Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

12 November 2014*

(Appeal — Agreements, decisions and concerted practices — Market for flat glass in the European Economic Area (EEA) — Price-fixing — Calculation of the amount of the fine — Inclusion of an undertaking's internal sales — Reasonable time — Admissibility of documents produced with a view to the General Court hearing)

In Case C-580/12 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 10 December 2012,

Guardian Industries Corp., established in Dover (United States),

Guardian Europe Sàrl, established in Dudelange (Luxembourg),

represented by F. Louis, avocat, and by H.-G. Kamann and S. Völcker, Rechtsanwälte, instructed by C. O'Daly, Solicitor,

appellants,

the other party to the proceedings being:

European Commission, represented by A. Dawes and R. Sauer, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, A. Ó Caoimh, C. Toader, E. Jarašiūnas and C.G. Fernlund (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 December 2013,

after hearing the Opinion of the Advocate General at the sitting on 29 April 2014,

gives the following

* Language of the case: English.

Judgment

1 By their appeal, Guardian Industries Corp. and Guardian Europe Sàrl (together 'Guardian') seek to have set aside the judgment of the General Court of the European Union of 27 September 2012 in *Guardian Industries and Guardian Europe* v *Commission* (T-82/08, EU:T:2012:494; 'the judgment under appeal'), by which the General Court dismissed their action for the annulment of Commission Decision C(2007) 5791 final of 28 November 2007 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/39165 — Flat glass) ('the decision at issue'), in so far as it concerns the appellants, and for a reduction in the amount of the fine imposed on them by that decision.

Legal context

Regulation (EC) No 1/2003

2 Article 23(2) and (3) of 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) provides:

'2. 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]; or

(b) they contravene a decision ordering interim measures under Article 8; or

(c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

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.

Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10% of the sum of the total turnover of each member active on the market affected by the infringement of the association.

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

3 Article 31 of Regulation No 1/2003 states:

'The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.'

The Instructions to the Registrar

4 Article 11 of the Instructions to the Registrar of the Court of First Instance of the European Communities of 5 July 2007 (OJ 2007 L 232, p. 1), as amended on 17 May 2010 (OJ 2010 L 170, p. 53), ('the Instructions to the Registrar') states:

'1. The Registrar shall prescribe the time-limits provided for in the Rules of Procedure, in accordance with the authority accorded to him by the President.

2. Documents received at the Registry after the period prescribed for their lodgment has expired may be accepted only with the authorisation of the President.

3. The Registrar may extend the time-limits prescribed, in accordance with the authority accorded to him by the President. When necessary, he shall submit to the President proposals for the extension of time-limits.

Applications for extensions of time-limits must be duly reasoned and be submitted in good time before the expiry of the period prescribed. A time-limit may not be extended more than once save for exceptional reasons.'

Background to the dispute and the decision at issue

5 It is apparent from paragraphs 1 to 10 of the judgment under appeal that, in the decision at issue, the Commission found that the undertakings Guardian, Asahi Glass, Pilkington and Saint-Gobain had participated in a single and continuous infringement of Article 81(1) EC, consisting in price-fixing in the flat-glass sector in the European Economic Area (EEA). As regards the Guardian undertaking, the Commission found it guilty of that infringement in respect of the period from 20 April 2004 to 22 February 2005 and on that basis imposed a fine of EUR 148 million jointly and severally on Guardian Industries Corp. and Guardian Europe Sàrl.

The procedure before the General Court and the judgment under appeal

6 By application lodged at the General Court Registry on 12 February 2008, Guardian brought an action seeking partial annulment of the decision at issue and a reduction of the fine imposed by the Commission.

7 In support of its head of claim seeking annulment, Guardian put forward a single plea in law alleging errors of fact concerning the duration of its participation in the cartel and the geographic scope of the cartel.

8 The head of claim seeking a reduction in the amount of the fine was based on three pleas in law. The first plea in law was that the necessary consequences should ensue from the claim for partial annulment. By its second plea in law, Guardian alleged infringement of the principle of non-discrimination and of the obligation to state reasons. The third plea in law alleged an error of assessment as to Guardian's role in the cartel at issue and infringement of the principle of non-discrimination.

