JUDGMENT OF THE COURT (Second Chamber)

8 December 2011 (*)

(Appeal – Competition – Agreements, decisions and concerted practices – Market for copper plumbing tubes – Fines – Size of the market, duration of the infringement and cooperation capable of being taken into consideration – Effective judicial remedy)

In Case C-389/10 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 28 July 2010,

KME Germany AG, formerly KM Europa Metal AG, established in Osnabrück (Germany),

KME France SAS, formerly Tréfimétaux SA, established in Courbevoie (France),

KME Italy SpA, formerly Europa Metalli SpA, established in Florence (Italy),

represented by M. Siragusa, avvocato, A. Winckler, avocat, G.C. Rizza, avvocato, T. Graf, advokat, and M. Piergiovanni, avvocato,

appellants,

the other party to the proceedings being:

European Commission, represented by E. Gippini Fournier and S. Noë, acting as Agents, and by C. Thomas, Solicitor, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Second Chamber),

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

Advocate General: E. Sharpston,

Registrar: L. Hewlett, Principal Administrator,

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

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

gives the following

Judgment

1 By their appeal, KME Germany AG, formerly KM Europa Metal AG (‘KME Germany’), KME France SAS, formerly Tréfimétaux SA (‘KME France’), and KME Italy SpA, formerly Europa Metalli SpA (‘KME Italy’) (collectively ‘the KME group’) seek to have set aside the judgment delivered by the General Court of the European Union on 19 May 2010 in Case T-25/05 *KME Germany and Others* v *Commission* (‘the judgment under appeal’) by which the General Court dismissed their application for a reduction of the fines which were imposed on them under Article 2(g) to (i) of Commission Decision C(2004) 2826 of 3 September 2004 relating to a proceeding pursuant to Article [81 EC] and

Article 53 of the EEA Agreement (Case COMP/E-1/38.069 – Copper plumbing tubes) (‘the decision at issue’).

Legal context

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

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

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

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

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

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

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

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

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

...

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

...

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

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

‘The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.’

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

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

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

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

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

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

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

11 Under Section 2 of the Guidelines the basic amount may be increased where there are aggravating circumstances such as, inter alia, repeated infringements of the same type by the same undertaking or undertakings. According to Section 3 of the Guidelines, that basic amount may be reduced where there are attenuating circumstances such as the exclusively passive or 'follow-my-leader' role of an undertaking in the infringement, non-implementation in practice of the agreements or the effective cooperation by the undertaking in the proceedings, outside the scope of the Commission notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4) ('the Leniency Notice').

12 The Guidelines were replaced as from 1 September 2006 by the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2).

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

14 The Leniency Notice was replaced as from 14 February 2002 by the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3). The Commission nevertheless

applied it in the present case, since that is the notice which the undertakings took into consideration when cooperating with the Commission.

Background to the dispute

15 Together with other undertakings producing semi-finished products in copper and copper alloys, the appellants took part in a set of agreements and practices designed to agree prices, share markets and exchange confidential information on the market for copper plumbing tubes.

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

17 In assessing the gravity of the infringement at issue, the Commission took account of the nature of the infringement, its actual impact on the market and the extent and size of the relevant geographic market. It stated that, by their nature, market-sharing and price-fixing practices of the kind at issue in the present case constituted a very serious infringement, and found that the geographic market affected by the cartel corresponded to the territory of the European Economic Area (EEA). The Commission also took account of the fact that the copper plumbing tubes market was a very important industrial sector. As regards the actual impact on the market, the Commission observed that there was sufficient proof that the cartel had overall had an impact on the relevant market. The Commission concluded from this that the undertakings concerned had committed a very serious infringement.

18 In the decision at issue the Commission identified four groups which it regarded as being representative of the relative importance of the undertakings involved in the infringement at issue. The KME group was regarded as the main player in the relevant market and was placed in the first category.

19 Market shares were determined on the basis of the turnover achieved by each offending undertaking from sales of copper plumbing tubes in the combined market for plain and plastic-coated copper plumbing tubes. The Commission therefore set the starting amount of the fines at EUR 70 million for the KME group.

20 In view of the fact that, until June 1995, KME France and KME Italy jointly formed an undertaking separate from KME Germany, the starting amount of the fines set at a total of EUR 70 million for the KME group was distributed as follows: EUR 35 million for the KME group; EUR 17.5 million for KME Germany; EUR 17.5 million for KME Italy and KME France jointly and severally.

21 It is apparent from the decision at issue that the Commission increased the starting amounts of the fines by 10% per full year of infringement and by 5% for any additional period of six months or more but less than a year. It was therefore concluded that:

– since the KME group had participated in the cartel for 5 years and 7 months, the starting amount of the fine of EUR 35 million should be increased by 55%;

– since KME Germany had participated in the cartel for 7 years and 2 months, the starting amount of the fine of EUR 17.5 million should be increased by 70%; and

– since KME France and KME Italy had participated in the cartel for 5 years and 10 months, the starting amount of the fine of EUR 17.5 million should be increased by 55%.

22 As is apparent from recital 719 of the decision at issue, after calculating the increase on account of the duration of participation in the infringement, the basic amounts of the fines imposed on the appellants are as follows:

– the KME group: EUR 54.25 million;

– KME Germany: EUR 29.75 million; and

– KME France and KME Italy (jointly and severally): EUR 27.13 million.

23 In respect of attenuating circumstances, the Commission took into account, as is apparent from recitals 758 and 759 of the decision at issue, the fact that the KME group and the group consisting of Outokumpu Oyj and Outokumpu Copper Products Oy (collectively 'the Outokumpu group') had provided it with information when each cooperated to an extent not covered by the Leniency Notice. The Commission therefore reduced the basic amount of the fine imposed on the Outokumpu group by EUR 40.17 million, corresponding to the fine that would have been imposed on it for the period of the infringement from September 1989 to July 1997, the finding in respect of that period having been made possible by the information which it had provided to the Commission. As regards the KME group, it is apparent from recitals 760 and 761 of the decision at issue that the basic amount of the fine was reduced by EUR 7.93 million for its cooperation, which had enabled the Commission to establish that the infringement at issue extended to plastic-coated copper plumbing tubes.

