



Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

23 April 2015 *

(Appeal — Competition — Agreements, decisions and concerted practices — Article 101 TFEU and Article 53 of the EEA Agreement — Worldwide market for liquid crystal display (LCD) panels — Price-fixing — Fines — Guidelines on the method of setting fines (2006) — Point 13 — Determination of value of sales — Joint venture — Taking sales to parent companies into account — Notice on immunity from fines and reduction of fines in cartel cases (2002) — Point 23(b), final paragraph — Partial immunity from fines — Evidence of facts previously unknown to the Commission)

In Case C-227/14 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 7 May 2014,

LG Display Co. Ltd, established in Seoul (South Korea),

LG Display Taiwan Co. Ltd, established in Taipei (Taiwan),

represented by A. Winckler and F.-C. Laprévote, avocats,

appellants,

the other party to the proceedings being:

European Commission, represented by F. Ronkes Agerbeek and P. Van Nuffel, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Eighth Chamber),

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

Advocate General: M. Wathelet,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 26 January 2015,

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

gives the following

* Language of the case: English.

Judgment

- 1 By their appeal, LG Display Co. Ltd ('LGD') and LG Display Taiwan Co. Ltd ('LGDT') request the Court partly to set aside the judgment of the General Court of the European Union in *LG Display and LG Display Taiwan v Commission* (T-128/11, EU:T:2014:88; 'the judgment under appeal'), whereby the General Court (i) varied Commission Decision C(2010) 8761 final of 8 December 2010 relating to a proceeding under Article 101 [TFEU] and Article 53 of the Agreement on the European Economic Area (Case COMP/39.309 — LCD), a summary of which was published in the *Official Journal of the European Union* of 7 October 2011 (OJ 2011 C 295, p. 8; 'the contested decision'), by setting at EUR 210 000 000 the fine imposed jointly and severally on them in Article 2 of that decision and (ii) dismissed, as to the remainder, their action for the partial annulment of that decision, in so far as it concerns them, and for a reduction in the amount of that fine.

Legal context

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

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

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

...

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

...

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

- 3 Article 31 of that regulation provides:

'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.'

- 4 Point 6 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the Guidelines on the method of setting fines') provides:

'The combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement ...'

- 5 Under the heading 'Basic amount of the fine', point 13 of those Guidelines states:

'In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly ... relates in the relevant geographic area within [the European Economic Area (EEA)]. ...'

- 6 Point 23(b) of the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; ‘the Leniency Notice’) provides for various reductions in fines which can be granted to undertakings according to the order on which they provided information. The final paragraph of that provision reads as follows:

‘In addition, if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these elements into account when setting any fine to be imposed on the undertaking which provided this evidence.’

Background to the dispute and the contested decision

- 7 The facts giving rise to the dispute and the contested decision, as set out in paragraphs 1 to 31 of the judgment under appeal, may be summarised as follows.
- 8 LGD is a company governed by Korean law which controls a group of companies established and operating worldwide in the production of liquid crystal display panels (‘LCD panels’). LGD was formed on 26 July 1999 through a joint venture agreement between LG Electronics Inc., a company governed by Korean law (‘LGE’), and Koninklijke Philips Electronics NV (‘Philips’), a company governed by Netherlands law. From 26 July 1999 until 23 July 2004, LGE and Philips each owned 50% of the capital of LGD. Subsequently, their respective shareholdings fell to 37.9% and 32.87%.
- 9 LGDT, a company governed by Taiwanese law, is a wholly owned subsidiary of LGD and is active in the production and supply of LCD panels.
- 10 In the spring of 2006, Samsung Electronics Co. Ltd (‘Samsung’), a company governed by Korean law, submitted to the Commission an application for immunity from fines under the Leniency Notice. In doing so, Samsung disclosed the existence of a cartel between several companies, including LGD and LGDT, concerning certain types of LCD panels.
- 11 On 17 July 2006 LGD also submitted to the Commission an application for immunity from fines under the Leniency Notice.
- 12 On 23 November 2006 the Commission granted conditional immunity to Samsung, in accordance with point 15 of the Leniency Notice, whereas it refused LGD such immunity.
- 13 On 27 May 2009 the Commission initiated the administrative procedure and adopted a statement of objections which was sent to 16 companies, including the appellants, LGE, and Philips. That statement of objections explained, inter alia, the reasons why, pursuant to the case-law of the General Court, those parties were to be held jointly and severally responsible for the infringements committed by LGD.
- 14 Within the period allowed, the addressees of the statement of objections made known in writing to the Commission their views on the objections raised against them. Further, a number of the addressees of the statement of objections, including the appellants, availed themselves of their right to be heard orally during the hearing held on 22 and 23 September 2009.
- 15 On 1 February 2010 LGD submitted an application, based on the final paragraph of point 23(b) of the Leniency Notice, whereby it requested partial immunity with respect to its participation in the cartel in the years 2005 and 2006.