9 The General Court dismissed the action in its entirety.

10 First, on the grounds set out in paragraphs 19 to 22 of the judgment under appeal, the General Court rejected the arguments put forward by Guardian in order to dispute the admissibility of a letter submitted by the Commission on 10 February 2012 ('the letter of 10 February 2012').

11 The General Court rejected the head of claim seeking the annulment of the decision at issue on the grounds set out in paragraphs 28 to 93 of the judgment under appeal. The head of claim seeking a reduction of the fine was rejected on the grounds set out in paragraphs 94 to 124 of the judgment under appeal.

Forms of order sought

12 Guardian claims that the Court of Justice should:

— set aside the judgment under appeal in so far as the General Court upheld the exclusion by the decision at issue of the sales made between companies in the same group ('the internal sales') in the calculation of the fines imposed on the other addressees of that decision;

— reduce the amount of the fine imposed on it by 37%;

— set aside the judgment under appeal in so far as the General Court held the letter of 10 February 2012 to be admissible and, accordingly, strike that letter from the record;

— reduce the amount of the fine imposed on Guardian by an amount not inferior to 25% in order to remedy the General Court's failure to grant it effective judicial review within a reasonable time;

— order the Commission to pay the costs, including those relating to the proceedings before the General Court.

13 The Commission contends that the Court should:

— primarily, dismiss the appeal;

— in the alternative, dismiss the claim for a reduction of the fine; and

— order Guardian to pay the costs of the proceedings both at first instance and on appeal.

The appeal

14 In support of the form of order which it seeks, Guardian raises three grounds of appeal which must be examined together, in an order different to that in which they were set out.

The ground alleging breach of the right to a hearing within a reasonable time

Arguments of the parties

15 Guardian submits that the duration of the procedure before the General Court amounts to a breach of the fundamental right to a fair trial within a reasonable time, referred to in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), such a breach giving grounds for a reduction in the amount of the fine imposed on it by the decision at issue. Guardian stated, at the hearing, that it intended to amend its claims in the light of the judgments in *Gascogne Sack Deutschland* v *Commission* (C-40/12 P, EU:C:2013:768), *Kendrion* v *Commission* (C-50/12 P, EU:C:2013:771) and *Groupe Gascogne* v *Commission* (C-58/12 P, EU:C:2013:770). Guardian therefore requests the Court to declare that the period within which the General Court prepared the case at first instance was excessive.

16 After stating, at the hearing, that it was withdrawing its objections to the admissibility of the present ground, the Commission contends, on the substance, that a reduction in the amount of the fine would not be appropriate and asks the Court, if necessary, to state the criteria for determining whether there has been a failure to comply with the reasonable-time principle.

Findings of the Court

17 The Court notes 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 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 (*Gascogne Sack Deutschland* v *Commission*, EU:C:2013:768, paragraph 89).

18 It follows that a claim for compensation in respect of the damage caused by the General Court's failure 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 (*Gascogne Sack Deutschland* v *Commission*, EU:C:2013:768, paragraph 90).

19 It is therefore for the General Court, which has jurisdiction under Article 256(1) TFEU, to determine such claims for damages, sitting in a different composition from that which heard the dispute giving rise to the procedure whose duration is criticised and applying the criteria set out in paragraphs 91 to 95 of the judgment in *Gascogne Sack Deutschland* v *Commission* (EU:C:2013:768).

20 That being so, where it is clear in the case before it, without there being any need for the parties to adduce evidence in that regard, that the General Court breached, in a sufficiently serious manner, its obligation to adjudicate on the case within a reasonable time, the Court of Justice may note that fact. In the present case, the duration of the proceedings before the General Court, amounting to almost four years and seven months, including, in particular, a period of more than three years and five months which elapsed between the end of the written procedure, which occurred after the Commission had lodged its statement in defence, and the opening of the oral procedure, cannot be justified by any of the circumstances specific to the case which gave rise to the present dispute.

21 It follows, however, from the considerations set out in paragraphs 17 to 19 above that the ground of appeal alleging a breach of the right to adjudication of a case within a reasonable time must be rejected.

The ground of appeal alleging infringement of the rights of the defence and the principle of the equality of arms

Arguments of the parties

22 This ground is directed at paragraphs 21 and 22 of the judgment under appeal, by which the General Court declared that the letter of 10 February 2012 addressed to it by the Commission was admissible.

