



Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

16 May 2017 *

(Competition — Agreements, decisions and concerted practices — Abuse of dominant position — Distribution of plant protection products market — Decision to reject a complaint — Alleged anticompetitive behaviour of producers and distributors — Concerted or coordinated action of lodging complaints, by producers and distributors, before administrative and criminal authorities — Reporting alleged infringements of the applicable rules by parallel importers — Administrative inspections subsequently carried out by the administrative authorities — Imposition of administrative and criminal penalties by national authorities on parallel importers — Assimilation of complaints by producers and distributors to vexatious actions or abuses of administrative procedures — Lack of European Union interest — Right to effective judicial protection)

In Case T-480/15,

Agria Polska sp. z o.o., established in Sosnowiec (Poland),

Agria Chemicals Poland sp. z o.o., established in Sosnowiec,

Star Agro Analyse und Handels GmbH, established in Allerheiligen bei Wildon (Austria),

Agria Beteiligungsgesellschaft mbH, established in Allerheiligen bei Wildon,

represented initially by S. Dudzik and J. Budzik, and subsequently by P. Graczyk and W. Ročławski, lawyers,

applicants,

v

European Commission, represented by J. Szczodrowski, A. Dawes and J. Norris-Usher, acting as Agents,

defendant,

APPLICATION based on Article 263 TFEU seeking annulment of Commission Decision C(2015) 4284 final of 19 June 2015 (Case AT.39864 — BASF (formerly *AGRIA and Others* v *BASF and Others*)), rejecting the applicants' complaint concerning infringements of Article 101 and/or Article 102 TFEU allegedly committed, essentially, by 13 producers and distributors of plant protection products, with the assistance or through four professional organisations and a law firm,

THE GENERAL COURT (First Chamber),

composed of I. Pelikánová, President, P. Nihoul and J. Svenningsen (Rapporteur), Judges,

* Language of the case: Polish.

Registrar: L. Grzegorzczak, Administrator,

having regard to the written part of the procedure and further to the hearing on 28 February 2017,
gives the following

Judgment

Background to the dispute

- 1 The applicants, Agria Polska sp. z o.o., Agria Chemicals Poland sp. z o.o., Star Agro Analyse und Handels GmbH and Agria Beteiligungsgesellschaft mbH are, respectively, two Polish companies, a German company and an Austrian company, active in the sale of plant protection products carried out in the context of parallel imports of those products, making it possible, inter alia, to generate profits derived from differences in the rate of value added tax (VAT) applied to those products in the various Member States. Those operations consist essentially of the import into Poland of such products from Member States in which they have already been authorised, their storage in the applicants' warehouses in Poland and their subsequent re-export to other Member States, including those in which those products had originally been authorised, in the present case, essentially, to Germany and in Austria.

Proceedings before the UOKiK

- 2 On 1 July 2010, Agria Polska brought before the Urząd Ochrony Konkurencji i Konsumentów (Office for the Protection of Competition and Consumers, Poland, 'the UOKiK'), a complaint ('the national complaint') alleging infringement of the Ustawa o ochronie konkurencji i konsumentów (law on competition and consumer protection), of 16 February 2007 (Dz. U. No 50, position 331), by 13 undertakings, namely BASF SE, Bayer CropScience, RWA Raiffeisen Ware Austria AG ('RWA'), Deutscher Raiffeisenverband, Sumi-Agro, Monsanto, Nufarm, Rokita Agro, DuPont, Arysta, Syngenta, Dow and Makhteshim Agan, producers or distributors of plant protection products, with the help or through four professional organisations, namely Industrieverband Agrar ('IVA'), Fachverband der chemischen Industrie — Industriegruppe Pflanzenschutz (IGP), European Crop Protection Association and Polskie Stowarzyszenie Ochrony Roślin (PSOR), established in Germany, Belgium and Poland respectively, and a law firm.
- 3 By letter of 10 August 2010, the President of the UOKiK informed Agria Polska that, in so far as the measure or practices referred to in the national complaint concerned 2005 and 2006, those practices could no longer be investigated by that office. Under Article 93 of the Law on the Protection of Competition and Consumers, a procedure concerning restrictive practices could no longer be commenced after a period of one year from the end of the year in which the infringement in question ended.
- 4 On 30 August 2010, Agria Polska reiterated before the UOKiK its request to open an investigation procedure concerning the alleged cartel between producers and distributors of plant protection products, arguing that the national complaint, introduced on 1 July 2010, also alleged an infringement by the latter of EU competition law rules.
- 5 By letter of 22 November 2010, the president of the UOKiK maintained its position, stating that the one-year limitation period provided for by Polish law was applicable even when the requested investigation concerned EU competition law provisions.

The Commission proceedings

- 6 On 30 November 2010, the applicants and Agro Nova Polska sp. z o.o. lodged, pursuant to Article 7 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1), a complaint with the European Commission ('the complaint'). That complaint concerned the same entities as those referred to in the national complaint made to the UOKiK. Agro Trade Handelsgesellschaft mbH and Cera Chem SARL, German and Luxembourgish companies respectively, joined the complaint, the Commission being informed thereof in the supplementary joint observations submitted by all those companies (hereinafter 'the original complainant companies') on 15 December 2010. Those companies submitted additional information to the Commission on 27 April 2011.
- 7 On 29 July 2011, the original complainant companies provided the Commission with a summary of the complaint.
- 8 It is apparent from the documents thus submitted by the original complainants that the complaint concerned, essentially, an infringement of Article 101 TFEU. That complaint also concerned an infringement of Article 102 TFEU by RWA.
- 9 In general, the original complainant companies argued that the entities referred to in the complaint had engaged in practices which infringed EU competition law. Such practices essentially took the form of an agreement and/or concerted practices between those entities and consisted of abusive complaints brought in a coordinated manner before the Austrian and Polish administrative and criminal authorities, calling into question the lawfulness of the commercial activities of the original complainant companies, with regard both to the requirements laid down in the regulations applicable to plant protection products and to the conditions for parallel trade in such products, including for tax purposes.
- 10 According to the original complainant companies, it was on the basis of false, truncated or even misleading statements, made by the entities referred to in the complaint in order to eliminate them from the market, that they were wrongly subject to numerous administrative, tax and criminal inspections by the Austrian and Polish administrative authorities, including on-the-spot inspections and seizures of plant protection products in their warehouses, and that criminal proceedings had been instituted against them, moreover at a strategic moment of the year for trade in plant protection products, which is seasonal, that is, during the first part of the year.
- 11 Those administrative and criminal proceedings, it is claimed, resulted in the imposition of heavy fines on the original complainant companies, which led to the bankruptcy of one of them, Agria Polska, as well as measures prohibiting the marketing of plant protection products at a key point in the year for trade in that type of product. That resulted, it is claimed, in a loss of market share for the original complainant companies that is significant and hard to reverse.
- 12 The original complainant companies, which were subject to administrative and criminal penalties, however, obtained in certain cases by means of actions brought before the competent national courts, the annulment of those penalties or substantial reductions in the amount of those penalties which, it is claimed, demonstrates the misleading and untruthful nature of the statements of the entities referred to in the complaint, which the original complainant companies refer to as 'vexatious proceedings' within the meaning of the case-law resulting from the judgment of 17 July 1998, *ITT Promedia v Commission* (T-111/96, EU:T:1998:183).