- 16 By a request for information of 4 March 2010 and by a supplementary letter of 6 April 2010, the parties were, *inter alia*, invited to submit to the Commission data concerning the value of the sales to be taken into account for the setting of the basic amount of the fines and to comment on that issue. LGD provided the data concerning it by letter of 21 April 2010.
- 17 On 8 December 2010 the Commission adopted the decision at issue. The contested decision is addressed to 6 of the 16 companies to which the statement of objections was addressed, including the appellants and Samsung. By contrast, LGE and Philips were not included.
- 18 In the contested decision, the Commission found there to be a cartel among six major international manufacturers of LCD panels, including the appellants and Samsung, concerning the following two categories of products equal to or greater than 12 inches in size: (i) LCD panels for information technology, such as those for notebooks and PC monitors, and (ii) LCD panels for televisions (referred to collectively as ‘cartelised LCD panels’).
- 19 According to the contested decision, that cartel took the form of a single and continuous infringement of Article 101 TFEU and Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3; ‘the EEA Agreement’) which took place from 5 October 2001 until at least 1 February 2006. During that period, the participants in the cartel held numerous multilateral meetings, which they called ‘Crystal Meetings’. Those meetings had a clearly anti-competitive object, since they provided an opportunity for the participants, *inter alia*, to fix minimum prices for cartelised LCD panels, to discuss their future prices in order to avoid price reductions and to coordinate price increases and levels of production. During the infringement period, the cartel participants also met bilaterally and frequently exchanged information on matters dealt with in the ‘Crystal Meetings’. They also took steps in order to verify whether the decisions adopted at those meetings had been applied.
- 20 In order to set the fines imposed by the contested decision, the Commission used the Guidelines on the method of setting fines. Pursuant to those Guidelines, the Commission established the value of the sales of cartelised LCD panels directly or indirectly concerned by the infringement. To that end, it established the following three categories of sales made by the participants in the cartel:
- the category of ‘direct EEA sales’, namely sales of cartelised LCD panels to another undertaking within the EEA;
 - the category of ‘direct EEA sales through transformed products’, namely sales of cartelised LCD panels incorporated, within the group to which the producer belongs, into finished products then sold to another undertaking within the EEA; and
 - the category of ‘indirect sales’, namely, sales of cartelised LCD panels to another undertaking situated outside the EEA, which then incorporates the panels in finished products which it sells within the EEA.
- 21 However, the Commission took the view that it needed to examine only the first two categories above, as the inclusion of the third category was not necessary for the fines imposed to achieve a sufficient level of deterrence.
- 22 As regards the appellants, the Commission, despite their objections, considered that the relevant sales value had to be calculated by also taking into account their sales to LGE and Philips. First, sales of cartelised LCD panels to those companies were also covered by the discussions between the participants in the cartel in question and, second, the prices of those sales were influenced by the actual market circumstances, that is to say, the existence of cartelised prices.

- 23 The Commission also took into consideration, in order to set the fines, the Leniency Notice. In that regard, the Commission first confirmed the total immunity granted to Samsung. The Commission then reduced by 50% the amount of the fine to be imposed on the appellants, because of the evidence which they had provided and which was of significant added value in relation to the evidence already in the Commission's possession, in accordance with point 21 and the first indent of point 23(b) of the Leniency Notice. Last, the Commission accepted the appellants' request for partial immunity from a fine, but solely with respect to the year 2006. According to the Commission, only in relation to that year did the information provided by the appellants constitute evidence of facts of which it was previously unaware. On the other hand, as regards 2005, the information provided by the appellants was added to information which the Commission had already received from Samsung and therefore did not concern facts previously unknown to the Commission.
- 24 On the basis of, *inter alia*, those considerations, the Commission, in Article 2 of the contested decision, imposed on the appellants joint and several liability for payment of a fine of EUR 215 000 000.

The judgment under appeal

- 25 By application lodged at the Registry of the General Court on 23 February 2011, the appellants brought before it an action for partial annulment of the contested decision and reduction of the fine imposed on them by that decision.
- 26 In support of their application, the appellants raised four pleas in law. The first of those pleas in law related to the claim that the Commission, wrongly and in breach of their rights of defence, included their internal sales in the calculation of the fine and the second was related to the claim that the Commission wrongly refused to grant them immunity from a fine in respect of the year 2005 and that it failed to take due account of the partial immunity which it granted to them for the month of January 2006.
- 27 In the judgment under appeal, the General Court partly upheld the latter plea in law, holding that the Commission had erred in taking into account the month of January 2006 in the value of the appellants' sales for the calculation of the fine to be imposed on them. Consequently, in the exercise of its unlimited jurisdiction, the General Court reduced the fine to EUR 210 000 000. As to the remainder, the General Court dismissed the action.

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

- 28 By their appeal, the appellants claim that the Court of Justice should:
- partly set aside the judgment under appeal, in so far as it dismissed their action for the partial annulment of the contested decision;
 - partly annul the contested decision and, in the exercise of its unlimited jurisdiction, reduce the fine imposed on them, and
 - order the Commission to pay the costs incurred before the Court of Justice and the General Court.
- 29 The Commission contends that the Court should dismiss the appeal and order the appellants to pay the costs.

The appeal

- 30 In support of their appeal, the appellants rely on two grounds of appeal. The first ground relates to a claim that the General Court erred in law, that it was in breach of its obligation to state reasons and that it infringed the appellants' rights of defence, manifestly distorted the evidence, and failed to exercise its unlimited jurisdiction as regards the inclusion of LGD's sales of cartelised LCD panels to its parent companies in the value of sales taken into account for the calculation of the fine. The second ground relates to a claim of an error in law, a failure to provide adequate reasoning and manifest distortion of the sense of the evidence in the refusal by the General Court to grant LGD partial immunity for the year 2005.