23 Guardian submits that that letter, which was sent on the last working day before the hearing, sets out for the first time the Commission's position concerning the method of calculating the reduction in the amount of the fine. That letter, Guardian argues, contains new information and was lodged without the prior authorisation of the General Court or justification.

24 Guardian states that, although that letter was lodged out of time, the General Court declared, in paragraph 22 of the judgment under appeal, that it was admissible having regard, first, to its 'content' and, secondly, to 'the fact that it was sent to [Guardian], which [was] therefore able to put forward [its] observations regarding it at the hearing'. Guardian submits that that assessment is contrary to Article 11(3) of the Instructions to the Registrar.

25 Guardian submits that the principle of the equality of arms and the principle *audi alteram partem* require the hearing to be restricted to information in the case-file which has been the subject of written debate. The mere fact that a party may make submissions at the hearing in relation to

documents submitted out of time does not mean that the rights of the defence have been observed. In accordance with its own relevant case-law, the General Court ought to have declared the letter of 10 February 2012 inadmissible (*Solvay* v *Commission*, T-30/91, EU:T:1995:115, paragraphs 83 and 101; *BASF* v *Commission*, T-175/95, EU:T:1999:99, paragraph 46; and *AstraZeneca* v *Commission*, T-321/05, EU:T:2010:266, paragraph 27).

26 Guardian further submits that paragraph 22 of the judgment under appeal contains no reasoning showing why the letter was recognised as admissible, in particular in the light of its content.

27 Consequently, Guardian takes the view that the decision of the General Court, in paragraph 22, to add the letter of 10 February 2012 to the file must be annulled and it requests the Court to declare that that letter is inadmissible.

28 The Commission contends that this ground is inoperative. Unless Guardian were to demonstrate that, in the absence of the letter of 10 February 2012, the General Court would have reached a different conclusion regarding the level of the fine imposed on that undertaking, that ground is, it submits, irrelevant.

29 In any event, the Commission contends that that ground is unfounded. It submits that, given its unlimited jurisdiction, the General Court is at liberty to take into account facts and matters submitted out of time, provided that it observes the principle *audi alteram partem*. That principle was observed in the present case, since Guardian was able to address the content of that letter at the hearing, but chose not to do so. The Commission observes that Guardian had a period of three days before the hearing to comment on that letter or to ask the General Court either to allow it to lodge written observations or to postpone the hearing.

Findings of the Court

30 The principle of respect for the rights of the defence is a fundamental principle of EU law. That principle would be infringed if a judicial decision were to be based on facts and documents of which the parties themselves, or one of them, have not been able to take cognisance and in relation to which they have not therefore been able to formulate an opinion (*Snupat* v *High Authority*, 42/59 and 49/59, EU:C:1961:5, 84).

31 The principle of equality of arms, which is a corollary of the very concept of a fair hearing and the aim of which is to ensure a balance between the parties to proceedings, guaranteeing that any document submitted to the court may be examined and challenged by any party to the proceedings, implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (*Otis and Others*, C-199/11, EU:C:2012:684, paragraphs 71 and 72).

32 In its letter of 10 February 2012, the Commission sought (i) to reply to a letter sent, for the purposes of preparing the hearing, by Guardian to the General Court concerning the calculation of the fine and (ii) to forward to the General Court certain statistical information on which it had relied for the purpose of calculating the turnovers on the relevant market of the four undertakings to which the decision at issue was addressed. The Commission stated, on the basis of those factors, that, if the Court were minded to grant a reduction, that reduction should not exceed 30%.

33 It is not disputed that Guardian received a copy of that letter on 10 February 2012. It therefore had three days to acquaint itself with its contents prior to the hearing. Because of the nature and content of that letter, such a period cannot be considered excessively short, regardless of whether the General Court failed to have regard to the provisions of Article 11(3) of the Instructions to the Registrar. In addition, it is common ground that Guardian neither asked the General Court for an opportunity to

comment on that letter in writing nor requested that the hearing be postponed. Lastly, Guardian was able to set out at the hearing its arguments relating to both the admissibility of that letter and its content.

