



Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

20 September 2018*

(Appeal — Competition — Rejection of a complaint by the European Commission — Lack of Union interest)

In Case C-373/17 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 20 June 2017,

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

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

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

Agria Beteiligungsgesellschaft mbH, established in Allerheiligen bei Wildon,

represented by P. Graczyk, adwokat, and W. Rocławski, radca prawny,

appellants,

the other party to the proceedings being:

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

defendant at first instance,

THE COURT (Ninth Chamber),

composed of C. Vajda, President of the Chamber, K. Jürimäe (Rapporteur) and C. Lycourgos, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

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

gives the following

* Language of the case: Polish.

Judgment

- 1 By their appeal, Agria Polska sp. z o.o., Agria Chemicals Poland sp. z o.o., Star Agro Analyse und Handels GmbH ('Star Agro') and Agria Beteiligungsgesellschaft mbH ask the Court to set aside the judgment of the General Court of the European Union of 16 May 2017, *Agria Polska and Others v Commission* (T-480/15, 'the judgment under appeal', EU:T:2017:339), by which the General Court dismissed their action seeking the annulment of Commission Decision C(2015) 4284 final of 19 June 2015 (Case AT.39864 — *BASF (formerly AGRIA and Others v BASF and Others)*), rejecting their complaint concerning infringements of Article 101 TFEU and/or Article 102 TFEU allegedly committed, essentially, by 13 producers and distributors of plant protection products, with the assistance of or through four professional organisations and a law firm ('the decision at issue').

Legal context

- 2 Article 7 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1) provides:

'1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article [101] or of Article [102 TFEU], it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.

2. Those entitled to lodge a complaint for the purposes of paragraph 1 are natural or legal persons who can show a legitimate interest and Member States.'

- 3 Article 7 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101] and [102 TFEU] (OJ 2004 L 123, p. 18), entitled 'Rejection of complaints', provides in paragraphs 1 and 2:

'1. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for acting on a complaint, it shall inform the complainant of its reasons and set a time-limit within which the complainant may make known its views in writing. The Commission shall not be obliged to take into account any further written submission received after the expiry of that time limit.

2. If the complainant makes known its views within the time limit set by the Commission and the written submissions made by the complainant do not lead to a different assessment of the complaint, the Commission shall reject the complaint by decision.'

Background to the dispute and the decision at issue

- 4 The background to the dispute and the essential elements of the decision at issue as apparent from paragraphs 1 to 19 of the judgment under appeal, may be summarised as follows for the purposes of the present case.

- 5 On 1 July 2010, Agria Polska brought before the Urząd Ochrony Konkurencji i Konsumentów (Office for the Protection of Competition and Consumers, Poland, 'the UOKiK'), a complaint ('the national complaint') alleging infringement of the Ustawa o ochronie konkurencji i konsumentów (Law on the Protection of Competition and Consumers) of 16 February 2007 (Dz. U. No 50, position 331), by 13 undertakings that are producers or distributors of plant protection products, with the assistance of or through four professional organisations, established in Belgium, Germany and Poland respectively, and a law firm.
- 6 By letter of 10 August 2010, the President of the UOKiK informed Agria Polska that, in so far as the practices referred to in the national complaint concerned 2005 and 2006, those practices could no longer be investigated by that office. Under Article 93 of the Law on the Protection of Competition and Consumers, a procedure concerning restrictive practices could no longer be commenced after a period of one year from the end of the year in which the infringement in question ended.
- 7 On 30 August 2010, Agria Polska reiterated before the UOKiK its request to open an investigation procedure, arguing that the national complaint also alleged an infringement of EU competition law rules.
- 8 By letter of 22 November 2010, the president of the UOKiK maintained her position, stating that the one-year limitation period provided for by Polish law was applicable even when the investigation requested concerned an infringement of EU competition law provisions.
- 9 On 30 November 2010, Agria Polska, Agria Chemicals Poland, Star Agro, Agria Beteiligungsgesellschaft and Agro Nova Polska sp. z o.o. lodged a complaint with the European Commission pursuant to Article 7 of Regulation No 1/2003 ('the complaint'). The complaint concerned the same entities as those referred to in the national complaint. Agro Trade Handelsgesellschaft mbH and Cera Chem Sàrl, German and Luxembourgish companies respectively, joined the complaint (together with Agria Polska, Agria Chemicals Poland, Star Agro, Agria Beteiligungsgesellschaft and Agro Nova Polska, 'the complaints').
- 10 The complaint concerned an infringement of Article 101 TFEU. It also referred to an infringement of Article 102 TFEU by RWA Raiffeisen Ware Austria AG, one of the entities referred to in the national complaint.
- 11 The complainants alleged that the entities referred to in the complaint had engaged in practices which essentially took the form of an agreement and/or concerted practices. Those practices consisted of wrongful allegations brought in a coordinated manner before the Austrian and Polish administrative and criminal authorities calling into question the lawfulness of the complainants' commercial activities, with regard to the requirements laid down in the regulations applicable to plant protection products and to the conditions for parallel trade in such products, including for tax purposes.
- 12 On the basis of false, truncated or even misleading statements, made by the entities referred to in the complaint in order to eliminate the complainants from the market, the complainants were wrongly subject to numerous administrative inspections by those authorities.
- 13 Those procedures, it was claimed, resulted in the imposition of fines on the complainants and measures prohibiting the marketing of plant protection products that, it was alleged, resulted in a loss of market share that was significant and hard to reverse.
- 14 The administrative and criminal penalties imposed on the complainants, were, it was claimed, in certain cases annulled or reduced by the competent national courts, which, it was alleged, demonstrates the misleading and untruthful nature of the statements of the entities referred to in the