- 13 The original complainant companies also argued that those reporting measures of the entities referred to in the complaint were facilitated by the active involvement both of the German authorities, in particular a representative of the Embassy of the Federal Republic of Germany in the Republic of Poland, and of the Polish authorities. In that regard, those national authorities were, it is claimed, the subject of intense lobbying by producers and distributors of plant protection products.
- 14 On 27 March 2012, the Commission, with the agreement of the original complainant companies, transmitted a non-confidential and consolidated version of the complaint to the entities referred to in that complaint, which filed their observations during the months of April to June 2012.
- 15 In their respective observations, the entities referred to in the complaint contested the presentation of the facts contained therein and argued, in essence, that the various actions taken by some of them before national administrative authorities or the national courts were legitimate, in particular in respect of infringements of their intellectual or industrial property rights and to prevent damage to their reputation. They also explained that their actions had not been coordinated at all and that the fact that those actions had been brought on dates that were close together was mainly due to the fact that they were affected, within the same time frame, by the unlawful activities of parallel importers. As regards the contacts made in that context between some of the undertakings producing and/or distributing plant protection products or between the latter and the professional organisations or with the national administrations, those had been fully justified, as had been their participation in the inspections. Thus, those legitimate contacts cannot demonstrate the existence of a cartel within the meaning of Article 101 TFEU.
- 16 By letter of 8 December 2014, the Commission informed the original complainants of its intention to reject the complaint on the main ground that there was not sufficient interest for the Union to continue its treatment under Articles 101 or 102 TFEU.
- 17 In support of its provisional analysis, the Commission explained, first, that the likelihood of establishing an infringement of Article 101 and/or 102 TFEU was limited because of insufficient evidence in support of the complaint and also the difficulty of establishing, in the present case, the existence of a dominant position of RWA or of a collective dominant position and, consequently, demonstrating an abuse of such a position. In that regard, the Commission indicated that it did not consider that the case-law resulting from the judgments of 17 July 1998, *ITT Promedia v Commission* (T-111/96, EU:T:1998:183), and of 1 July 2010, *AstraZeneca v Commission* (T-321/05, EU:T:2010:266), confirmed on appeal by judgment of 6 December 2012, *AstraZeneca v Commission* (C-457/10 P, EU:C:2012:770), was intended to apply to situations in which undertakings informed the national authorities of allegedly unlawful conduct or actions by other undertakings or exerted pressure seeking administrative or criminal proceedings against those undertakings. Secondly, the Commission considered that the resources necessary for the investigation requested would probably be disproportionate in view of the limited likelihood of establishing the existence of an infringement. Thirdly, the Commission considered that, at this stage, the national authorities and courts could be better placed to deal with the issues raised in the complaint.
- 18 In their observations lodged on 8 January 2015, the counsel for the original complainant companies, with the exception of Agro Nova Polska, informed the Commission that Agro Trade Handelsgesellschaft and Cera Chem had decided not to pursue the proceedings and could therefore be regarded as having ‘withdrawn their complaint’. He also explained that the applicants were challenging the announced closing of the complaint without further action, stating in particular that such an approach significantly diminished their chance of obtaining compensation before the national courts for the infringements of EU law in question, namely Articles 101 and 102 TFEU.
- 19 By decision C(2015) 4284 final, of 19 June 2015 (Case AT.39864 — BASF (previously *AGRIA and Others v BASF and Others*)) (‘the contested decision’), the Commission rejected the complaint reiterating, in essence, the elements of the interim analysis set out in the letter of 8 December 2014,

while stressing that it had limited resources and that, in the present case, the thorough investigation which should have been carried out, potentially concerning the activities carried out over a period of seven years by 18 entities located in four Member States, would have been too complex and time-consuming even though the probability of establishing an infringement seemed limited in the present case, which militated against opening an investigation.

Procedure and forms of order sought

- 20 By application lodged at the Registry of the General Court on 19 August 2015, the applicants brought the present action.
- 21 Following a double exchange of pleadings and on a proposal by the Judge-Rapporteur, the Court decided to open the oral stage of the procedure. In that regard, the applicants and the Commission were asked to reply in writing to questions put by the General Court as measures of organisation of procedure. They replied to those questions within the time limits laid down on 16 and 12 January 2017 respectively and, invited to adopt a position on their respective replies, on 6 February 2017 the Commission submitted observations on the applicants' reply of 16 January 2017 whereas the applicants took a position in that regard only at the hearing.
- 22 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 28 February 2017. In the course of their arguments, the applicants referred in particular to the length of the administrative procedure before the Commission but, when questioned by the Court, they explained that they did not intend to raise a new plea alleging infringement of the principle that a decision should be taken within a reasonable time.
- 23 The applicants claim that the General Court should:
- annul the contested decision;
 - order the Commission to pay the costs.
- 24 The Commission contends that the General Court should:
- dismiss the action;
 - order the applicants to pay the costs.

Law

- 25 In support of the action, the applicants rely on two pleas in law alleging, first, infringement of the right to effective judicial protection, as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, and, secondly, infringement of Articles 101 and 102 TFEU.
- 26 The Court considers it appropriate to examine at the outset the second plea in law.

The second plea in law

- 27 The applicants' second plea in law has two parts. The first part relates to a manifest error on the part of the Commission in assessing the European Union's interest in opening an investigation and, in that context, to an error of law in the Commission's refusal to apply the principles laid down in the judgments of 17 July 1998, *ITT Promedia v Commission* (T-111/96, EU:T:1998:183), and of 1 July 2010, *AstraZeneca v Commission* (T-321/05, EU:T:2010:266). The second part of that plea relates to a

failure to ensure the effectiveness of Articles 101 and 102 TFEU in so far as, in the present case, no national authority or national court could usefully implement those provisions of primary EU law in the absence of an investigation carried out by the Commission.

