are subject to a quantifiable and absolute ceiling, so that the maximum amount of the fine that can be imposed on a given undertaking can be determined in advance. *****

78. Inevitably, an element of prognosis is inherent in the concept of predictability. Prognoses are more reliable if made on the basis of data already ascertained from the recent past than on the basis of data which is as yet unknown.

79. There can therefore be no doubt that an undertaking is better able to predict the 10% ceiling on fines under the second paragraph of Article 23(2) of Regulation No 1/2003 that will apply to it if this upper limit is calculated by reference to the average exchange rate of its last full business year and is not based on a future exchange rate, which, although up-to-date at the time the decision imposing a fine is adopted, is not available at all in advance.

80. Accordingly, the General Court emphasised, ***** entirely correctly, that the application of the ECB's average exchange rate for an undertaking's last full business year prior to the adoption of the decision imposing the fine is clearly more suitable for ensuring legal certainty than relying on the exchange rate at a future point in time, namely the day on which the decision imposing the fine is adopted.

81. This is because the average exchange rate referred to is fixed from the end of the relevant business year and does not change thereafter, whereas the up-to-date rate depends on arbitrary events in the future, specifically on the time the Commission chooses to adopt its decision imposing a fine and on the economic circumstances at that time. Thus, if the average exchange rate is used as a basis then every undertaking against which the Commission proceeds because of a breach of antitrust law can calculate precisely, in advance of the decision which concludes the proceedings, the highest amount in euros of any fine which may have to be paid.

82. The appellants object that undertakings which do not account for their turnover in euros are less able to predict the financial cost of any fines which may be payable under antitrust law than undertakings which account in euros.

***** Judgments in *Akzo Nobel Chemicals and Akros Chemicals v Commission* (C-550/07 P, EU:C:2010:512, paragraph 100) and *Ålands Vindkraft* (C-573/12, EU:C:2014:2037, paragraph 127); see also judgments in *Van Es Douane Agenten* (C-143/93, EU:C:1996:45, paragraph 27) and *Association nationale d'assistance aux frontières pour les étrangers* (C-606/10, EU:C:2012:348, paragraph 76).

***** Judgments in *ArcelorMittal Luxembourg v Commission* and *Commission v ArcelorMittal Luxembourg and Others* (C-201/09 P and C-216/09 P, EU:C:2011:190, paragraph 68); *ThyssenKrupp Nirosta v Commission* (C-352/09 P, EU:C:2011:191, paragraph 81); and *Ålands Vindkraft* (C-573/12, EU:C:2014:2037, paragraph 128).

***** Judgments in *Guardian Industries and Guardian Europe v Commission* (C-580/12 P, EU:C:2014:2363, paragraph 55); *LG Display and LG Display Taiwan v Commission* (C-227/14 P, EU:C:2015:258, paragraph 51); and *InnoLux v Commission* (C-231/14 P, EU:C:2015:451, paragraph 48).

***** Paragraph 420 of the judgment under appeal.

83. However, this uncertainty results from the exchange rate risk which undertakings established outside the euro area must always bear, as already mentioned. ***** That is not all: in relation to potential liabilities a forward-looking undertaking must always take precautions in the currency in which those liabilities will fall to be paid in the future. To that extent there is no material difference between a fine under antitrust law which may be going to be imposed by the Commission and any potential liabilities under civil law which may arise for the undertaking concerned in proceedings before national courts.

84. If an undertaking is pursued by the Commission in proceedings under Regulation No 1/2003 as a suspected cartel participant, it is in its own interest during the proceedings to build reserves in euros on the basis of its own turnover figures for its most recent business year in respect of any fine which it may have to pay, or at least to ensure, by means of agreements with financial institutions, that at the time the decision imposing the fine is issued it will have the necessary liquid funds in euros, of up to the 10% upper limit under paragraph 2 of Article 23(2) of Regulation No 1/2003.

85. If the undertaking concerned does not take such precautions, then it is ultimately entering into a speculative venture as regards exchange rate movements and knowingly accepts the risk that it will be able to obtain the funds to pay any fine on less favourable conditions than it would have at the end of its last full business year preceding the decision imposing the fine.