34 It follows that Guardian has not established that the General Court infringed its rights of defence or the principle of the equality of arms by failing to ensure that it had sufficient time in which to acquaint itself with the letter of 10 February 2012 and to express its position on that letter in writing (see, by analogy, *Corus UK* v *Commission*, C-199/99 P, EU:C:2003:531, paragraph 25).

35 In such circumstances, the General Court did not err in law in holding, in paragraph 22 of the judgment under appeal, that '[i]n view of the content of that letter and of the fact that it was sent to [Guardian], which [was] therefore able to put forward [its] observations regarding it at the hearing, it must be held that the document in question is admissible'.

36 It follows that the present ground of appeal is not well founded and must therefore be rejected.

The ground of appeal alleging infringement of the principle of equal treatment and of the obligation to state reasons

Arguments of the parties

37 Guardian submits that, in paragraphs 104 to 106 of the judgment under appeal, the General Court failed to have regard to the principle of equal treatment. It refused to accept that, when the fine is calculated, internal sales must be taken into account on the same basis as sales to third parties.

38 The General Court, Guardian contends, therefore failed to have regard to settled case-law and decisional practice, the rationale of which is to ensure that there is no discrimination between vertically integrated undertakings and non-vertically integrated undertakings. Such equal treatment is incumbent upon the Commission pursuant to the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [ECSC] (OJ 1998 C 9, p. 3) and also 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').

39 Guardian criticises the General Court on the ground that it failed to set out the reasons why it departed from that settled case-law. It submits that the General Court merely stated, in paragraph 104 of the judgment under appeal, that 'the existence of anti-competitive conduct was established only in respect of sales to independent customers.'

40 In addition to the contention that the General Court distorted the wording of recital 377 of the decision at issue, Guardian submits that the abovementioned statement is irrelevant. It is of little importance whether the cartel also covered internal sales. According to Guardian, the crucial point is that a vertically integrated undertaking may derive a competitive advantage from both the sale of the goods covered by the cartel and the sale of goods which are inputs to them. It states that the Commission has never, in the past, proved the existence of such an advantage and the Court has conceded that the exclusion of internal sales would 'inevitably' give an unjustified advantage to vertically integrated producers (*KNP BT* v *Commission*, C-248/98 P, EU:C:2000:625, paragraph 62). None the less, in paragraph 105 of the judgment under appeal, the General Court held that it had not been established that the vertically integrated undertakings had drawn such a competitive advantage from the infringement.

41 Since Guardian was the only non-vertically integrated undertaking which had participated in the infringement, it submits that the only way to restore equal treatment is to reduce the amount of the fine imposed on it by 37%, since such a percentage corresponds to the proportion of internal sales in relation to the total volume of sales on the relevant market.

42 The Commission takes the view that the present ground of appeal is unfounded.

43 In the first place, the Commission contends that the General Court in no way distorted the decision at issue nor erred in law in finding that the infringement relates solely to the sales to independent third parties. It takes the view, therefore, that those sales alone may serve as a basis for calculating the amount of the fine.

44 In the second place, the Commission disputes the contention that it is under an obligation pursuant to the case-law to take into account internal sales when calculating fines. That contention, it submits, is based on the idea that vertically integrated producers inevitably derive a competitive advantage on the markets downstream to that of the cartel. That idea is misconceived, because the existence of a competitive advantage derived from the operation of a cartel upstream depends on a multitude of factors and must be assessed on a case-by-case basis.

45 In any event, the taking into account of internal sales is neither precluded nor required by the case-law (*KNP BT* v *Commission*, EU:C:2000:625, paragraph 62; *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, C-397/03 P, EU:C:2006:328, paragraphs 102 and 103; *Europa Carton* v *Commission*, T-304/94, EU:T:1998:89, paragraph 123; *KNP BT* v *Commission*, T-309/94, EU:T:1998:91, paragraph 112; *Lögstör Rör* v *Commission*, T-16/99, EU:T:2002:72, paragraph 358; *Tokai Carbon and Others* v *Commission*, T-71/03, T-74/03, T-87/03 and T-91/03, EU:T:2005:220, paragraph 260; *Daiichi Pharmaceutical* v *Commission*, T-26/02, EU:T:2006:75, paragraphs 57, 63 and 64; and *BST* v *Commission*, T-452/05, EU:T:2010:167, paragraph 82).

