Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

26 January 2017*

(Appeal — Agreements, decisions and concerted practices — Bathroom fittings and fixtures markets of Belgium, Germany, France, Italy, the Netherlands and Austria — Coordination of selling prices and exchange of sensitive business information — 2006 Guidelines on the method of setting fines — Obligation to state reasons — Principle of equal treatment — Proportionality — Exercise of unlimited jurisdiction)

In Case C-636/13 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 27 November 2013,

Roca Sanitario SA, established in Barcelona (Spain), represented by J. Folguera Crespo, P. Vidal Martínez and E. Navarro Varona, abogados,

appellant,

the other party to the proceedings being:

European Commission, represented by F. Castilla Contreras, F. Castillo de la Torre and F. Jimeno Fernández, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (First Chamber),

composed of A. Tizzano, Vice-President of the Court, acting as President of the First Chamber, M. Berger, E. Levits, S. Rodin (Rapporteur) and F. Biltgen, Judges,

Advocate General: M. Wathelet,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 10 September 2015,

after hearing the Opinion of the Advocate General at the sitting on 26 November 2015,

gives the following

* * Language of the case: Spanish.

Judgment

1 By its appeal Roca Sanitario SA ('Roca Sanitario' or 'the appellant')asks the Court of Justice to set aside in part the judgment of the General Court of the European Union of 16 September 2013, *Roca Sanitario* v *Commission* (T-408/10, 'the judgment under appeal', EU:T:2013:440), by which the General Court reduced to EUR 6 298 000 the fine imposed on Roca Sanitario jointly and severally with its subsidiary Roca SARL ('Roca') by Commission Decision C(2010) 4185 final of 23 June 2010 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case COMP/39092 — Bathroom Fittings and Fixtures) ('the decision at issue') and dismissed the remainder of Roca Sanitario's action for annulment of that decision.

Legal context

Regulation (EC) No 1/2003

2 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1) provides, in Article 23(2) and (3):

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

(a) they infringe Article [101] 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.'

The 2006 Guidelines

4 The Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the 2006 Guidelines') state, in point 2, that, so far as concerns the setting of fines, 'the Commission must have regard both to the gravity and to the duration of the infringement' and that 'the fine imposed may not exceed the limits specified in Article 23(2), second and third subparagraphs, of Regulation No 1/2003'.

5 Point 13 of the 2006 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)]. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement. …’

6 In accordance with point 20 of the 2006 Guidelines:

‘The assessment of gravity will be made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case.’

7 Point 21 of the 2006 Guidelines states:

‘As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30% of the value of sales.’

8 In accordance with point 22 of the 2006 Guidelines:

‘In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.’

9 Point 23 of the 2006 Guidelines states:

‘Horizontal price-fixing, market-sharing and output-limitation agreements …, which are usually secret, are, by their very nature, among the most harmful restrictions of competition. As a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale.’

10 Point 25 of the 2006 Guidelines states:

‘In addition, irrespective of the duration of the undertaking’s participation in the infringement, the Commission will include in the basic amount a sum of between 15% and 25% of the value of sales as defined in Section A above in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements. The Commission may also apply such an additional amount in the case of other infringements. For the purpose of deciding the proportion of the value of sales to be considered in a given case, the Commission will have regard to a number of factors, in particular those referred [to] in point 22.’

11 Point 29 of the 2006 Guidelines states:

‘The basic amount may be reduced where the Commission finds that mitigating circumstances exist, such as:

— where the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened: this will not apply to secret agreements or practices (in particular, cartels);

— where the undertaking provides evidence that the infringement has been committed as a result of negligence;

— where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market: the mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount;

— where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so;

— where the anticompetitive conduct of the undertaking has been authorised or encouraged by public authorities or by legislation. …'

Background to the dispute and the decision at issue

12 The background to the dispute was set out in paragraphs 1 to 28 of the judgment under appeal and may be summarised as follows.