complaint, which the complainants characterise as ‘vexatious proceedings’ within the meaning of the case-law resulting from the judgment of 17 July 1998, *ITT Promedia v Commission* (T-111/96, EU:T:1998:183).

- 15 On 27 March 2012, the Commission transmitted a non-confidential and consolidated version of the complaint to the entities referred to in that complaint, and those entities filed their observations during the months of April to June 2012.
- 16 In their respective observations, those entities disputed the presentation of the facts contained in the complaint and argued, in essence, that the various actions taken by some of them before national administrative authorities or the national courts were legitimate, in particular in respect of infringements of their intellectual or industrial property rights and to prevent damage to their reputation. They also explained that their actions had not been coordinated and that the fact that those actions had been brought on dates that were close together was mainly due to the fact that they were affected, within the same time frame, by the unlawful activities of parallel importers. The contacts made in that context between some of the undertakings producing and/or distributing plant protection products or between the latter and the professional organisations or with the national administrations, had been fully justified, as had been their participation in the inspections. Thus, those legitimate contacts cannot demonstrate the existence of an agreement, decision or concerted practice within the meaning of Article 101 TFEU.
- 17 By letter of 8 December 2014, the Commission informed the complainants of its intention to reject the complaint on the principal ground that there was not sufficient interest for the European Union to continue investigating the case in terms of Articles 101 or 102 TFEU.
- 18 In support of its provisional analysis, the Commission explained, first, that the likelihood of establishing an infringement of Article 101 and/or 102 TFEU was limited because of insufficient evidence in support of the complaint and also the difficulty of establishing, in the present case, the existence of a dominant position of RWA Raiffeisen Ware Austria or a collective dominant position and, consequently, of demonstrating an abuse of such a position. In that regard, according to the Commission, the case-law resulting from the judgments of 17 July 1998, *ITT Promedia v Commission* (T-111/96, EU:T:1998:183), and of 1 July 2010, *AstraZeneca v Commission* (T-321/05, EU:T:2010:266), was not intended to apply to situations in which undertakings informed the national authorities of allegedly unlawful conduct or actions by other undertakings or pressure exerted seeking administrative or criminal proceedings against those undertakings. Secondly, the Commission considered that the resources necessary for the investigation requested would probably be disproportionate in view of the limited likelihood of establishing the existence of an infringement. Thirdly, the Commission considered that, at this stage, the national authorities and courts could be better placed to deal with the issues raised in the complaint.
- 19 In observations lodged on 8 January 2015, the counsel for Agro Trade Handelsgesellschaft and Cera Chem essentially informed the Commission that those companies had withdrawn their complaint. He also explained that Agria Polska, Agria Chemicals Poland, Star Agro and Agria Beteiligungsgesellschaft were challenging the announced discontinuance of the complaint, stating in particular that such an approach significantly diminished their chance of obtaining compensation before the national courts for the infringements of Articles 101 and 102 TFEU.
- 20 By the decision at issue, the Commission rejected the complaint reiterating, in essence, the elements of the provisional analysis set out in the letter of 8 December 2014, while stressing that it had limited resources; in the present case, the thorough investigation which should allegedly have been carried out, potentially concerning the activities carried out over a period of seven years by 18 entities located in four Member States, would have been too complex and time-consuming; while the probability of establishing an infringement seemed limited in the present case, which militated against opening an investigation.

The procedure before the General Court and the judgment under appeal

- 21 By application lodged at the General Court Registry on 19 August 2015, Agria Polska, Agria Chemicals Poland, Star Agro and Agria Beteiligungsgesellschaft brought an action for the annulment of the decision at issue.
- 22 In support of their action, they relied on two pleas in law, the first alleging infringement of the right to effective judicial protection, as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), and the second infringement of Articles 101 and 102 TFEU.
- 23 By the judgment under appeal, the General Court rejected both pleas in law and, therefore, dismissed the action in its entirety.