46 The Commission states that, as a rule, it takes into account internal sales if there are sufficient indications to justify the conclusion that a competitive advantage exists or where the cartel expressly covers internal sales (Commission Decision C(2010) 8761 final of 8 December 2010 in Case COMP/39.309 — *LCD*).

47 However, on other occasions the Commission has not taken into account internal sales (see Commission Decision C(2009) 7601 final of 7 October 2009 in Case COMP/39.129 — *Power Transformers* and Commission Decision C(2011) 7436 final of 19 October 2011 in Case COMP/39.605 — *CRT Glass*).

48 By contrast, when, as in the present proceedings, there are no clear indications that the cartel also covered internal sales or led to an indirect advantage on the downstream level, the Commission contends that it cannot be legally required to take internal sales into account. To impose such an obligation on the Commission would, it submits, limit its discretion as to fines and might lead to a significant increase in the fines imposed, without the need for any finding that internal or downstream sales are actually affected. Such an obligation might create discrimination between the various participants in an infringement based purely on the form of their corporate structures.

49 In the Commission's view, there is no reason to assume that it must always investigate whether internal sales are related to an infringement, provided that it adopts a consistent approach to all undertakings involved in a given cartel.

50 In the third place, the Commission contends that Guardian has in no way been the victim of discrimination. Consequently, it takes the view that Guardian has no right to a reduction in the fine imposed on it by the decision at issue. The fact that the inclusion of internal sales could have led to higher fines for other cartel participants cannot justify a lowering of Guardian's fine. The amount of

that fine is appropriate, proportionate and in line with the 2006 Guidelines. It reflects the economic weight of that undertaking in the infringement. For the purposes of deterrence, the Commission points out that it increased the fine on Saint-Gobain by 30% in order to reflect better the fact that it was a vertically integrated producer.

Findings of the Court

51 It must be recalled that the principle of equal treatment is a general principle of EU law, enshrined in Articles 20 and 21 of the Charter. According to settled case-law, that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, inter alia, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:512, paragraphs 54 and 55 and the case-law cited).

52 The second subparagraph of Article 23(2) of Regulation No 1/2003 provides that, for each undertaking and association of undertakings participating in the infringement, the fine may not exceed 10% of its total turnover in the preceding business year.

53 The Commission must assess, in each specific case and having regard both to the context and the objectives pursued by the scheme of penalties created by Regulation No 1/2003, the intended impact on the undertaking in question, taking into account in particular a turnover which reflects the undertaking's real economic situation during the period in which the infringement was committed (*Britannia Alloys & Chemicals* v *Commission*, C-76/06 P, EU:C:2007:326, paragraph 25).

54 According to the settled case-law of the Court, it is permissible, for the purpose of fixing the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement (*Musique Diffusion française and Others* v *Commission*, 100/80 to 103/80, EU:C:1983:158, paragraph 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, paragraph 243; and *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, EU:C:2006:328, paragraph 100).

55 It is apparent from the case-law of the Court that, although Article 23(2) of Regulation No 1/2003 leaves the Commission a discretion, it nevertheless limits the exercise of that discretion by establishing objective criteria to which the Commission must adhere. Thus, first, the amount of the fine that may be imposed on an undertaking is subject to a quantifiable and absolute ceiling, with the result that the maximum amount of the fine that can be imposed on a given undertaking can be determined in advance. Secondly, the exercise of that discretion is also limited by rules of conduct which the Commission imposed on itself, in particular in the 2006 Guidelines (see, to that effect, *Schindler Holding and Others* v *Commission*, C-501/11 P, EU:C:2013:522, paragraph 58).

56 Point 13 of the 2006 Guidelines states, '[i]n 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'. Point 6 of those guidelines states that '[t]he 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'.

57 It follows that point 13 of the 2006 Guidelines pursues the objective of adopting, as the starting point for the calculation of the fine imposed on an undertaking, an amount which reflects the economic significance of the infringement and the relative size of the undertaking's contribution to it. Consequently, while the concept of the value of sales referred to in point 13 of those guidelines admittedly cannot extend to encompassing sales made by the undertaking in question which do not fall within the scope of the alleged cartel, it would, however, be contrary to the goal pursued by that provision if that concept were to be understood as applying only to turnover achieved by the sales in respect of which it is established that they were actually affected by that cartel (*Team Relocations and Others* v *Commission*, C-444/11 P, EU:C:2013:464, paragraph 76).