24 Under Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003, the Commission set the amounts of the fines to be imposed on the addressees of the decision at issue as follows:

– the KME group: EUR 32.75 million;

– KME Germany: EUR 17.96 million; and

– KME France and KME Italy (jointly and severally): EUR 16.37 million.

The proceedings in the General Court and the judgment under appeal

25 The appellants put forward seven pleas in law, all concerning the determination of the amount of the fine imposed upon them. Those pleas alleged, respectively: failure to take sufficient account of the actual impact of the cartel on the market for the purpose of calculating the starting amount of the fine; incorrect assessment of the size of the sector affected by the cartel; incorrect assessment of the importance of the KME group in the copper plumbing tube market; an erroneous increase in the starting amount of the fine by reason of the duration of the cartel; failure to take account of certain attenuating circumstances; erroneous application of the Leniency Notice; and failure to take account of the precarious financial situation of the KME group.

26 The General Court rejected each of those pleas and dismissed the action in its entirety.

27 It also rejected the Commission's counterclaim for the fines to be increased.

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

28 The KME group asks the Court to:

– set aside the judgment under appeal;

– to the extent that it is possible, based on the facts before the Court of Justice, annul in part the decision at issue and reduce the amount of the fine imposed on the KME group;

– order the Commission to pay the costs of these proceedings and of the proceedings before the General Court; or

– in the alternative, set aside the judgment under appeal and refer the case back to the General Court.

29 The Commission contends that the Court should:

– dismiss the appeal; and

– order the KME group to pay the costs.

30 The Court of Justice decided in its general meeting that the present case would be determined without an Opinion and pleaded on the same day as Case C-386/10 P *Chalkor* v *Commission*, which concerns the same cartel. However, since the appellants had put forward various grounds of appeal similar to those which they had raised in the context of Case C-272/09 P *KME Germany and Others* v *Commission*, pleaded previously, in an action also brought against the Commission concerning an earlier decision imposing fines in respect of a parallel cartel on the market for copper industrial tubes, the parties were invited to take into account at the hearing the Opinion delivered in that case by Advocate General Sharpston on 10 February 2011.

The appeal

31 The KME group puts forward six grounds of appeal alleging, respectively, various errors of law relating to the impact of the infringement on the market, the account taken of turnover and of the duration of the infringement, infringement of the Guidelines and of the principles of fairness and equal treatment in the failure to take account of certain attenuating circumstances, infringement of the Guidelines and an incorrect statement of reasons and, lastly, infringement of the right to an effective judicial review.

First ground of appeal: various errors of law relating to the impact of the infringement on the market

Arguments of the parties

32 The appellants state that their first ground of appeal relates to paragraphs 81 to 92 of the judgment under appeal. Those paragraphs are preceded by a summary of the parties' arguments and the General Court's view on the admissibility of certain arguments and of two new economic reports produced by the appellants to demonstrate the lack of real impact of the infringement on the market; the General Court concluded in paragraph 77 of the judgment under appeal that those arguments and reports were admissible.

33 Paragraphs 81 to 92 of the judgment under appeal are worded as follows:

> '81 Next, as regards the assessment of the gravity of the infringement, it should also be noted that, even if the Commission had not proved that the cartel had had an actual effect on the market, that would have been irrelevant to the classification of the infringement as "very serious" and thus to the amount of the fine.
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> 82 In that regard, it should be noted that the system of penalties for infringement of the competition rules, as established by Regulations No 17 and No 1/2003 and interpreted by the case-law, shows that, by reason of their very nature, cartels merit the severest fines. Their possible concrete impact on the market, particularly the question to what extent the restriction of competition resulted in a market price higher than would have obtained without the cartel, is not a decisive factor for determining the level of fines (see, to that effect, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraphs 120 and 129; Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraphs 68 to 77; see also the Opinion of Advocate General Mischo in Case C-283/98 P *Mo och Domsjö* v *Commission* [2000] ECR I-9855, I-9858, points 95 to 101).
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> 83 Moreover, according to the Guidelines, agreements or concerted practices involving in particular, as in the present case, price-fixing and customer-sharing may be classified as "very serious" on the basis of their nature alone, without it being necessary for such conduct to have a particular impact or cover a particular geographic area. That conclusion is supported by the fact that, whilst the description of "serious" infringements expressly mentions market impact and effects over extensive areas of the common market, the description of "very serious" infringements makes no mention of a requirement that there be an impact or that there be effects in a particular geographic area (Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 150).

84 In any event, and for the sake of completeness, the Court considers that the Commission has demonstrated to the requisite legal standard that the cartel did have an actual impact on the relevant market.

85 In that context, it should be emphasised that the applicants' premiss, to the effect that, if the Commission relied on actual impact of the cartel in determining the amount of the fine, it was under a duty scientifically to demonstrate the existence of a tangible economic effect on the market and a link of cause and effect between the impact and the infringement, has been rejected by the case-law.

86 This Court has held on numerous occasions that actual impact of a cartel on the market must be regarded as sufficiently demonstrated if the Commission is able to provide specific and credible evidence indicating with reasonable probability that the cartel had an impact on the market ([Case T-241/01] *Scandinavian Airlines System* v *Commission* [[2005] ECR II-2917], paragraph 122; Case T-59/02 *Archer Daniels Midland* v *Commission* [2006] ECR II-3627, paragraphs 159 to 161; Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraphs 153 to 155; Case T-329/01 *Archer Daniels Midland* v *Commission* [2006] ECR II-3255, paragraphs 176 to 178; and Case T-322/01 *Roquette Frères* v *Commission* [2006] ECR II-3137, paragraphs 73 to 75).