Procedure before the Court of Justice and forms of order sought

- 24 By document lodged at the Registry of the Court of Justice on 20 June 2017, Agria Polska, Agria Chemicals Poland, Star Agro and Agria Beteiligungsgesellschaft brought the present appeal.
- 25 By document lodged at the Court Registry on 12 December 2017, Star Agro informed the Court that it was discontinuing its appeal.
- 26 By document lodged at the Court Registry on 21 December 2017, the Commission informed the Court that it had no comment to make regarding that discontinuance.
- 27 By their appeal, Agria Polska, Agria Chemicals Poland and Agria Beteiligungsgesellschaft ('the appellants') claim that the Court should:
- set aside the judgment under appeal;
 - give final judgment in the case and annul the decision at issue, and
 - order the Commission to pay the costs.
- 28 The Commission contends that the Court of Justice should:
- dismiss the appeal; and
 - order the appellants to pay the costs.

The appeal

Admissibility

- 29 The Commission contends, in essence, that each of the grounds of appeal raised by the appellants is inadmissible. While stating that it experienced considerable difficulties in understanding the appellants' submissions, it nonetheless defers to the Court's judgment as to the admissibility of the appeal in its entirety.
- 30 The appellants reply that their appeal is admissible in its entirety and that each of their grounds of appeal is admissible.

- 31 In accordance with the second subparagraph of Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal is to be limited to points of law and is to lie on the grounds of lack of competence of the General Court, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Union law by the General Court.
- 32 The General Court therefore has exclusive jurisdiction to find the facts, except in a case where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and to evaluate the evidence adduced. The establishment of those facts and the evaluation of that evidence do not, save where the clear sense of the evidence has been distorted, constitute a point of law which is subject as such to review by the Court of Justice (order of 25 March 2009, *Scippacercola and Terezakis v Commission*, C-159/08 P, not published, EU:C:2009:188, paragraph 33 and the case-law cited).
- 33 In addition, under Article 169(2) of the Rules of Procedure of the Court of Justice, the pleas in law and legal arguments relied on must identify precisely those points in the grounds of the decision of the General Court which are contested. Consequently, according to settled case-law, an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal, failing which the appeal or the relevant ground of appeal will be declared inadmissible (judgments of 23 April 2009, *AEPI v Commission*, C-425/07 P, EU:C:2009:253, paragraph 25; of 19 September 2013, *EFIM v Commission*, C-56/12 P, not published, EU:C:2013:575, paragraph 21; and of 6 June 2018, *Apcoa Parking Holdings v EUIPO*, C-32/17 P, not published, EU:C:2018:396, paragraph 38).
- 34 In the present case, it must be found that the appeal has not indeed been drafted with all desirable clarity and contains claims that are formulated in general terms and lacking in specific reasoning, as well as questioning findings of fact.
- 35 Notwithstanding such defects, however, the appeal identifies, in relation to several arguments, the elements of the judgment under appeal which are being contested and sets out legal arguments in support of those arguments.
- 36 In so far as the Commission argues that the appellants merely repeat arguments raised before the General Court, it must, subject to the observations in the preceding paragraph, be noted that the appellants have, in essence, challenged the interpretation or application of EU law by the General Court. In those circumstances, the points of law examined at first instance may be discussed again in the course of the present appeal. Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose (see, to that effect, order of 25 March 2009, *Scippacercola and Terezakis v Commission*, C-159/08 P, not published, EU:C:2009:188, paragraph 36 and the case-law cited, and judgment of 23 April 2009, *AEPI v Commission*, C-425/07 P, EU:C:2009:253, paragraph 24).
- 37 Consequently, the present appeal cannot be considered inadmissible in its entirety. The admissibility of the appellants' pleas and arguments will, therefore, be assessed when each of them is being examined.

Substance

- 38 In support of their appeal, the appellants rely on three grounds. The first ground of appeal alleges the infringement by the General Court of Articles 101 and/or 102 TFEU, read in conjunction with Article 7(1) and (2) of Regulation No 1/2003 and Article 7(2) of Regulation No 773/2004. The second ground of appeal alleges the breach by the General Court of the effectiveness of Articles 101 and/or 102 TFEU, read in conjunction with Article 17(1) TEU and Article 105 TFEU. The third ground of appeal alleges the infringement by the General Court of the principle of effective judicial protection, the right to an effective remedy before a tribunal and the principle of sound administration.

