Reports of Cases

ORDER OF THE COURT (Sixth Chamber)

7 July 2016 *

(Appeal — Article 181 of the Rules of Procedure of the Court — Competition — Agreements, decisions and concerted practices — European prestressing steel market — Fines — Appraisal of the ability to pay — The 2006 Guidelines on the method of setting fines — Unlimited jurisdiction — Taking into account facts subsequent to the contested decision — Principles of proportionality and equal treatment — Right to effective judicial protection)

In Case C-523/15 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 28 September 2015,

Westfälische Drahtindustrie GmbH, established in Hamm (Germany),

Westfälische Drahtindustrie Verwaltungsgesellschaft mbH & Co. KG, established in Hamm,

Pampus Industriebeteiligungen GmbH & Co. KG, established in Iserlohn (Germany),

represented by C. Stadler, Rechtsanwalt,

appellants,

the other party to the proceedings being:

European Commission, represented by V. Bottka, H. Leupold and G. Meessen, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Sixth Chamber),

composed of A. Arabadjiev, President of the Chamber, J.-C. Bonichot and E. Regan (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to give a decision by reasoned order, in accordance with Article 181 of the Rules of Procedure of the Court,

makes the following

* Language of the case: German.

Order

1 By their appeal, Westfälische Drahtindustrie GmbH ('WDI'), Westfälische Drahtindustrie Verwaltungsgesellschaft mbH & Co. KG ('WDV') and Pampus Industriebeteiligungen GmbH & Co. KG ('Pampus') seek to have set aside, first, the judgment of the General Court of the European Union of 15 July 2015 in *Westfälische Drahtindustrie and Others* v *Commission* (T-393/10, 'the judgment under appeal', EU:T:2015:515,) whereby the General Court dismissed their action for annulment and variation of Commission Decision C(2010) 4387 final of 30 June 2010 relating to proceedings under Article 101 TFEU and Article 53 of the EEA Agreement (Case COMP/38344 — Prestressing Steel), as amended by Commission Decision C(2010) 6676 final of 30 September 2010 and by Commission Decision C(2011) 2269 final of 4 April 2011 ('the contested decision'), and, second, the letter of 14 February 2011 from the Director-General of the Commission's Directorate-General for Competition ('the letter of 14 February 2011').

Legal context

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

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

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

…'

3 Article 31 of that regulation provides:

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

4 Point 35 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the 2006 Guidelines') provides, under the heading 'Ability to Pay':

'In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.'

Background to the dispute

5 The sector to which the present case relates is the prestressing steel ('PS') sector. That expression refers to metal wires and strands made of wire rod and, in particular, steel used for prestressed concrete, which is used in making balconies, foundation piles and pipes, and steel used for post-tensioned concrete, which is used in structural engineering, underground engineering and bridge-building.

6 WDI, formerly Klöckner Draht GmbH, is a German undertaking in the steel sector producing, inter alia, PS. Since 3 September 1987, WDI has been 98% owned by WDV, which itself has been two-thirds owned by Pampus since 1 July 1997.

7 On 19 and 20 September 2002, having received information from the Bundeskartellamt (Federal Competition Authority, Germany) and from a PS manufacturer concerning an infringement of Article 101 TFEU, the Commission carried out inspections at the premises of a number of undertakings.

8 Following its investigation and after rejecting WDI's leniency application, the Commission, on 30 September 2008, adopted a statement of objections directed towards a number of undertakings, including the appellants. All the addressees of that statement of objections submitted written observations in response to those objections. A hearing, in which the appellants took part, was held on 11 and 12 February 2009.

9 Fourteen undertakings, including the appellants, also claimed that they were unable to pay within the meaning of Point 35 of the 2006 Guidelines. They submitted evidence in support of their claims.

10 By the contested decision, the Commission took the view that a number of PS manufacturers had breached Article 101(1) TFEU and, as from 1 January 1994, Article 53(1) of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3), by participating in a cartel at European, national and regional levels over a period from 1 January 1984 until 19 September 2002. The Commission found that Klöckner Draht, now WDI, had directly participated in that infringement for the whole of that period. The Commission also criticised Mr Pampus, as the administrator of Pampus and WDI, for directly participating in several cartel meetings and for giving direct instructions to his employees, such that WDV and Pampus were regarded as having exerted a decisive influence over WDI throughout the entire period during which they had control. Consequently, WDI was ordered to pay a fine of EUR 46.55 million. WDV and Pampus were held jointly and severally liable for that infringement in the amounts of EUR 38.855 million and EUR 15.485 million respectively.