The first ground of appeal: taking into account LGD's sales of cartelised LCD panels to its parent companies for the calculation of the fine

Arguments of the parties

- 31 This ground of appeal is divided into two parts. In the first part, the appellants claim that the General Court erred in law in its application of point 13 of the Guidelines on the method of setting fines, failed to state reasons for its decision to the requisite legal standard, manifestly distorted the sense of the evidence, infringed LGD's rights of defence and failed to exercise its unlimited jurisdiction in concluding that the Commission might include in the value of sales taken into account for the calculation of the fine all sales made on the relevant market. In the second part, the appellants claim that the General Court erred in law by disregarding the principle of proportionality, failed to provide adequate reasoning, manifestly distorted the sense of the evidence and infringed LGD's rights of defence, by upholding the Commission's conclusion that LGD's internal sales to its parent companies were in fact affected by the infringement pursued.
- The first part of the first ground of appeal, concerning the ability to take into account all sales made on the market affected by the infringement
- 32 In the first part of the first ground of appeal, the appellants claim, in essence, that the General Court erred in holding, in paragraph 97 of the judgment under appeal, that the Commission was entitled to include, in order to calculate the fine, LGD's internal sales to its parent companies, on the sole ground that those sales were made on the market affected by the infringement, even though those sales were not affected by the infringement.
- 33 First, the appellants claim that, although the Commission is not obliged to ascertain which individual sales were affected by the cartel, the General Court, by including the value of all sales of cartelised LCD panels made on the market affected by the infringement in the value of sales taken into account in order to calculate the fine, notwithstanding the lack of evidence to show that the infringement affected LGD's internal sales to LGE and Philips, infringed point 13 of the Guidelines on the method of setting fines and moreover departed from the Commission's prior decision-making practice, as that emerges from, inter alia, Decision C(2008) 6815 final of 12 November 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/39.125 — Car glass) and Decision C(2008) 926 final of 11 March 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.543 — International removal services).
- 34 Second, the appellants claim that the General Court erred in law by failing to state reasons to the requisite legal standard why the internal sales of cartelised LCD panels by LGD to Philips and LGE could have distorted competition on the relevant market, notwithstanding that there were structural guarantees to rule out the possibility of those sales being affected by the cartel, since those sales were, inter alia, made at preferential prices and could not, consequently, be considered to have been made

‘on the free market’. In that regard, this case is comparable to that which gave rise to the judgment in *Team Relocations v Commission* (T-204/08 and T-212/08, EU:T:2011:286), relating to international removal services, where the General Court, for that reason, excluded certain sales from the value of sales made on the market concerned.

- 35 Third, the appellants claim that the General Court did not exercise its unlimited jurisdiction under Article 261 TFEU and Article 31 of Regulation No 1/2003, by permitting the Commission to deviate, without providing adequate reasons, from its previous decision-making practice, as that emerges from, inter alia, Decision C(2007) 5791 final of 28 November 2007 relating to proceedings under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/39165 — Flat glass), and decisions adopted in the area of merger control, where the Commission excluded the taking into account of internal sales in order to calculate the fine.
- 36 Fourth, the appellants criticise the General Court for having erred in law and having failed to exercise its unlimited jurisdiction by permitting the Commission to set the fine on the basis of the total turnover relating to the market concerned. In that regard, the General Court failed to examine the evidence produced and arguments put forward by LGD to show that its internal sales to LGE and Philips could not have been affected by the cartel, in particular because of the contractual terms in the joint venture agreement entered into by LGE and Philips.
- 37 Fifth, the appellants complain that the General Court’s reasoning was contradictory with respect to the interpretation of the Guidelines on the method of setting fines. In paragraph 97 of the judgment under appeal, according to the appellants, the General Court interpreted those Guidelines as allowing the Commission to include in the value of sales taken into consideration for the calculation of the fine the value of all sales made on the relevant market, and not to exclude the value of sales which were not affected by the infringement. On the other hand, in paragraph 70 of the judgment under appeal, the General Court stated that the value of sales taken into account for that calculation should encompass the value of sales with respect to which competition within the relevant market was distorted. Likewise, in paragraph 68 of the judgment under appeal, the General Court defined the value of sales to be taken into account for that calculation by reference to the sale of goods in respect of which the infringement was committed and products which were the subject of a restrictive practice. Further, in paragraph 62 of the judgment under appeal it is stated that there must be a link between the value of sales taken into consideration and the infringement.
- 38 Sixth, the appellants consider that the General Court erred in law and infringed LGD’s rights of defence by relying on an irrebuttable presumption that all sales made on the relevant market were affected by the infringement at issue. Yet the Guidelines on the method of setting fines do not establish such a presumption, but on the contrary impose on the Commission the obligation to examine on a case-by-case basis whether sales were affected by the infringement at issue. The General Court thus failed to assess the evidence adduced by LGD.
- 39 The Commission contends that this part of the ground of appeal is unfounded, since neither the Court’s case-law nor the Guidelines prevent it from taking into consideration internal sales in order to calculate the fine. In any event, the argument is ineffective, because it is common ground that LGD’s sales to Philips and LGE constituted sales to other undertakings. As to the remainder, it is compatible both with the Commission’s decision-making practice and point 13 of the Guidelines that the value of sales to be taken into account in order to calculate fines should not be restricted solely to transactions which are in fact affected by the cartel at issue.

– The second part of the first ground of appeal, concerning the impact of the infringement on LGD's internal sales to its parent companies