86. As the Court has already held in another context, currency fluctuations are an element of chance which may produce advantages and disadvantages. ***** The very existence of such currency fluctuations is not such as to render inappropriate a fine lawfully fixed. *****

3. Interim conclusion

87. All in all, therefore, when carrying out a currency conversion for the purpose of determining the 10% upper limit for fines under antitrust law, taking the average exchange rate for the last full business year of the undertaking concerned preceding the adoption of the decision imposing the fine infringes neither the purpose of the second paragraph of Article 23(2) of Regulation No 1/2003 nor the general principles of equal treatment and legal certainty. The General Court's conclusion to that effect ***** is free of errors in law. The second ground of appeal is thus unfounded.

***** See above, point 73 of this Opinion.

***** Judgment in *Limburgse Vinyl Maatschappij and Others v Commission* (C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 604).

***** Judgments in *Enso Española v Commission* (C-282/98 P, EU:C:2000:628, paragraph 59); *Sarrió v Commission* (C-291/98 P, EU:C:2000:631, paragraph 89); and *Limburgse Vinyl Maatschappij and Others v Commission* (C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 604).

***** Paragraph 421 in conjunction with paragraphs 415 and 416 of the judgment under appeal.

C – Various general legal principles and considerations concerning the rule of law (third ground of appeal)

88. The third ground of appeal raises various general legal principles and considerations concerning the rule of law, the appellants alleging that the General Court has breached them. By this ground, the appellants challenge on the one hand paragraphs 396 to 402 of the judgment under appeal, and on the other paragraphs 434, 438 and 440 to 444 thereof. In doing so, the first part of the third ground of appeal relates only to the legal requirements that arise out of the principles of equal treatment and proportionality (see section 1 below), whereas the second part concerns the General Court's unlimited jurisdiction (see section 2 below).

89. The study by a business consultancy which was adduced by Pilkington in the proceedings at first instance plays a significant role in the appellants' arguments in relation to both parts of this ground of appeal. The appellants are of the view that it is possible to infer from this study that in consequence of the fine imposed by the Commission, Pilkington's financial situation has been significantly worsened.

90. I say immediately that the General Court's approach in relation to this study was entirely appropriate and is not liable to any criticism in law. The General Court correctly took that study into account only for the purpose of its unlimited jurisdiction, within the framework of which it was entitled to take into account facts and evidence which emerged only after the decision under appeal had been adopted. ***** By contrast, and also entirely correctly, the General Court left that study out of account in assessing the lawfulness of the decision at issue, because for that purpose the only matters which may be taken into account are those which were available to the Commission at the time it adopted its decision. *****

1. The principles of equal treatment and proportionality (first part of the third ground of appeal)

91. First, the appellants complain that the General Court misunderstood the legal requirements of the general principles of equal treatment and proportionality. They complain of a 'glaring disparity' in the impact which the fines imposed by the Commission mean for individual cartel participants. Pilkington itself considers that it has been punished much more harshly than the other participants in the cartel, because the fine imposed on it is a much larger proportion of its total turnover than is the case with the other participants, who had a wider product range.

92. Rightly, in this connection the General Court recalled ***** that the final amounts of the fines for the undertakings concerned need not reflect all differences between them in terms of their overall turnover or their relevant turnover. ***** Except for the 10% upper limit laid down by paragraph 2 of Article 23(2) of Regulation No 1/2003, the calculation of fines under antitrust law is not a mechanical exercise in which the penalty must have a specific relationship to the respective total turnover of each of the undertakings concerned.

***** Judgment in *Galp Energía España and Others v Commission* (C-603/13 P, EU:C:2016:38, paragraph 72).

***** Judgments in *France v Commission* (15/76 and 16/76, EU:C:1979:29, paragraph 7); *Crispoltoni and Others* (C-133/93, C-300/93 and C-362/93, EU:C:1994:364, paragraph 43); *IECC v Commission* (C-449/98 P, EU:C:2001:275, paragraph 87); and *Schindler Holding and Others v Commission* (C-501/11 P, EU:C:2013:522, paragraph 31).