13 Roca Sanitario is the parent company of a group of companies active in the bathroom fittings and fixtures sector ('the Roca group'). At the time of the events constituting the infringement found, Roca Sanitario held all the share capital of Roca, whose core business was the distribution of ceramic ware and taps and fittings on the French market. On 29 October 1999 Roca Sanitario acquired the group whose ultimate parent was Keramik Holding AG ('the Laufen group'), a company governed by Swiss law which held, inter alia, all the share capital of Laufen Austria AG. At the time of the events constituting the infringement found, Laufen Austria manufactured ceramic sanitary ware under its own brands and marketed those products as well as products manufactured by its competitors. Its sales were concentrated in Austria and, to a lesser extent, Germany.

14 On 15 July 2004, Masco Corp. and its subsidiaries, including Hansgrohe AG, which manufactures taps and fittings, and Hüppe GmbH, which manufactures shower enclosures, informed the Commission of the existence of a cartel in the bathroom fittings and fixtures sector and submitted an application for immunity from fines under the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3) or, in the alternative, for a reduction of any fines that might be imposed on them.

15 On 9 and 10 November 2004, the Commission conducted unannounced inspections at the premises of various companies and national industry associations operating in the bathroom fittings and fixtures sector. Between 15 November 2005 and 16 May 2006, the Commission sent requests for information to those companies and associations, including Roca and Laufen Austria. It then, on 26 March 2007, adopted a statement of objections, which was notified, inter alia, to the appellant.

16 On 17 January 2006, Roca applied, on its own behalf and on behalf of the Laufen group in so far as Roca had taken over the activities of that group in France, for immunity from fines under the Commission notice on immunity from fines and reduction of fines in cartel cases or, in the alternative, for a reduction of any fine that might be imposed on it.

17 Following a hearing held from 12 to 14 November 2007, the sending, on 9 July 2009, of a letter of facts to certain companies and further requests for information that were addressed to, amongst others, the appellant, the Commission, on 23 June 2010, adopted the decision at issue, by which it found there to have been an infringement of Article 101(1) TFEU and Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) in the bathroom fittings and fixtures sector. That infringement, in which 17 undertakings had allegedly participated, was said to have taken place over various periods between 16 October 1992 and 9 November 2004 and to have taken the form of anticompetitive agreements or concerted practices covering the territory of Belgium, Germany, France,

Italy, the Netherlands and Austria. According to the decision at issue, the products covered by the cartel were bathroom fittings and fixtures belonging to the following three product sub-groups: taps and fittings, shower enclosures and accessories, and ceramic sanitary ware (ceramics) ('the three product sub-groups').

18 The Commission pointed to, amongst other things, the existence of national industry associations whose members' activities covered all three product sub-groups, which it termed 'umbrella associations', national industry associations with members active in at least two of those three product sub-groups, which it termed 'cross-product associations', as well as product-specific associations with members active in only one of the three product sub-groups. Lastly, it identified a central group of undertakings which participated in the cartel in various Member States and in umbrella associations and cross-product associations.

19 As regards the Roca group's participation in the infringement found, the Commission considered that the group had been aware that the infringement covered the three product sub-groups. However, so far as the geographic scope of the cartel was concerned, the Commission concluded that the Roca group could not be considered to have been aware of the cartel's overall scope but was to be regarded as having been aware only of the collusive conduct in France and Austria.

20 The Commission thus found, in Article 1(3) of the decision at issue, that Roca Sanitario and its two subsidiaries, Roca and Laufen Austria, had infringed Article 101(1) TFEU and Article 53 of the Agreement on the European Economic Area of 2 May 1992 by participating in a continuing agreement or concerted practice in the bathroom fittings and fixtures sector in France and Austria.

21 Under Article 2(4) of the decision at issue, the Commission imposed a fine of EUR 17 700 000 on Roca Sanitario jointly and severally with Laufen Austria and a fine of EUR 6 700 000 on Roca Sanitario jointly and severally with Roca. It also imposed a fine on Laufen Austria of EUR 14 300 000 in respect of its participation in the infringement during the period prior to Roca Sanitario's acquisition of the Laufen group.