- 40 In the second part of the first ground of appeal the appellants claim, in essence, that the General Court was wrong to hold, in paragraphs 73 and 83 of the judgment under appeal, that, in any event, the cartel did in fact affect LGD's internal sales to its parent companies.
- 41 First, the appellants claim that, since the General Court stated, in paragraph 86 of the judgment under appeal, that the Commission had no evidence regarding specifically LGD's internal sales to LGE and Philips made in the period from July 2002 to September 2005, the General Court erred in law and infringed LGDs' rights of defence by taking those sales into account for the calculation of the fine. The Commission deviated in that regard from the practice followed in Commission Decision C(2009) 428 final of 28 January 2009 relating to proceedings under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/39406 — Marine Hoses), where the Commission took the view that the principle of proportionality precludes taking into account sales relating to a period for which no evidence is available. That practice is also confirmed by the case-law of the General Court (judgments in *Dansk Rørindustri v Commission*, T-21/99, EU:T:2002:74, paragraph 62, and *IMI and Others v Commission*, T-18/05, EU:T:2010:202, paragraph 95). Further, the General Court failed to assess whether, taking into consideration that lack of evidence for the period from July 2002 to September 2005, LGD's internal sales to its parent companies were part of a single and continuous infringement throughout the whole of the infringement period.
- 42 Second, the appellants claim that the General Court failed to provide adequate reasoning and manifestly distorted the sense of the evidence when it held that the sales of cartelised LCD panels by LGD to LGE, as opposed to the sales made to Philips, were affected by the infringement. In the first place, the General Court distorted the sense of the notes of a meeting of 15 November 2001, referred to in paragraph 76 of the judgment under appeal, by inferring from that document alone, in paragraph 150 of that judgment, a general rule that the cartel at issue also concerned internal sales, although that document makes no mention of LGE and Philips and there is nothing in its content to support the existence of such a general rule. In the second place, the General Court distorted the sense of Table 2 of the contested decision by inferring from that table, in paragraph 151 of the judgment under appeal, that the prices of cartelised LCD panels sold by LGD to its parent companies were influenced by the cartel, although that table related only to sales to LGD's customers in general, over a short period of six months, of a specific type of LCD monitor panel.
- 43 Third, the appellants claim that the General Court failed to state reasons to the requisite legal standard for its rejection, in paragraph 125 of the judgment under appeal, of their argument that the Commission infringed LGD's rights of defence when it found that LGD's internal sales to its parent companies were affected by the cartel. According to the appellants, there is, in that regard, a contradiction in finding, in paragraph 111 of the judgment under appeal, that 'the objection concerning [the appellants'] sales to LGE and Philips was already clear from the statement of objections', while, in paragraph 99 of the judgment under appeal, the General Court also stated that 'it is true that the statement of objections did not expressly state that [the appellants'] sales to LGE and Philips were affected by the cartel'. Yet if LGD had known, at the time of the statement of objections, that the Commission envisaged including its internal sales to its parent companies in the calculation of a fine on the ground that those sales had been made on a market affected by the cartel, LGD could have presented its arguments on that point in order to explain why sales made within the same group ought not, in general, to be taken into consideration when calculating a fine.
- 44 The Commission contends, in essence, that the second part of the first ground of appeal is ineffective, for the reason that, even if it were to be held that this part of the first ground of appeal is well founded, that would not preclude the sales of cartelised LCD panels by LGD to Philips and LGE being taken into consideration for the purposes of calculating the fine. In any event, this part of the first ground of appeal is unfounded.

Findings of the Court

- 45 First, it must be observed that the appellants' complaint in the first part of the first ground of appeal, stated more than once, is that the General Court was wrong to conclude that the Commission was entitled to include LGD's internal sales to its parent companies, namely LGE and Philips, in the value of sales taken into account for the calculation of the fine.
- 46 It must however be observed that, as is clear from paragraphs 136 to 145 of the judgment under appeal, the General Court held that the Commission was justified in reaching a conclusion which the appellants did not dispute before that court, that the appellants did not form with LGE and Philips a single undertaking for the purposes of application of Article 101 TFEU and therefore did not constitute a vertically-integrated undertaking, and consequently the appellants' relevant sales to LGE and Philips were included in the category of 'direct EEA sales', relating to the sales of cartelised LCD panels to independent third parties. That finding has also not been challenged by the appellants in their appeal. On the contrary, at the hearing, the appellants expressly stated that the sales of cartelised LCD panels to their parent companies were not internal sales.
- 47 That being the case, in so far as, in the first part of the first ground of appeal, the appellants complain that the General Court was wrong to conclude that the Commission was entitled to include LGD's internal sales to its parent companies in the value of sales taken into account for the calculation of the fine, their arguments must be rejected, since those arguments are based on a misreading of the judgment under appeal.
- 48 In so far as the appellants' complaint in that part of the first ground of appeal is that the General Court erred in concluding that the Commission was entitled to include LGD's relevant sales to its parent companies in the value of sales taken into account for the calculation of the fine, it must be recalled that the second subparagraph of Article 23(2) of Regulation No 1/2003 provides that, for each undertaking and association of undertakings participating in the infringement, the fine is not to exceed 10% of its total turnover in the preceding business year.
- 49 As the Court has previously held, the Commission must assess, in each specific case and having regard both to the context and the objectives pursued by the scheme of penalties created by that regulation, the intended impact on the undertaking in question, taking into account in particular a turnover which reflects the undertaking's real economic situation during the period in which the infringement was committed (judgments in *Britannia Alloys & Chemicals v Commission*, C-76/06 P, EU:C:2007:326, paragraph 25, and *Guardian Industries and Guardian Europe v Commission*, C-580/12 P, EU:C:2014:2363, paragraph 53).
- 50 In accordance with the Court's settled case-law, it is permissible, for the purpose of fixing the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement (judgments in *Musique Diffusion française and Others v Commission*, 100/80 to 103/80, EU:C:1983:158, paragraph 121; *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 243; *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*, C-397/03 P, EU:C:2006:328, paragraph 100; and *Guardian Industries and Guardian Europe v Commission*, C-580/12 P, EU:C:2014:2363, paragraph 54).
- 51 According to the Court's case-law, although Article 23(2) of Regulation No 1/2003 leaves the Commission a discretion, it nevertheless limits the exercise of that discretion by establishing objective criteria to which the Commission must adhere. Thus, first, the amount of the fine that may be imposed on an undertaking is subject to a quantifiable and absolute ceiling, so that the maximum amount of the fine that can be imposed on a given undertaking can be determined in advance. Secondly, the exercise

of that discretion is also limited by rules of conduct which the Commission imposed on itself, in particular in the Guidelines on the method of setting fines (judgment in *Guardian Industries and Guardian Europe v Commission*, C-580/12 P, EU:C:2014:2363, paragraph 55).