87 It should be noted in that regard that the facts on which the Commission principally relied in concluding that the cartel had an actual impact on the market are the implementation of an information exchange system in relation to sales volumes and price levels, the existence of documents drawn up in connection with meetings of the cartel showing price increases during certain periods of the cartel and indicating that the cartel had enabled the undertakings concerned to achieve their price targets, the significant market share held by all the participants in the infringement at issue, and the fact that the respective market shares of those participants had remained relatively stable throughout the period of the infringement at issue ...

88 The applicants submit that the implementation of the cartel was limited and that the other evidence put forward by the Commission cannot demonstrate that the infringement at issue had an actual impact on the market.

89 It is apparent from the case-law that the Commission is entitled to infer, on the basis of the evidence referred to in paragraph 87 above, that the infringement at issue had an actual impact on the market (see, to that effect, *Jungbunzlauer* v *Commission*, … paragraph 159; *Roquette Frères* v *Commission*, … paragraph 78; Case T-59/02 *Archer Daniels Midland* v *Commission*, … paragraph 165; Case T-329/01 *Archer Daniels Midland* v *Commission*, … paragraph 181; and Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraphs 285 to 287).

90 Furthermore, the Commission cannot be blamed for finding in the [decision at issue] that the initial report was not sufficient to refute the Commission's conclusions concerning the actual effects of the cartel on the market. The initial report deals solely with detailed figures relating to the applicants. It is apparent from the case-law that the actual conduct which an undertaking claims to have adopted is irrelevant for the purposes of evaluating a cartel's effect on the market, since account must only be taken of effects resulting from the infringement taken as a whole (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraphs 150 and 152; Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 342; and Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 167).

91 Therefore, having regard to all the foregoing considerations, the present plea must be dismissed as unfounded.

92 The Court further considers, in the exercise of its unlimited jurisdiction and in the light of the foregoing considerations, that there is no cause to call into question the starting amount of the fine imposed on the applicants which was fixed by reference to the gravity of the infringement, as determined by the Commission in recital 693 of the [decision at issue].'

34 The appellants submit that the General Court gave an illogical and inadequate statement of reasons for the judgment under appeal and erred in law in holding that the Commission was permitted, in determining the starting amount of the fine imposed on them, having regard to the gravity of the infringement, to take account of the impact of the cartel on the relevant market without being required to demonstrate that the arrangements actually had such an impact and, in any event, by inferring such an impact from mere indicators. Moreover, by holding that the Commission had demonstrated to the requisite legal standard that the arrangements had an impact on the market, the General Court manifestly distorted the facts and economic evidence which the KME group put before it.

35 The Commission maintains first of all that the first ground of appeal is ineffective. That ground of appeal ignored the fact that, in paragraph 92 of the judgment under appeal, the General Court exercised its unlimited jurisdiction to confirm the starting amount of the fine imposed on the KME group by reference to the gravity of the infringement as set out in recital 693 of the decision at issue.

36 The Commission then submits that the General Court was entitled to find that the findings as to market impact of the infringement were not decisive and that, in any event, the General Court applied the correct legal standards when considering that impact. Lastly, the Commission states that the first ground of appeal is inadmissible in so far as it relates to the appraisal of the facts and evidence and that adequate reasons were given for the General Court's findings, in particular in paragraph 90 of the judgment under appeal, in which it stated that only the effects of the infringement as a whole were to be taken into account, which explains why it disregarded the econometric reports produced by the appellants and which relate to them.

Findings of the Court

37 The appellants do not contest the General Court's findings concerning the classification of the infringement as a 'very serious infringement' within the meaning of the Guidelines; they do however contest those concerning the actual impact of the cartel on the market as a factor taken into account in determining the basic amount of the fine.

38 According to Section 1 A of the Guidelines, in assessing the criterion of the gravity of the infringement, account is to be taken of its actual impact on the market only where this can be measured.

39 Determination of the actual impact of a cartel on the market requires a comparison of the market situation resulting from the cartel with that which would have resulted from free competition. Such a comparison necessarily involves recourse to assumptions, given the multiplicity of variables capable of having an impact on the market.

40 In recital 629 of the decision at issue, the Commission emphasised the impossibility of determining what the evolution of prices during the period of the infringement would have been in the absence of the cartel. Having refuted the appellants' arguments, it provided evidence from which it concluded, in recital 673 of that decision, that the anti-competitive scheme had overall had an impact on the market, although it was not possible to quantify it precisely.

41 It thus follows from the decision at issue that, in this instance, the Commission did not consider it possible for the purposes of calculating the fine to take that optional element – the actual impact of the infringement on the market – into account since it could not be measured. That conclusion was not challenged in the judgment under appeal.

42 In paragraphs 86 and 89 of the judgment under appeal, the General Court recalled the case-law relating to the standard of proof of the actual impact of a cartel on the market. In paragraphs 87 and 90 of its judgment it checked, moreover, that the Commission had demonstrated to the requisite legal standard the actual impact of the cartel on the relevant market. However, it did so for the sake of completeness, as indicated in paragraph 84 of that judgment, and after correctly observing, in paragraph 82, that the actual impact of cartels on the market is not a decisive factor for determining the level of fines. It follows from this that the appellants' plea countering that part of the General Court's reasoning is ineffective.

43 In any event, the General Court's reasoning in relation to the evidence of the impact of the infringement on the market deals with the appellants' argument, summarised in paragraphs 58 to 62 of the judgment under appeal, that such evidence was not put forward by the Commission in the decision at issue. The General Court found that there was evidence to prove the existence of such impact, but did not call in question the impossibility of measuring it precisely.

44 Thus the General Court was not contradicting itself when, on the one hand, it recalled the principle that the actual impact of the infringement on the market is not a decisive factor for determining the level of fines and, on the other, it reviewed the evidence of that impact.

