JUDGMENT OF THE COURT (Second Chamber)

8 December 2011 *

In Case C-386/10 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 29 July 2010,

Chalkor AE Epexergasias Metallon, established in Athens (Greece), represented by I. Forrester QC,

appellant,

the other party to the proceedings being:

European Commission, represented by E. Gippini Fournier and S. Noë, acting as Agents, and by B. Doherty, Barrister, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: English.

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, U. Lõhmus, A. Rosas (Rapporteur), A. Ó Caoimh and A. Arabadjiev, Judges,

Advocate General: E. Sharpston,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 May 2011,

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

gives the following

Judgment

1 By its appeal, Chalkor AE Epexergasias Metallon ('Chalkor') seeks to have set aside the judgment delivered by the General Court of the European Union on 19 May 2010 in Case T-21/05 *Chalkor* v *Commission* [2010] ECR II-1895 ('the judgment under appeal') by which the General Court dismissed in part its application for cancellation or reduction of the fine imposed on it under Article 2(d) of Commission Decision C(2004) 2826 of 3 September 2004 relating to a proceeding pursuant to Article [81 EC] and Article 53 of the EEA Agreement (Case COMP/E-1/38.069 – Copper plumbing tubes) ('the decision at issue').

Legal context

2 Article 15(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) provided:

'The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

(a) they infringe Article [81](1) [EC] or Article [82 EC]; or

(b) they commit a breach of any obligation imposed pursuant to Article 8(1).

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

3 Regulation No 17 was repealed and replaced by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1), applicable as from 1 May 2004.

4 Article 23(2) and (3) of Regulation No 1/2003 is worded as follows:

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

(a) they infringe Article 81 or Article 82 of the Treaty; …

…

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

…

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

5 Article 31 of Regulation No 1/2003 is worded as follows:

'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.'

6 The Commission notice entitled 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty' (OJ 1998 C 9, p. 3) ('the Guidelines'), applicable at the time the decision at issue was adopted, states, in its preamble:

'The principles outlined … should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike, while upholding the discretion which the Commission is granted under the relevant legislation to set fines within the limit of 10 % of overall turnover. This discretion must, however, follow a coherent and non-discriminatory policy which is consistent with the objectives pursued in penalising infringements of the competition rules.

The new method of determining the amount of a fine will adhere to the following rules, which start from a basic amount that will be increased to take account of aggravating circumstances or reduced to take account of attenuating circumstances.'

7 According to Section 1 of the Guidelines, '[that] basic amount will be determined according to the gravity and duration of the infringement, which are the only criteria referred to in Article 15(2) of Regulation No 17'.

8 With regard to gravity, Section 1 A of the Guidelines provides that in assessing the criterion of the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market. Infringements are put into one of three categories: minor infringements, serious infringements and very serious infringements.

9 According to the Guidelines, very serious infringements are, in particular, horizontal restrictions such as price cartels and market-sharing quotas. The basic amount of the likely fine is 'above [EUR] 20 million'. The Guidelines refer to the need to vary basic amounts according to the nature of the infringement committed; the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers; the deterrent effect of the fine; and the undertakings' legal and economic knowledge and infrastructures which enable them to recognise that their conduct constitutes an infringement. It is also stated that where infringements involve several undertakings, it might be necessary to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type.

10 As regards the duration of infringements, the Guidelines make a distinction between infringements of short duration (in general, less than one year), infringements of medium duration (in general, one to five years) and infringements of long duration (in general, more than five years). With regard to the latter, provision is made for an increase in the amount of the fine of up to 10 % per year in the amount determined for gravity. The Guidelines also strengthen the position regarding increases in fines for long-term infringements with a view to imposing effective sanctions on restrictions which have had a harmful impact on consumers over a long period and increasing the incentive to denounce the infringement or to cooperate with the Commission.

11 Under Section 2 of the Guidelines the basic amount may be increased where there are aggravating circumstances such as, inter alia, repeated infringements of the same type by the same undertaking or undertakings. According to Section 3 of the Guidelines, that basic amount may be reduced where there are attenuating circumstances such as the exclusively passive or 'follow-my-leader' role of an undertaking in the infringement, non-implementation in practice of the agreements or the effective cooperation by the undertaking in the proceedings, outside the scope of the Commission

notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4) ('the Leniency Notice').

12 The Guidelines were replaced as from 1 September 2006 by 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).

13 The Leniency Notice sets out the conditions under which undertakings cooperating with the Commission during an investigation which it carries out into a cartel may be exempted from fines, or may be granted reductions in the fine which would otherwise have been imposed upon them. According to Section B of that notice, an undertaking which informs the Commission about a cartel before the Commission has undertaken an investigation, provided that it does not have sufficient information to establish the existence of the alleged cartel, or which is the first to adduce decisive evidence of the cartel's existence, will benefit from a reduction of at least 75 % of the fine or from total exemption from the fine. According to Section D of the notice, an undertaking will benefit from a reduction of 10 % to 50 % of the fine if, inter alia, before the statement of objections is sent, it has provided the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement.

14 The Leniency Notice was replaced as from 14 February 2002 by the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3). The Commission nevertheless applied it in the present case, since that is the notice which the undertakings took into consideration when cooperating with the Commission.