28 The Commission contends that the second plea should be rejected as unfounded.

The first part of the second plea, concerning a manifest error in the assessment of the European Union's interest in opening an investigation

29 According to the applicants, the Commission committed a manifest error of assessment in finding, in the contested decision, that there was not sufficient interest for the European Union to open an investigation. In that regard, they state that the complaint concerned an obstacle to parallel trade and that the Commission itself acknowledged in that decision that, if it had had to be opened, the investigation would have concerned the practice of 18 entities located in four Member States, covering a presumed period of seven years. Thus, it is claimed, the geographical and material scope of the investigation, as requested by the applicants in the complaint, demonstrate the need to conduct it at EU level and, consequently, the Commission was in a much better position to do it, with the required or expected efficiency, than the Polish and/or Austrian authorities.

30 The applicants also consider that they have provided sufficient evidence to support the allegations made in the complaint. Accordingly, by refusing to open the investigation, the Commission did not make a proper assessment of all the factual and legal circumstances of the case.

31 In that regard, in the first place, the applicants refer in particular to the correspondence between the two Polish and Austrian law firms. The Austrian firm, it is claimed, was authorised by companies, whose anonymity had been preserved, to bring, by itself or by means of the Polish law firm, numerous complaints of all kinds against the applicants before the Polish and/or Austrian administrative authorities and criminal courts. The purpose of these complaints and pressure, which the applicants also refer to as 'abuse of criminal and administrative procedure' and which they attributed primarily to RWA, was essentially to obtain, by supplying false or misleading information in a coordinated manner, a ban on three of the applicants from carrying on their parallel trade activities for the next three years and intensifying the tax inspections of the applicants, without any particular foundation. RWA, it is claimed, also engaged private detectives in Poland to monitor the applicants' activities.

32 In the second place, the applicants refer to the testimony given by certain Polish and Austrian officials in the minutes of hearings, drawn up in the course of the administrative and criminal judicial proceedings initiated at the request of the entities referred to in the complaint and the fact that a representative of the Embassy of the Federal Republic of Germany in the Republic of Poland participated, together with Polish officials, in a meeting between PSOR and IVA on 14 and 15 June 2005, two associations of producers and distributors of the plant protection products referred to in the complaint. That meeting, it is claimed, led to the drafting of eloquent minutes by the representative of IVA, as is apparent from the satisfaction expressed, according to the applicants, by the person drafting those minutes, who was pleased at having prevented Agria Polska from carrying out its commercial activities by intervening 'at the right time' and choosing the 'right' intermediaries.

33 In the third place, the applicants challenge the legitimacy and validity of the meetings between the German, Austrian and Polish authorities with regard to the activities of the original complainant companies, which gave rise, inter alia, after a visit, on 6 February 2006, of Polish officials to their Austrian counterparts in the Bundesamt für Ernährungssicherheit (Federal Office for Food Safety, Austria), to an instruction issued on 22 February 2006 by the Polish Inspector-General for Plant and Seed Health of the Silesian Region in Katowice, Poland, to carry out a new inspection of the activities of Agria Polska. In the reply of 16 January 2017 to the questions put by the General Court, the

applicants also state that the visit of the Polish officials to Austria included a meeting with the IVA working party on plant protection products which, it is claimed, revealed the influence exerted by that association on the decision-making process of the Polish authorities.

– *General points*

- 34 According to established case-law, the Commission, entrusted by Article 105(1) TFEU with the task of ensuring the application of Articles 101 and 102 TFEU, is responsible for defining and implementing the competition policy of the European Union and for that purpose has a discretion as to how it deals with complaints (judgments of 26 January 2005, *Piau v Commission*, T-193/02, EU:T:2005:22, paragraph 80; of 12 July 2007, *AEPI v Commission*, T-229/05, not published, EU:T:2007:224, paragraph 38; and of 15 December 2010, *CEAHR v Commission*, T-427/08, EU:T:2010:517, paragraph 26). In order to perform that task effectively, it is entitled to give differing degrees of priority to the complaints brought before it (see judgment of 4 March 1999, *Ufex and Others v Commission*, C-119/97 P, EU:C:1999:116, paragraph 88 and the case-law cited).
- 35 When, in the exercise of that discretion, the Commission decides to assign different priorities to the examination of complaints submitted to it, the Commission may not only decide on the order in which they are to be examined, but also reject a complaint on the ground that there is an insufficient European Union interest in further investigation of the case (judgments of 24 January 1995, *Tremblay and Others v Commission*, T-5/93, EU:T:1995:12, paragraph 60, and of 14 February 2001, *Sodima v Commission*, T-62/99, EU:T:2001:53, paragraph 36). As the assessment of the European Union interest raised by a complaint concerning competition depends on the factual and legal circumstances in each case (judgment of 12 July 2007, *AEPI v Commission*, T-229/05, not published, EU:T:2007:224, paragraph 38), the number of assessment criteria to which the Commission may refer should not be limited, nor, conversely, should the Commission be required to have recourse exclusively to certain criteria (judgments of 17 May 2001, *IECC v Commission*, C-450/98 P, EU:C:2001:276, paragraph 58, and of 16 January 2008, *Scippacercola and Terezakis v Commission*, T-306/05, not published, EU:T:2008:9, paragraph 189).
- 36 The Commission's discretion is not unlimited, however (judgment of 4 March 1999, *Ufex and Others v Commission*, C-119/97 P, EU:C:1999:116, paragraph 89). It must consider attentively all the relevant matters of fact and of law which the complainant brings to its attention in order to decide on what action to take in response to a complaint (see judgment of 17 May 2001, *IECC v Commission*, C-450/98 P, EU:C:2001:276, paragraph 57 and the case-law cited).
- 37 Where the Commission decides, as in the present case, not to initiate an investigation, it is not required to establish that there has been no infringement in support of such a decision (see, to that effect, judgment of 16 January 2008, *Scippacercola and Terezakis v Commission*, T-306/05, not published, EU:T:2008:9, paragraphs 130 and 180 and the case-law cited).
- 38 Accordingly, in such a situation, the Court must examine, not if the complainant had, in its complaint, provided sufficient evidence to find an infringement of competition law, but whether it is clear from the contested decision that the Commission balanced the significance of the impact which the alleged infringement may have on the functioning of the common market, the probability of its being able to establish the existence of the infringement and the extent of the investigative measures required for it to perform, under the best possible conditions, its task of ensuring that Articles 101 and 102 of the TFEU are complied with (judgments of 18 September 1992, *Automec v Commission*, T-24/90, EU:T:1992:97, paragraph 86; of 24 January 1995, *Tremblay and Others v Commission*, T-5/93, EU:T:1995:12, paragraph 62; and of 12 July 2007, *AEPI v Commission*, T-229/05, not published, EU:T:2007:224, paragraph 41). Moreover, the review by the Courts of the European Union must not

lead them to substitute their assessment of the European Union interest (see judgment of 16 January 2008, *Scippacercola and Terezakis v Commission*, T-306/05, not published, EU:T:2008:9, paragraph 97 and the case-law cited).