The first ground of appeal

– Arguments of the parties

- 39 By their first ground of appeal, the appellants dispute the General Court's conclusion that the Commission had not committed a manifest error of assessment of the circumstances having a bearing on the decision to open an investigation.
- 40 In the first place, the appellants contest paragraphs 46 and 47 of the judgment under appeal.
- 41 They submit that the General Court erred in law in relying, in paragraph 46 of that judgment, on the explanations provided by certain undertakings referred to in the complaint in order to justify the simultaneous nature of their conduct with regard to the appellants. It is clear that those undertakings, in order to protect their interest in the complaint being rejected, provided explanations of such a kind as to dispute the alleged infringement of Articles 101 and 102 TFEU. The General Court ought to have examined those explanations in the light of the evidence submitted by the appellants.
- 42 The considerations in paragraph 47 of the judgment under appeal concerning the potentially anticompetitive purpose of the measures taken by the undertakings referred to in the complaint in no way correspond to the facts put forward by the appellants. Nor can it be asserted, as is stated in paragraph 44 of that judgment, that those measures were covered by the right of those undertakings to adapt themselves intelligently to the existing and anticipated conduct of their competitors. In this respect, the General Court failed to give the necessary importance to the fact that most of the allegations raised by those undertakings were unjustified and that the decisions adopted on the basis of the inspections carried out at their request were annulled. In addition, the appellants showed, in the application at first instance, the clearly anticompetitive purpose of the practices the subject of the complaint.
- 43 In the second place, the appellants dispute the interpretation and application by the General Court, in paragraphs 67 to 73 of the judgment under appeal, of the case-law arising from the judgments of 17 July 1998, *ITT Promedia v Commission* (T-111/96, EU:T:1998:183), and of 1 July 2010, *AstraZeneca v Commission* (T-321/05, EU:T:2010:266). That case-law, relating to Article 102 TFEU, is also relevant in the context of Article 101 TFEU.
- 44 First, the appellants submit that the conditions set out in the judgment of 17 July 1998, *ITT Promedia v Commission* (T-111/96, EU:T:1998:183), are met in the present case. The allegations in question containing false or misleading information may not be considered to amount to a measure taken in good faith. The General Court had insufficient regard to circumstances of the case, in that those allegations were addressed, inter alia, to the wrong authorities.
- 45 Secondly, the appellants submit that the legal assessment of the conduct of which the undertakings referred to in the complaint are accused cannot be made subject to the discretion of the national authorities because of the nature and continuation of the conduct of those undertakings. They dispute in that context paragraphs 49, 50, 70 and 71 of the judgment under appeal, complain that the General Court took insufficient account of the factual context of the case and submit that the Polish authorities in question and the Austrian police and public prosecutor's office were required to conduct an investigation and to initiate proceedings in response to the allegations, respectively.
- 46 In the third place, the appellants emphasise the cross-border dimension of the alleged infringements, which is such as to justify the opening of an investigation by the Commission, contrary to the General Court's findings in paragraphs 63 and 64 of the judgment under appeal. Those infringements concern the territory of at least four Member States, not merely two Member States as the General Court incorrectly found.

- 47 In addition, contrary to what is apparent from paragraph 62 of the judgment under appeal, the lodging of a complaint before a national competition authority cannot, according to the General Court's case-law, be considered an argument in favour of the exclusive jurisdiction of that authority. It cannot be deduced from the broad logic of Regulation No 1/2003 that the possible jurisdiction of such a national authority may preclude the opening of a procedure by the Commission, all the more so when the national procedure has not been opened for procedural reasons. In the present case, the significance of the infringements alleged, their scale and lengthy duration, as underlined by the appellants in their complaint to the Commission, ought to have an influence on the assessment of the Union interest, as is apparent from the judgment of 23 April 2009, *AEPI v Commission* (C-425/07 P, EU:C:2009:253, paragraph 53).
- 48 In the fourth place, the appellants submit that paragraphs 56 and 57 of the judgment under appeal are vitiated by an error of law in that the General Court erred in finding that neither the scope of the investigation sought nor the extent of the conduct encompassing several Member States justified the opening of an investigation by the Commission. According to the appellants, the amount of resources required by such an investigation shows, on the contrary, that the Commission is the authority best placed to pursue those who have committed the infringements in question. That is true all the more so because of the inadequacy of private enforcement.
- 49 In annex to their reply, the appellants produced two documents containing a list of the entities referred to in the complaint and describing the activities carried out by them in several Member States.
- 50 The Commission contends that the first ground of appeal should be rejected as principally inadmissible and in part ineffective. It also contends that the documents produced in annex to the reply are inadmissible.

– *Findings of the Court*

- 51 By their first ground of appeal, the appellants dispute, in essence, the General Court's findings concerning the merits of the Commission's evaluation of the Union interest in investigating the case further.
- 52 First of all, it must be found that the arguments by which the appellants dispute the findings of fact by the General Court are inadmissible in accordance with the case-law cited in paragraph 32 above, on the ground that the appellants have not claimed that there has been a distortion of the facts or evidence examined by the General Court. That is true of the arguments disputing the assessment, in paragraph 47 of the judgment under appeal, of the purpose of the measures taken by the entities referred to in the complaint. The arguments relating to the scope of the national authorities' and courts' discretion, their alleged lack of jurisdiction and the fact that the inspections had not initially revealed any irregularity are also inadmissible. Lastly, the arguments calling in question the assessment, in paragraphs 59 and 64 of the judgment under appeal, of the geographical scope of the alleged infringement are inadmissible. In those circumstances, it is also unnecessary to adjudicate on the admissibility of the documents produced by the appellants in annex to the reply in order to illustrate the scope — and in particular the territorial scope — of the conduct of which the entities referred to in the complaint are accused.
- 53 Primarily, in the first case, as regards the likelihood of finding an infringement of Articles 101 and 102 TFEU, it must be pointed out that, as the appellants indeed observe, the General Court found, in paragraph 45 of the judgment under appeal, that it could be envisaged solely on the basis of the elements in the complaint that there was evidence of potential coordination between the entities that referred to in that complaint. Nonetheless, in paragraphs 46 and 47 of that judgment, the General Court, first, held that the Commission had not made a manifest error of assessment in finding that the explanations provided by some of those entities could justify the simultaneous allegations made to

the national authorities and, secondly, pointed out that it could be legitimate for those entities to inform the competent national authorities of possible infringements by their competitors of the provisions in force.