Background to the dispute

15 Chalkor is a company incorporated under Greek law and listed on the Athens (Greece) stock exchange. Together with other undertakings producing semi-finished products in copper and copper alloys, it took part in a set of agreements and practices designed to agree prices, share markets and exchange confidential information on the market for copper plumbing tubes.

16 Following inspections and investigations, on 3 September 2004 the Commission adopted the decision at issue, a summary of which was published in the *Official Journal of the European Union* of 13 July 2006 (OJ 2006 L 192, p. 21).

17 The Commission observed in recitals 458 and 459 of the decision at issue that the relevant infringement manifested itself in three separate but interconnected forms. The first branch of the cartel consisted in the arrangements entered into between the 'SANCO producers' of a certain type of plain copper plumbing tube ('the SANCO arrangements'). The second branch of the infringement comprised the arrangements concluded between the 'WICU and Cuprotherm producers' of plastic-coated copper plumbing tubes ('the WICU and Cuprotherm arrangements'). Finally, the third branch of the cartel involved the arrangements entered into within a wider group of plain copper plumbing tube producers ('the broader European arrangements').

18 It is apparent from recital 216 of the decision at issue that Chalkor participated in the broader European arrangements cartel and that there were originally five participants in that group ('the group of five'). According to that recital, following the arrival of Chalkor and three other undertakings, the number of participants in that group rose to nine ('the group of nine'). According to the Commission, the members of the group of five and the group of nine attempted to stabilise the plain copper plumbing tube

market by using market shares of a reference year as a basis for fixing a target for future market shares. The Commission found, in recital 192 of the decision at issue, that the members had reached agreement on exchange of sensitive information, allocation of market shares, monitoring of sales volumes, a market leadership mechanism and coordination of prices, including price-lists, the application of price-lines and rebates.

19 As regards the duration of the infringement committed by Chalkor, the Commission stated in recital 597 of the decision at issue that the infringement started at the latest on 29 August 1998 and came to an end in September 1999.

20 In the decision at issue, the Commission imposed fines pursuant to Article 23(2) of Regulation No 1/2003 and Article 15(2) of Regulation No 17. In fixing the amount of the fines, the Commission applied the methods set out in the Guidelines.

21 Taking account of the nature of the infringement, its actual impact on the market and the extent and size of the relevant geographic market, the Commission took the view that the undertakings concerned had committed a very serious infringement.

22 In the decision at issue the Commission identified four groups which it regarded as being representative of the relative importance of the undertakings involved in the infringement at issue. The appellant belonged to the fourth category.

23 It is apparent from recital 683 of the decision at issue that market shares were determined on the basis of the turnover achieved by each offender from sales of plumbing tubes in the combined market for plain and plastic-coated copper plumbing tubes. Therefore, as recital 692 of the decision at issue shows, the market shares of the undertakings which did not sell WICU and Cuprotherm tubes were calculated by dividing their turnover in respect of plain copper plumbing tubes by the overall size of the combined market for plain and plastic-coated copper plumbing tubes.

24 The Commission set the starting amount of Chalkor's fine at EUR 9.8 million. As with the other undertakings, the Commission increased the starting amount of the fine by 10 % per full year of infringement and by 5 % for any additional period of six months or more but less than a year. Since Chalkor had participated in the cartel for 12 months, the starting amount of the fine of EUR 9.8 million was increased by 10 %, giving a total amount of EUR 10.78 million.

25 Under Section D of the Leniency Notice, the Commission reduced Chalkor's fine by 15 %. The final amount of the fine was therefore EUR 9.16 million.

The proceedings in the General Court and the judgment under appeal

26 The appellant put forward six pleas in law in support of its action before the General Court, alleging, respectively, that the Commission had failed to take account of the fact that the appellant was coerced into participating in the cartel; the starting amount of the fine was set incorrectly; the starting amount of the fine was wrongly increased by reason of the duration of the infringement; attenuating circumstances

were not taken into account; the Leniency Notice was misapplied; and the amount of the fine was disproportionate.

27 Before examining the pleas raised by the appellant, the General Court recalled, in paragraphs 61 to 64 of the judgment under appeal, the principles of the judicial review of decisions adopted by the Commission in competition matters.

28 In its examination of the second plea, the General Court considered that the Commission had not examined the question whether an offender who participates in a single branch of a cartel commits a less serious infringement, for the purposes of Article 23(3) of Regulation No 1/2003, than an offender who, in the context of the same cartel, participates in all of its branches. That question was important in this case, since the appellant participated only in the broader European arrangements and was not held liable in respect of the two other branches of the cartel, namely the SANCO and the WICU and Cuprotherm arrangements. The General Court therefore reduced the fine by 10 %.

29 The General Court rejected the appellant's other pleas.

Forms of order sought by the parties and the procedure before the Court of Justice

30 Chalkor asks the Court to:

— set aside in whole or in part the judgment under appeal in so far as it dismissed Chalkor's application for annulment of Article 1 of the decision at issue;

— annul or substantially reduce the fine imposed on Chalkor or take such other action as justice may require; and

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

31 The Commission contends that the Court should:

— dismiss the appeal; and

— order the appellant to pay the costs.