- 39 In order to allow the General Court to review effectively the Commission's use of its discretion to define priorities, that institution is however under an obligation to state reasons if it declines to continue with the examination of a complaint, and those reasons must be sufficiently precise and detailed (judgments of 4 March 1999, *Ufex and Others v Commission*, C-119/97 P, EU:C:1999:116, paragraphs 90 and 91, and of 14 February 2001, *Sodima v Commission*, T-62/99, EU:T:2001:53, paragraph 42).
- 40 In the present case, the Commission considered, in the contested decision, that there was insufficient EU interest to justify opening an investigation on the ground that the likelihood of an infringement of Article 101 and/or Article 102 TFEU seemed limited, that the scope of the investigations needed would probably be disproportionate in the light of that limited probability and that the national authorities and courts seemed to be in a better position to deal with the issues raised.
- 41 It is in that context and having regard to the references to the case-law, set out in paragraphs 34 to 39 of this judgment, that the first part of the second plea must be examined.

– *The likelihood of establishing an infringement of competition law and the scope of the investigation*

- 42 As regards the fact that, in the contested decision, the Commission considered that the likelihood of establishing the alleged infringement seemed to be limited, the Court observes that the factual evidence provided by the applicants certainly made it possible to establish that they had been the subject of simultaneous and concurring complaints, mainly in 2005 and 2006, but also, in 2008 and from 2010 to 2012, to the Austrian and Polish authorities, which complaints were likely to have been made by some of the producers and distributors of plant protection products referred to in the complaint, even if this fact is not established with certainty or precision.
- 43 In that regard, the Court finds, as the Commission pointed out in the contested decision, that the evidence submitted by the applicants in order to demonstrate the likelihood of an agreement or concerted practice on the part of producers and distributors of plant protection products concerned, in essence (i) the simultaneous nature of the complaints against the applicants before the national authorities; (ii) the fact that those producers and distributors met in the context of sectoral associations of which they were members, notably on 14 and 15 June 2005 during a joint meeting between PSOR and IVA and (iii) the fact that two law firms had been mandated to inform the various national authorities of the alleged infringements, committed by the original complainant companies, of the legislation applicable to trade in plant protection products.
- 44 Article 101 TFEU strictly precludes any direct or indirect contact between economic operators the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market. However, the economic operators retain the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors (judgments of 16 December 1975, *Suiker Unie and Others v Commission*, 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, EU:C:1975:174, paragraph 174, and of 20 April 1999, *Limburgse Vinyl Maatschappij and Others v Commission*, T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, EU:T:1999:80, paragraph 720). Thus, undertakings may act, inter alia, in the defence of their legitimate interests in the event of infringement by their competitors of applicable provisions, such as, in the present case, regulations

relating to trade in plant protection products. On the other hand, Article 7 of Regulation No 1/2003 allows undertakings, such as the applicants, to file a complaint with the Commission concerning any infringement committed by their competitors of Articles 101 and 102 TFEU.

- 45 In the present case, it could have been envisaged that, solely on the basis of the elements submitted unilaterally in the complaint by the applicants, there was evidence of potential coordination between the entities referred to in the complaint concerning the definition of a collective strategy to disclosure alleged infringements committed by the applicants of the reporting rules, relating in particular to parallel trade in plant protection products.
- 46 However, as regards the likelihood of establishing the existence of a cartel or a concerted practice, the General Court considers, in the light of the explanations provided by certain entities referred to in the complaint, that they had to deal with the infringements of the original complainant companies at the same time of year, namely the period when the need for plant protection products for farmers was highest, that the Commission did not make a manifest error of assessment in deciding, in the contested decision, that such elements of response could justify the simultaneous complaints of producers and distributors of those products to the national authorities.
- 47 Furthermore, as regards the likelihood of establishing that the subject matter of these simultaneous complaints was potentially anticompetitive, the Court considers that, in general, having regard in particular to the risks of damage to their reputation or of adverse effects on the original condition of the products traded, it may be legitimate for producers and distributors of plant protection products to inform the competent national authorities of possible infringements by their competitors of the provisions in force, in particular in the context of parallel trade in such products. As regards the participation of certain of the entities referred to in the complaint in the inspections carried out by the national authorities at the premises of the applicants, the EU rules, such as Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights (OJ 2003 L 196, p. 7), and Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003 (OJ 2013 L 181, p. 15), provide, in certain cases, for the possible presence of holders of intellectual property rights in order to determine, in the course of inspections, any infringement of those rights.
- 48 It is therefore also without committing a manifest error of assessment that the Commission considered, in the contested decision, that the entities referred to in the complaint were entitled to inform the national authorities of the alleged infringements committed by the applicants of the applicable rules and, where appropriate, to cooperate with those authorities in the context of the inspections that they carried out.
- 49 Finally, as regards the assimilation of the administrative inspections and the administrative and criminal proceedings in respect of the applicants to the conduct of the entities referred to in the complaint, the Court finds that the decisions to conduct off-site and on-site inspections and to institute administrative and criminal proceedings against the applicants, which gave rise to difficulties for those applicants in pursuing their commercial activities in those circumstances, were attributable to those national authorities which, as the applicants acknowledge, act in the public interest and whose decisions fall, as such, within their discretion. Despite the references made in the reply of 16 January 2017 to certain provisions of Polish and Austrian legislation, the wording of which does not necessarily make it possible to support their positions, the applicants have failed to prove that those national authorities were acting with limited discretion in the sense that, under those national legislations, those authorities had an obligation to act solely on the ground of having received information from third parties.