- 54 It follows that the General Court duly took into consideration not only the explanations provided by the entities referred to in the complaint, but also the evidence put forward by the appellants.
- 55 In that context, the appellants' argument disputing paragraph 44 of the judgment under appeal is based upon a misreading of that paragraph. The General Court simply cited there the case-law of the Court of Justice without applying it to the circumstances of the case. In any event, in so far as the appellants complain that the General Court failed to take into account the national courts' annulment of the decisions adopted following the allegations made by the entities referred to in the complaint, it is sufficient to point out that the General Court did take that fact into account in paragraph 51 of the judgment under appeal.
- 56 In the second place, as regards the alleged errors concerning the application, in paragraphs 67 to 73 of the judgment under appeal, of the case-law arising from the judgments of 17 July 1998, *ITT Promedia v Commission* (T-111/96, EU:T:1998:183), and of 1 July 2010, *AstraZeneca v Commission* (T-321/05, EU:T:2010:266), it is important to note that, in paragraphs 69 to 71 of the judgment under appeal, the General Court found that those two judgments involved conduct different from that attributed, in the present case, to the entities referred to in the complaint. According to the General Court, in the cases which gave rise to those judgments, the administrative and judicial authorities seized by undertakings in a dominant position had no discretion as to whether or not it was appropriate to act on the applications made by those undertakings. By contrast, as is apparent from paragraphs 49 and 50 of the judgment under appeal, referred to in paragraph 71 of that judgment, in the circumstances of the present case the authorities seized did have such a discretion.
- 57 The General Court did not, therefore, rule on whether the conditions for applying the case-law arising from the judgments referred to in the preceding paragraph were met; in the appellants' view, those conditions were connected with the fact that, first, the action, such as the allegations at issue in the present case, was not commenced in good faith but with the aim of harassing the other party and, secondly, with the fact that that action was conceived in the context of a plan to eliminate competition. Consequently, the appellants' argument that those conditions were met in the present case is ineffective.
- 58 In addition, even if the appellants seek to argue that General Court erred in law in that it made the applicability of that case-law conditional upon the absence of discretion on the part of the authorities and courts seized, their argument is insufficiently substantiated in the light of the case-law referred to in paragraph 33 above and is, therefore, inadmissible.
- 59 In the third place, as regards the arguments relating to the competence of the Commission in the light of the extent of the alleged infringement and the referral to a competent national authority, first, it must be found that the appellants' argument seeking to dispute paragraph 62 of the judgment under appeal is based on a misreading of that paragraph. It is apparent neither from that paragraph nor from the judgment as a whole that the General Court found that the filing of a complaint with a national competition authority and the jurisdiction of that authority may preclude the opening of an investigation by the Commission.
- 60 Secondly, it is true that, as the appellants argue before the Court of Justice, the latter has held that when the Commission evaluates the Union interest in opening an investigation, it is required to assess in each case how serious the alleged interferences with competition are and how persistent their consequences are and that that obligation means in particular that it must take into account the

duration and extent of the infringements complained of and their effect on the competition situation in the European Union (judgment of 23 April 2009, *AEPI v Commission*, C-425/07 P, EU:C:2009:253, paragraph 53 and the case-law cited).