32 The Court of Justice decided in its general meeting that the present case would be determined without an Opinion and pleaded on the same day as Case C-389/10 P *KME Germany and Others* v *Commission*, which concerns the same cartel. However, since the appellant has put forward a ground of appeal alleging an error of law in that the General Court applied a limited standard of judicial review, a ground which was also raised by the appellants in the aforementioned case as well as in Case C-272/09 P *KME Germany and Others* v *Commission*, pleaded previously and relating to a parallel cartel on the market for copper industrial tubes, the parties were invited to take into account at the hearing the Opinion delivered in the latter case by Advocate General Sharpston on 10 February 2011.

The appeal

33 Chalkor puts forward four grounds of appeal alleging that the General Court erred in the standard of judicial review applied; there was an infringement of the principle of equal treatment; the General Court's adjustment of the fine was irrational and arbitrary; and there was a lack of reasoning to justify the fine imposed on it.

First and second grounds of appeal: the General Court erred in law in applying a limited standard of judicial review, and infringement of the principle of equal treatment

Arguments of the parties

34 By the first ground of appeal, the appellant criticises the method adopted by the General Court in reviewing whether the fine imposed on it was appropriate, fair and proportionate in relation to the gravity and duration of the unlawful conduct of which it was accused. By the second ground of appeal, it alleges that the General Court failed to take account of the differences between its conduct and that of the group of five and, therefore, did not sufficiently tailor the penalty to Chalkor individually. These two grounds of appeal concern the General Court's review of the penalty and must therefore be examined together.

35 The appellant challenges, first of all, the method of review described by the General Court in paragraphs 61 to 64 of the judgment under appeal. Those paragraphs are worded as follows:

'61 It is therefore for the Court to verify, when reviewing the legality of the fines imposed by the [decision at issue], whether the Commission exercised its discretion in accordance with the method set out in the Guidelines and, should it be found to have departed from that method, to verify whether that departure is justified and supported by sufficient legal reasoning. In that regard, it should be noted that the Court of Justice has confirmed the validity, first, of the principle of the Guidelines and, second, of the general method which is there indicated (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 252 to 255, 266, 267, 312 and 313).

62 The self-limitation on the Commission's discretion arising from the adoption of the Guidelines is not incompatible with the Commission's maintaining a substantial margin of discretion. The Guidelines display flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with the provisions of Regulations No 17 and No 1/2003, as interpreted by the Court of Justice (*Dansk Rørindustri and Others* v *Commission*…, paragraph 267).

63 Therefore, in areas where the Commission has maintained a discretion, for example as regards the uplift for duration, review of the legality of those assessments is limited to determining the absence of manifest error of assessment (see, to that effect, Case T-241/01 *Scandinavian Airlines System* v *Commission* [2005] ECR II-2917, paragraphs 64 and 79).

64 Nor, in principle, does the discretion enjoyed by the Commission and the limits which it has imposed in that regard prejudge the exercise by the Court of its unlimited jurisdiction (Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 538), which empowers it to annul, increase or reduce the fine imposed by the Commission (see, to that effect, Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraphs 60 to 62, and Case T-368/00 *General Motors Nederland and Opel Nederland* v *Commission* [2003] ECR II-4491, paragraph 181).'

36 Relying on the opinion of Sir Francis Jacobs annexed to the appeal, the appellant submits that the General Court did not exercise its unlimited jurisdiction but simply checked that the Commission had applied the Guidelines. In particular, it takes issue with paragraph 177 of the judgment under appeal, in which the General Court rejected its arguments as being indirectly aimed at calling into question the scheme for the calculation of fines established by the Guidelines. However, according to the case-law,

the General Court is not bound by the Guidelines and is itself under a duty to verify whether the fine is proportionate in relation to the gravity of the unlawful conduct.

37 The appellant submits that the duty to perform a full review has been reinforced by the Charter of Fundamental Rights of the European Union ('the Charter') and by Article 261 TFEU, read in conjunction with Articles 47 and 49 of the Charter. According to the explanations relating to the Charter, Article 47 thereof implements in European Union law the protection afforded by Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'). The appellant maintains in that regard that competition proceedings before the Commission are criminal proceedings within the meaning of the ECHR. Consequently, since the Commission is an administrative body, not an 'independent and impartial tribunal', the General Court is required, when an action is brought before it, to carry out a full review of Commission decisions as regards both matters of fact and law, that is, it must review all the relevant circumstances of the case and decide on all matters of fact on the basis of its own independent assessment.

38 The appellant is of the view that, in this instance, the General Court did not carry out an adequate judicial review, failing inter alia to take account of the short duration of the infringement and Chalkor's voluntary withdrawal from the cartel before the Commission began its investigations. It criticises, moreover, paragraphs 143 to 145 of the judgment under appeal, in which the General Court refers to the Commission's wide discretion in determining the uplift which it intends to apply in respect of the duration of the infringement. In the appellant's view, the General Court was wrong to limit its review to a mere review of legality.

39 In the context of the second ground of appeal, the appellant submits that the General Court failed to take account of the fact that the appellant was the victim, not the initiator. Accordingly, it treated the appellant in the same way as the other undertakings, by taking account only of sales volumes and not of the appellant's culpability.