- 50 The Court considers that, in the present case, it was not excluded that those national authorities could have decided, under their national legislation, that the information submitted to them, whether anonymously or not, did not show or provide evidence of suspected infringements by the applicants of the applicable administrative, tax or criminal law provisions and, therefore, did not justify prosecution of the applicants. Furthermore, as the Commission pointed out in paragraph 52 of the contested decision, some of the inspections carried out by the Polish authorities, in particular in 2008, were in any event carried out *ex officio* and not as a result of a request by competitors of the applicants.
- 51 Leaving aside the issue of the assessment by the Austrian and Polish authorities as to whether it was appropriate to carry out inspections or to bring proceedings against the applicants, the Court observes that, according to the information provided by the applicants, 57 decisions, each relating to a different product marketed by the applicants, were adopted in Austria as a result of the administrative inspection procedures which allowed the national authorities to find infringements of the applicable law by the applicants and that, in the case of Poland, administrative fines were imposed on the applicants in the amounts, essentially, of PLN (Polish zlotys) 21759969.92, PLN 48247161.60 and PLN 375056.56. In that regard, some of the abovementioned decisions and fines were subsequently annulled, in part or in whole, by the competent national courts ruling on the actions brought by the applicants. However, the fact remains that the national authorities had initially held, in decisions adopted under national law, that the applicants had infringed the provisions applicable to trade in plant protection products and that, in any event, any irregularities committed by the national authorities could not be attributed to the entities referred to in the complaint.
- 52 Those findings by the Polish and Austrian authorities made it possible, as the Commission held in the present case, to put into perspective the applicants' assertion that the statements and complaints, allegedly made by the producers and distributors of the plant protection products referred to in the complaint, were misleading or dishonest and were part of a collective effort to eliminate the applicants as competing companies. Moreover, in that regard, the Court observes that the applicants have failed to explain the specific reasons why they have not brought, under national law, defamation actions before the Polish and Austrian national courts against the companies they accuse, in the present case, of making misleading or deceptive statements about them.
- 53 In the light of those considerations, it was not obvious, *prima facie*, that, in the present state of EU law, it would have been easy for the Commission to establish that the behaviour of the entities referred to in the complaint, as described and documented by the applicants, could as such, be regarded as forming part of the context of a cartel within the meaning of Article 101 TFEU or a collective dominant position within the meaning of Article 102 TFEU.
- 54 Consequently, the Commission could, without committing a manifest error of assessment, find in the contested decision that the likelihood of establishing an infringement of Article 101 or 102 TFEU appeared to be low.
- 55 In so far as the applicants, by the complaint and by the present action, challenged the conduct and the decisions of the national authorities, in this case the German, Austrian and Polish authorities, in particular their consultations with a view to fulfilling their duties of monitoring compliance, by operators marketing plant protection products, of the applicable legislation, it must be held that such conduct and decisions by the authorities of the Member States fall outside the scope of Articles 101 and 102 TFEU, since those articles are intended to govern the conduct of undertakings only (see, to that effect, judgment of 5 April 1984, *van de Haar and Kaveka de Meern*, 177/82 and 178/82, EU:C:1984:144, paragraph 24). In that regard, the circumstance, referred to by the applicants in the reply of 16 January 2017, that those authorities were influenced in their decisions to carry out inspections by applications made to them by instructed law firms does not alter the fact that those decisions are decisions of national authorities.

- 56 Moreover, the Commission could rightly consider that the investigation, as requested in the complaint, which would have been necessary in order to prove or, conversely, disprove the existence of an infringement of Article 101 and/or Article 102 TFEU, would have required committing substantial resources. While the applicants only provided evidence in respect of some of the entities covered by the complaint, in particular RWA, they nevertheless called into question a large number of other companies and professional organisations.
- 57 Furthermore, contrary to the applicants' submissions, the fact that the Commission found that the investigation, as requested in the complaint, would have been far-reaching if it had to be opened was not, in itself, a decisive criterion compelling it to open such an investigation. That also applies to the fact that the conduct complained of was allegedly adopted in several Member States.
- 58 In that regard, the Commission argues in the present case that the conduct complained of in the complaint was essentially confined to one Member State, namely Poland, in which the main warehouses of Agria Polska were situated.
- 59 In that regard, even if certain inspections may have taken place in Austria and resulted, in that Member State, in the imposition of penalties on the applicants, it is clear from the documents before the Court that most of the difficulties encountered by the applicants in their dealings with the national authorities concerned their activities in Poland and, only to a lesser extent, those in Austria.
- 60 However, the Court notes that the applicants brought a national complaint only in Poland. In their reply of 16 January 2017, they confirmed that they had not lodged a similar complaint with the Bundeswettbewerbsbehörde (federal competition authority, Austria) and, in that regard, they explained, at the hearing, that the failure to file a complaint before that authority was due to the decision of the Luxembourg company Cera Chem to refer the case to the Commission, which was in their view, after the refusal of the UOKiK to deal with the national complaint, the entity naturally best placed to hear the complaint.
- 61 Independently of those explanations, the Court considers that the applicants could have lodged a complaint with the federal competition authority in so far as, first, they accuse RWA of having instructed an Austrian law firm which it is claimed, in turn instructed a Polish law firm to file complaints with the national administrative and criminal authorities against the applicants and, secondly, they were subject, in April 2012, to inspections by the federal office for food safety.
- 62 Moreover, the fact that the applicants have lodged a complaint only in Poland confirms the fact that, in their minds and as the Commission found, in essence, in the contested decision, the UOKiK could be best placed to deal with the objections raised in the complaint, as well as the Polish and even Austrian courts in the context of the action that the applicants might bring in order to obtain compensation for the damage resulting from the alleged infringement, by the producers of plant protection products, of Articles 101 and 102 TFEU.
- 63 Even accepting that the complaint concerned the conduct of the applicants' competitors both in Austria and Poland, or, despite the absence of relevant and substantial evidence in that regard, in Germany and Luxembourg, the fact that the alleged conduct took place in several Member States, in this case, essentially, in two of them, must be treated as merely indicating that an action at EU level could be more effective than various actions at national level (see, to that effect, judgment of 15 December 2010, *CEAHR v Commission*, T-427/08, EU:T:2010:517, paragraph 176). However, such evidence would not, in itself, suffice to justify the opening of an investigation by the Commission.
- 64 In any event, even on the assumption that, to a certain extent, the Commission had also been well placed to deal with the case, in so far as the conduct alleged in the complaint concerned several Member States and with due regard to the fact that the UOKiK rejected the analogous national complaint on a ground relating to a national rule on limitation, the applicant did not have any right

to have the case dealt with by the Commission (see, to that effect, judgment of 17 December 2014, *Si.mobil v Commission*, T-201/11, EU:T:2014:1096, paragraph 40), since it is clear from the documents before the Court that, in the present case, that conduct concerned, essentially, only two Member States and that, without making a manifest error of assessment in that regard, the Commission found that the possibility of proving an infringement was limited, a finding which, in itself, could lead to the conclusion that there was no European Union interest in further investigation of the case (see, to that effect, judgment of 17 December 2014, *Si.mobil v Commission*, T-201/11, EU:T:2014:1096, paragraph 100 and the case-law cited).