***** Paragraph 397 of the judgment under appeal.

***** Judgment in *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 312).

93. It is, admittedly, correct that in the exercise of its discretion when imposing fines under letter (a) of the first paragraph of Article 23(2) of Regulation No 1/2003 the Commission does not have an entirely free hand, but is subject to judicial supervision as regards whether it has observed the general principles of EU law and the fundamental rights guaranteed at Union level, ***** in particular the principles of equal treatment and proportionality. *****

94. However, in the present case the General Court misunderstood the legal requirements of neither of those principles.

a) The legal requirements of the principle of equal treatment

95. First, as already explained, ***** the general principle of equal treatment 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.

96. In the normal case, when punishing cartel infringements the principle of equal treatment is satisfied if all cartel participants are dealt with by reference to the same criteria as regards the calculation of the fines imposed on them, ***** so that, *in qualitative terms*, in relation to a single cartel offence two different standards are not applied. ***** On its own, the fact that the fine ultimately imposed on one undertaking amounts to roughly 10% of its total turnover, in other words approaches the upper limit fixed by legislation (paragraph 2 of Article 23(2) of Regulation No 1/2003), whereas the percentage turns out lower for other cartel participants, does not constitute an infringement of the principle of equal treatment. *****

97. In the present case, the appellants nonetheless seek special treatment for Pilkington so that the fine imposed on them is reduced to a lower percentage of their total turnover. Correspondingly, they complain that the General Court withheld this special treatment from them.

***** First sentence of Article 51(1) of the Charter of Fundamental Rights; for completeness, see the declaratory reference in recital 37 of Regulation No 1/2003, according to which the regulation is to be interpreted and applied consistently with the rights and principles laid down in the Charter.

***** To this effect see judgments in *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 304 and 319); *Alliance One International and Standard Commercial Tobacco v Commission* (C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 58); and *Guardian Industries and Guardian Europe v Commission* (C-580/12 P, EU:C:2014:2363, paragraph 62).

***** See, in that regard, points 66 and 67 of this Opinion above.

***** To this effect, see judgment in *Alliance One International and Standard Commercial Tobacco v Commission* (C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 58), according to which, when the amount of the fine is determined, there cannot, by the application of different methods of calculation, be any discrimination between the undertakings which have participated in an agreement or a concerted practice contrary to Article 81(1) EC.

***** On this point, see my Opinion in Joined Cases *Alliance One International and Standard Commercial Tobacco v Commission* (C-628/10 P and C-14/11 P, EU:C:2012:111, paragraph 57).

***** Judgment in *Putters International v Commission* (T-211/08, EU:T:2011:289, paragraph 74).

98. A departure from the classic method for calculating fines may be justified if the method of calculation applied by the Commission on the basis of the 2006 Guidelines does not sufficiently differentiate between the fines imposed on individual cartel participants having regard to the duration and gravity of their respective individual participation in the cartel and any mitigating or aggravating circumstances. ***** However, nothing suggests that this may be the case here, and the appellants have not made any submissions to this effect.

99. Whether, apart from that, Pilkington's situation is materially different from that of the other cartel participants due to particular circumstances, and therefore necessitates special treatment as regards calculating the fine, is ultimately a matter of the assessment of the facts and the evidence. According to consistent case-law, ***** this is a matter for the General Court alone, and at the stage of an appeal before the Court of Justice is not to be considered anew, except where the facts or the evidence have been distorted, of which there is no complaint in the present case.

100. Purely for the sake of completeness, I mention in addition that it appears to me that Pilkington's strong focus on automotive glass and its narrower (in comparison with the other cartel participants) product range are not in themselves sufficient to allow different standards to apply in calculating the fine on Pilkington. Instead, the Commission correctly points out that an undertaking such as Pilkington, which derives a particularly large part of its total turnover from products encompassed by the cartel, profited correspondingly more from any profit which the cartel participants were able to make out of their collusive behaviour. Against this background, it therefore is by no means unjust that the fine imposed by the Commission is a higher percentage of this undertaking's total turnover than is the case as regards other cartel participants.

101. Nor is this conclusion called into question by the fact that in the past the Commission granted reductions in fines on an individual basis, in order to do justice to the characteristics of the business models of individual cartel participants. According to the Court's consistent case-law, the Commission's practice in previous decisions does not serve as a legal framework for the fines imposed in competition matters. *****

102. As regards specifically the case of *Almamet*, relied upon by the appellants, the situation of that undertaking was characterised by features which do not apply to Pilkington to the same extent — at least according to the information before the Courts of the European Union. *****

103. Thus, the complaint of an infringement of the legal requirements of the principle of equal treatment is to be dismissed as unfounded.