Proceedings before the General Court and the judgment under appeal

22 By application lodged at the Registry of the General Court on 8 September 2010, Roca Sanitario brought an action for annulment of the decision at issue in so far as the decision concerned it or, in the alternative, for reduction of the fine imposed on it.

23 In support of its claim for the partial annulment of the decision at issue, Roca Sanitario put forward six pleas in law. The first, second and fifth pleas in law concerned the imputing to Roca Sanitario of liability for the actions of Roca and Laufen Austria. The third plea alleged infringement of the rights of the defence. The fourth plea concerned the calculation of the fine imposed jointly and severally on Roca Sanitario and Laufen Austria. The sixth plea related to the Commission's assessment of the gravity of the infringement.

24 In its alternative claim for reduction of the amount of the fine, Roca Sanitario relied on the lesser gravity of the participation in the infringement, liability for which was imputed to it, as compared with that of other participants and argued that it should benefit from any reduction of the fine that might be granted to Roca and Laufen Austria following their respective actions.

25 By the judgment under appeal the General Court, in the exercise of its unlimited jurisdiction, reduced the fine imposed jointly and severally on the appellant and Roca and set it at EUR 6 298 000 in order that the appellant might share in a reduction of the fine granted to Roca. Apart from that it dismissed the action as unfounded.

Forms of order sought by the parties

26 Roca Sanitario claims that the Court should:

— set aside in part the judgment under appeal;

— reduce the fine imposed on it; and

— order the Commission to pay the costs.

27 The Commission contends that the Court should:

— dismiss the appeal; and

— order Roca Sanitario to pay the costs.

The appeal

28 Roca Sanitario puts forward two grounds in support of its appeal. The first ground of appeal alleges that the General Court erred in law in holding that one of its pleas raised at first instance was put forward 'out of time'. The second alleges that the General Court, in refusing to reduce the basic amount of the fine imposed on Roca Sanitario, infringed the principle that penalties must be specific to the offender, the principles of personal responsibility, proportionality, equal treatment and protection of legitimate expectations and the obligation to state reasons.

The first ground of appeal

Arguments of the parties

29 By its first ground of appeal, Roca Sanitario complains that the General Court, in paragraphs 44 and 45 of the judgment under appeal, rejected as inadmissible its argument that the Commission, in applying the presumption that Roca Sanitario exercised decisive influence over Laufen Austria, took into account an incorrect date so far as Roca Sanitario's acquisition of virtually all the shares in Keramik Holding was concerned. It maintains that, contrary to what is stated in the decision at issue, that acquisition did not take place until 31 December 1999.

30 The appellant submits that the General Court, incorrectly, held that argument to be out of time on the ground that it had been put forward for the first time at the stage of the reply. In its submission, that argument should have been regarded as expanding upon a plea that had already been set out in the application. In any event, the General Court is obliged to raise of its own motion at any stage of the proceedings an error in the assessment of the facts and to reduce the fine accordingly, if the right to effective judicial protection enshrined in Article 47 of the Charter of Fundamental Rights of the European Union and the principle of proportionality underpinning Article 31 of Regulation No 1/2003 are not to be infringed.

31 The Commission disputes the appellant's arguments.

Findings of the Court

32 It should be recalled that the Courts of the European Union 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 (judgment of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 62).

33 The review of legality is supplemented by the unlimited jurisdiction which is 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 legality with regard to the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed (judgment of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 63 and the case-law cited).

34 It must, however, be pointed out that the exercise of unlimited jurisdiction is not equivalent to an own-motion review and that proceedings before the Courts of the European Union are *inter partes*. With the exception of grounds 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 (judgment of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 64).

35 In accordance with Article 48(2) of the Rules of Procedure of the General Court in the version in force at the date of the judgment under appeal, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. An argument which does not expand upon an argument raised previously, whether directly or by implication, in the original application and which is not closely connected with that previous argument must be regarded as a new plea (see, to that effect, judgment of 12 November 2009, *SGL Carbon* v *Commission*, C-564/08 P, not published, EU:C:2009:703, paragraphs 20 to 34, and of 16 December 2010, *AceaElectrabel Produzione* v *Commission*, C-480/09 P, EU:C:2010:787, paragraph 111).