– *The applicability to the present case of the case-law arising from the judgments of 17 July 1998, ITT Promedia v Commission (T-111/96), and of 1 July 2010, AstraZeneca v Commission (T-321/05)*

- ⁶⁵ The applicants dispute the position taken by the Commission in the contested decision, according to which the case-law resulting from the judgments of 17 July 1998, *ITT Promedia v Commission* (T-111/96, EU:T:1998:183), and of 1 July 2010, *AstraZeneca v Commission* (T-321/05, EU:T:2010:266), was not applicable in the present case and therefore did not make it possible to consider the coordinated conduct of the entities referred to in the complaint as anticompetitive. They also consider that the practices described in the complaint provided an opportunity for the Commission to develop EU competition law, which is one of the grounds recognised by the Commission Notice on the handling of complaints under Article [101 TFEU] and [102 TFEU] (OJ 2004 C 101, p. 65).
- ⁶⁶ It should be pointed out in that regard that, in the contested decision, the Commission justified the difficulty of establishing the infringement complained of on the ground, inter alia, that according to that institution, the fact that undertakings informed the national authorities, or, in the words of the applicants, reported possible infringements to those national authorities, did not fall within the concepts of ‘vexatious action’ or ‘abuse of regulatory procedures’ within the meaning of the case-law developed from the concept of abuse of a dominant position, resulting from the judgments of 17 July 1998, *ITT Promedia v Commission* (T-111/96, EU:T:1998:183), and of 1 July 2010, *AstraZeneca v Commission* (T-321/05, EU:T:2010:266). It is therefore necessary to examine the relevance of that case-law in the present case.
- ⁶⁷ In that regard, in paragraphs 60 and 61 of the judgment of 17 July 1998, *Promedia v Commission* (T-111/96, EU:T:1998:183), read in conjunction with paragraph 55 of that judgment, the General Court pointed out that access to the courts, including by an undertaking in a dominant position, was a fundamental right and a general principle ensuring the rule of law and that it was therefore only in wholly exceptional circumstances that bringing a legal action, by an undertaking in a dominant position against its competitor, could constitute an abuse of a dominant position within the meaning of Article 102 TFEU. Thus, in order to conclude that a legal action may in fact constitute an abuse of a dominant position, two cumulative conditions must be met. It is necessary that the action (i) cannot reasonably be considered as an attempt to establish the rights of the undertaking concerned and can therefore only serve to harass the opposite party and (ii) it is conceived in the framework of a plan whose goal is to eliminate competition. Those two criteria must be interpreted and applied restrictively in a manner which does not frustrate the general rule of access to the courts (judgment of 13 September 2012, *Protégé International v Commission*, T-119/09, not published, EU:T:2012:421, paragraph 49).
- ⁶⁸ In the case giving rise to the judgment of 1 July 2010, *AstraZeneca v Commission* (T-321/05, EU:T:2010:266), the EU Courts held that an undertaking which holds a dominant position cannot use ‘regulatory procedures’ in such a way as to prevent or make more difficult the entry of competitors on the market, in the absence of grounds relating to the defence of the legitimate interests of an undertaking engaged in competition on the merits or in the absence of objective justification (judgment of 1 July 2010, *AstraZeneca v Commission*, T-321/05, EU:T:2010:266, paragraphs 672 and 817, confirmed on appeal by judgment of 6 December 2012, *AstraZeneca v Commission*,

C-457/10 P, EU:C:2012:770, paragraph 134). According to the Court of Justice, the illegality of abusive conduct under Article 102 TFEU is unrelated to its compliance or non-compliance with other legal rules and, in the majority of cases, abuses of dominant positions consist of behaviour which is otherwise lawful under branches of law other than competition law (judgment of 6 December 2012, *AstraZeneca v Commission*, C-457/10 P, EU:C:2012:770, paragraph 132).

- 69 The judgments of 17 July 1998, *ITT Promedia v Commission* (T-111/96, EU:T:1998:183), and of 1 July 2010, *AstraZeneca v Commission* (T-321/05, EU:T:2010:266), however, involved conduct different from that attributed, in the present case, by the applicants to the entities referred to in the complaint.
- 70 It must be held that, in the two cases which gave rise to the judgments of 17 July 1998, *ITT Promedia v Commission* (T-111/96, EU:T:1998:183), and of 1 July 2010, *AstraZeneca v Commission* (T-321/05, EU:T:2010:266), the administrative and judicial authorities seised by the undertakings in a dominant position concerned had no discretion as to whether it was appropriate to follow up or otherwise the applications made by those undertakings, whether that was a counterclaim brought before a national court or the decision of an undertaking to withdraw its application for authorisation to place a medicinal product on the market. First, the court to which that counterclaim was made was required to rule on it. Secondly, the authority which granted the marketing authorisation could not decide to maintain that authorisation in force contrary to the will of the holder of that authorisation.
- 71 On the other hand, as was found in paragraphs 49 and 50 of the present judgment, the administrative and criminal authorities which, in the present case, decided to inspect or prosecute, or indeed impose sanctions on the applicants, could have adopted those decisions independently of the information allegedly supplied to them by the producers and distributors of plant protection products. Conversely, they could also have found, on the basis of the information which they had received, including that received anonymously, that there was no need to carry out inspections or to prosecute the applicants.
- 72 Consequently, apart from the fact that it was not clear, on the basis of the information provided in the complaint, as to whether there was a collective dominant position of the undertakings referred to in the complaint or a dominant position of one of them, in the present case RWA, the Court considers that the Commission could, without committing a manifest error of assessment in that regard, find that the likelihood of establishing an infringement in the present case in Articles 101 and/or 102 TFEU was low, not least because it was not clear that the conduct at issue in the present case could fall within the concept of abuse of a dominant position within the meaning of the case-law resulting from the judgments of 17 July 1998, *ITT Promedia v Commission* (T-111/96, EU:T:1998:183), and of 1 July 2010, *AstraZeneca v Commission* (T-321/05, EU:T:2010:266). That finding is borne out by the fact that in the judgment of 17 July 1998, *ITT Promedia v Commission* (T-111/96, EU:T:1998:183), the EU courts stressed the exceptional nature of acknowledging an abuse of a dominant position in the situation referred to in the present case.
- 73 Finally, in view of the Commission's broad discretion in setting priorities for the development of EU competition law, the fact that a case may potentially contribute to the development of a new aspect of that law cannot have the effect of compelling the Commission to carry out an investigation, contrary to what the applicants suggest.
- 74 In the light of the foregoing considerations, the first part of the second plea must be rejected as unfounded.

The second part of the second plea, relating to the effectiveness of Articles 101 and 102 TFEU

- 75 In the second part of the second plea, the applicants submit that, by refusing to open an investigation, the Commission, in the present case, deprived Articles 101 and 102 TFEU of all practical effect.