- 52 According to point 13 of the Guidelines, '[i]n determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly ... relates in the relevant geographic area within the EEA'. It is added in point 6 of those Guidelines that '[t]he combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement'.
- 53 It follows that, as the Court has previously held, point 13 of the Guidelines on the method of setting fines pursues the objective of adopting, as the starting point for the setting of the fine imposed on an undertaking, an amount which reflects the economic significance of the infringement and the relative size of the undertaking's contribution to it. Consequently, while the concept of the value of sales referred to in point 13 of those guidelines admittedly cannot extend to encompassing sales made by the undertaking in question which do not fall within the scope of the alleged cartel, it would, however, be contrary to the goal pursued by that provision if that concept were to be understood as applying only to turnover achieved by the sales in respect of which it is established that they were actually affected by that cartel (judgments in *Team Relocations and Others v Commission*, C-444/11 P, EU:C:2013:464, paragraphs 76 and 88, and *Guardian Industries and Guardian Europe v Commission*, C-580/12 P, EU:C:2014:2363, paragraph 57).
- 54 Such a limitation would, in addition, have the effect of artificially minimising the economic significance of the infringement committed by a particular undertaking, since the mere fact that a limited amount of direct evidence of sales actually affected by the cartel had been found would lead to the imposition of a fine which bore no actual relation to the scope of application of the cartel in question. Such a reward for secrecy would also adversely affect the objective of effective investigation and sanctioning of infringements of Article 101 TFEU and, therefore, cannot be permitted (judgments in *Team Relocations and Others v Commission*, C-444/11 P, EU:C:2013:464, paragraph 77, and *Guardian Industries and Guardian Europe v Commission*, C-580/12 P, EU:C:2014:2363, paragraph 58).
- 55 In any event, it must be stated that the proportion of the overall turnover deriving from the sale of products in respect of which the infringement was committed is best able to reflect the economic importance of that infringement (judgment in *Guardian Industries and Guardian Europe v Commission*, C-580/12 P, EU:C:2014:2363, paragraph 59 and case-law cited).
- 56 In this case, the General Court was therefore correct to hold, in paragraph 97 of the judgment under appeal, that 'the Commission's ability to include sales of cartelised LCD panels made by [the appellants] to LGE and Philips in the value of relevant sales for the purpose of calculating the fine does not depend on whether those sales were made at prices influenced by the cartel but merely on the fact that the sales were made on a market affected by a cartel in which [the appellants] were participating'.
- 57 In that regard, the General Court was correct to rely (i) on point 13 of the Guidelines on the method of setting fines, in paragraphs 65 and 66 of that judgment, in finding that point 13 covers, in fact, sales in the relevant market, which is the market concerned by the infringement, and not only the cases for which the Commission has documentary evidence of the infringement, (ii) on the objective of the EU competition rules, in paragraph 67 of the judgment under appeal, after observing that the interpretation put forward by the appellants would mean that, in order to determine the basic amount of the fines to be imposed in cartel cases, the Commission would be obliged in each case to ascertain

the individual sales which were affected by the cartel, and (iii), in paragraph 68 of that judgment, on the case-law stemming from the judgment in *Musique Diffusion française and Others v Commission* (100/80 to 103/80, EU:C:1983:158) referred to in paragraph 50 of this judgment.

- 58 Consequently, since the General Court held, in paragraph 69 of the judgment under appeal, in its assessment of the facts against which there is no appeal, there being no claim by the appellants of any distortion of the sense of the evidence, that the appellants' sales of cartelised LCD panels to LGE and Philips were made on the market concerned by the infringement, that court did not err in law in holding, in paragraphs 71 and 72 of that judgment, that the Commission was entitled to take account of those sales in order to calculate the amount of the fine to be imposed on them, irrespective of whether LGE and Philips actually paid the appellants higher prices because of the cartel and whether they passed on that possible overcharging in the prices of the finished products incorporating the cartelised LCD panels which they sold to consumers in the EEA.
- 59 That being the case, the General Court was under no obligation either to clarify how the sales of those LCD panels made by LGD to LGE and Philips, notwithstanding the terms of the contracts linking LGD to LGE and Philips under their joint venture agreement, could have distorted competition on the relevant market, or to examine the evidence supplied by the appellants for that purpose.
- 60 In that regard, it must be observed that to ignore the value of sales made to independent third parties on the ground that the undertaking participating in the infringement has particular structural links with those third parties would give an unjustified advantage to such an undertaking by allowing it to avoid the imposition of a fine proportionate to its importance on the product market to which the infringement relates (see, by analogy, judgment in *Guardian Industries and Guardian Europe v Commission*, C-580/12 P, EU:C:2014:2363, paragraphs 59 and 63).
- 61 That is because, in addition to the profit which can be expected from a cartel which provides for horizontal price-fixing in sales to independent third parties, an undertaking may also benefit from such a cartel through growth in its sales to undertakings with which there are certain structural links, where such undertakings are not subject to the increased prices fixed within the cartel, since, as a result, that undertaking acquires a competitive advantage over its competitors who offer those increased prices on the relevant market.
- 62 Moreover, the very fact that an undertaking achieves sales on the relevant market to independent third parties at such increased prices entails a distortion of competition affecting the entire relevant market, to the disadvantage, in particular, of consumers.
- 63 It follows that, as the General Court stated, in essence, in paragraph 70 of the judgment under appeal, even where a cartel does not relate to the sales of the product in question to undertakings linked to the members of that cartel, competition on the relevant market is distorted, and consequently those sales may be taken into account for the calculation of the fine.
- 64 Contrary to what is claimed by the appellants, the General Court did not thereby in any way rely on an irrebuttable presumption that all sales made on the relevant market were affected by the infringement at issue. The General Court rather held, stating reasons which, as is clear from paragraphs 48 to 59 of this judgment, are not vitiated by any error of law, that, even in the absence of any evidence that the sales of cartelised LCD panels by the appellants to their parent companies were affected by that infringement, those sales may nonetheless be taken into account for the purposes of calculation of the fine to be imposed on the appellants, provided that they were made on the market affected by the infringement. The appellants' arguments are therefore based on a misreading of the judgment under appeal and must accordingly be rejected.
- 65 Nor can the complaint be made that the reasons stated by the General Court in paragraphs 62 and 68 to 70 of the judgment under appeal are contradictory.