Likewise, it wrongly took sales volumes in Greece into account even though Greece was manifestly not affected by the infringing conduct.

40 At the hearing, the appellant took the view that the argument that competition proceedings are criminal in nature (within the meaning of Article 6 of the ECHR) was not relevant to the review to be carried out by the Courts, since that review has to satisfy the same criteria whether the proceedings are regarded as forming part of the hard core of criminal law within the meaning of the case-law of the European Court of Human Rights or are covered by administrative law, as the Commission maintains. By contrast, classification as 'criminal proceedings' is stated to be relevant for the purposes of assessing the proceedings before the Commission in the light of Article 6 of the ECHR. The appellant put forward a number of criticisms in that regard.

41 Also at the hearing, the appellant criticised the General Court's inconsistency in its reviews in competition cases. In some of its judgments, such as those in Case T-59/99 *Ventouris* v *Commission* [2003] ECR II-5257, and Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, the General Court carried out a thorough review, whereas in others, as in this instance, it referred to the Commission's wide discretion and applied the standard of a manifest error of assessment.

42 The appellant refers to the error detected by the General Court in regard to the fact that the appellant did not participate in all of the arrangements, and submits that the General Court should have been all the more vigilant in its review as to whether the fine was appropriate to the gravity of the infringement.

43 The Commission states that the concept of 'full jurisdiction' for the purposes of the ECHR is not the same as that of the 'unlimited jurisdiction' given to the Courts of the European Union by the Treaty on the Functioning of the European Union and

European Union legislation. For the purposes of the ECHR, a body with 'full jurisdiction' is one which has the power to 'quash in all respects, on questions of fact and law, the challenged decision'. The General Court has such full jurisdiction. The unlimited jurisdiction conferred on the General Court in relation to fines by the Treaty and by European Union legislation, which enables it to substitute its own assessment of the fine for that of the Commission, goes beyond what is necessary for the purpose of compliance with the ECHR, since the latter simply requires the Court to be able to establish whether there are errors of fact. The appellant's submission that the General Court was not entitled simply to review legality but was under a duty to review the proportionality of the fine is therefore at variance with the standard applied by the European Court of Human Rights.

44 Lastly, the Commission responds to the various specific criticisms of the judgment under appeal.

Findings of the Court

45 The appellants rely on Article 6 of the ECHR and the Charter in challenging, first, the principles of judicial review and, in particular, the manner in which the General Court stated that it was required to take account of the Commission's wide discretion, and, second, the manner in which the General Court carried out its review in the present case.

46 The role of the Court of Justice in adjudicating on an appeal is to establish whether the General Court erred in law in the manner in which it adjudicated on the action brought before it.

47 Accordingly, it is necessary to establish whether, in the present case, the General Court carried out the requisite review, without taking account of the abstract and declaratory description of judicial review contained in paragraphs 61 to 64 of the judgment under appeal, since that description does not constitute a response to the pleas in law relied on by the appellant in its action and has proved not to constitute the necessary basis for the operative part of the judgment under appeal.

48 Furthermore, the argument as to the General Court's alleged lack of consistency in its reviews carried out in competition cases is of no relevance. It is the judgment under appeal that falls to be reviewed by the Court of Justice in the present appeal, not the General Court's case-law as a whole.

49 In addition, this Court is required not to carry out of its own motion a full review of the judgment under appeal, but to respond to the grounds of appeal raised by the appellant.

50 The appellant took the view at the hearing that the argument that competition proceedings are criminal in nature (within the meaning of Article 6 of the ECHR) is not relevant to the Court's review, since that review has to satisfy the same criteria whether the proceedings are regarded as forming part of the hard core of criminal law within the meaning of the case-law of the European Court of Human Rights or are covered by administrative law.

51 Moreover, as the appellant noted in its appeal, Article 47 of the Charter implements in European Union law the protection afforded by Article 6(1) of the ECHR. It is necessary, therefore, to refer only to Article 47.

52 The principle of effective judicial protection is a general principle of European Union law to which expression is now given by Article 47 of the Charter (see Case C-279/09 *DEB* [2010] ECR I-13849, paragraphs 30 and 31; order in Case C-457/09 *Chartry* [2011] ECR I-819, paragraph 25; and Case C-69/10 *Samba Diouf* [2011] ECR I-7151, paragraph 49).

53 The judicial review of the decisions of the institutions was arranged by the founding Treaties. In addition to the review of legality, now provided for under Article 263 TFEU, a review with unlimited jurisdiction was envisaged in regard to the penalties laid down by regulations.

54 As regards the review of legality, the Court of Justice has held that whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts of the European Union must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must those Courts establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (see Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 39, and Case C-525/04 P *Spain* v *Lenzing* [2007] ECR I-9947, paragraphs 56 and 57).

55 With regard to the penalties for infringements of competition law, the second subparagraph of Article 15(2) of Regulation No 17 provides that in fixing the amount of the fine, regard is to be had both to the gravity and to the duration of the infringement. The same wording appears in Article 23(3) of Regulation No 1/2003.

