Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 3 September 2020[1]

Case C-563/19 P

Recylex SA,
Fonderie et Manufacture de Métaux SA,
Harz-Metall GmbH
v

European Commission

(Appeal – Agreements, decisions and concerted practices – Purchase prices for scrap lead-acid batteries – Point 26 of the 2006 Leniency Notice – Partial immunity – Applicable test – Classification for the purposes of reducing the fine – Chronological order)

1. By bringing the appeal which is the subject of this Opinion, Recylex SA, Fonderie et Manufacture de Métaux SA and Harz-Metall GmbH (together 'Recylex' or 'the appellants') seek to have set aside the judgment of 23 May 2019 in *Recylex and Others* v *Commission* ('the judgment under appeal'),[2] by which the General Court dismissed their action against the Commission Decision of 8 February 2017 relating to a proceeding under Article 101 TFEU[3] ('the decision at issue').

2. In the present appeal, the Court of Justice is asked to rule, in particular, on the interpretation of the third paragraph of point 26 of the Commission Notice on Immunity from fines and reduction of fines in cartel cases ('the 2006 Leniency Notice'),[4] which provides for partial immunity from fines – in respect of particular aspects of the infringement – for undertakings that meet certain conditions. Specifically, the Court will have to clarify the extent to which the criteria for granting undertakings the partial immunity envisaged in that provision have been changed compared to the previous version of the Leniency Notice ('the 2002 Leniency Notice'),[5] given the different wording used by the Commission compared to that of the third paragraph of point 23 of the 2002 Leniency Notice.

I. Legal framework

3. The third part of the 2006 Leniency Notice deals with reductions of fines. Section A, entitled 'Requirements to qualify for reduction of a fine', comprises points 23 to 26. Under point 23, 'undertakings disclosing their participation in an alleged cartel affecting the Community that do not meet the conditions under section II above [on immunity from fines] may be eligible to benefit from a reduction of any fine that would otherwise have been imposed'. Under point 24, 'in order to qualify, an undertaking must provide the Commission with evidence of the alleged infringement which represents

1 Original language: Italian.

2 T-222/17, EU:T:2019:356.

3 C(2017) 900 final (Case AT.40018 – Car battery recycling).

4 OJ 2006 C 298, p. 17.

5 Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

significant added value with respect to the evidence already in the Commission's possession'. Point 25 defines the concept of 'added value'. The final sentence of that point states that '… the degree of corroboration from other sources required for the evidence submitted to be relied upon against other undertakings involved in the case will have an impact on the value of that evidence, so that compelling evidence will be attributed a greater value than evidence such as statements which require corroboration if contested'.

4. The first paragraph of point 26 of the 2006 Leniency Notice reads as follows:

'The Commission will determine in any final decision adopted at the end of the administrative procedure the level of reduction an undertaking will benefit from, relative to the fine which would otherwise be imposed. For the:

– first undertaking to provide significant added value: a reduction of 30-50%,

– second undertaking to provide significant added value: a reduction of 20-30%,

– subsequent undertakings that provide significant added value: a reduction of up to 20%.'

5. According to the third paragraph of point 26 of the 2006 Leniency Notice, 'if the applicant for a reduction of a fine is the first to submit compelling evidence in the sense of point (25) which the Commission uses to establish additional facts increasing the gravity or the duration of the infringement, the Commission will not take such additional facts into account when setting any fine to be imposed on the undertaking which provided this evidence'. [6]

6. According to the third paragraph of point 23 of the 2002 Leniency Notice, '… if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these elements into account when setting any fine to be imposed on the undertaking which provided this evidence'.

II. Background to the dispute

7. The background to the dispute is described, in so far as is relevant for the purposes of the present case, in paragraphs 1 to 11 and 67 to 72 of the judgment under appeal.

8. The appellants are companies established in Belgium, France and Germany, respectively, and are active in the production of recycled lead and other products (polypropylene, zinc and special metals).

9. By the decision at issue, the Commission found that Recylex and three other undertakings – Campine NV and Campine Recycling NV (together 'Campine'), Eco-Bat Technologies Ltd, Berzelius Metall GmbH and Société de traitement chimique des métaux SAS (together 'Eco-Bat') and Johnson Controls, Inc., Johnson Controls Tolling GmbH & Co. KG and Johnson Controls Recycling GmbH (together 'JCI') – had participated, in breach of Article 101 TFEU, in a single and continuous

6 I note that a similar provision, albeit worded differently, is contained in Article 18(3) of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (OJ 2019 L 11, p. 3). That provision reads as follows: 'Member States shall ensure that if the applicant submits compelling evidence which the national competition authority uses to prove additional facts which lead to an increase in fines as compared to the fines that would otherwise have been imposed on the participants in the secret cartel, the national competition authority shall not take such additional facts into account when setting any fine to be imposed on the applicant for reduction of fines which provided this evidence.'

infringement in the sector for the purchase of scrap lead-acid car batteries used for the production of recycled lead, during the period from 23 September 2009 to 26 September 2012, which consisted in agreements and/or concerted practices concerning the coordination of prices (see Article 1 of the decision at issue).

10. The investigation was initiated following an application for immunity from fines under the 2006 Leniency Notice, submitted by JCI on 22 June 2012. On 13 September 2012, the Commission granted conditional immunity to that undertaking under point 18 of the 2006 Leniency Notice (recital 29 of the decision at issue).