45 Consequently, as is apparent from the wording of their first ground of appeal, the appellants incorrectly infer from the General Court's review that the actual impact of the infringement on the market must have been taken into account for the purpose of calculating the starting amount of the fine that was imposed on them. That argument is based on a false premiss.

46 With regard to the claim that the General Court distorted the economic evidence adduced by the appellants, it is not alleged that the General Court construed those economic reports in a manner manifestly at odds with their wording (see, to that effect, Case C-260/09 P *Activision Blizzard Germany* v *Commission* [2011] ECR I-0000, paragraph 57), rather that the General Court erred in its assessment of the content of those reports. In any event, the appellants do not indicate precisely which parts of those reports the General Court misconstrued as to their real meaning. Accordingly that argument is inadmissible.

47 It follows from the foregoing considerations that the first ground of appeal must be rejected.

Second ground of appeal: various errors of law relating to the account taken of turnover

Arguments of the parties

48 The second ground of appeal relates, in essence, to paragraphs 97 to 101 of the judgment under appeal, which are worded as follows:

'97 It must be held at the outset that there is no valid reason to require that the turnover of a relevant market be calculated excluding certain production costs. As the Commission has rightly pointed out, there are in all industries costs inherent in the final product which the manufacturer cannot control but which nevertheless constitute an essential element of its business as a whole and which, therefore, cannot be excluded from its turnover when fixing the starting amount of the fine (see, to that effect, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraphs 5030 and 5031). The fact that the price of copper constitutes an important part of the final price of plumbing tubes or that the risk of fluctuations of copper prices is far higher than for other raw materials does not invalidate that conclusion.

98 Regarding the applicants' various claims seeking to argue that, instead of using the criterion of the turnover of the relevant market, it would be more appropriate, having regard to the deterrent purpose of fines and the principle of equal treatment, to fix their amount by reference to the profitability of the sector affected or the added value relating thereto, the Court finds that they are irrelevant.

99 First, since the gravity of the infringement is determined by reference to numerous factors, in respect of which the Commission has a margin of discretion (Joined Cases T-101/05 and T-111/05 *BASF* v *Commission* [2007] ECR II-4949, paragraph 65), no binding or exhaustive list of criteria to be taken into account in that regard having been drawn up (Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 129), it is not for the Court but for the Commission to choose, within the framework of its discretion and in accordance with the limits which follow from the equal treatment principle and Regulations No 17 and No 1/2003, the factors and the detailed figures which it will take into account in order to implement a policy which ensures compliance with the prohibitions laid down by Article 81 EC.

100 It is undeniable that, as a factor for assessing the gravity of the infringement, the turnover of an undertaking or of a market is necessarily vague and imperfect. It does not make a distinction either between sectors with a high added value and those with a low added value, or between undertakings which are profitable and those which are less so. However, despite its approximate nature, turnover is currently considered, by the legislature, the Commission and the Court, as an adequate criterion, in the context of competition law, for assessing the size and economic power of the undertakings concerned (see, in particular, *Musique Diffusion française and Others* v *Commission*, … paragraph 121; Article 15(2) of Regulation No 17; recital 10 and Articles 14 and 15 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1)).

101 Having regard to all of the above, the Court finds that the Commission was right to take the copper price into account for the purposes of determining the size of the sector concerned.'

49 In the appellants' submission, the General Court infringed European Union law and provided an inadequate statement of reasons for the judgment under appeal by approving the Commission's reference – in order to assess the size of the market affected by the infringement for the purpose of establishing the gravity element of the fine imposed on them – to a market value that wrongly included the revenue from sales made in an upstream market separate from the 'cartel' market, despite the fact that the cartel members were not vertically integrated in that upstream market.

50 They explain that the copper transformation industry has specific features. In particular, it is the customer who decides when the metal will be purchased on the London Metal Exchange and hence its price. Even though that price invoiced by the tube manufacturer to the customer includes the processing margin, to take it into consideration when calculating the undertaking's turnover would be to ignore the economic reality of the market, which is characterised in particular by the important part represented by the raw material in the cost of the product and the very significant fluctuations in the price of that raw material. Those facts were established by the General Court.

51 According to the appellants, the General Court infringed the principle of proportionality by failing to hold that the Commission should have taken account of the case-law of the General Court and the Commission's previous practice in taking decisions, whereby, when the Commission calculates the starting amount of the fine and/or applies the 10% turnover cap, it is required to take into consideration the specific features of the relevant market.

52 They also claim that, by failing to distinguish the appellants from other undertakings whose turnover is not so greatly influenced by the price of the raw material, the General Court infringed the principle of non-discrimination, which requires that different situations be treated differently.

53 Lastly, the appellants challenge the case-law on which the General Court relied, which is based on the Commission's discretion. They take the view that the General Court failed to examine whether the criteria used by the Commission to establish the gravity of the cartel were pertinent and adequate.

54 The Commission submits that the General Court was entitled to state, in paragraph 97 of the judgment under appeal that there are in all industries costs inherent in the final product which the manufacturer cannot control but which nevertheless constitute an essential element of its business as a whole and which therefore cannot be excluded from its turnover when fixing the starting amount of the fine.

55 The Commission also contends that, in so far as the appellants invite the Court of Justice to make a different appraisal from that of the General Court of whether the copper plumbing tubes industry is unique, the ground of appeal is inadmissible.

56 According to the Commission, the General Court carried out an objective appraisal, taking account of turnover rather than the disputed data which would have entailed the deduction of costs that cartel members did not 'control'. In its submission, this conclusion is consistent with the principle of proportionality.

57 Finally, the Commission disputes the appellants' claims concerning the way in which prices are set in the relevant market. It would be false to distinguish a separate upstream market from the market

affected by the cartel. There is only one market – the market for copper tubes – and copper represents merely one cost.