56 The Court of Justice has held that, in order to determine the amount of a fine, it is necessary to take account of the duration of the infringements and of all the factors capable of affecting the assessment of their gravity, such as the conduct of each of the undertakings, the role played by each of them in the establishment of the concerted practices, the profit which they were able to derive from those practices, their size, the value of the goods concerned and the threat that infringements of that type pose to the European Community (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 129; *Dansk Rørindustri and Others* v *Commission*, paragraph 242; and Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraph 96).

57 The Court has also stated that objective factors such as the content and duration of the anti-competitive conduct, the number of incidents and their intensity, the extent of the market affected and the damage to the economic public order must be taken into account. The analysis must also take into consideration the relative importance and market share of the undertakings responsible and also any repeated infringements (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 91).

58 This large number of factors requires that the Commission carry out a thorough examination of the circumstances of the infringement.

59 In the interests of transparency the Commission adopted the Guidelines, in which it indicates the basis on which it will take account of one or other aspect of the infringement and what this will imply as regards the amount of the fine.

60 The Guidelines, which, the Court has held, form rules of practice from which the administration may not depart in an individual case without giving reasons compatible with the principle of equal treatment (Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 91),

merely describe the method used by the Commission to examine infringements and the criteria that the Commission requires to be taken into account in setting the amount of a fine.

61 It is important to bear in mind the obligation to state reasons for acts of the European Union. That is a particularly important obligation in the present case. It is for the Commission to state the reasons for its decision and, in particular, to explain the weighting and assessment of the factors taken into account (see, to that effect, *Prym and Prym Consumer* v *Commission*, paragraph 87). The Courts must establish of their own motion that there is a statement of reasons.

62 Furthermore, the Courts must carry out the review of legality incumbent upon them on the basis of the evidence adduced by the applicant in support of the pleas in law put forward. In carrying out such a review, the Courts cannot use the Commission's margin of discretion – either as regards the choice of factors taken into account in the application of the criteria mentioned in the Guidelines or as regards the assessment of those factors – as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.

63 The review of legality is supplemented by the unlimited jurisdiction which the Courts of the European Union were afforded by Article 17 of Regulation No 17 and which is now recognised by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU. That jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed (see, to that effect, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 692).

64 It must, however, be pointed out that the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, and that proceedings before the Courts of the European Union are *inter partes*. With the exception of pleas involving matters of public policy which the Courts are required to raise of their own motion, such as the failure to state reasons for a contested decision, it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas.

65 That requirement, which is procedural in nature, does not conflict with the rule that, in regard to infringements of the competition rules, it is for the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement. What the applicant is required to do in the context of a legal challenge is to identify the impugned elements of the contested decision, to formulate grounds of challenge in that regard and to adduce evidence – direct or circumstantial – to demonstrate that its objections are well founded.

66 The failure to review the whole of the contested decision of the Court's own motion does not contravene the principle of effective judicial protection. Compliance with that principle does not require that the General Court – which is indeed obliged to respond to the pleas in law raised and to carry out a review of both the law and the facts – should be obliged to undertake of its own motion a new and comprehensive investigation of the file.

67 The review provided for by the Treaties thus involves review by the Courts of the European Union of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine. The review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation No 1/2003, is not therefore contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter.

68 The Court must now examine the various criticisms expressed by the appellant in regard to the judgment under appeal.

69 The appellant takes issue, in the first place, with paragraph 177 of the judgment under appeal, in which the General Court rejected its arguments as being indirectly aimed at calling into question the scheme for the calculation of fines established by the Guidelines. However, according to the case-law, the General Court is not bound by the Guidelines and is itself under a duty to verify whether the fine is proportionate in relation to the gravity of the unlawful conduct.

70 It must be noted in that regard that, in paragraph 175 of the judgment under appeal, the General Court rejected one of the appellant's complaints by reference to an explanation provided by the Commission which is not challenged by the appellant. In paragraph 176 it stated that, even on the assumption that Chalkor could argue that the amount of the fine imposed on it is capable of reducing its competitiveness, so as to demonstrate that the fine is disproportionate, it had to be noted that Chalkor had not put forward any specific evidence in this respect. As observed in paragraphs 64 to 66 of the present judgment, with the exception of pleas involving matters of public policy, the General Court is required not to carry out of its own motion a review of a Commission decision but to adjudicate on the pleas of illegality submitted to it by an applicant. In the present case, the appellant cannot complain that the General Court failed to adjudicate on pleas which were not submitted to it or which were not specified in the complaints and evidence enabling the General Court to carry out an effective review of the decision at issue.

71 In any event, in paragraph 178 of the judgment under appeal the General Court demonstrated, without any error of reasoning, that the appellant was attempting to challenge anew the Commission's determination of the amount of the fine imposed on account of the duration of the infringement. In paragraph 179 of that judgment, the General Court correctly rejected the appellant's complaint that, given the 10% increase in the fine per year of participation in the infringement, the monthly rate is smaller the longer the undertaking takes part, observing that the Guidelines are a case of self-limitation on the Commission's part. It must be noted that the duration of an

infringement is referred to as such by the European Union legislature as a factor to which regard is to be had in fixing the amount of a fine and that, in the absence of any criterion defined by the legislature, the Guidelines provide a means of clarifying the impact of that element in the calculation of the fine.