- 66 By stating, in paragraph 62 of the judgment under appeal, that the Commission was required ‘to explain in what way [the appellants’] sales to LGE and Philips were linked to the cartel’, by recalling, in paragraph 68 of that judgment, that ‘it is settled case-law that the proportion of the turnover accounted for by the goods in respect of which the infringement was committed gives a proper indication of the scale of the infringement on the relevant market’ and by observing, in paragraph 70 of that judgment, that ‘where a product covered by a cartel is sold in the internal market, competition within that market is distorted’, the General Court did no more than give expression to the same argument, underpinning its entire statement of reasons and set out, in particular, in paragraphs 66 and 97 of the judgment under appeal, that the appellants’ sales to LGE and Philips might be taken into account by the Commission for the purposes of calculation of the fine since those sales were made on the market affected by the infringement.
- 67 Further, as regards the complaint that the General Court deviated from the Commission’s decision-making practice, suffice it to state, as the General Court did in paragraph 143 of the judgment under appeal, that, according to the Court’s settled case-law, the Commission’s practice in previous decisions does not serve as a legal framework for the fines imposed in competition matters (see judgments in *JCB Service v Commission*, C-167/04 P, EU:C:2006:594, paragraph 205; *Tomra Systems and Others v Commission*, C-549/10 P, EU:C:2012:221, paragraph 104; and *Team Relocations and Others v Commission*, C-444/11 P, EU:C:2013:464, paragraph 82).
- 68 Consequently, the first part of the first ground of appeal must be rejected as being unfounded.
- 69 In those circumstances, the second part of that ground of appeal, whereby the appellants seek to call into question the findings made by the General Court in paragraphs 73 to 89 and 147 to 154 of the judgment under appeal, to the effect that, in essence, as indicated in paragraph 73, it is apparent ‘in any event’ from the file that sales of cartelised LCD panels by the appellants to LGE and Philips had been included in the cartel discussions and that the Commission had proved to the requisite legal standard that the cartel also affected those sales, must be rejected as being ineffective since it concerns a ground included in that judgment purely for the sake of completeness (see, inter alia, judgment in *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 148).
- 70 As is clear from the examination of the first part of the first ground of appeal, the reasons stated in paragraphs 65 to 72 and 97 of the judgment under appeal are themselves sufficient justification for taking into account those sales for the setting of the fine.
- 71 It follows that the first ground of appeal must be dismissed in its entirety.

The second ground of appeal, on partial immunity from a fine

- 72 This ground of appeal is divided into two parts. In the first part, the appellants claim that the General Court erred in law in the application of the final paragraph of point 23(b) of the Leniency Notice and failed to state adequate reasons by placing the undertaking which requested total immunity in a privileged position as compared with the undertaking requesting that it be granted partial immunity. In the second part, the appellants claim that the General Court manifestly distorted the sense of the evidence and erred in law in the application of the Leniency Notice by refusing to grant LGD partial immunity for the period subsequent to 26 August 2005.

The first part of the second ground of appeal, on the conditions for the granting of partial immunity

– Arguments of the parties

- 73 In this part, the appellants' criticism of the General Court is that it erred in law in the interpretation of the final paragraph of point 23(b) of the Leniency Notice by refusing, by means of a restrictive application of that paragraph, to grant LGD partial immunity from a fine for 2005 while failing to demonstrate that the information submitted by Samsung constituted in itself a sufficient basis for the Commission to establish that the infringement at issue continued throughout 2005. The appellants claim that the judgment in *Transcatab v Commission* (T-39/06, EU:T:2011:562) indicates that facts evidence of which is provided by the undertaking requesting partial immunity are to be regarded as having been previously unknown to the Commission where those facts 'enable the Commission to make new findings concerning the infringement'.
- 74 Yet, according to the appellants, the evidence which they provided in their statement of 20 July 2006 was of much greater value than that submitted by Samsung, since that evidence related to the entire duration of the infringement until February 2006, to the main multilateral meetings, to all the participants, and to the various categories of products, whereas the evidence submitted by Samsung was very limited in time and scope and would not have enabled the Commission to investigate the cartel and penalise several members of it with respect to what was done during 2005. The General Court itself recognised, in paragraphs 189 and 190 of the judgment under appeal, that the contested decision most often relies on evidence provided by the appellants so far as the year 2005 is concerned and that the information provided by the appellants had in fact greater evidential value than the information previously disclosed by Samsung.
- 75 The appellants consider that the General Court's interpretation of the final paragraph of point 23(b) of the Leniency Notice is contrary to the *ratio legis* of that provision since its effect is to discourage members of the cartel other than the undertaking which requested total immunity from providing relevant evidence, concerning further facts which that undertaking chose not to disclose, demonstrating that the infringement under investigation is of longer duration, since it is unlikely that those other members would obtain partial immunity for that additional period and they would even be at risk of being required to pay a higher fine.
- 76 The Commission considers that the first part of the second ground of appeal, since it is based on a misinterpretation of that provision, must be rejected.