- 61 However, in view of the fact that the assessment of the Union interest raised by a complaint depends on the circumstances of each case, the number of criteria of assessment the Commission may refer to should not be limited, nor conversely should it be required to have recourse exclusively to certain criteria (judgments of 4 March 1999, *Ufex and Others v Commission*, C-119/97 P, EU:C:1999:116, paragraph 79, and of 17 May 2001, *IECC v Commission*, C-449/98 P, EU:C:2001:275, paragraph 46). Given that, in a field such as competition law, the factual and legal circumstances may differ considerably from case to case, it is permissible to apply criteria which have not hitherto been considered (judgment of 4 March 1999, *Ufex and Others v Commission*, C-119/97 P, EU:C:1999:116, paragraph 80) or to give priority to a single criterion for assessing that Union interest (judgment of 17 May 2001, *IECC v Commission*, C-449/98 P, EU:C:2001:275, paragraph 47).
- 62 The rules set out in the preceding paragraph cannot be called in question by the case-law cited by the appellants and referred to in paragraph 60 above, which must be interpreted in the light of the particular context in which it is set out (see, to that effect, judgment of 19 September 2013, *EFIM v Commission*, C-56/12 P, not published, EU:C:2013:575, paragraph 86).
- 63 Although the appellants submit that it was for good reason that they lodged the complaint with the Commission and that the infringements alleged covered a seven-year period and had a cross-border dimension, they have failed to explain how, having regard to the respective contexts of the cases giving rise to that case-law and that of the present case, the General Court erred in law in rejecting their argument relating to the Union interest in the light of that case-law. It follows that the arguments which they derive from that case-law must be rejected as unfounded.
- 64 In the fourth place, the appellants' arguments that, in paragraphs 56 and 57 of the judgment under appeal, the General Court erred in finding that the scope of the investigation and the extent of the conduct at issue do not justify the opening of a procedure, must be rejected as unfounded in that they are contrary to the case-law cited in paragraph 61 above.
- 65 Those arguments amount, in essence, to asserting that provided that the investigation sought would encompass the territory of several Member States and require considerable resources, the Commission would be required to open an investigation without having regard to all the circumstances of the case and, in particular, the low likelihood of finding an infringement of EU competition-law rules. Those arguments would, therefore, militate in favour of establishing territorial scope and the costs of an investigation as decisive criteria for finding that there is a Union interest in opening an investigation in disregard of the abovementioned case-law.
- 66 Consequently, the first ground of appeal must be rejected as in part inadmissible, in part ineffective and in part unfounded.

The second ground of appeal

– Arguments of the parties

- 67 By their second ground of appeal, the appellants dispute the conclusion, in paragraph 83 of the judgment under appeal, that the Commission did not disregard the effectiveness of Articles 101 and 102 TFEU.

- 68 In the first place, they submit that the General Court failed to give the necessary importance to the role played by the Commission, in that it is for the Commission, pursuant to Article 17(1) TEU and Article 105 TFEU, to ensure the application of Articles 101 and 102 TFEU and to ensure their effectiveness. They submit that while the Commission enjoys discretion in the handling of complaints, that discretion is not without its limits. In particular, the Commission cannot deprive Articles 101 and 102 TFEU of their effectiveness by refusing to open an investigation where the appellants have submitted to it facts and evidence establishing at the very least the likelihood of an infringement of EU law concerning the territory of several Member States and have informed it of the UOKiK's refusal to open a procedure because of the expiry of the limitation period, a refusal against which they have no means of challenge.
- 69 In that context, the statement, in paragraph 78 of the judgment under appeal, that the Commission was not under an obligation to establish whether the national competition authority seised of a similar complaint had the institutional, financial and technical means to fulfil the task entrusted to it by Regulation No 1/2003, is contrary to the judgment of 15 December 2010, *CEAHR v Commission* (T-427/08, EU:T:2010:517, paragraph 173).
- 70 In the present case, according to the appellants, the General Court could not endorse the rejection of the complaint, given that the infringement at issue concerned the territory of several Member States and the appellants did not have effective protection before the national competition authority. That is true all the more so since, as the Commission acknowledged at the hearing before the General Court, the impossibility of bringing an action against the UOKiK's refusal to open a procedure could undermine Articles 101 and 102 TFEU, which the General Court failed to take into account.
- 71 In the second place, the appellants submit that the General Court erred, in paragraph 79 et seq. of the judgment under appeal, concerning the actual impossibility for them of obtaining effective protection before the national competition authority and courts.
- 72 First, they submit that the statement, in paragraph 79 of that judgment, that they failed to show that the UOKiK had no intention to prosecute and penalise effectively infringements of Articles 101 and 102 TFEU, is incomprehensible in the light of the evidence which they adduced before the General Court. It is undeniable that the UOKiK failed to examine their complaint as to the substance on the basis of limitation.
- 73 Secondly, in paragraph 80 et seq. of the judgment under appeal, the General Court relied on the theoretical possibility of bringing an action for compensation of the damage caused by practices contrary to Articles 101 and 102 TFEU before the national courts. Consequently, it did not duly analyse the actual possibilities for the appellants of bringing such an action. In practice, such an action would have been impossible for procedural and institutional reasons, since the mechanisms transposing Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1), into national law are only being created. Both the Commission and the General Court have long been aware of the ineffectiveness of private enforcement.
- 74 The appellants submit that, in those circumstances, the General Court could not endorse the Commission's refusal to open an investigation notwithstanding the obvious existence of the conditions demonstrating the need to apply EU competition law.
- 75 The Commission replies that the second ground of appeal is both inadmissible and in part ineffective and in part unfounded.