- 76 In the contested decision, and in view of the UOKiK's refusal to open an investigation in Poland and the difficulty, or impossibility, in practice, of obtaining compensation for the damage suffered before national courts, the infringements of competition law by the entities referred to in the complaint could not have been penalised, either by a competition authority or a national court, even though the free movement of goods was also at issue, and particularly trade in plant protection products, and even though the Commission had a real opportunity to bring about a relevant development of EU competition law.
- 77 As a preliminary point, as regards the fact that the UOKiK decided not to hear the national complaint because of the one-year limitation period, provided for in Polish law and running from the end of the year during which the alleged infringement ceased, it must be held that that decision of the national competition authority, which does not contain any assessment relating to the infringement of Articles 101 and 102 TFEU, cannot have the effect of requiring the Commission to open an investigation (see, to that effect, judgment of 21 January 2015, *easyJet Airline v Commission*, T-355/13, EU:T:2015:36, paragraph 28).
- 78 Moreover, it must be emphasised that the requirement of effectiveness cannot have the effect of imposing an obligation on the Commission, when it finds that there is no European Union interest in opening the investigation, to establish whether the competition authority which had previously been seised of a similar complaint, had the institutional, financial and technical means to fulfil the task entrusted to it by Regulation No 1/2003 (see, by analogy, judgment of 17 December 2014, *Si.mobil v Commission*, T-201/11, EU:T:2014:1096, paragraph 57).
- 79 In any event, the applicants have failed to show that the UOKiK has no intention to effectively prosecute and penalise infringements of Articles 101 and 102 TFEU. Similarly, they have not established in any way how the limitation period prescribed by Polish law, relied on against them to support the rejection of the national complaint and which, in the absence of EU law applicable at the time at issue, came within the procedural autonomy of the Republic of Poland, was such as to render impossible or excessively difficult the exercise of their rights under those provisions of the TFEU (see, to that effect and by analogy, judgment of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraphs 77 and 78). Moreover, the applicants conceded at the hearing that, in the national complaint and in the letter of 30 August 2010, they had not submitted to the UOKiK for assessment factual evidence relating to a period after 2008, even though, as the Commission pointed out, in particular in the observations of 6 February 2017, the warehouses and main offices of Agria Polska had been subject to inspections by the Polish authorities during the months of May to June 2010.
- 80 Furthermore, the Court notes that, in general and as is pointed out in Article 6 of Regulation No 1/2003, the national courts whose task it is to apply the provisions of Articles 101 and 102 TFEU in areas within their jurisdiction, which produce direct effect in relations between individuals and create rights in respect of the individuals concerned, must ensure that those rules take full effect and must protect the rights which they confer on individuals (judgment of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraphs 23 and 25).
- 81 It was therefore open to the applicants to bring actions before the national courts, in Poland or Austria, for damages allegedly caused by the conduct or actions of producers and distributors of plant protection products which they considered to be contrary to Articles 101 and 102 TFEU. Any person, whether natural or legal, can claim compensation for harm suffered where there is a causal relationship between that harm and a cartel or practice prohibited under Article 101 or 102 TFEU (judgment of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraph 61).
- 82 In that regard, it should be noted that any refusal by a national competition authority or the Commission to open an investigation, which may lead to an assessment by one of those administrative authorities as to the existence of an infringement of the competition rules and, where

appropriate, the imposition of a financial penalty on the undertakings concerned by that investigation, cannot have the effect of limiting the applicants' right to bring proceedings before the national courts for damages caused by infringement of Articles 101 and 102 TFEU.

83 In those circumstances, even in a context in which the national competition authority, in this case the UOKiK, had rejected the national complaint on grounds relating to a national limitation rule and even if a possible investigation by the Commission could potentially alleviate, in the course of actions brought before the national courts, the burden of proof of the applicants, those applicants cannot argue that the contested decision, by which the Commission refused to open an investigation, had the consequence of depriving Articles 101 and 102 TFEU of any practical effect.

84 Moreover, the Court notes that actions for damages before national courts, in the same way as the action of the Commission and the national competition authorities, can make a significant contribution to the maintenance of effective competition in the EU (judgment of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraph 27) and particularly when the Commission decides not to pursue a complaint which the complainant is entitled to bring before a national court to assert his rights under Articles 101 and 102 TFEU (see judgment of 18 March 1997, *Guérin automobiles v Commission*, C-282/95 P, EU:C:1997:159, paragraph 39 and the case-law cited).

85 In the light of the foregoing, the second part of the second plea must be rejected.

86 It follows from all the considerations set out in paragraphs 42 to 84 of the present judgment that the Commission did not, in the contested decision, commit a manifest error of assessment in balancing the significance of the impact which the alleged infringement may have on the functioning of the common market, the probability of its being able to establish the existence of the infringement and the extent of the investigative measures required.

87 Accordingly, the second plea must be rejected as unfounded.

The first plea in law

88 In the first plea, the applicants allege an infringement by the Commission of their right to effective judicial protection, as laid down both in Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (the 'ECHR'), and Article 47 of the Charter of Fundamental Rights. That, it is claimed, caused significant damage to their reputation and the possibility of developing their parallel trade activities. They assess that damage, at least as far as Agria Polska is concerned, in the amount of PLN 45 868 000.

89 According to the applicants, they should have a right to an effective remedy in a situation, such as that in the present case, in which their rights were infringed as a result of an alleged breach of EU competition law by the entities referred to in the complaint. By refusing to open an investigation, even though the UOKiK had already refused to open a national inquiry by a decision which was not subject to appeal under Polish law, the Commission, it is claimed, deprived them of any possibility of challenging, on the merits, the latter's decision, which ought have established an infringement of Article 101 or Article 102 TFEU. Only the adoption by the Commission of such a decision, on the merits, would have enabled the applicants to have an appeal against that decision before the General Court. Thus, according to the applicants, the only effective remedy to ensure the protection afforded them by the TFEU and EU secondary legislation was, specifically, the opening of an investigation by the Commission.

90 Contrary to the Commission's assertion in the contested decision, the bringing of an action by applicants before the national courts, against the entities referred to in the complaint and in the national complaint, possibly in the field of civil, tax, administrative law commercial or criminal law, in

particular on grounds of falsification of evidence, defamation or breach of ethical rules, would not enable them to obtain compensation for the damage directly related to the alleged infringement of Articles 101 and/or 102 TFUE referred to in the complaint. First, certain actions, it is claimed, are prescribed under Polish law because of the application of a three-year limitation period laid down in national law for actions relating to the pursuit of an economic activity. Secondly, according to the applicants, the Polish courts are not yet prepared to ensure effective protection of the rights of undertakings guaranteed by Articles 101 and 102 TFEU.