– Findings of the Court

- 77 It must be recalled that the final paragraph of point 23(b) of the Leniency Notice provides that 'if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these elements into account when setting any fine to be imposed on the undertaking which provided this evidence'.
- 78 As the General Court correctly stated in paragraph 166 of the judgment under appeal, it follows from the very wording of that provision that the partial immunity provided for therein requires two conditions to be satisfied: first, the undertaking in question should be the first to prove facts previously unknown to the Commission; and, second, those facts, which have a direct bearing on the gravity or the duration of the suspected cartel, should enable the Commission to make new findings concerning the infringement.

- 79 As is stated in the Court's case-law, the wording 'facts ... unknown to the Commission', in relation to the first of those conditions, is unambiguous and allows, as stated by the General Court in paragraph 167 of the judgment under appeal, the adoption of a restrictive interpretation of the final paragraph of point 23(b) of the Leniency Notice, by limiting that provision to cases in which a company party to a cartel provides the Commission with new information relating to the gravity or the duration of the infringement, and by excluding from it cases in which a company has merely provided information which strengthens the evidence of the existence of the infringement (see, to that effect, the order in *Kuwait Petroleum and Others v Commission*, C-581/12 P, EU:C:2013:772, paragraph 19).
- 80 In this case, the General Court stated in paragraph 189 of the judgment under appeal, in its assessment of the facts against which there is no appeal, there being no claim of any distortion, that 'at the time of [the appellants'] statement on 20 July 2006, the Commission knew, because of the evidence provided by Samsung, that bilateral contacts between certain cartel participants had continued in 2005'.
- 81 The General Court, having thus found that the information provided by the appellants concerned facts which were not previously unknown to the Commission, was justified, for that reason alone, in rejecting, in paragraph 194 of the judgment under appeal, the appellants' arguments concerning the grant of partial immunity from a fine under the final paragraph of point 23(b) of the Leniency Notice with respect to those facts, and was not required to examine whether that information was such as to enable the Commission to make new findings concerning the infringement, there being no need to compare the evidential value of that information with that of the information provided earlier by Samsung.
- 82 Accordingly, it is of no consequence that, in paragraphs 189 and 190 of the judgment under appeal, the General Court held, respectively, that the contested decision 'most often relies on evidence provided by the appellants so far as the year 2005 is concerned' and that 'the information provided by [the appellants] on 20 July 2006 ... had in fact greater evidential value than the information previously disclosed by Samsung'.
- 83 Further, it must be observed that those findings, as is clear from paragraph 190 of the judgment under appeal, were included for the sake of completeness by the General Court, not in order to justify the rejection of the request for partial immunity from a fine for 2005, but in order to explain why the Commission had been led to grant the appellants a reduction in the fine, since the conditions governing such a reduction as laid down in the Leniency Notice differ from those laid down for the granting of partial immunity from a fine.
- 84 Moreover, contrary to what is claimed by the appellants, that interpretation of the final paragraph of point 23(b) of the Leniency Notice is in no way at odds with the objective pursued by that notice, since, as the General Court held in paragraph 167 of the judgment under appeal, the effectiveness of leniency programmes would be undermined if undertakings no longer had an incentive to be the first to submit information revealing the existence of a cartel to the Commission (see, to that effect, the order in *Kuwait Petroleum and Others v Commission*, C-581/12 P, EU:C:2013:772, paragraph 20).
- 85 Accordingly, where the undertaking which is the first to submit to the Commission, in order to obtain total immunity from a fine under the Leniency Notice, evidence to enable the Commission to find an infringement of Article 101 TFEU has chosen not to disclose information which demonstrates that the duration of the infringement at issue was longer than disclosed by that evidence, any other undertaking participating in that infringement has an incentive, contrary to what is claimed by the appellants, to be the first to disclose such information, since such disclosure may justify the granting of partial immunity from a fine under the final paragraph of point 23(b) of the Leniency Notice. However, that is precisely not the situation in this case, as has been stated above in paragraph 80 of this judgment, as regards the knowledge which the Commission had of the continuation of the infringement during 2005.

- 86 Admittedly, an undertaking which provides information to the Commission under the Leniency Notice, since it is normally unaware of the evidence already in the possession of the Commission, cannot be certain that it meets the conditions to be granted the partial immunity provided for in the final paragraph of point 23(b) of the Leniency Notice.
- 87 However, the Leniency Notice is not designed to remove such uncertainty; on the contrary, the effect sought by that notice, as the General Court correctly held in paragraph 163 of the judgment under appeal, is the creation of a climate of uncertainty within cartels in order to encourage the reporting of them to the Commission.
- 88 Nor can the appellants maintain that the interpretation adopted by the General Court in the judgment under appeal would, in practice, ensure that the granting of partial immunity from a fine would be unlikely, since, as is clear from, inter alia, paragraphs 182 and 195 to 203 of the judgment under appeal, they were in fact granted partial immunity from a fine for the month of January 2006.
- 89 Further, the appellants are wrong to complain that the General Court failed to state sufficient reasons for the judgment under appeal on that point. As is clear from all the foregoing, that judgment, particularly in paragraphs 166, 167 and 189 thereof, set out with all the clarity required the reasons why the General Court held that the Commission was right to refuse to grant to the appellants partial immunity from a fine for 2005.
- 90 Consequently, the first part of the second ground of appeal must be rejected as being unfounded.