Findings of the Court

58 It has consistently been held that, in assessing the gravity of an infringement, regard must be had to a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case. Those factors may, depending on the circumstances, include the volume and value of the goods in respect of which the infringement was committed and the size and economic power of the undertaking and, consequently, the influence which the undertaking was able to exert on the market (see, to that effect, *Musique Diffusion française and Others* v *Commission*, paragraph 120).

59 While the Court of Justice has concluded from this that it is permissible, for the determination of the fine, to take into account both the undertaking's overall turnover, which is an indication of the size of the undertaking and its economic strength, and that part of the turnover which derives from the goods which are the subject of the infringement and which therefore is capable of giving an indication of the scale of the infringement, it has nevertheless recognised that the overall turnover of an undertaking gives only an approximate and imperfect indication of the size of that undertaking (*Musique Diffusion française and Others* v *Commission*, paragraph 121; Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 139; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 243; Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 100; and Case C-510/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-1843, paragraph 74).

60 It has also pointed out on a number of occasions that it is important not to confer on one or the other of those figures an importance which is disproportionate in relation to the other factors to be assessed in relation to the gravity of the infringement (*Musique Diffusion française and Others* v *Commission*, paragraph 121; *Dansk Rørindustri and Others* v *Commission*, paragraph 243; Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 100; and Case C-510/06 P *Archer Daniels Midland* v *Commission*, paragraph 74).

61 The General Court did not, therefore, err in law or, in particular, infringe either the principle of proportionality or that of non-discrimination when it observed in paragraph 100 of the judgment under appeal that turnover, although vague and imperfect, is an adequate criterion for assessing the size and economic power of the undertakings concerned.

62 Nor, moreover, did the General Court err in law when it held, in paragraph 97 of the judgment under appeal, that there is no valid reason to require that the turnover of a relevant market be calculated excluding certain production costs. As the Court of Justice ruled in its judgment of today's date in proceedings also brought by the appellants against the Commission (Case C-272/09 P), to take gross turnover into account in some cases but not in others would require a threshold to be established, in the form of a ratio between net and gross turnover, which would be difficult to apply and would give scope for endless and insoluble disputes, including allegations of unequal treatment.

63 As regards the allegation that the General Court failed to examine whether the criteria used by the Commission to establish the gravity of the cartel were pertinent and adequate, it should be borne in mind that, in an action on a decision relating to a competition matter, it is for the applicant to formulate his pleas in law and not for the General Court to review of its own motion the weighting of the factors taken into account by the Commission in order to determine the amount of the fine.

64 In the judgment under appeal, the General Court carried out its review in the manner required of it. It responded to the plea in law put forward by the appellants and did not err in law in concluding, in paragraph 101 of the judgment under appeal, that the Commission was right to take the copper price into account for the purposes of determining the size of the market concerned.

65 The second ground of appeal is therefore unfounded.

Third ground of appeal: various errors of law relating to the account taken of the duration of the infringement

Arguments of the parties

66 The appellants state that their third ground of appeal relates to paragraphs 111 to 117 of the judgment under appeal. They claim that the General Court infringed European Union law and provided an obscure, illogical and inadequate statement of reasons for that judgment by upholding the part of the decision at issue in which the Commission misapplied the Guidelines, and infringed the principles of proportionality and equal treatment by imposing the maximum percentage increase on the starting amount of the fine imposed on them on account of the duration of the infringement.

67 According to the appellants, it is apparent from Section 1 B of the Guidelines that the purpose of a fine increase on account of duration of an infringement is to '[impose] effective sanctions on restrictions which have had a harmful impact on consumers over a long period'. The requirement of a link between the infringement's duration and its harmful effect is also clear from the case-law. The General Court, however, failed to enquire whether the Commission, in its assessment of the infringement's gravity, really did give proper weight to the circumstance that the cartel's intensity and effectiveness varied over time. The General Court was therefore wrong in holding, in paragraph 116 of the judgment under appeal, that the 125% increase in the starting amount of the fine is not manifestly disproportionate.

68 Furthermore, the General Court's failure to recognise that the KME group was in a very similar situation to that of the applicant undertakings in Case T-18/05 *IMI and Others* v *Commission* [2010] ECR I-0000, and its refusal to determine afresh the starting amount of the fine, contrary to the action it took in that judgment, constituted the unlawful differential treatment of the KME group and those undertakings.

69 The Commission contends that the appellants have failed to rebut the findings of the General Court contained in paragraphs 111 to 115 of the judgment under appeal. It adds that Article 23(3) of Regulation No 1/2003 itself draws a distinction between the gravity of the infringement and its duration, and that any consideration of equal treatment in relation to the duration of the infringement should therefore entail examination of that duration and not factors relating to the gravity of the infringement, such as the intensity of the cartel or its effects.

70 As regards the applicant undertakings in *IMI and Others* v *Commission*, the Commission points out that the General Court annulled the infringement decision against those undertakings in relation to a period of 16 months. Those undertakings were therefore in a different position from that of the appellants.

71 Lastly, the Commission states that, for the purposes of taking account of the harm caused by a cartel, the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 provide for a 100% increase in the fine for each year of the cartel's duration. The 10% increase for each additional year, applied in the present case, is actually very low and clearly not disproportionate.

Findings of the Court

72 By their third ground of appeal, the appellants challenge both the principle of an increase in the fine to take account of the duration of the infringement and the result of the application of that principle in their particular case, namely the increase in the starting amount of the fine, set at EUR 70 million, by 125% to take account of an infringement period of 12 years and 9 months, each year of participation corresponding to a 10% increase. According to the figures in recital 719 of the decision at issue and restated in paragraph 22 of the present judgment, the basic amount for the KME group was thus increased to EUR 111.13 million.

73 However, the objection to the result is based on the erroneous assumption that the rate of increase was 125%, whereas in fact it was only 58.75% (111.13÷70 = 1.5875).