36 In the present case the General Court found, in paragraph 44 of the judgment under appeal, that 'the claim that the applicant held the entire share capital of Laufen Austria only from 6 June 2000 was raised for the first time in the reply'. It then observed, in paragraph 45 of the judgment, that 'the applicant expressly stated, in the application, that it had acquired 100% of the share capital of Keramik Holding on 29 October 1999' and concluded that 'it is therefore incorrect of the applicant to maintain that [this] claim is to be regarded as expanding upon submissions made in the application'.

37 Accordingly, in view of the fact that the date of the appellant's acquisition of Keramik Holding's share capital is essential for the purpose of calculating the basic amount of the fine imposed on Roca Sanitario, the claim cannot be regarded as expanding upon a plea raised in the original application but must be classified as a new plea.

38 Moreover, it is not for the General Court to repair the mistakes made by a party in the presentation of the facts which may serve as a basis for pleas seeking annulment of the decision at issue.

39 The first ground of appeal must therefore be rejected as unfounded.

The second ground of appeal

Arguments of the parties

40 By its second ground of appeal, Roca Sanitario complains that the General Court infringed, in, inter alia, paragraphs 157 to 188, 201 and 202 of the judgment under appeal, the principle that penalties must be specific to the offender, the principles of personal responsibility, proportionality, equal treatment and protection of legitimate expectations and the obligation to state reasons, in that it did not act upon its finding that the participation in the infringement, liability for which was imputed to Roca Sanitario, was of lesser gravity than that of other participants and should, in particular, have (i) adjusted the multiplier linked to the gravity of the infringement found, as provided for in points 20 to 23 of the 2006 Guidelines ('the multiplier for the "gravity of the infringement"') and the additional multiplier provided for in point 25 of the guidelines ('the multiplier for the "additional amount"') and (ii) reduced the basic amount of the fine.

41 Roca Sanitario submits, in the first place, that paragraphs 157 to 188 of the judgment under appeal are vitiated by an error of law in that they take no account, in the determination of the amount of the fine, of the fact that the participation in the infringement, liability for which was imputed to it, was of lesser gravity than that of the other undertakings penalised. Roca Sanitario argues in this respect that the judgment under appeal drew no distinction — other than with regard to the geographic extent of the involvement of the participants in the infringement — between the gravity of the conduct of its subsidiaries and the gravity of the conduct of the undertakings making up the 'hard core' of participating undertakings, in order to reflect the nature of their respective actions and the number of product sub-groups covered by the infringement. In accordance with the principle of non-discrimination, the General Court should have reduced the basic amount of the fine imposed on Roca Sanitario, applying lower multipliers for the 'gravity of the infringement' and for the 'additional amount' than those applied to those core undertakings and should have acted upon the findings it made in paragraphs 169, 186 and 187 of the judgment under appeal.

42 In the second place, Roca Sanitario maintains that the grounds stated in paragraphs 168 and 187 of the judgment under appeal conflict with the case-law precedents in the matter of the gradation of fines and unduly favour the principle of proportionality of the fine to the detriment of the principle of equal treatment.

43 In the third place, Roca Sanitario submits that the lesser gravity of the participation in the infringement, liability for which was imputed to it, should have been taken into account as a mitigating circumstance for the purposes of the third indent of point 29 of the 2006 Guidelines. However, in paragraphs 171 to 177 of the judgment under appeal, the General Court, on the basis of an over-restrictive and incorrect interpretation of that provision, did not allow any reduction of the fine in this regard.

44 In the fourth place, the General Court infringed the principle of the protection of legitimate expectations and failed in its obligation to state reasons inasmuch as, whilst relying on points 21 to 23 of the 2006 Guidelines in paragraph 185 of the judgment under appeal, it failed to take into account that the participation in the infringement, liability for which was imputed to Roca Sanitario, was of lesser gravity than that of other participants and held that the Commission had acted in accordance with the principle of proportionality.