The second part of the second ground of appeal, concerning the refusal of partial immunity for the period subsequent to 26 August 2005

– Arguments of the parties

- 91 In this part, the appellants complain, first, that the General Court wrongly refused partial immunity from a fine to LGD for the period subsequent to 26 August 2005, though the Commission had in its possession no evidence supplied by the undertaking requesting total immunity to demonstrate that LGD had continued to participate in the cartel after that date. The only evidence submitted by Samsung on the subject of the period subsequent to August 2005 was an e-mail dated 6 December 2005 concerning possible bilateral contacts between Samsung, on the one hand, and AU Optronics Corp. and Chi Mei Optoelectronics Corp., on the other, which makes no mention of LGD or other participants. By suggesting, in paragraph 187 of the judgment under appeal, that that document could concern any cartel participant, including LGD, the General Court distorted the content of that e-mail.
- 92 Second, the appellants consider that the General Court also erred in law by concluding, in paragraph 193 of the judgment under appeal, that the evidence submitted by Samsung allowed the Commission to presume that LGD had continued to participate in the infringement until the end, since there was a single and continuous infringement. That conclusion is at odds with the case-law stemming from the judgment in *Dansk Rørindustri v Commission* (T-21/99, EU:T:2002:74, paragraph 62) where the General Court ruled out the possibility of the Commission presuming, without evidence, that a member of a cartel participated in it until the end of the cartel.
- 93 Third, the appellants consider that paragraph 193 of the judgment under appeal is also vitiated by an error of law in that the General Court held that the evidence in question allowed the Commission to hold LGD responsible for the conduct of other participants, while failing to assess the strict conditions governing such an attribution of responsibility. According to the case-law of the General Court, that responsibility can be attributed to an undertaking only where it is established that it was aware of the unlawful conduct of other participants or that it could reasonably have foreseen that conduct and was prepared to accept the risk (judgments in *BASF and UCB v Commission*, T-101/05

and T-111/05, EU:T:2007:380, paragraph 160, and *Denki Kagaku Kogyo and Denka Chemicals v Commission*, T-83/08, EU:T:2012:48, paragraph 242). In this case, however, without the evidence submitted by LGD, the Commission would not have been able to extend the duration of the infringement with respect to the participants in the cartel other than Samsung and Chi Mei Optoelectronics Corp. beyond August 2005.

- 94 The Commission states that the General Court's conclusion that the Commission had information, on the date when statements were made by the appellants, that is on 20 July 2006, on the continuation of the cartel throughout the whole of 2005, is a finding of fact which cannot be the subject of an appeal to the Court of Justice, unless the facts or the evidence have been distorted. Yet in this case, the appellants do not claim any distortion of the evidence, but claim rather that the e-mail of 6 December 2005 is insufficient to justify the conclusion of the General Court.

– Findings of the Court

- 95 It is clear that this second part of the second ground of appeal, whereby the appellants claim, in essence, that the General Court erred in refusing to them partial immunity from the fine for the period subsequent to 26 August 2005, is based entirely on the premiss that the General Court was wrong to hold that the Commission had information of the participation of LGD in the cartel after that date solely because of the e-mail of 6 December 2005 provided by Samsung, cited in paragraph 187 of the judgment under appeal, the content of which the General Court distorted.
- 96 That premiss is based on a misreading of the judgment under appeal.
- 97 Not only did the General Court not make such a finding in the judgment under appeal, but it is moreover very clear from paragraph 193 of that judgment that, in order to hold that the appellants continued to participate in the cartel throughout the whole of 2005, the General Court relied not on that e-mail of 6 December 2005 but on another document produced by Samsung, namely an e-mail of 14 January 2005, referred to in paragraph 185 of that judgment, which mentions the possibility of Samsung asking the appellants about their intentions as to certain prices.
- 98 That being the case, the appellants cannot complain that the General Court distorted the content of the e-mail of 6 December 2005 on the ground that that e-mail did not demonstrate that they continued to participate in the cartel after 26 August 2005, since the General Court drew no such conclusion from that document, but relied on it, as is clear from paragraph 189 of the judgment under appeal, in order to find, more generally, that the cartel had continued in 2005.
- 99 Consequently, the appellants' claims on this point are unfounded.
- 100 For the remainder, since the appellants do not challenge the General Court's finding in paragraph 193 of the judgment under appeal with respect to the e-mail of 14 January 2005, which finding, it may be added, falls, unless distortion is claimed, exclusively within the jurisdiction of the General Court, the second part of the second ground of appeal must, in accordance with the case-law stated in paragraph 69 of this judgment, be rejected as being ineffective. That finding was sufficient ground for the General Court correctly to hold that the Commission was not unaware of the appellants' participation in the cartel during 2005. The appellants' complaints with regard to the second part of the abovementioned paragraph 193 relate, accordingly, to a reason which was stated for the sake of completeness.
- 101 Consequently, the second part of the second ground of appeal must be rejected as being unfounded.
- 102 It follows that the second ground of appeal must be rejected in its entirety.

103 In the light of the foregoing, the appeal must be dismissed as being unfounded.

Costs

104 Under Article 138(1) of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

105 Since the Commission has applied for costs against LGD and LGDT, and the latter have been unsuccessful, they must be ordered to pay the costs.

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

- 1. Dismisses the appeal;**
- 2. Orders LG Display Co. Ltd and LG Display Taiwan Co. Ltd to pay the costs.**

[Signatures]