11 By the contested decision the Commission also rejected the appellants' request to be granted a reduction of the fine, pursuant to Point 35 of the 2006 Guidelines, when their ability to pay was taken into account.

12 The request made by the appellants seeking a reassessment of that ability to pay was rejected by the letter of 14 February 2011.

The procedure before the General Court and the judgment under appeal

13 By application lodged at the Registry of the General Court on 14 September 2010, the appellants brought an action for annulment and variation of the contested decision.

14 By separate document lodged at the Registry of the General Court on 3 December 2010, the appellants also applied for suspension of the operation of that decision.

15 By order of 13 April 2011 in *Westfälische Drahtindustrie and Others* v *Commission* (T-393/10 R, 'the decision of the judge hearing the application for interim relief', EU:T:2011:178), the President of the General Court partially upheld the application for interim measures lodged by the appellants by ordering the suspension of the obligation imposed on them to provide a bank guarantee in favour of the Commission for the avoidance of the immediate recovery of the fines imposed on them by the contested decision, on condition that they pay the Commission (i) EUR 2 million before 30 June 2011, and (ii) monthly instalments of EUR 300 000 on the 15th of each month, from 15 July 2011 until further notice, but not beyond the delivery of the judgment in the main proceedings.

16 In support of their action, the appellants raised nine pleas in law, of which only the sixth and ninth are of any relevance to the present appeal. The sixth plea in law alleged an infringement, in particular, of the principle of proportionality in that the Commission had failed to take account of their inability to pay in the contested decision. The ninth plea in law related to the assessment of their ability to pay in the letter of 14 February 2011, which the appellants sought to have annulled before the General Court on 19 April 2011.

17 By the judgment under appeal, the General Court, upholding those two pleas in law, annulled the contested decision, in so far as it imposed a fine on the appellants, as well as the letter of 14 February 2011, on the ground that the Commission had erred in that letter when assessing their ability to pay. In the exercise of its unlimited jurisdiction, the General Court, applying the 2006 Guidelines itself, took the view, however, that the appellants were not entitled to claim that they should be granted a reduction of their fine due to their inability to pay and, consequently, it fixed the fine at the same amount as had been imposed on them in the contested decision.

Forms of order sought

18 By their appeal, the appellants claim that the Court should:

— principally, set aside the judgment under appeal, in so far as it orders them to pay a fine, or set aside that judgment in its entirety and annul the contested decision, in so far as it imposes a fine on them, and the letter of 14 February and the fine itself;

— in the alternative, reduce the fine imposed by that decision or set aside the judgment under appeal and remit the case back to the General Court for it to reduce the fine imposed by the contested decision; and

— order the Commission to pay the costs relating to the proceedings at first instance and on appeal.

19 The Commission contends that the Court should dismiss the appeal and order the appellants to pay the costs.

The appeal

20 In support of their appeal, the appellants put forward three grounds of appeal. The first ground of appeal alleges an infringement of Article 261 TFEU and of Article 31 of Regulation No 1/2003, as well as an infringement of the system of division of powers and the institutional balance. The second ground of appeal alleges an infringement of the principle of proportionality and the principle of equal treatment. The third ground of appeal alleges an infringement of the right to effective judicial protection.

21 Under Article 181 of the Rules of Procedure of the Court of Justice, where the appeal is, in whole or in part, manifestly inadmissible or manifestly unfounded, the Court may at any time, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide by reasoned order to dismiss that appeal in whole or in part.

22 It is appropriate to apply that provision in the present case.

The first ground of appeal

Arguments of the parties

23 By the first part of the first ground of appeal, the appellants submit that the General Court disregarded the bounds of its unlimited jurisdiction since it did not confine its role to reviewing the contested decision by cancelling, reducing or increasing the amount of the fine, but delivered an independent decision imposing a fine which, as regards their ability to pay, is based on new facts that occurred subsequent to the contested decision and the letter of 14 February 2011.

24 Consequently, the General Court, as set out in the operative part of the judgment under appeal, 'ordered' the appellants to pay a fine. Similarly, in paragraph 302 of the judgment under appeal, the General Court indicated that the amount of the fine is the consequence of its own decision at the point in time at which that decision is delivered.

25 In doing so, the appellants claim, the General Court infringed the system of the division of powers and the institutional balance, as well as the right to effective judicial protection, by putting itself in the place of the Commission. Having varied the contested decision by its annulment in so far as it imposed a fine, the General Court should have found that it was not necessary to modify the amount of the fine.