– Findings of the Court

- 76 In paragraph 83 of the judgment under appeal, the General Court found, in essence, that even in a context in which the national competition authority, in this case the UOKiK, had rejected the national complaint on grounds relating to a national limitation rule and even if a possible investigation by the Commission could have potentially alleviated, in the course of actions brought before the national courts, the burden of proof on the appellants, the Commission's refusal to open an investigation did not have the consequence of depriving Articles 101 and 102 TFEU of any practical effect.
- 77 By their second ground of appeal, the appellants submit, in essence, that the General Court's conclusion is contrary to the effectiveness of those articles. It is apparent in that regard from their pleadings that, in essence, the appellants submit that the Commission's task of ensuring that those articles are complied with ought to have led it to open an investigation for three reasons.
- 78 First, the appellants base their argument on the fact that they adduced evidence showing that an infringement of Articles 101 and 102 TFEU in respect of the territory of several Member States was likely.
- 79 That contention is, however, based on a factual premiss invalidated by the General Court and must, therefore, be rejected. The General Court, first, concluded, in paragraphs 53 and 54 of the judgment under appeal, that the Commission had not committed a manifest error of assessment in finding that the likelihood of establishing an infringement was low in the light of the evidence submitted to it. Secondly, the General Court found, in paragraphs 63 and 64 of that judgment, that that infringement concerned essentially the territory of two Member States.
- 80 In any event, even if, as the appellants submit, the infringements alleged concerned the territory of several Member States, it must be found that their argument is contrary to the settled case-law referred to in paragraph 61 above. That argument amounts to considering that the Commission is obliged, if it is not to contravene the effectiveness of Articles 101 and 102 TFEU, to open an investigation solely on the ground that the alleged infringements concern several Member States.
- 81 Secondly, the appellants submit that they could not obtain effective protection at national level, given that the UOKiK refused to open a procedure because of the expiry of the limitation period, by a decision against which there is no remedy, and the Commission ought to have verified beforehand that the national authorities could safeguard the appellants' rights satisfactorily.
- 82 In that regard, it is apparent from paragraphs 77 and 79 of the judgment under appeal that, as confirmed by the appellants in their pleadings before the Court of Justice, the UOKiK's refusal to examine the national complaint is based on the expiry of the limitation period — which the appellants did not prove was contrary to EU law before the General Court — and that the appellants had not submitted to the UOKiK for assessment, in the national complaint, factual evidence relating to a period after 2008. It follows that the appellants have not shown how it was impossible for them to obtain compliance with Articles 101 and 102 TFEU before the national authorities. On the contrary, the impossibility of obtaining compliance with Articles 101 and 102 TFEU before the UOKiK, which they allege, is due to their own lack of diligence.
- 83 In addition, in accordance with the settled case-law of the Court of Justice, which the General Court correctly referred to in paragraphs 80 to 82 and 84 of the judgment under appeal, it is open to applicants to bring actions before the national courts for compensation of the damage allegedly caused by the conduct the subject of a complaint, in order to obtain compliance with Articles 101 and 102 TFEU and to assert their rights under those provisions before a national court, in particular when the Commission decides not to pursue their complaint.

- 84 In those circumstances, even if the General Court erred in law and failed to apply its own case-law in holding, in paragraph 78 of the judgment under appeal, that the requirement of effectiveness cannot have the effect of imposing an obligation on the Commission, when it finds that there is no Union interest in opening the investigation, to establish whether the national competition authority has the institutional, financial and technical means to fulfil the task entrusted to it by Regulation No 1/2003, such an error would, in any event, be ineffective. There is, therefore, no need to examine the argument relating to paragraph 78 as to the substance.
- 85 The argument that the General Court erred in finding, in paragraph 79 of the judgment under appeal, that the UOKiK had no intention of prosecuting and penalising effectively infringements of Articles 101 and 102 TFEU is also ineffective, since that argument merely criticises a ground given in that judgment for the sake of completeness.
- 86 Thirdly, the appellants submit that the possibility of bringing an action for compensation before the national courts is not genuine and the General Court ought to have analysed the actual possibilities open to them of instituting proceedings before those courts.
- 87 As provided for by the second subparagraph of Article 19(1) TEU, it is for the Member States to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law (see, to that effect, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 34), and not for the Commission to make up for any shortcomings in judicial protection at national level by opening an investigation requiring considerable resources where the likelihood of finding an infringement of Articles 101 and 102 TFEU is low.
- 88 The appellants' arguments based on the alleged gaps in judicial protection before the national courts must, therefore, be rejected as unfounded.
- 89 Consequently, the second ground of appeal must be rejected as in part ineffective and in part unfounded.

The third ground of appeal

– Arguments of the parties

- 90 By their third ground of appeal, the appellants submit that in dismissing their action and endorsing the decision at issue adopted without fully examining the case as to the substance, the General Court infringed the principle of effective judicial protection, the right to an effective remedy before a tribunal and the principle of sound administration.
- 91 In that context, first of all, they reiterate their position, developed in the context of their second ground of appeal, regarding the absence of effective judicial protection at the national level. First, the decision of the UOKiK refusing to open a procedure because of limitation cannot be appealed against by reason of the case-law of the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland). At the hearing before the General Court, the Commission acknowledged that it is not precluded that that case-law may undermine Articles 101 and 102 TFEU. Secondly, private enforcement procedures are not effective. It follows that paragraph 99 of the judgment under appeal is vitiated by an infringement of the principle of effective judicial protection.
- 92 Next, the appellants submit that the General Court erred in failing to examine the substance of their plea for annulment which alleged that they had been deprived of the right to an effective remedy. Consequently, in paragraph 93 of the judgment under appeal, the General Court stated that they had a remedy against the rejection of the complaint. However, their plea before the General Court was