72 In the second place, the appellant is critical of the fact that the General Court did not take account of the short duration of the infringement committed by the appellant. However, its criticism is based on the premiss that the duration of the infringement was less than the period taken into account by the Commission in the decision at issue. It must however be stated that, in paragraphs 129 and 130 of the judgment under appeal, the General Court recalled the case-law specifying the constituent elements of an infringement. In the light of that case-law, it reviewed, in paragraphs 131 to 133 of its judgment, when the infringement period began and, in paragraphs 134 and 135, when it came to an end. Having found that the Commission had not erred in its assessment of those facts, the General Court rejected the plea.

73 The appellant does not challenge that assessment of the facts in its appeal; such a challenge would in any event be inadmissible since the assessment of the facts is not open to review by the Court of Justice. It must be held, therefore, that the criticism regarding the failure to take account of the duration of the infringement is based on a false premiss and must be rejected.

74 In the third place, the appellant criticises the General Court for failing to take account of its voluntary withdrawal from the cartel before the Commission began its investigations. However, in paragraph 151 of the judgment under appeal, the General Court recalled the case-law according to which the Commission is under no obligation to reduce a fine for the termination of an infringement which had already come to an end before the Commission intervened, and, in paragraph 152 of its judgment, the fact that Chalkor's voluntary withdrawal from the cartel was taken sufficiently into account in the calculation of the duration of the infringement period found against it. It follows that the appellant's criticism is unfounded.

75 In the fourth place, the appellant is critical of paragraphs 143 to 145 of the judgment under appeal, in which the General Court refers to the Commission's wide discretion in determining the uplift which it intends to apply in respect of the duration of the infringement. The appellant takes the view that the General Court was wrong to limit its review to a mere review of the conformity with the Guidelines of the uplift in the fine on account of the duration of the infringement.

76 It is necessary in that regard to refer back to the principles identified by the case-law of the Court in relation to the determination of the amount of a fine, which are recalled in paragraphs 56 and 57 of the present judgment. The large number of factors to be taken into account necessarily gives the Commission a variety of options in its assessment of those factors, their weighting and their evaluation so as adequately to punish the infringement. However, the Commission remains subject to certain obligations.

77 It must be borne in mind, as has already been stated in paragraph 71 of the present judgment, that the duration of an infringement is referred to as such by the European Union legislature as a factor to which regard is to be had in fixing the amount of a fine and that, in the absence of any criterion defined by the legislature, the Guidelines provide a means of clarifying the impact of that element in the calculation of the fine. The General Court did not therefore make an error in reviewing the conformity with the Guidelines of the Commission's calculation.

78 In any event, and contrary to the appellant's submission, the General Court did not confine itself to that review of conformity with the Guidelines, but itself reviewed, in paragraph 145 of the judgment under appeal, the adequacy of the penalty.

79 In the fifth place, the appellant submits that the General Court failed to take account of the fact that the appellant was the victim, and treated it in the same way as the other undertakings, taking account only of sales volumes and not of its culpability. It must however be noted that, in paragraph 72 of the judgment under appeal, the General Court recalled the case-law according to which pressure which is brought

to bear on an undertaking does not absolve it from its responsibility in participating in an infringement (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraphs 369 and 370; Case T-17/99 *KE KELIT* v *Commission* [2002] ECR II-1647, paragraph 50; and Case T-62/02 *Union Pigments* v *Commission* [2005] ECR II-5057, paragraph 63). It follows that this criticism is based on a false premiss, that is that the appellant is a victim and not a responsible participant in the infringement.

80 In the sixth place, the appellant criticises the General Court for wrongly taking sales volumes in Greece into account even though Greece was manifestly not affected by the infringing conduct. This criticism is however based on a false premiss as regards Greece's exclusion from the territory covered by the cartel. In paragraph 120 of the judgment under appeal the General Court observed that the appellant had not challenged the Commission's finding, in recital 17 of the decision at issue, that the territory of the European Economic Area (EEA) – which includes Greece – constituted the relevant geographic market affected by the cartel.

81 In any event, it is clear from the appellant's own statements, as summarised in paragraph 117 of the judgment under appeal, that the appellant participated in the cartel for fear of retaliation (dumping) by the group of five on the Greek market. Such remarks are sufficient to establish that the appellant's participation in the cartel was motivated by its concern to be preserved from competition on the Greek market. The criticism is therefore unfounded.

82 It follows from all of those considerations that the appellant's criticisms are unfounded. Although the General Court repeatedly referred to the 'substantial margin of discretion' or the 'wide discretion' of the Commission, including in paragraphs 62, 63 or 143 of the judgment under appeal, such references did not prevent the General Court from carrying out the full and unrestricted review, in law and in fact, required of it.

83 The first and second grounds of appeal must therefore be rejected.

Third and fourth grounds of appeal: the adjustment of the fine imposed on Chalkor was irrational and arbitrary, and there was a lack of appropriate reasoning in that regard in the judgment under appeal

Arguments of the parties

84 These two grounds of appeal relate to paragraphs 105 to 113 and 182 to 184 of the judgment under appeal. It is appropriate to consider them together.