58 Such a limitation would, in addition, have the effect of artificially minimising the economic significance of the infringement committed by a particular undertaking since the mere fact that a limited amount of direct evidence of sales actually affected by the cartel had been found would lead to the imposition of a fine which bore no actual relation to the scope of application of the cartel in question. Such a reward for being secretive would also adversely affect the objective of the effective investigation and sanctioning of infringements of Article 81 EC and, therefore, cannot be permitted (*Team Relocations and Others* v *Commission*, EU:C:2013:464, paragraph 77).

59 In any event, the Court notes that the proportion of the overall turnover deriving from the sale of products in respect of which the infringement was committed is best able to reflect the economic importance of that infringement. A distinction must not therefore be drawn between those sales depending on whether they are to independent third parties or to entities belonging to the same undertaking. To ignore the value of the sales belonging to that latter category would inevitably give an unjustified advantage to vertically integrated companies by allowing them to avoid the imposition of a fine proportionate to their importance on the product market to which the infringement relates (see, to that effect, *KNP BT* v *Commission*, EU:C:2000:625, paragraph 62).

60 In addition to the anticipated benefit from a horizontal price-fixing agreement when sales are made to independent third parties, vertically integrated undertakings may also benefit from such an agreement on the downstream market in processed goods made up of, inter alia, the goods which are the subject of the infringement. This is so for two different reasons: either those undertakings pass on the price increases in the inputs as a result of the infringement in the price of the processed goods, or they do not pass those increases on, which thus effectively grants them a cost advantage in relation to their competitors which obtain those same inputs on the market for the goods which are the subject of the infringement.

61 It is for that reason, as the Advocate General observed in points 28 to 34 of his Opinion, that the Courts of the European Union have always rejected pleas by which vertically integrated producers have sought to have their internal sales excluded from the turnover figure used as a basis for calculating their fine (*KNP BT* v *Commission*, EU:C:2000:625, paragraph 62; see also *Europa Carton* v *Commissio*n, EU:T:1998:89, paragraph 128; *KNP BT* v *Commission*, EU:T:1998:91, paragraph 112; *Lögstör Rör* v *Commission*, EU:T:2002:72, paragraphs 360 to 363; and *Tokai Carbon and Others* v *Commission*, EU:T:2005:220, paragraph 260).

62 Lastly, in accordance with the Court's settled case-law, 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 the same infringement of Article 81 EC (*Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 58).

63 As noted in paragraph 59 above, for the purposes of assessing the proportion of the overall turnover deriving from the sale of products which are the subject of the infringement, a distinction must not be drawn between internal sales and sales to independent third parties. It follows that, in order to determine that turnover, vertically integrated undertakings are in a comparable situation to that of

non-vertically integrated producers. Those two types of undertaking must therefore be treated equally. Excluding internal sales from the relevant turnover would effectively favour the first type of undertaking by reducing its relative weight in the infringement to the detriment of the other undertakings, on the basis of a criterion having no connection with the objective pursued when that turnover is determined, namely that of reflecting the economic importance of the infringement and the relative weight of each of the undertakings that took part in it.