based on the fact that the absence of a decision on the substance adopted by the Commission pursuant to Article 7 of Regulation No 1/2003 had deprived them of the possibility of submitting such a Commission decision for review by a court as to whether or not there was in the present case an infringement of Articles 101 and/or 102 TFEU. The General Court simply examined the validity of the decision at issue with regard to compliance with the requirements of precision and detail, as is apparent from paragraph 38 of the judgment under appeal. Such an examination does not guarantee their right to effective judicial protection or to an effective remedy within the meaning of Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and Article 47 of the Charter.

93 Lastly, the appellants submit that the General Court did not take into account the Commission's obligation to deal with the case within a reasonable time, in accordance with Article 41 of the Charter.

94 The Commission replies that the third ground of appeal is both inadmissible and unfounded.

– *Findings of the Court*

95 First, the appellants' arguments alleging inadequate protection before the national courts must be rejected on the grounds set out in paragraph 87 above.

96 Secondly, it must be pointed out that, contrary to the appellants' submissions, the General Court duly answered, in paragraphs 93 to 95 of the judgment under appeal, their argument that the absence of a Commission decision on the substance as to whether or not there was an infringement of Articles 101 and 102 TFEU was such as to prejudice their right to effective judicial protection.

97 Moreover, the General Court did not err in law in rejecting that argument. As it correctly pointed out in paragraph 94 of the judgment under appeal, Article 7 of Regulation No 1/2003 does not give a complainant the right to insist that the Commission take a final decision as to the existence or non-existence of the alleged infringement (see, to that effect, judgment of 4 March 1999, *Ufex and Others v Commission*, C-119/97 P, EU:C:1999:116, paragraph 87, and order of 31 March 2011, *EMC Development v Commission*, C-367/10 P, not published, EU:C:2011:203, paragraph 73).

98 The General Court did not, therefore, err in law when it did not adjudicate on the substance as regards the existence of the infringement alleged in the complaint.

99 Thirdly, as regards the appellants' argument based on the duration of the procedure before the Commission, it is important to bear in mind that since in an appeal the review by the Court of Justice is confined to the findings of law on the pleas and arguments debated before the General Court, a party cannot put forward for the first time before the Court of Justice an argument which it did not raise before the General Court (see, to that effect, judgments of 8 November 2016, *BSH v EUIPO*, C-43/15 P, EU:C:2016:837, paragraph 43, and of 13 December 2017, *Telefónica v Commission*, C-487/16 P, not published, EU:C:2017:961, paragraph 84).

100 In the present case, it is apparent from paragraph 22 of the judgment under appeal, which is not disputed by the appellants before the Court of Justice, that it was not until the hearing before the General Court that they referred to the duration of the administrative procedure before the Commission while explaining, in response to a question from the General Court, that they did not intend to raise a new plea in law alleging the infringement of the principle that a decision should be taken within a reasonable time.

101 It cannot, therefore, be open to the appellants to challenge, before the Court of Justice, the duration of the administrative procedure before the Commission.

- ¹⁰² In addition, the appellants wrongly claim that the General Court ought to have examined of its own motion the duration of that procedure (see, by analogy, order of 13 December 2000, *SGA v Commission*, C-39/00 P, EU:C:2000:685, point 45).
- ¹⁰³ Accordingly, the third ground of appeal must be rejected as in part inadmissible and in part unfounded.
- ¹⁰⁴ Since none of the grounds of appeal relied upon by the appellants in support of their appeal has been upheld, the appeal must be dismissed in its entirety.

Costs

- ¹⁰⁵ In accordance with Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those rules, applicable to the procedure on an 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.
- ¹⁰⁶ Since the Commission has applied for costs and the appellants have been unsuccessful in their appeal, the appellants must be ordered to bear their own costs and to pay those incurred by the Commission.
- ¹⁰⁷ In addition, pursuant to the provisions of Article 141(1) in conjunction with Article 184(1) of the Rules of Procedure, a party who discontinues or withdraws from proceedings is to be ordered to pay the costs if they have been applied for in the other party's observations on the discontinuance. Pursuant to the provisions of Article 141(4) in conjunction with Article 184(1) of the Rules of Procedure, if costs are not claimed, the parties must bear their own costs.
- ¹⁰⁸ In this case, it is appropriate to order Star Agro to bear its own costs.

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

- 1. Dismisses the appeal;**
- 2. Orders Agria Polska sp. z o.o., Agria Chemicals Poland sp. z o.o. and Agria Beteiligungsgesellschaft mbH to bear their own costs and to pay those incurred by the European Commission;**
- 3. Orders Star Agro Analyse und Handels GmbH to bear its own costs.**

[Signatures]