85 Paragraphs 105 to 113 of the judgment under appeal are worded as follows:

'105 ... The Court considers..., in the exercise of its unlimited jurisdiction, that the starting amount adopted by the Commission is appropriate in relation to the seriousness of the three branches of the cartel as a whole, and that the starting amount of the fine imposed on Chalkor should be reduced in order to take account of the fact that the Commission held it liable for participation only in the third branch of the cartel.

106 Furthermore, the Court must reject the Commission's arguments set out in paragraphs 83 and 84 above in so far as they may be regarded as a submission to the effect that the applicant's non-participation in the SANCO arrangements was sufficiently reflected in the specific starting amount of the fine imposed on it. That argument is based on the premiss that the market share of Chalkor,

which did not sell SANCO tubes, was calculated on the basis of the aggregate turnover of all producers of plain copper plumbing tubes, including sales of SANCO tubes.

107 The SANCO arrangements and the broader European arrangements concerned the same relevant market, namely that for plain copper plumbing tubes. Therefore, the Commission was required, even in the absence of the SANCO arrangements, to take account of the turnover generated by sales of SANCO tubes in order to calculate the applicant's market share on the relevant market.

108 By contrast, as regards the WICU and Cuprotherm arrangements, the situation is different. Those arrangements concerned products which could not be substituted for plain copper plumbing tubes. Recital 459 of the [decision at issue] shows that plain copper plumbing tubes and plastic-coated copper plumbing tubes constitute distinct relevant markets.

109 Accordingly, by calculating the market share of the applicant, which was active in the plain copper plumbing tube market, on the basis of turnover achieved in both the plain and plastic-coated copper plumbing tube markets, the applicant was in fact deemed to have a smaller market share and, therefore, allocated a lower specific starting amount than would have been set if its market share had been calculated solely on the basis of turnover in the market in respect of which it actually participated in the cartel.

110 In the second place, as regards the question whether the fact that cooperation within the group of five was more intense than cooperation within the group of nine justified different treatment with regard to fines, the Court finds as follows.

111 The group of five and the group of nine both operated in the third branch of the cartel, in respect of which the applicant has been held responsible. In recital 690 of the [decision at issue], the Commission stated that the applicant was not a member of the group of five because of its size. The applicant did not challenge that statement.

112 Consequently, the Commission cannot be blamed for concluding that the gravity of the applicant's participation in the broader European arrangements was adequately taken into consideration by the Commission's division of the offenders into categories on the basis of their market shares.

113 Having regard to all of the above, it is appropriate merely to amend the amount of the fine imposed on the applicant to reflect the fact that it did not participate in the SANCO arrangements. The specific consequences of that adjustment are detailed in paragraphs 183 to 186 below.'

86 Paragraphs 182 to 184 of the judgment under appeal are worded as follows:

'182 ... it is necessary to vary the [decision at issue] inasmuch as the Commission failed, in setting the amount of the fine, to take account of the fact that the applicant did not participate in the SANCO arrangements.

183 As to the remainder, the considerations which the Commission set out in the [decision at issue] and the method of calculation of the fines that was applied in the present case remain unchanged. The final amount of the fine is therefore calculated as follows.

184 The starting amount of the fine imposed on the applicant is reduced by 10 % to take account of the lesser gravity of its participation in the cartel by comparison with that of the "SANCO producers". The new starting amount of the fine imposed on the applicant is, therefore, set at EUR 8.82 million.'

87 By its third ground of appeal, the appellant submits that the General Court was correct in finding, in paragraph 104 of the judgment under appeal, that the Commission had infringed the principle of equal treatment by failing to take into consideration, when calculating the amount of the fines, the fact that – unlike the group comprising KME Germany AG (formerly KM Europa Metal AG), KME France SAS (formerly Tréfimétaux SA) and KME Italy SpA (formerly Europa Metalli SpA); Wieland-Werke AG; and the group consisting of Boliden AB, Outokumpu Copper Fabrication AB (formerly Boliden Fabrication AB) and Outokumpu Copper BCZ SA (formerly Boliden Cuivre & Zinc SA) – the appellant had participated in only one branch of the cartel. However, it applied an arbitrary 10 % reduction to the amount of the fine, which seems to be far too modest a reduction to reflect the distinctive and essentially undisputed circumstances of Chalkor.

88 However, the General Court did not adopt a principled approach in reviewing the amount of the fine, for example by basing the reduction on the share of sales of SANCO tubes on the plain copper plumbing tubes market (that is a reduction of 49 % or 37 % depending on the market taken into consideration) or reducing the fine to take account of the erroneous inclusion of the Greek turnover in the basis of the calculation of the fine. Instead, it confined itself to endorsing the mathematical approach advocated by the Commission and reduced the fine in an arbitrary manner which did not follow a principled, mathematically coherent approach.

89 The appellant compares that decision of the General Court with the decision adopted in *Ventouris* v *Commission*. The same reasons of equity and proportionality as those mentioned in paragraph 219 of that judgment should have led the General Court

to reduce the fine by 49 %, taking into account the exclusion of the SANCO and the WICU and Cuprotherm markets from the broader copper tubes market, or by 37 %, taking into account the exclusion of the SANCO market from the narrower plain copper plumbing tube market.