45 The Commission disputes those arguments. Furthermore, whilst it considers that the General Court was correct in rejecting Roca Sanitario's arguments concerning infringement of the principles of equal treatment and proportionality, it submits, in essence, that the General Court accepted an incorrect premiss, namely that the multipliers for the 'gravity of the infringement' and for the 'additional amount' applied to Roca Sanitario, which participated in the infringement only with regard to France

and Austria, should have been different from those used for other cartel members which had participated in the infringement in six Member States and in relation to three product sub-groups. The Commission therefore requests the Court of Justice to replace the relevant grounds of the judgment under appeal.

Findings of the Court

46 It must first of all be recalled that the General Court alone has jurisdiction to examine how in each particular case the Commission assessed the gravity of unlawful conduct. In an appeal, the purpose of review by the Court of Justice is, first, to examine to what extent the General Court took into consideration, in a legally correct manner, all the essential factors to assess the gravity of particular conduct in the light of Article 101 TFEU and Article 23 of Regulation No 1/2003 and, second, to consider whether the General Court responded to a sufficient legal standard to all the arguments raised in support of the claim for cancellation or reduction of the fine (see, inter alia, judgments of 17 December 1998, *Baustahlgewebe* v *Commission*, C-185/95 P, EU:C:1998:608, paragraph 128; of 28 June 2005, *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 244; and of 5 December 2013, *Solvay Solexis* v *Commission*, C-449/11 P, not published, EU:C:2013:802, paragraph 74).

47 In so far as Roca Sanitario, by its second ground of appeal, complains that the General Court failed — both in carrying out its review of the legality of the decision at issue (in paragraphs 157 to 179 of the judgment under appeal) and in exercising its unlimited jurisdiction as regards the setting of the fine (in paragraphs 185 to 188 of that judgment) — to take account of the fact that the participation in the infringement, liability for which was imputed to Roca Sanitario, was of lesser gravity than that of the undertakings making up the 'hard core' of the cartel, it should be noted that it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the General Court exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of EU law (judgments of 28 June 2005, *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 245, and of 11 July 2013, *Gosselin Group* v *Commission*, C-429/11 P, not published, EU:C:2013:463, paragraph 87).

48 It should also be recalled that, in setting the amount of fines, regard must be had to the duration of the infringement and to all the factors capable of affecting the assessment of the gravity of that infringement (judgments of 28 June 2005, *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 240, and of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 98).

49 The factors capable of affecting the assessment of the gravity of the infringements include the conduct of each of the undertakings, the role played by each of them in the establishment of the cartel, the profit which they were able to derive from the cartel, their size, the value of the goods concerned and the threat that infringements of that type pose to the objectives of the European Union (judgments of 28 June 2005, *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 242, and of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 100).

50 In the present case, as is clear from paragraph 155 of the judgment under appeal, it is undisputed (i) that Roca Sanitario must be held liable, in its capacity as the parent company holding all the share capital of Laufen Austria, for the latter's activities consisting in implementing the coordination of future price increases, (ii) that Roca Sanitario was aware, because of Laufen Austria's participation in

the meetings of the Arbeitskreis Sanitärindustrie, of the material scope of the infringement found, which encompassed the three product sub-groups (a matter which was not challenged by Roca Sanitario in its action), and (iii) that that infringement covered the whole of Austria.

51 The General Court thus concluded that the Commission could, in accordance with points 21 to 23 and 25 of the 2006 Guidelines, consider that multipliers of 15% for the 'gravity of the infringement' and for the 'additional amount' were appropriate.

52 In that regard, Roca Sanitario complains that the General Court failed to take into account the fact that Laufen Austria and Roca did not belong to the 'hard core' of the cartel because, amongst other things, they had not played a part in its creation and maintenance.