64 In the present case, the General Court found as follows in paragraphs 104 to 106 of the judgment under appeal:

> 104 'In the present case, the Commission found that the anti-competitive agreements related to sales of flat glass to independent customers (recital 377 of the [decision at issue]) and it therefore used those sales in order to calculate the basic amount of the fines (recital 41, table 1, and recital 470 of the [decision at issue]). The Commission therefore excluded from the calculation of the fine the sales of flat glass which was to be processed by a division of the undertaking or by a company in the same group. As the existence of anti-competitive conduct was established only in respect of sales to independent customers, the Commission cannot be criticised on the ground that it excluded the internal sales of vertically integrated members of the cartel from the calculation of the fine. Nor can the Commission be criticised on the ground that it did not state the reasons for the exclusion of those sales from the calculation of the fine.
>
> 105 In addition, as the Commission states, it has not been established that the vertically integrated members of the cartel which supplied the products concerned to divisions of the same undertaking or to companies which are part of the same group of undertakings drew an indirect advantage from the price increase agreed on or that the price increase in the upstream market resulted in an anti-competitive advantage in the downstream market for processed flat glass.
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> 106 Lastly, as regards the argument that the Commission infringed the principle of non-discrimination by excluding the captive sales from the calculation of the fine, it must be borne in mind that, according to settled case-law, the principle of equal treatment or non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see [*BPB de Eendracht* v *Commission*, T-311/94, EU:T:1998:93] paragraph 309 and the case-law cited). In the present case, inasmuch as the Commission took the view that the anti-competitive arrangements related only to the price of flat glass invoiced to independent customers, the exclusion of internal sales from the calculation of the fine in the case of vertically integrated members of the cartel meant only that it treated objectively different situations differently. Consequently, it cannot be argued that the Commission infringed the principle of non-discrimination.'

65 In so ruling, the General Court failed to have regard to the principles of the case-law referred to in paragraphs 52 to 63 above.

66 In those circumstances, the ground relied on by Guardian in support of its appeal must be upheld in so far as it alleges an infringement of the principle of equal treatment, and there is no need to adjudicate on that same ground in so far as it relates to the alleged infringement by the General Court of the obligation to state reasons. Consequently, the appeal must be allowed and the judgment under appeal set aside in so far as it rejected the plea alleging infringement of the principle of non-discrimination as regards the calculation of the amount of the fine and ordered Guardian to pay the costs.

The action before the General Court

67 In accordance with Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded, the Court may, if it quashes the decision of the General Court, give final judgment in the action, where the state of the proceedings so permits. That is the position in the present case. The Court of Justice has at its disposal all the factors necessary to rule on the action.

68 It is none the less necessary to clarify the scope of the Court's review. On the grounds set out in paragraphs 28 to 93 of the judgment under appeal, the General Court rejected the heads of claim seeking annulment of the decision at issue. Since Guardian has not disputed those assessments in the context of its appeal, they have become final. It is therefore for the Court of Justice to examine the dispute only in so far as it relates to the plea alleging infringement of the principle of equal treatment and of the obligation to state reasons regarding the calculation of the amount of the fine relied on in support of the head of claim seeking the reduction of that fine.

69 The second plea in law relied on by Guardian in its action before the General Court with a view to obtaining a reduction in the amount of the fine seeks to remedy the unequal treatment stemming from the exclusion of the internal sales from the calculation of that fine. On the grounds set out in paragraphs 52 to 66 of the present judgment, it must be found that, in excluding those sales, the Commission infringed the principle of equal treatment.

70 In this regard, the Court notes that it was clear from point 41 of the statement of objections that, of the four undertakings to which the decision at issue was addressed, Guardian had the smallest share of the relevant market, assessed at between 10% and 20%, while Saint Gobain's share of between 20% and 30% was the largest. By contrast, at the time of the decision at issue, that order had been reversed, Saint-Gobain then having the smallest market share of between 10% and 20% and Guardian the largest with 25%, the decision at issue, however, providing no explanation as to the reasons for such a significant change in the basis for calculating the fine. The exclusion of the internal sales therefore led to Saint Gobain's relative weight in the infringement being reduced and that of Guardian being increased commensurately.

71 In that regard, the Commission's argument that the amount of the fine imposed on Saint-Gobain was increased by 30% in order to reflect more effectively the fact that it was a vertically integrated producer cannot be upheld. According to recital 519 of the decision at issue, the increase at issue was imposed on Saint-Gobain for the purposes of providing the fine with a sufficiently deterrent effect, on account in particular of Saint-Gobain's 'far bigger presence in the glass sector' and 'its turnover [which] is, in absolute terms, much larger than that of the others'.

72 The second plea in law raised by Guardian before the General Court in order to obtain a reduction of the amount of the fine imposed on it by the Commission must therefore be declared well founded.

73 The Court must therefore rule, in accordance with the unlimited jurisdiction conferred on it by Article 31 of Regulation No 1/2003, on the amount of the fine to be imposed on Guardian (*Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 79, and *Alliance One International* v *Commission*, C-679/11 P, EU:C:2013:606, paragraph 104).