90 By its fourth ground of appeal, the appellant alleges that the General Court did not properly state the reasons for the judgment under appeal. The General Court reduced the starting amount of the fine by 10 % to take account of the lesser gravity of the appellant's participation in the cartel by comparison with that of the 'SANCO producers' but gave no indication of the means by which it selected 10 % as the remedy to the problem. By failing to specify any of the criteria on which it based its decision, the General Court makes it impossible for the Court of Justice to decide whether the judgment under appeal is in breach of the principle of proportionality and whether the fine as set by the General Court adequately reflects the gravity of Chalkor's involvement in the infringement.

91 The Commission contends that these grounds of appeal are inadmissible in so far as the appellant is seeking from the Court a fresh assessment of the fine, which falls outside the Court's jurisdiction in an appeal.

92 In the alternative, the Commission submits that by its third ground of appeal the appellant simply criticises the judgment under appeal without identifying any specific legal basis on which the General Court should have decided otherwise. In response to the fourth ground of appeal, the Commission maintains, inter alia, that passages of the judgment under appeal other than those referred to by the appellant explain why the General Court rejected certain arguments relied on by the appellant to challenge the amount by which the fine was reduced.

Findings of the Court

93 It is necessary, first of all, to refer back to paragraphs 80 and 81 of the present judgment with regard to sales in Greece.

94 It must be noted that the General Court gave reasons for its decision to adjust the amount of the fine in paragraphs 105 to 113 and 183 of the judgment under appeal. It pointed out, first of all, in paragraph 109 of its judgment that the method of calculation of the appellant's market share was favourable to the appellant, because it was calculated by dividing the appellant's turnover by an amount representing turnover achieved in both the plain and plastic-coated copper plumbing tube markets, although it was not accused of participation in the WICU and Cuprotherm arrangements relating to plastic-coated copper plumbing tubes.

95 It noted, moreover, in paragraph 111 of the judgment under appeal that the appellant did not challenge the fact, established in recital 692 of the decision at issue, that its non-participation in the group of five was due to its size. Thus it responded to the appellant's argument, summarised in paragraph 77 of the judgment under appeal, that cooperation among the group of nine had been of a lesser intensity than that among the group of five and, by its reference to recital 690 of the decision at issue, endorsed the Commission's argument that the appellant's participation in the cartel had not differed qualitatively or quantitatively from that of the other offenders.

96 In paragraph 112 of the judgment under appeal, the General Court approved the principle that the gravity of an infringement may be measured by the division of offenders into categories on the basis of their market shares. It reiterated its overall approval of the method of calculation of the fines in paragraph 183 of that judgment.

97 Such reasoning establishes to the requisite legal standard the factors taken into account by the General Court in reducing the fine imposed on the appellant. The decision to reduce the fine by a fixed amount cannot be cause for complaint against the General Court, given that it is impossible to weigh up each factor precisely; some are favourable to the appellant, others, unfavourable.

98 Furthermore, the appellant cannot show that there has been a breach of the principle of proportionality by relying exclusively on turnover excluding the SANCO and the WICU and Cuprotherm arrangements, or only the SANCO arrangements. It must be borne in mind that turnover in a market covered by a cartel is only one of a number of factors that may be taken into consideration in the determination of the amount of the penalty.

99 As regards the comparison with the method which the General Court used in *Ventouris* v *Commission*, it must be pointed out that, in that case, the Commission had punished Ventouris Group Enterprises SA for two infringements although it had committed only one, whereas in this instance the appellant took part in only one branch of a complex but single infringement. Furthermore, it is clear from paragraph 221 of the judgment in *Ventouris* v *Commission* that the General Court adjusted the fine while respecting the broad logic of the contested decision and the method used by the Commission to determine the amount of the fine. This is precisely what the General Court did in the judgment under appeal when it approved the methods of assessment of the gravity of the infringement and of calculation of the fine by the Commission in paragraphs 112 and 183 of that judgment.

100 It follows that nothing can be inferred from that comparison with *Ventouris* v *Commission* that would serve as a basis for calling into question the grounds of the judgment under appeal, even if it were relevant in spite of the fact that *Ventouris* v *Commission* concerns a separate dispute in which the applicant put forward different pleas in law from those raised in the present case, and which resulted in an exchange of arguments to which Chalkor was not a party.

101 In so far as the appellant calls into question the General Court's fairness, it must be held that a decision of the General Court that is based solely on fairness cannot at any rate be reviewed by the Court in the context of an appeal.

102 Having regard to all of these considerations, the third and fourth grounds of appeal are unfounded.

103 Consequently, none of the grounds that Chalkor has put forward in support of its appeal can be accepted, and the appeal must therefore be dismissed.

Costs

104 Under Article 69(2) of the Rules of Procedure, applicable to the procedure on appeal pursuant to Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for Chalkor to be ordered to pay the costs and Chalkor has been unsuccessful, the latter must be ordered to pay the costs of the present proceedings.

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

1. Dismisses the appeal;

2. Orders Chalkor AE Epexergasias Metallon to pay the costs.

[Signatures]