26 By the second part of the first ground of appeal, the appellants take issue with the General Court for having held, in paragraphs 109, 302 and 335 of the judgment under appeal, that, in order to assess an undertaking's ability to pay within the context of the exercise of its unlimited jurisdiction, account must be taken, in principle, of the legal and factual situation prevailing on the date on which it makes its determination. In doing so, they contend, the General Court departed from its own case-law, in particular, the judgment of 14 May 2014 in *Donau Chemie* v *Commission* (T-406/09, EU:T:2014:254).

27 Although the General Court was correct to take account of any increased ability to pay on the part of any of the undertakings subsequent to the annulment of the initial fine, the appellants argue that this had a dissuasive effect for them, incompatible with the principle of the rule of law and an infringement of the principle of judicial self-restraint in relation to the administrative authorities, which are better placed to assess the facts. In any case, the taking into account of facts subsequent to the adoption of the decision imposing a fine should be excluded where, as in the present case, that decision has been annulled precisely because it imposes a fine. If the contested decision had been lawful, the General Court would not have had to review it under its unlimited jurisdiction.

28 The Commission argues that both parts of the first ground of appeal are unfounded.

Findings of the Court

29 By the two parts of the first ground of appeal, which should be examined together, the appellants submit, in essence, that the General Court erred in law in so far as it imposed a new fine itself by taking account of matters subsequent to the adoption of the contested decision.

30 It should be noted that the system of judicial review of Commission decisions relating to proceedings under Articles 101 TFEU and 102 TFEU consists in a review of the legality of the acts of the institutions for which provision is made in Article 263 TFEU, which may be supplemented, pursuant to Article 261 TFEU and Article 31 of Regulation No 1/2003, and at the request of the appellants, by the General Court's exercise of unlimited jurisdiction with regard to the penalties imposed in that regard by the Commission (see, inter alia, judgments of 10 July 2014 in *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 42, and of 21 January 2016 in *Galp Energía España and Others* v *Commission*, C-603/13 P, EU:C:2016:38, paragraph 71).

31 When they exercise their unlimited jurisdiction, the EU Courts are empowered, in addition to the mere review of the legality of the penalty, to substitute their own assessment in relation to the determination of the amount of that penalty for that of the Commission, which adopted the measure in which that amount was initially fixed (see, inter alia, judgment of 21 January 2016 in *Galp Energía España and Others* v *Commission*, C-603/13 P, EU:C:2016:38, paragraph 75).

32 Consequently, the EU Courts can vary the contested measure, even without annulling it (judgment of 3 September 2009 in *Prym and Prym Consumer* v *Commission*, C-534/07 P, EU:C:2009:505, paragraph 86), in order to cancel, reduce or increase the amount of the fine imposed (see, inter alia, judgments of 26 September 2013 in *Alliance One International* v *Commission*, C-679/11 P, not published, EU:C:2013:606, paragraph 104, and of 22 October 2015 in *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 74).

33 That jurisdiction is exercised by taking account of all the factual circumstances (judgments of in *Prym and Prym Consumer* v *Commission*, C-534/07 P, EU:C:2009:505, paragraph 86, and of 26 September 2013 in *Alliance One International* v *Commission*, C-679/11 P, not published, EU:C:2013:606, paragraph 104).

34 It follows that the EU Courts are empowered to exercise their unlimited jurisdiction where the question of the amount of the fine is put before them (judgments of 8 February 2007 in *Groupe Danone* v *Commission*, C-3/06 P, EU:C:2007:88, paragraph 62, and of 26 September 2013 in *Alliance One International* v *Commission*, C-679/11 P, not published, EU:C:2013:606, paragraph 105), and the exercise of that jurisdiction removes the final transfer to the latter of the power to impose penalties (see, to that effect, judgment of 15 October 2002 in *Limburgse Vinyl Maatschappij and Others* v *Commission*, 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, EU:C:2002:582, paragraph 693).

35 In the present case, in the course of its review of the lawfulness of the contested decision, the General Court, after rejecting the first to fourth, as well as the seventh and eighth, pleas in law raised by the appellants, took the view, in paragraphs 285 to 332 of the judgment under appeal, that the Commission had erred in its assessment of the appellants' ability to pay within the meaning of Article 35 of the 2006 Guidelines, and that those errors were capable of leading to the annulment of, first, the contested decision, in so far as it imposed a fine on the appellants, and, second, the letter of 14 February 2011.