74 In this regard, it must be observed that Article 23(3) of Regulation No 1/2003 provides that, in fixing the amount of the fine, regard must be had both to the gravity and to the duration of the infringement. In addition, it is apparent from the second subparagraph of Article 23(2) that, for each undertaking participating in the infringement, the fine cannot exceed 10% of its total turnover in the preceding business year.

75 Although it is for the Court, in the exercise of its unlimited jurisdiction in this regard, to assess for itself the circumstances of the case and the nature of the infringement in question in order to determine the amount of the fine, the exercise of unlimited jurisdiction cannot result, when the amount of the fines to be imposed is determined, in discrimination between undertakings which have participated in an agreement or concerted practice contrary to Article 81(1) EC (*Commission* v *Verhuizingen Coppens*, EU:C:2012:778, paragraph 80).

76 As regards the reduction of the amount of the fine, the parties disagree as to both the principle of a reduction itself and the extent of any reduction.

77 In the first place, the Commission takes the view that the fact that the inclusion of internal sales could have led to higher fines for other cartel participants does not justify a lowering of the fine imposed on Guardian, an argument which the latter disputes.

78 In this regard, suffice it to note that, having found that the decision at issue is unlawful, the Court may, in the exercise of its unlimited jurisdiction, substitute its own appraisal for the Commission's and, consequently, cancel, reduce or increase the fine imposed (see *Groupe Danone* v *Commission*, C-3/06 P, EU:C:2007:88, paragraph 61, and *Otis and Others*, EU:C:2012:684, paragraph 62). That power is exercised by taking into account all of the factual circumstances (see, to that effect, *Prym and Prym Consumer* v *Commission*, C-534/07 P, EU:C:2009:505, paragraph 86 and the case-law cited). Consequently, the abovementioned argument of the Commission must be rejected.

79 In the second place, the parties disagree as to the rate of reduction to apply to the fine in order to remedy the unequal treatment resulting from the exclusion of the internal sales from the calculation of the fine. Guardian submits, by comparing the data set out in the decision at issue with those of the statement of objections, that the amount of the fine should be reduced by 37%. In its letter of 10 February 2012, the Commission takes the view that the reduction cannot go beyond 30%. It argues that the data on which Guardian bases its calculations include the sales of certain types of glass which were included in the statement of objections but not in the decision at issue.

80 In those circumstances, in the light of all the considerations of fact and law in the present case, the amount of the fine imposed on Guardian in Article 2 of the decision at issue must be reduced by 30% and set at EUR 103 600 000.

Costs

81 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

82 Under Article 138(1) of those Rules, applicable 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.

83 Under Article 138(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the parties are to be ordered to bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

84 Since Guardian's appeal has been granted in part, the Commission must, in addition to bearing its own costs in respect of both the proceedings at first instance and the appeal, be ordered to pay one half of the costs incurred by Guardian relating to those two sets of proceedings. Guardian must bear one half of its own costs relating to those proceedings.

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

1. **Sets aside the judgment of the General Court of the European Union in *Guardian Industries and Guardian Europe* v *Commission* (T-82/08, EU:T:2012:494), in so far as it rejected the plea in law alleging infringement of the principle of non-discrimination as regards the calculation of the amount of the fine imposed jointly and severally on Guardian Industries Corp. and Guardian Europe Sàrl and ordered them to pay the costs;**

2. **Annuls Article 2 of Commission Decision C(2007) 5791 final of 28 November 2007 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/39165 — Flat glass) in so far as it sets the amount of the fine imposed jointly and severally on Guardian Industries Corp. and Guardian Europe Sàrl at EUR 148 000 000;**

3. **Sets the amount of the fine imposed jointly and severally on Guardian Industries Corp. and Guardian Europe Sàrl by reason of the infringement established in Article 1 of that decision at EUR 103 600 000;**

4. **Dismisses the appeal as to the remainder;**

5. **Orders the European Commission, in addition to bearing its own costs in respect of both the proceedings at first instance and the appeal, to pay one half of the costs incurred by Guardian Industries Corp. and Guardian Europe Sàrl relating to those two sets of proceedings;**

6. **Orders Guardian Industries Corp. and Guardian Europe Sàrl to bear one half of their own costs relating to those proceedings.**

[Signatures]