- 91 The Commission contends that the plea should be rejected as unfounded.
- 92 In the first place, the General Court notes that, under the first paragraph of Article 47 of the Charter of Fundamental Rights, everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. That principle constitutes a general principle of EU law, which derives from the constitutional traditions common to the Member States and which has been enshrined in Articles 6 and 13 of the ECHR. According to the explanations relating to Article 47 of the Charter of Fundamental Rights, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter of Fundamental Rights, have to be taken into consideration for the interpretation of the Charter, the second paragraph of Article 47 of the Charter of Fundamental Rights corresponds to Article 6(1) of the ECHR (judgment of 22 December 2010, *DEB*, C-279/09, EU:C:2010:811, paragraphs 29 and 32).
- 93 First, as regards the applicants' arguments relating to the infringement of their right to effective judicial protection before the General Court, it must be borne in mind that natural or legal persons, who are entitled to lodge a complaint under Article 7 of Regulation No 1/2003, are able to institute proceedings in order to protect their legitimate interests if their request is not complied with either wholly or in part (judgment of 25 October 1977, *Metro SB-Großmärkte v Commission*, 26/76, EU:C:1977:167, paragraph 13). In the present case, the applicants have specifically made use of that remedy by bringing the present action under Article 263 TFEU.
- 94 Secondly, as regards the fact that the applicants sought to obtain from the Commission a decision as to the existence or non-existence of the alleged infringements of Articles 101 and/or 102 TFEU in order, where appropriate, to bring an action under Article 263 TFEU against such a decision, it must be borne in mind that Article 7 of Regulation No 1/2003 does not give a complainant the right to insist that the Commission take a final decision as to the existence or non-existence of the alleged infringement and does not oblige the Commission to continue the proceedings, whatever the circumstances, right up to the stage of a final decision (judgment of 18 October 1979, *GEMA v Commission*, 125/78, EU:C:1979:237, paragraph 18, and order of 31 March 2011, *EMC Development v Commission*, C-367/10 P, not published, EU:C:2011:203, paragraph 73).
- 95 Furthermore, to accept the applicants' view that the Commission should systematically open an investigation where a complaint, similar to that lodged before it, has already been rejected, possibly erroneously, by a national competition authority on a ground connected with the limitation period, is not, moreover, compatible with the objective of Article 13(2) of Regulation No 1/2003, which was to establish, with a view to ensuring effectiveness, an optimal allocation of resources within the European competition network (see, to that effect, judgment of 21 January 2015, *easyJet Airline v Commission*, T-355/13, EU:T:2015:36, paragraph 37). In any event, neither Regulation No 1/2003 nor the Commission Notice on Cooperation within the Network of Competition Authorities (OJ 2004 C 101, p. 43) creates rights or expectations for an undertaking to have its case dealt with by a specific competition authority (see judgment of 17 December 2014, *Si.mobil v Commission*, T-201/11, EU:T:2014:1096, paragraph 39 and the case-law cited) in order, where appropriate, to benefit from the collection of evidence obtained by that authority by means of its powers of investigation.

- 96 Thirdly, the applicants complain, in essence, on the one hand, about the lack of any remedy at national level to effectively obtain compensation for the damage they consider to have suffered as a result of the conduct of the companies referred to in the complaint and which have not been investigated by the UOKiK and, on the other hand, the lack of any appeal against the UOKiK's decision not to open a national investigation on grounds of the limitation period, since, it is claimed, in the order II GSK 1035/11 of 12 July 2011, the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) held, in a similar case, that 'information [from the president of the UOKiK] concerning the lack of any basis for instituting cartel proceedings cannot be regarded as a decision refusing to open proceedings' and that '[the] letter from the president of the UOKiK [in that regard was] informative and cannot be characterised as an act or measure within the meaning of Article 3(2)(4) of the [Polish] Administrative Court Code of Procedure'.
- 97 However, in that regard, even if, during the hearing, the Commission conceded that it was not excluded that that case-law of the Naczelny Sąd Administracyjny (Supreme Administrative Court) could infringe Articles 101 and 102 TFEU and justify the subsequent initiation of proceedings against the Republic of Poland, the General Court points out that it is unconnected with the procedure provided for in Article 7 of Regulation No 1/2003 to make findings of possible breaches by the authorities, including the judicial authorities, of the Member States since that falls under the procedure for failure to fulfil obligations provided for under Article 258 TFEU (see, to that effect, order of 29 September 1997, *Sateba v Commission*, T-83/97, EU:T:1997:140, paragraph 39) and that it is not permissible to circumvent the rules actually applicable by seeking to exempt from the application of Article 258 TFEU a procedure governed by the Treaty by artificially subjecting it to the rules laid down by Regulation No 1/2003 (see order of 19 February 1997, *Intertronic v Commission*, T-117/96, EU:T:1997:16, paragraph 24 and the case-law cited).
- 98 Accordingly, the applicants' arguments relating, on the one hand, to the shortness of the limitation period applicable to the UOKiK for the prosecution of anticompetitive behaviour and the three-year limitation period applicable to the actions of undertakings under Polish law and, on the other hand, the lack of an appeal in Polish law against the UOKiK's decision not to open a national investigation must be dismissed.
- 99 Irrespective of the UOKiK's refusal to open a national investigation, it was in any event open to the applicants to bring, before the national courts and under national law, actions for compensation in respect of alleged damage arising from the infringement, by the entities referred to in the complaint, of Articles 101 and/or 102 TFEU. In that respect, on the one hand, the fact that, unlike Polish law applicable at the time of filing the national complaint, Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1) provides for a longer limitation period for such actions, in the present case a period of five years, is irrelevant since the time limit for transposing that directive had not expired on the date when the complaint was lodged. Moreover, and in any event, even if it were to be established that the applicants had not had an adequate remedy before the national courts to obtain compensation for those damages by means of a private enforcement of the competition rules, such a situation cannot have the effect of compelling the Commission to open an investigation at EU level by way of the public enforcement of those rules.
- 100 Moreover, the applicants explained that they had lodged an action for damages based on Polish law before the Sąd Okręgowy w Warszawie (Warsaw Regional Court, Poland) in order to obtain compensation for the damage allegedly sustained by them as a result of erroneous decisions adopted by the officials of the Polish supervisory authorities and action by RWA to ensure that those officials adopted such decisions.

¹⁰¹ Finally, with regard to the argument based on the alleged infringement by the Commission of Article 1 of Protocol No 1 to the ECHR, it must be rejected as inadmissible, as the Commission contends, since the applicants' arguments in that regard do not satisfy the clarity requirements of Article 76 of the Rules of Procedure of the General Court.

¹⁰² In the light of all the foregoing considerations, the first plea in law must be dismissed and, consequently, the action must be dismissed in its entirety.

Costs

¹⁰³ Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

¹⁰⁴ As the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

1. Dismisses the action;

2. Orders Agria Polska sp. z o.o., Agria Chemicals Poland sp. z o.o., Star Agro Analyse und Handels GmbH and Agria Beteiligungsgesellschaft mbH to pay the costs.

Pelikánová

Nihoul

Svenningsen

Delivered in open court in Luxembourg on 16 May 2017

[Signatures]