53 Even if that fact were established, it would not, in any event, show that the General Court should have held that multipliers for the 'gravity of the infringement' and for the 'additional amount' at a rate of 15% are not appropriate or are too high, since such a rate was warranted by reason of the very nature of the infringement at issue, namely the implementation of coordinated price increases. Such an infringement is among the most harmful restrictions of competition for the purposes of points 23 and 25 of the 2006 Guidelines and 15% is the lowest rate on the scale of penalties prescribed for such infringements under those guidelines (see, to that effect, judgments of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraphs 124 and 125, and of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 125).

54 Accordingly, the General Court was fully entitled to hold, in paragraphs 169 and 185 of the judgment under appeal, that the Commission had not infringed the principle of proportionality in having set the multipliers for the 'gravity of the infringement' and for the 'additional amount' at 15%, even though the geographic scope of the participation in the infringement at issue was limited to France and Austria.

55 In so far as Roca Sanitario complains that the General Court, despite finding that the participation in the infringement, liability for which was imputed to Roca Sanitario, was of lesser gravity than that of other participants, used those multipliers in its case and thereby infringed the principle of equal treatment, it must be found that, as the Commission has in essence submitted, there is an error of law in the grounds set out in paragraphs 168 and 169 and 186 and 187 of the judgment under appeal which state (i) that an infringement covering the territories of six Member States and three product sub-groups must be regarded as more serious than an infringement such as that at issue, which was committed in two Member States, and (ii) that the undertakings that participated in the first-mentioned infringement should, for that reason alone, be subject to a fine calculated on the basis of higher multipliers for the 'gravity of the infringement' and for the 'additional amount' than those applied to the appellant.

56 As regards the determination of the multipliers for the 'gravity of the infringement' and for the 'additional amount', it is apparent from points 22 and 25 of the 2006 Guidelines that account must be taken of a number of factors, in particular those set out in point 22 of the guidelines. Although, in order to assess the gravity of an infringement and subsequently set the fine to be imposed, account may be taken, inter alia, of the geographic extent of an infringement, the fact that the geographic scope of one infringement is more extensive than that of another does not, on its own, necessarily mean that the first infringement, considered as a whole, and in particular in the light of its nature, must be classified as more serious than the second and as therefore justifying the setting of higher multipliers for the 'gravity of the infringement' and for the 'additional amount' than those used in the calculation of the fine for the second infringement (see, to that effect, judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 178).

57 It must nonetheless be recalled that the principle of equal treatment is a general principle of EU law enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union. According to settled case-law, that principle requires that comparable situations must not be treated

differently and different situations must not be treated in the same way unless such treatment is objectively justified (see, inter alia, judgment of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363, paragraph 51).

58 Observance of that principle is binding on the General Court not only in the exercise of its review of the legality of the Commission's decision imposing fines but also in the exercise of its unlimited jurisdiction. When the amount of the fines imposed is determined, the exercise of such jurisdiction cannot result in discrimination between undertakings which have participated in an agreement or concerted practice contrary to Article 101(1) TFEU (see, to that effect, judgment of 18 December 2014, *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraph 77).

59 It follows from the case-law of the Court of Justice, however, that the taking into account, by virtue of the principle of equal treatment, of differences between the undertakings that have participated in a single cartel (in particular with regard to the geographic scope of their respective involvement) for the purpose of assessing the gravity of an infringement need not necessarily occur when the multipliers for the 'gravity of the infringement' and for the 'additional amount' are set but may occur at another stage in the setting of the fine, such as when the basic amount of the fine is adjusted in the light of mitigating and aggravating circumstances under points 28 and 29 of the 2006 Guidelines (see, to that effect, judgments of 11 July 2013, *Gosselin Group* v *Commission*, C-429/11 P, not published, EU:C:2013:463, paragraphs 96 to 100, and of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraphs 104 and 105).

60 As the Commission has observed, such differences may also be reflected by means of the value of sales that is used in calculating the basic amount of the fine inasmuch as that value reflects, for each participating undertaking, the scale of its involvement in the infringement in question, in accordance with point 13 of the 2006 Guidelines, under which it is possible to take as a starting point for the calculation of the fines an amount which reflects the economic significance of the infringement and the size of the undertaking's contribution to it (see, to that effect, judgment of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 76).