74 As regards the principle of an increase in the fine to take account of the duration of the infringement, it is not necessary to establish in practical terms a direct relation between that duration and increased damage to the European Union objectives pursued by the competition rules.

75 For the purpose of applying Article 81(1) EC, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition (see, to that effect, Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299). That applies in particular in the case, as in this instance, of obvious restrictions of competition such as price-fixing and market-sharing. If a cartel determines the state of the market at the moment it is agreed, its lengthy duration can make the structures of that market more rigid, reducing cartel participants' incentive for innovation and development. A return to free competition will be all the more difficult and protracted, the longer the cartel continues.

76 Even if the cartel's intensity and effectiveness varies over time, the fact remains that that cartel continues to exist and, therefore, to make the structures of the market all the more rigid.

77 Where an agreement has not been implemented at all, it must be borne in mind that Section 3 of the Guidelines provides that non-implementation in practice of the offending agreements or practices may constitute an attenuating circumstance giving rise to a reduction in the basic amount of the fine. It appears, however, that that has not been the case here, since the appellants have challenged not the implementation of the cartel in so far as it relates to them, but only the failure to take into consideration the variable intensity of that implementation and the actual and objective impact of the cartel on consumers.

78 Furthermore, real damage to the consumer can be difficult to quantify, given the range of variables affecting, in particular, price-setting in relation to a manufactured product.

79 In any event, the duration of the infringement is mentioned by the European Union legislature as a factor to be taken into account as such for the purpose of determining the amount of the fines.

80 In the light of those points, the General Court was right to reject as unfounded, in paragraph 117 of the judgment under appeal, the plea relating to the increase in the amount of the fine for the duration of the cartel.

81 As regards the applicant undertakings in *IMI and Others* v *Commission*, it is clear from paragraph 96 of the judgment in that case that the General Court regarded the infringement as having been interrupted for a period of a little more than 16 months. The situation of those undertakings was therefore entirely different from that of the appellants, who have never claimed that there was an interruption of the infringement but have merely relied on the variation in its intensity. It follows from this that the General Court did not infringe the principle of non-discrimination by treating the appellants and those undertakings differently.

82 It follows from all of those considerations that the third ground of appeal is unfounded.

Fourth ground of appeal: infringement of the Guidelines and of the principles of fairness and equal treatment in the failure to take account of certain attenuating circumstances

Arguments of the parties

83 The appellants state that their fourth ground of appeal relates to paragraphs 125 to 142 of the judgment under appeal. They submit that the General Court infringed European Union law in rejecting the fifth plea relied on in the application and upholding the relevant part of the decision at issue in which the Commission, in breach of the Guidelines and the principles of fairness and equal treatment, refused to reduce their fine on account of (1) the limited implementation of the arrangements; (2) the crisis in the copper plumbing tube industry; and (3) the fact that they cooperated to an extent not covered by the Leniency Notice.

84 The appellants submit, in the first place, that the General Court erred in law in totally disregarding in the judgment under appeal the fact that they refrained from implementing the arrangements and

adopted competitive conduct. They take issue with the test referred to in paragraph 127 of that judgment and applied by the General Court in determining whether they qualified for attenuating circumstances, which requires them to show that they clearly and substantially infringed the obligations relating to the implementation of the cartel to the point of disrupting its very operation. According to the appellants, such a standard is stricter than that applied to determine the moment when participation has ceased – namely that an undertaking openly distances itself from the unlawful collusion – which is illogical.

85 In the second place, they maintain that the General Court infringed the principle of non-discrimination, since it should have treated the difficult problems which the plumbing tubes industry was experiencing as an attenuating circumstance.

86 In the third place, the appellants submit that the General Court infringed European Union law by upholding the part of the decision at issue in which the Commission refused to reduce their fine on account of the fact that they cooperated to an extent not covered by the Leniency Notice. In their view, they alone should have been granted a reduction in or partial immunity from the fine, on the ground that they provided evidence of the duration of the infringement, unlike the Outokumpu group, which only provided information on the total duration of the cartel.

87 The Commission takes the view that the General Court correctly applied the case-law that a fine can be reduced on the ground that the cartel agreements were not implemented.

88 It also observes that decisions concerning other cartels cannot form the basis of a plea alleging disregard of the principle of non-discrimination. In any event, the difficult period experienced by the sector occurred after the cartel.

89 Lastly, as regards cooperation, the Commission contends that, since the KME group is inviting the Court to substitute its own appraisal for that of the General Court, the fourth ground of appeal is inadmissible.

90 That submission is, according to the Commission, moreover unfounded. The Commission maintains that the General Court provided a clear and logical explanation for its appraisal of when partial immunity should be available, which responded to all the legal arguments put forward by the KME group.

91 While the Outokumpu group's fine was reduced, this was on the ground that the information which it provided enabled the Commission to investigate and seek evidence. The appellants facilitated that task by providing evidence, but nothing more. Contrary to what the appellants imply in their appeal, they could not have been granted partial immunity under the Commission notice on immunity from fines and reduction of fines in cartel cases, since such immunity is granted in respect of evidence relating to 'facts previously unknown to the Commission', which was not the case as regards the full duration of the cartel.

92 The Commission contends, lastly, that the award of partial immunity in the situation described by the appellants would run counter to Section D of the Leniency Notice, which already provides for a reduction in the fine where an undertaking supplies the Commission with information, documents or other evidence which contributes to establishing the existence of the infringement.

Findings of the Court

93 The first argument relates to paragraph 127 of the judgment under appeal, in which the General Court referred to the case-law under which, in order to benefit from the attenuating circumstance set out in the second indent of Section 3 of the Guidelines, the offenders must show that they adopted competitive conduct or, at the very least, that they clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation and did not give the appearance of complying with the agreement, thereby encouraging other undertakings to implement the cartel in question (Case T-50/00 *Dalmine* v *Commission* [2004] ECR II-2395, paragraph 292, and Case T-26/02 *Daiichi Pharmaceutical* v *Commission* [2006] ECR II-713, paragraph 113).