***** To this effect, see judgment in *Putters International v Commission* (T-211/08, EU:T:2011:289, paragraph 75); in addition, see the Resolution of the European Parliament of 10 March 2015 on the Report from the Commission on EU Competition Policy 2013, submitted on 6 May 2014 (Parliament Resolution P8 TA (2015) 0051, paragraph 29).

***** See, instead of many more, judgments in *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 177); *Dole Food and Dole Fresh Fruit Europe v Commission* (C-268/13 P, EU:C:2015:184, paragraph 58); and *Toshiba Corporation v Commission* (C-373/14 P, EU:C:2016:26, paragraphs 40 and 41).

***** Judgments in *JCB Service v Commission* (C-167/04 P, EU:C:2006:594); *Telefónica and Telefónica de España v Commission* (C-295/12 P, EU:C:2014:2062, paragraph 189); and *LG Display and LG Display Taiwan v Commission* (C-227/14 P, EU:C:2015:258, paragraph 67).

***** As the General Court emphasised in its judgment in *Novácké chemické závody v Commission* (T-352/09, EU:T:2012:673, paragraph 139), the position of the *Almamet* undertaking was characterised by 'high value materials with a low margin'.

b) The legal requirements of the principle of proportionality

104. As regards the principle of proportionality, which, pursuant to Article 49(3) of the Charter, enjoys the status of a fundamental right, ***** there is no dispute that it has to be observed when fines are imposed for cartel infringements. *****

105. In the present case, the appellants ultimately allege that the General Court overlooked the legal requirements of proportionality having regard to the relationship between the fine imposed by the Commission and Pilkington's total turnover.

106. In principle, the 10% upper limit under the second paragraph of Article 23(2) of Regulation No 1/2003, which has already been mentioned, ***** ensures that fines imposed by the Commission on cartel participants maintain a reasonable relationship to their respective capacity to make payment, and that no excessive or disproportionate fines are imposed. ***** If this upper limit is observed, it is assumed that the fine *does not* disproportionately burden the capacity of the undertaking concerned to make payment.

107. The mere fact that a fine is a financial burden — possibly even a significant one — on the undertaking concerned and may cause temporary weakness in its financial strength can by no means lead to the conclusion that the fine is disproportionately high. On the contrary, the penalty, in the form of the fine imposed on the undertaking, *should* be appreciable, in order that it has the intended specific and general deterrent effects (on this see also point 4 of the 2006 Guidelines). This aim would not be achieved if an undertaking could pay the fine imposed on it 'out of petty cash', so to speak.

108. If one accepted any weakening of the financial strength of the undertaking concerned which might be expected to occur in consequence of an antitrust fine as giving cause to reduce that penalty, this would moreover have the absurd consequence that the undertaking would be rewarded by an unjustified financial advantage for a serious infringement of the competition rules it had committed. ***** If an undertaking unexpectedly suffered payment difficulties, then, as already mentioned, ***** EU budget law provides for appropriate solutions.

***** On this point, see my Opinion in *Schindler Holding and Others v Commission* (C-501/11 P, EU:C:2013:248, paragraph 222).

***** Judgments in *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 319), and *Aalborg Portland and Others v Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 365).

***** On this, see my discussion of the second plea in law above, in particular in point 48 of this Opinion.

***** Judgments in *Musique diffusion française and Others v Commission* (100/80 to 103/80, EU:C:1983:158, paragraphs 119 and 121); *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 280 and 281); *Britannia Alloys & Chemicals v Commission* (C-76/06 P, EU:C:2007:326, paragraph 24); and *YKK and Others v Commission* (C-408/12 P, EU:C:2014:2153, paragraph 63).

***** To this effect, see judgments in *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 327); *SGL Carbon v Commission* (C-308/04 P, EU:C:2006:433, paragraph 105); and *KME Germany and Others v Commission* (C-389/10 P, EU:C:2011:816, paragraph 103); in the same vein, see the judgment in the early case of *IAZ International Belgium and Others v Commission* (96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82, EU:C:1983:310, paragraphs 54 and 55).