36 Following that legality review, the General Court found that it was justified in exercising, in the present case, its unlimited jurisdiction. Applying the 2006 Guidelines, in paragraphs 333 to 358 of the judgment under appeal, it found, on the basis of the evidence adduced by the parties in respect of the financial situation of the appellants, such as it had evolved subsequent to the adoption of the contested decision, that the appellants were not justified in submitting that a reduction of the fine should be granted to them by reason of their inability to pay, on grounds analogous to those set out in Point 35 of those guidelines, and that, consequently, the appellants should be ordered to pay a fine identical in amount to that of the fine imposed in the contested decision.

37 In doing so, the General Court did not in any way exceed the bounds of its unlimited jurisdiction.

38 Although, admittedly, the General Court's exercise of its review of the legality of the contested decision led, in the present case, to the annulment of that decision in so far as a fine was imposed on the appellants by the Commission, that circumstance does not in any way mean, contrary to what the appellants argue, that the General Court had, for that reason, no power to exercise its unlimited jurisdiction. In fact, the General Court remained fully seised of the matter of the assessment of the amount of the fine since the appellants had claimed in their appeal for a reduction of that amount, in particular because of their inability to pay within the meaning of Point 35 of the 2006 Guidelines.

39 Exercising its unlimited jurisdiction, the General Court therefore only had the power to sanction the appellants and, therefore, was empowered, on the basis of the evidence submitted by the parties and in compliance with the principle *audi alteram partem*, to vary the amount of the fine that had been imposed on the appellants by the contested decision.

40 As the General Court therefore properly substituted its assessment for that of the Commission as regards the exercise of the power to sanction, the fact that it ultimately considered it appropriate to maintain the same amount of fine as that which has been fixed in the contested decision does not affect the propriety of that exercise of power (see, by analogy, judgment of 3 September 2009 in *Prym and Prym Consumer* v *Commission*, C-534/07 P, EU:C:2009:505, paragraph 88).

41 The same holds good with regard to the use of the word 'order' in paragraph 358 and in the operative part of the judgment under appeal. It is made clear to the requisite legal standard in the grounds of that judgment that the General Court exercised its unlimited jurisdiction in order to adjust the amount of the fine imposed by the Commission in the contested decision.

42 As regards the taking into account by the General Court of factors post-dating the adoption of the contested decision and the letter of 14 February 2011, it must be recalled that, in the present case, the adjustment of the fine results from the General Court's exercise of its unlimited jurisdiction.

43 In that context, the EU Courts are entitled to take into account, in order to complete the exercise of their review as to legality, all the factual circumstances which they consider to be relevant, whether they be prior to or subsequent to the contested decision (see, to that effect, judgments of 6 March 1974 in *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission*, 6/73 and 7/73, EU:C:1974:18, paragraphs 51 and 52; of 22 January 2013 in *Commission* v *Tomkins*, C-286/11 P, EU:C:2013:29, paragraph 49; of 26 September 2013 in *Alliance One International* v *Commission*, C-679/11 P, not published, EU:C:2013:606, paragraph 107; and of 17 September 2015 in *Total* v *Commission*, C-597/13 P, EU:C:2015:613, paragraph 41).

44 The respect for the principle of effective judicial protection, which is a general principle of EU law now expressed in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), provides that the EU Courts may, in the exercise of their unlimited jurisdiction, consider all the questions of fact and law that are relevant to the case before them (see, to that effect, judgment of 18 July 2013 in *Schindler Holding and Others* v *Commission*, C-501/11 P, EU:C:2013:522, paragraphs 35 and 36).

45 This applies *a fortiori* where, as in the present case, the exercise of unlimited jurisdiction relates to the assessment of the ability to pay on the part of the undertaking concerned. If the EU Courts were unable to assess that capacity by taking into account the prevailing factual situation at the time at which they give their ruling, they could be required to refuse or to grant a reduction or a cancellation of a fine owed or not owed, in such a way as to cause a disadvantage or provide an unfair competitive advantage for that undertaking.

46 According to settled case-law, an undertaking's ability to pay can be relevant only in a specific social context, namely the consequences which payment of the fine could have, in particular, by leading to an increase in unemployment or a deterioration in the economic sectors upstream and downstream of the undertaking concerned (see, inter alia, judgment of 29 June 2006 in *SGL Carbon* v *Commission*, C-308/04 P, EU:C:2006:433, paragraph 106).