94 In paragraph 491 of the judgment in *Raiffeisen Zentralbank Österreich and Others* v *Commission*, in particular, the General Court clarified that case-law, observing that an undertaking which, despite colluding with its competitors, follows a more or less independent policy in the market may simply be trying to exploit the cartel for its own benefit. If attenuating circumstances were recognised in such circumstances, it would be too easy for undertakings to reduce the risk of being required to pay a heavy fine, since they would be able to take advantage of an unlawful agreement and then benefit from a reduction in the fine on the ground that they had played only a limited role in implementing the infringement, whereas their attitude encouraged other undertakings to act in a way that was more harmful to competition (see also Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraphs 277 and 278).

95 Contrary to the appellants' submission, an undertaking which ceases to participate in a cartel is not in the same position as an undertaking which is a member of that cartel but does not implement it or ceases to do so. In the latter case, the undertaking continues to harm competition by its participation in any discussions and by the fact, noted by the General Court, that its participation in the cartel is likely to encourage other undertakings to act in a way that is harmful to competition.

96 The General Court did not therefore err in law by interpreting strictly the conditions that must be fulfilled if an undertaking is to benefit from the attenuating circumstance referred to in the second indent of Section 3 of the Guidelines. As the General Court noted in paragraph 128 of the judgment under appeal, the appellants did not claim to have fulfilled those conditions. The first argument is therefore unfounded.

97 As regards the second argument, it is sufficient to note that, as a general rule, cartels come into being when an economic sector is experiencing difficulties and that such difficulties cannot, in principle, constitute an attenuating circumstance.

98 Furthermore, difficulties in comparing the level of fines imposed on undertakings which have participated in different agreements on different markets at times which, in some cases, are separated by long intervals may also arise from the conditions necessary for implementing an effective competition policy (Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11005, paragraph 81). The General Court did not, therefore, infringe the principle of non-discrimination by concluding, in paragraph 129 of the judgment under appeal, that the fact that in previous cases the Commission took account of the economic situation in the sector as an attenuating circumstance does not mean that it must necessarily continue to follow that practice.

99 As regards the third argument, the appellants object to the judgment under appeal but do not explain, with reasons, in what respect the General Court erred in law in the reasoning set out in paragraphs 136 to 140 of that judgment, or explain how the production of evidence of facts already known to the Commission would justify the granting of attenuating circumstances any more than the earlier provision of new information to the Commission. It follows that that argument is inadmissible as it is too vague.

100 It follows from all of those considerations that the fourth ground of appeal is, in part, inadmissible and, in part, unfounded.

Fifth ground of appeal: infringement of the Guidelines and an incorrect statement of reasons

Arguments of the parties

101 The appellants state that their fifth ground of appeal relates to paragraphs 163 to 174 of the judgment under appeal. They submit that the General Court made an error of law and provided illogical and insufficient reasons for its rejection of the seventh plea relied on in the application and for upholding the Commission's refusal to reduce their fine on account of their inability to pay, especially following the onerous penalty already imposed on them in the copper industrial tubes case. According to them, the General Court did not apply the appropriate test, since the undertaking concerned is simply required to show that the imposition of a heavy penalty would cause it very serious economic and financial harm. The appellants also maintain that the General Court misinterpreted the second limb of the test laid down in Section 5(b) of the Guidelines, thereby concluding that no 'specific social context'

within the meaning of Section 5 justified a reduction of the fine. Finally, they argue that the judgment under appeal failed to remedy the unlawful discrimination committed by the Commission against them as compared with SGL Carbon AG in Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977 and Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921.

102 The Commission contends, first of all, that the appellants' first argument is not directed against an error of law identified in the judgment under appeal and that the General Court did not rule on the meaning of 'inability to pay'. It also states that the issue concerning 'specific social context' was not put before the General Court. In any event, the appellants' claims are vague and relate to that court's appraisal of the facts and evidence, which is inadmissible in an appeal. Lastly, the General Court was correct in rejecting the appellants' argument alleging discrimination, because the Commission's practice in previous decisions does not serve as a legal framework for fines. In any event, the situation of SGL Carbon AG was different.

Findings of the Court

103 The General Court did not err in law in observing, in paragraph 165 of the judgment under appeal that the Commission is not required to take account of the undertaking's financial losses since recognition of such an obligation would have the effect of conferring an unfair competitive advantage on the undertakings least well adapted to the conditions of the market (see Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others* v *Commission* [1983] ECR 3369, paragraphs 54 and 55; *Dansk Rørindustri and Others* v *Commission*, paragraph 327; Case C-308/04 P *SGL Carbon* v *Commission*, paragraph 105; and Case C-328/05 P *SGL Carbon* v *Commission*, paragraph 100).

104 Nor is the Commission required to take account of a presumed inability to pay caused by a financial penalty imposed as a result of another infringement of competition law, since it is the undertaking that is primarily responsible for that situation which has arisen as a result of its unlawful conduct.

105 Furthermore, as has been pointed out in paragraph 98 of the present judgment, difficulties in comparing the level of fines imposed on undertakings which have participated in different agreements on different markets at times which, in some cases, are separated by long intervals may also arise from the conditions necessary for implementing an effective competition policy. The General Court did not therefore infringe the principle of non-discrimination by finding, in paragraph 164 of the judgment under appeal, that the fact that, in previous cases, the Commission took account of the financial difficulties of an undertaking does not mean that it is obliged to make the same assessment in a later case.

106 Lastly, the remainder of the fifth ground of appeal is in particularly general terms; the appellants merely allege that the General Court erred in law, but do not specify precisely in what respect it did so. In any event, this Court does not have jurisdiction to review the General Court's findings of fact as set out in paragraphs 169 and 170 of the judgment under appeal.