***** See above, point 59 of this Opinion.

109. Against this background, the complaint of an infringement of the legal requirements of the principle of proportionality is just as unfounded as the complaint as regards the principle of equal treatment.

2. Exercise by the General Court of unlimited jurisdiction (second part of the third ground of appeal)

110. Finally, by this third ground of appeal the appellants complain that the General Court did not exercise its unlimited jurisdiction under Article 261 TFEU in conjunction with Article 31 of Regulation No 1/2003 with the necessary intensity.

111. The basis of complaint is primarily what is said in paragraphs 442 and 443 of the judgment under appeal, where the General Court said that it would reduce a fine imposed by the Commission on the ground of the negative financial consequences faced by an undertaking only ‘in exceptional circumstances, where justified by an overriding interest’. ***** In the opinion of the appellants, by this statement the General Court unlawfully restricted itself to ‘a “light touch” review’ ***** in the exercise of its unlimited jurisdiction.

112. The exercise by the General Court of its unlimited jurisdiction is reviewed by the Court only for manifest error. ***** Errors of that kind must be assumed, first, where the General Court has failed to take into account the extent of its powers under Article 261 TFEU, ***** second, where it did not fully consider all the material points, ***** and, third, where it has applied incorrect legal

***** Paragraph 442 of the judgment under appeal.

***** The terms used by the appellants.

***** Judgment in *Aalborg Portland and Others v Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 365).

***** On this point, see my Opinions in *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* (C-105/04 P, EU:C:2005:751, paragraph 137) and *Schindler Holding and Others v Commission* (C-501/11 P, EU:C:2013:248, paragraph 190); to the same effect, see the judgments in *Schindler Holding and Others v Commission* (C-501/11 P, EU:C:2013:522, paragraph 155 and 156) and *Kone and Others v Commission* (C-510/11 P, EU:C:2013:696, paragraphs 40 and 42).

***** Judgments in *Baustahlgewebe v Commission* (C-185/95 P, EU:C:1998:608, paragraph 128); *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 244 and 303); and *Papierfabrik August Koehler and Others v Commission* (C-322/07 P, C-327/07 P and C-338/07 P, EU:C:2009:500, paragraph 125).

criteria, ***** not least having regard
to the principles of equal
treatment ***** and
proportionality. *****

113. The complaint made in the present case by the appellants, that the approach to the '*pleine jurisdiction*' was too superficial, falls into the first of the categories referred to: ultimately, the complaint against the General Court is that it did not take into account the extent of its powers under Article 261 TFEU. *****

114. This jurisdiction is indeed very wide: under Article 261 TFEU the General Court is empowered, in addition to the mere review of the legality of the fine imposed by the Commission under antitrust law, to substitute its own decision as regards the amount of that fine for that of the Commission. ***** It may therefore cancel, reduce or increase the fine purely on the basis of considerations of expediency, without first having to set aside the decision appealed against. ***** It follows that the exercise of unlimited jurisdiction does not necessarily presuppose a finding of an error in law.

115. In the present case the General Court was clearly aware of this possibility available to it under Article 261 TFEU. ***** The General Court by no means assumed that it *could* reduce the fine imposed by the Commission only in exceptional circumstances. Instead, it took the approach that such a reduction specifically on the ground of an alleged weakening in the financial strength of the undertaking concerned was *appropriate* only in exceptional circumstances.

***** Judgments in *Baustahlgewebe v Commission* (C-185/95 P, EU:C:1998:608, paragraph 128); *Dansk Rørintustri 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 244 and 303); and *Papierfabrik August Koehler and Others v Commission* (C-322/07 P, C-327/07 P and C-338/07 P, EU:C:2009:500, paragraph 125).

***** Judgments in *Weig v Commission* (C-280/98 P, EU:C:2000:627, paragraphs 63 and 68); *Sarrió v Commission* (C-291/98 P, EU:C:2000:631, paragraphs 97 and 99); and *Alliance One International and Standard Commercial Tobacco v Commission* (C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 58).