47 As the General Court correctly held in paragraph 302 of the judgment under appeal, that situation must apply *a fortiori* where, as in the present case, the appellants had, by virtue of the interim order, been granted suspension of the operation of the Commission's decision imposing a fine, pending delivery of the judgment under appeal.

48 Consequently, the first ground of appeal must be rejected as being manifestly unfounded.

The second ground of appeal

The first part of the second ground of appeal

– Arguments of the parties

49 By the first part of the second ground of appeal, the appellants argue that the General Court did not take into account, in breach of the principle of equal treatment and the principle of proportionality and contrary to what it indicated in paragraph 333 of the judgment under appeal, all the relevant circumstances for the purpose of calculating the fine, as is provided for in Point 35 of the 2006 Guidelines. In particular, the General Court misinterpreted the Commission Information Note of 12 June 2010 entitled 'Inability to pay under Point 35 of the 2006 Guidelines of 1/09/2006 relating to the calculation of fines imposed pursuant to Regulation No 1/2003' (SEC(2010) 737/2), according to which the taking into account of an undertaking's inability to pay may be performed either by the reduction of the fine to an amount that the undertaking is able to pay, or by payment of the fine by instalments over a period of three to five years. However, in the present case, the duration of the period for payment of the fine imposed by the General Court would, taking into account the payment plan currently negotiated with the Commission and the payments already effected pursuant to the decision of the judge hearing the application for interim relief, be around 15 or 20 years.

50 Therefore, according to the administrative practice in force, where the conditions set out in Point 35 of the 2006 Guidelines have been met, the Commission would reduce, in principle, the fine to the amount that the undertaking concerned is able to settle at the at the time that it adopted its decision.

51 In any event, even if the General Court had found it appropriate to adopt a hybrid solution combining a reduction of the fine imposed and payment of that fine in instalments, it would have been necessary, in order for the fine to remain appropriate, to reduce the overall amount of the fine to a maximum amount of EUR 20 million, corresponding to the amount of EUR 2 million already paid pursuant to the decision of the judge hearing the application for interim relief and the 60 monthly payments of EUR 300 000 payable over a period of no more than five years.

52 The Commission argues that this first part of the second ground of appeal is irrelevant.

– Findings of the Court

53 It must be held at the outset that the argument of the appellants, whereby they take issue with the General Court for having imposed a fine on them, the payment of which in instalments covers an excessively long period of time, is based on a misreading of the judgment under appeal since the General Court neither envisaged nor, *a fortiori*, imposed payment of the fine in instalments.

54 In that regard, it must be recalled that, according to the decision of the judge hearing the application for interim relief, the payment of the fine in instalments, to which it made the suspension of the obligation to providing a bank guarantee subject, expired on the date on which the judgment under appeal was delivered. In reality, it appears that the alleged duration of the period for payment of the fine stems from a payment plan negotiated by the appellants themselves with the Commission subsequent to the delivery of that judgment.

55 For the remainder, in so far as the appellants criticise the General Court for not granting them a reduction of the fine, suffice it to state that their argument seeks to have the Court of Justice reassess the facts in so far as they relate to their ability to pay, something which, save where the facts or

evidence are distorted, which has not been alleged in the presence case, falls outside the jurisdiction of the Court of Justice in appeal proceedings (judgment of 20 January 2016 in *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, paragraph 40).

56 As regards the Commission's previous decision-making practice, it must be noted that this does not serve as a legal framework for fines imposed in competition matters and that decisions in other cases can provide only an indication for the purpose of determining whether there is discrimination (judgment of 10 July 2014 in *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 189).

57 Consequently, the first part of the second ground of appeal must be rejected as being in part manifestly inadmissible and in part manifestly unfounded.

The second part of the second ground of appeal

– Arguments of the parties

58 By the second part of the second ground of appeal, the appellants submit that the General Court, in the exercise of its unlimited jurisdiction, discriminated against them in relation to other undertakings which obtained a reduction of the fine under Point 35 of the 2006 Guidelines since none of those other undertakings was ordered to make payment in instalments over as long a period.

59 Furthermore, they argue, the General Court also infringed the principle of equal treatment in that it assessed the appellants' ability to pay at the time of the judgment under appeal, whereas it assessed the other undertakings' ability to pay at the time when the contested decision was adopted.

60 First, all the addressees of the contested decision were in a comparable situation when they lodged their request for a fine reduction in that regard. Had the Commission correctly assessed their ability to pay, it would have reduced the fine imposed on the appellants and the appellants would not have had to bring an action leading to a new finding being pronounced on a different date by the General Court. The alleged unequal treatment is, they argue, even more evident in view of the fact that, on that date, the General Court did not establish whether there had been an improvement in the economic situation of the undertakings that had obtained a fine reduction.