107 It follows that the fifth ground of appeal must be rejected, in part, as inadmissible and, in part, as unfounded.

Sixth ground of appeal: infringement of the right to an effective judicial review

Arguments of the parties

108 The appellants submit that the General Court infringed European Union law and their fundamental right to a full and effective judicial review by failing to examine their arguments closely and thoroughly and deferred, to an excessive and unreasonable extent, to the Commission's discretion. In particular, they challenge the manner in which the General Court examined the second plea relied on in the application, relating to the size of the market, the fourth plea, relating to the duration of the infringement, and the fifth plea, relating to attenuating circumstances. According to the appellants, the General Court's refusal to examine thoroughly and closely the pleas and arguments developed in their application amounts to an infringement of their fundamental right to a full, effective and fair judicial review of the decision at issue by an impartial and independent tribunal.

109 The appellants explain that the doctrine of ‘margin of appreciation’ and ‘judicial deference’ should now no longer be applied, since European Union law is now characterised by the huge fines imposed by the Commission, a development which is frequently described as the de facto ‘criminalisation’ of European Union competition law.

110 Furthermore, the direct applicability of the exception provided for in Article 81(3) EC, introduced by Regulation No 1/2003 – replacing the earlier authorisation scheme – excludes, by definition, any margin of appreciation on the part of the Commission in the application of the competition rules and thus mandates only a very limited degree of judicial deference by the Courts when reviewing their application by the Commission in a specific case.

111 The appellants also submit that a justification for the proposition that the Commission enjoys a margin of appreciation should not be sought in the Commission’s alleged superior expertise in evaluating complex factual or economic matters. The appellants state in that regard that both the Court of Justice and the General Court have satisfactorily engaged in particularly intense judicial scrutiny of complex cases.

112 Likewise, in view of the unlimited jurisdiction conferred on it under Article 261 TFEU and Article 31 of Regulation No 1/2003, the General Court should not admit of any margin of appreciation on the part of the Commission, not only as far as the appropriate and proportionate character of the amount of a fine is concerned, but also with regard to the working method followed by the Commission in its calculation. In the appellants’ view, the General Court must examine how in each particular case the Commission assessed the gravity and duration of unlawful conduct and is then entitled to substitute its own assessment for that of the Commission by cancelling, reducing or increasing the fine.

113 According to the appellants, the Commission must follow a coherent and non-discriminatory policy in all cases in which it fixes the amount of the penalty for breach of competition rules. This means that it should treat in the same manner undertakings in equivalent situations in the context of separate infringements established by way of separate decisions. Otherwise, the margin of discretion enjoyed by the Commission would become a purely arbitrary exercise of power, since it would be acknowledged that the Commission can change at will its policy stance as to fines in individual cases.

114 The appellants also observe that the European Court of Human Rights has accepted that the enforcement of administrative law via administrative decision-making and fines is not as such contrary to Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (‘the ECHR’). It must, however, be governed by sufficiently strong procedural guarantees, combined with an effective regime of judicial control with full jurisdiction to review administrative decisions. The right to ‘an effective remedy before a tribunal’ has also been enshrined in Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

115 As a preliminary point, the Commission observes that the appellants’ application for a reduction of their fine is based on Article 230 EC, not on the unlimited jurisdiction provided for in Article 31 of Regulation No 1/2003.

116 As regards the response to the second, fourth and fifth pleas relied on in the application, the Commission takes the view that, notwithstanding the references made to the discretion exercised by the Commission, the General Court carried out a thorough and effective review of the calculation of the fine imposed on the KME group and reached its own affirmative conclusions that those pleas were unfounded.

117 Lastly, according to the Commission, the KME group merely alludes to ‘criminal charges’ and to Article 6(1) of the ECHR, but avoids any discussion of what this might imply.

Findings of the Court

118 The appellants challenge both the manner in which the General Court stated that it was obliged to take account of the Commission’s broad margin of appreciation and the manner in which it actually reviewed the decision at issue. They rely in that regard on Article 6 of the ECHR and on the Charter.

119 The principle of effective judicial protection is a general principle of European Union law to which expression is now given by Article 47 of the Charter (see Case C-279/09 *DEB* [2010] ECR I-0000, paragraphs 30 and 31; order in Case C-457/09 *Chartry* [2011] ECR I-0000, paragraph 25; and Case C-69/10 *Samba Diouf* [2011] ECR I-0000, paragraph 49).

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

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

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

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

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

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

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

127 The Guidelines, which, the Court has held, form rules of practice from which the administration may not depart in an individual case without giving reasons compatible with the principle of equal treatment (Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 91), merely describe the method used by the Commission to examine infringements and the criteria that the Commission requires to be taken into account in setting the amount of a fine.

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

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

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

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

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

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

134 It follows from this that, in so far as it relates to the rules of judicial review in the light of the principle of effective judicial protection, the sixth ground of appeal is unfounded.

135 In so far as it relates to the manner in which the General Court carried out its review of the decision at issue in connection with the second, fourth and fifth pleas relied on in the application, the present ground of appeal is indissociable from the second, third and fourth grounds of the appeal and has thus already been examined by the Court of Justice.

136 It must be noted in that regard that although the General Court repeatedly referred to the 'discretion', the 'substantial margin of discretion' or the 'wide discretion' of the Commission, including in paragraphs 52 to 54, 99, 114, 136 and 150 of the judgment under appeal, such references did not prevent the General Court from carrying out the full and unrestricted review, in law and in fact, required of it.

137 It follows from all of those considerations that the sixth ground of appeal is unfounded.

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

Costs

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

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

1. Dismisses the appeal;

2. Orders KME Germany AG, KME France SAS and KME Italy SpA to pay the costs.

[Signatures]

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* Language of the case: English.