61 Consequently, since it is not disputed that the basic amount of the fines imposed on Roca Sanitario was determined by reference to the value of the sales made by Laufen Austria in Austria and by Roca in France, the General Court could, in paragraphs 168 and 169 and paragraphs 186 and 187 of the judgment under appeal, set the multipliers for the 'gravity of the infringement' and for the 'additional amount' at 15% of that value without infringing the principle of equal treatment.

62 Although it follows from the foregoing that the reasoning of the General Court in paragraphs 168 and 169 and paragraphs 186 and 187 of the judgment under appeal is vitiated by errors of law, it must be recalled that, if the grounds of a decision of the General Court disclose an infringement of EU law but its operative part is shown to be well founded on other legal grounds, such an infringement is not one that should cause that decision to be set aside, and a substitution of grounds must be made (see, to that effect, judgments of 9 June 1992, *Lestelle* v *Commission*, C-30/91 P, EU:C:1992:252, paragraph 28, and of 9 September 2008, *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 187 and the case-law cited).

63 As is apparent from the grounds set out in paragraphs 56 to 61 of the present judgment, which must be substituted for those relied on by the General Court, that is the case here.

64 The second ground of appeal must therefore be rejected in so far as it complains that the General Court made errors of law and, in particular, infringed the principles of proportionality and equal treatment in that, since the General Court failed to apply to Roca Sanitario multipliers for the 'gravity of the infringement' and for the 'additional amount' that were lower than those applied to undertakings

whose conduct in the infringement was the most serious, account was not taken, in the judgment under appeal, of the lesser gravity of the participation in the infringement for which liability was imputed to Roca Sanitario.

65 As regards the claim that the General Court failed in its obligation to state reasons and infringed the principle of the protection of legitimate expectations in holding, in paragraph 185 of the judgment under appeal, that the Commission had acted in accordance with the principle of proportionality, it must be noted that the General Court described the method for calculating the amount of the fine in general terms, in paragraphs 148 and 149 of the judgment under appeal, and, in paragraphs 150 to 152 of the judgment, described how the Commission had applied that method in the present case.

66 Such a claim therefore cannot succeed.

67 As regards, finally, the complaint that the General Court failed to take into account, as mitigating circumstances within the meaning of the third indent of point 29 of the 2006 Guidelines, the lesser gravity of Roca Sanitario's participation in the infringement as compared with that of other participants, it is not disputed that Roca Sanitario merely put forward an assertion about the limited nature of the participation of Roca and Laufen Austria in the infringement found.

68 Under point 29 of the 2006 Guidelines, the appellant should, in order to be granted a reduction in the amount of the fine on account of mitigating circumstances, have established that it had actually avoided applying the offending agreements in question by adopting competitive conduct on the market, a matter which the appellant failed to prove, as the General Court found in paragraph 177 of the judgment under appeal.

69 In any event such an assessment of the evidence cannot — unless the clear sense of the evidence has been distorted, which has not been claimed in this case — be challenged in an appeal (see, to that effect, judgments of 13 January 2011, *Media-Saturn-Holding* v *OHIM*, C-92/10 P, not published, EU:C:2011:15, paragraph 27; of 10 July 2014, *Greece* v *Commission*, C-391/13 P, not published, EU:C:2014:2061, paragraphs 28 and 29; and of 20 January 2016, *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, paragraph 40).

70 Accordingly, the complaint concerning the examination by the General Court of mitigating circumstances within the meaning of the third indent of point 29 of the 2006 Guidelines must be rejected.

71 It follows from all the foregoing considerations that the second ground of appeal must be rejected and that the appeal must therefore be dismissed.

Costs

72 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs.

73 Under Article 138(1) of those rules, which applies to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the appellant has been unsuccessful and the Commission has applied for costs against it, the appellant must be ordered to pay the costs relating to the present appeal proceedings.

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

1. Dismisses the appeal;

2. Orders Roca Sanitario SA to pay the costs.

[Signatures]