61 Second, they contend, the rejection of the requests for a fine reduction submitted by the appellants in itself amounted to unequal treatment which persisted due to the judgment under appeal, since they had to challenge the Commission's argument that the interest due on the fine imposed by the General Court ran from the date laid down in the contested decision, even though it had not been established that the conditions set out in Point 35 of the 2006 Guidelines had not been satisfied on that date.

62 The Commission submits that this second part of the second ground of appeal is unfounded.

– Findings of the Court

63 The principle of equal treatment is a general principle of EU law, enshrined in Articles 20 and 21 of the Charter. According to settled case-law, that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, inter alia, judgment of 12 November 2014 in *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363, paragraph 51).

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

65 In the present case, however, in so far as the appellants criticise the General Court for having imposed discriminatory payment periods on them, their argument must be rejected as completely unfounded for the same reasons as those set out in paragraphs 53 and 54 above.

66 Moreover, it must be held that the General Court was right to hold, in paragraph 356 of the judgment under appeal, that the taking into account of facts subsequent to the contested decision in order to assess the appellants' ability to pay in the context of the exercise of its unlimited jurisdiction does not give rise to any discrimination in comparison with the undertakings which did not bring proceedings to challenge the Commission's assessment of their ability to pay. The appellants do not find themselves in a comparable situation to those undertakings, since they brought an action before the General Court (see, to that effect, judgment of 14 September 1999 in *Commission* v *AssiDomän Kraft Products and Others*, C-310/97 P, EU:C:1999:407, paragraphs 49 to 63).

67 Consequently, the second part of the second ground of appeal must be rejected as being manifestly unfounded.

68 It follows that the second ground of appeal must be rejected.

The third ground of appeal

Arguments of the parties

69 By their third ground of appeal, the appellants criticise the General Court for having failed to carry out, in breach of the right to effective judicial protection set out in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and in Article 47 of the Charter, an independent review in the exercise of its full discretion, as it held, in paragraph 334 of the judgment under appeal, that the assessment of the appellants' ability to pay should have been made with regard to the amount of the fine imposed by the contested decision.

70 The conduct of an appropriate independent review of the fine would have required the General Court to examine in detail the determining parameters for the calculation of that fine, such as the duration and seriousness of the infringement. A review limited to errors of assessment cannot be regarded as sufficient, particularly as the exercise of its unlimited jurisdiction relates to a unilateral procedure in the context of which the General Court is called on to substitute its assessment for that of the Commission.

71 The Commission expresses doubts as to the admissibility of the third ground of appeal in so far as it seeks a review of the assessment of the facts. In any event, the Commission submits that the third ground of appeal is unfounded.

Findings of the Court

72 It is necessary from the outset to reject the doubts expressed by the Commission as regards the admissibility of the third ground of appeal since, by this ground of appeal, the appellants criticise the General Court for having committed an error of law in the exercise of its review of the contested decision.

73 As regards the merits of this plea, it is common ground that the General Court, in paragraphs 121 to 265 of the judgment under appeal, rejected, in their entirety, the first, second, third and fourth pleas in law, by which the appellants sought, in essence, to contest the infringement found by the contested decision and the amount of the fine which that decision imposed on them. In the context of the present appeal, the appellants did not put forward any argument to challenge that part of the judgment under appeal.

74 In those circumstances, it cannot be held that the General Court erred in law in holding, in paragraph 334 of the judgment under appeal, that, as there was no error of such a kind as to vitiate the contested decision with illegality, it was appropriate to assess afresh the appellants' ability to pay, in view of the amount of the fine imposed by that decision.

75 Consequently, the third ground of appeal must be rejected as being manifestly unfounded.

Costs

76 In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those Rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

77 Since the Commission had applied for costs to be awarded against Westfälische Drahtindustrie GmbH, Westfälische Drahtindustrie Verwaltungsgesellschaft mbH & Co. KG and Pampus Industriebeteiligungen GmbH & Co. KG, and since they have been unsuccessful in their appeal, those companies must be ordered to pay the costs.

On those grounds, the Court (Sixth Chamber) hereby orders:

1. **The appeal is dismissed.**

2. **Westfälische Drahtindustrie GmbH, Westfälische Drahtindustrie Verwaltungsgesellschaft mbH & Co. KG and Pampus Industriebeteiligungen GmbH & Co. KG shall pay the costs.**

[Signatures]