***** Judgments in *E.ON Energie v Commission* (C-89/11 P, EU:C:2012:738, paragraph 126) and *Schindler Holding and Others v Commission* (C-501/11 P, EU:C:2013:522, paragraph 165).

***** I have discussed the legal requirements arising out of the principles of equal treatment and proportionality in the first part of the third plea in law (see above, points 91 to 109 of this Opinion).

***** Judgments in *Limburgse Vinyl Maatschappij and Others v Commission* (C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 692); *KME Germany and Others v Commission* (C-389/10 P, EU:C:2011:816, paragraph 130); *AC-Treuhand v Commission* (C-194/14 P, EU:C:2015:717, paragraph 74); and *Galp Energía España and Others v Commission* (C-603/13 P, EU:C:2016:38, paragraph 75).

***** Judgments in *Limburgse Vinyl Maatschappij and Others v Commission* (C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 692) and *Prym and Prym Consumer v Commission* (C-534/07 P, EU:C:2009:505, paragraph 86).

***** See in particular paragraphs 431, 432 and 434 of the judgment under appeal.

116. In other words, in the present case the General Court certainly considered Pilkington's submissions as regards the worsening of its financial strength, including the study of a business consultancy put forward by Pilkington. However, in that regard, not for — incorrectly understood — legal considerations, but only on the basis of *considerations of expediency*, did it decide against reducing the fine. This is particularly important if one has regard to the background against which the General Court discussed the 'exceptional circumstances': the General Court is led by the concern that the effectiveness of EU competition policy could suffer if antitrust fines did not cause a certain difficulty to the undertakings concerned. *****

117. As indicated above, ***** such an approach gives no ground for complaint from a legal point of view. In addition, it is entirely consistent with the Commission's approach to EU competition policy, as defined in its 2006 Guidelines. ***** Although such Guidelines cannot be binding on it, the EU judiciary may nonetheless take inspiration from them in exercising its unlimited jurisdiction. *****

118. Thus, all in all the General Court correctly understood its unlimited jurisdiction. In principle, the Court of Justice, as an appellate body, does not have power to make a more thorough assessment of the fine as regards its proportionality. It is only in the most exceptional circumstances that the Court may itself intervene, that is to say if 'the level of the penalty is not merely inappropriate, but also excessive to the point of being disproportionate'. ***** However, there is no basis at all in the present case for believing there to be such a glaring and manifest disparity between infringement and penalty that would require correction by the Court of Justice as an appellate court.

119. The last part of the third ground of appeal is therefore unfounded. Thus, the whole of the third ground of appeal is unfounded.

D – Summary

120. Given that none of the grounds of appeal put forward by the appellants succeeds, the appeal as a whole is to be dismissed.

***** Paragraph 441 of the judgment under appeal.

***** See above, points 106 to 108 of this Opinion.

***** See in particular point 35 of the 2006 Guidelines: 'In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.'

***** Judgments in *Commission v Verhuizingen Coppens* (C-441/11 P, EU:C:2012:778, paragraph 80) and *Galp Energía España and Others v Commission* (C-603/13 P, EU:C:2016:38, paragraph 90).

***** Judgments in *E.ON Energie v Commission* (C-89/11 P, EU:C:2012:738, paragraphs 125 and 126); *Schindler Holding and Others v Commission* (C-501/11 P, EU:C:2013:522, paragraphs 164 and 165); and *Telefónica and Telefónica de España v Commission* (C-295/12 P, EU:C:2014:2062, paragraph 205).

VI – Costs

121. Article 184(2) of the Rules of Procedure provides that where the appeal is unfounded the Court is to make a decision as to costs.

122. It follows from Article 138(1) and (2) in conjunction with Article 184(1) of the Rules of Procedure that the unsuccessful party is to be ordered to pay the costs if they have been applied for; where there is more than one unsuccessful party the Court shall decide how the costs are to be shared. Since the Commission has applied for costs against the appellants and the latter have been unsuccessful in their pleas, they must be ordered to pay the costs. As they brought the appeal jointly, they must bear the costs jointly and severally.

VII – Conclusion

123. On the basis of the above considerations, I propose that the Court should:

- (1) dismiss the appeal;
- (2) order the appellants, jointly and severally, to pay the costs of the proceedings.