11. From 26 to 28 September 2012, the Commission carried out inspections at the premises of JCI, Recylex, Eco-Bat and Campine in Belgium, France and Germany (recital 30 of the decision at issue).

12. First Eco-Bat, on 27 September 2012, and then Recylex, on 23 October 2012, applied for immunity from fines, or in the alternative, a reduction of the fine under the 2006 Leniency Notice. On 4 December 2012, Campine in turn applied for a reduction in the amount of the fine under the same notice (recital 31 of the decision at issue).

13. On 24 June 2015, the Commission initiated the administrative procedure against JCI, Recylex, Eco-Bat and Campine and sent them a statement of objections. By letter of the same date, the Commission informed Eco-Bat and Recylex of its provisional finding that the evidence they had submitted represented significant added value within the meaning of points 24 and 25 of the 2006 Leniency Notice and, accordingly, of its intention to reduce the amount of the fine to be imposed on them. The Commission also informed Campine of its intention not to apply a reduction of its fine (recital 33 of the decision at issue).

14. In the decision at issue, the Commission imposed, jointly and severally, a fine of EUR 26 739 000 on the appellants for their participation in the infringement from 23 September 2009 to 26 September 2012 (see Articles 1(1)(d) and 2(1)(d)).

15. The Commission decided on the application of the 2006 Leniency Notice to the undertakings responsible for the infringement, in recitals 384 to 411 of the decision at issue.

16. First, it granted immunity from fines to JCI under point 8(a) of the 2006 Leniency Notice, after finding that JCI's cooperation met the requirements laid down in point 12 of that notice (recitals 384 to 386 of the decision at issue).

17. Secondly, the Commission found that Eco-Bat was the first undertaking to submit evidence which represented significant added value and granted it the maximum reduction in fine of 50%, as provided for in the first indent of the first paragraph of point 26 of the 2006 Leniency Notice (recitals 387 to 393 of the decision at issue).

18. Thirdly, the Commission granted Recylex a 30% reduction of the fine under the second indent of the first paragraph of point 26 of the 2006 Leniency Notice, finding that Recylex was the second undertaking to provide evidence which represented significant added value, relating, in particular: (i) to the origins of the cartel; (ii) to various anticompetitive contacts not reported by other undertakings; (iii) to the multilateral meeting in Windhagen on 23 September 2009, which was the commencement date of the infringement; and (iv) to various telephone contacts and text messages between Recylex and its competitors (recitals 394 to 399 of the decision at issue). The Commission rejected Recylex's arguments seeking a greater reduction of the fine, in the band of 30% to 50%. In particular, while acknowledging that Recylex was the first undertaking to provide explanations regarding the Windhagen meeting, the Commission stated that that information concerned 'organisational issues' and that it had already found during the inspection at Campine 'compelling evidence' regarding the actual subject and content of that meeting (recital 401 of the decision at issue, which refers to

recitals 68 and 69). The Commission also rejected Recylex's argument that it was the first undertaking to submit evidence concerning cartel behaviour in France. In that regard, the Commission stated that it 'was already in possession of information regarding the geographical scope of the cartel, including France' (recital 402 of the decision at issue).

19. Lastly, the Commission rejected Campine's application for a reduction of the fine (recitals 404 to 411 of the decision at issue).

III. The proceedings before the General Court and the judgment under appeal

20. On 18 April 2017, Recylex brought an action under Article 263 TFEU against the decision at issue, seeking a reduction of the amount of the fine imposed on it. In support of its action, Recylex put forward six pleas in law. By the first two pleas, it alleged an error in the application of the third paragraph of point 26 of the 2006 Leniency Notice. In essence, it submitted that it should have qualified for partial immunity from fines under that provision, since it was the first to provide compelling evidence which the Commission relied on to establish the commencement date of the infringement (first plea) and the existence of the infringement in the French market (second plea). By its third plea, Recylex contested the 10% increase applied to it under point 37 of the Guidelines on the method of setting fines.[7] By its fourth plea, it claimed that the Commission had wrongly granted it a 30% reduction of the fine under the second indent of the first paragraph of point 26 of the 2006 Leniency Notice, instead of a 50% reduction under the first indent, even though it had been the first to provide compelling evidence as to the duration of the infringement and its geographic scope. The fifth plea alleged an infringement of the principle of proportionality, the principle of non-discrimination and the principle that penalties must be specific to the individual concerned. Lastly, by the sixth plea, Recylex requested the General Court to exercise its unlimited jurisdiction in order to grant it payment terms for any part of the fine still due.

21. By the judgment under appeal, the General Court dismissed the action in its entirety and ordered Recylex to pay the costs.

IV. Procedure before the Court of Justice and forms of order sought

22. By application lodged at the Registry of the Court of Justice on 23 July 2019, Recylex brought the appeal which is the subject of this Opinion.

23. By its appeal, Recylex claims that the Court should:

– set aside the judgment under appeal in so far as it upholds the fine imposed on it by the Commission by means of the decision at issue and in so far as that judgment ordered Recylex to pay the costs;

– annul the decision at issue in so far as the Commission imposed a fine of EUR 26 739 000 on Recylex;

– reduce the amount of the fine imposed on Recylex;[8] and

7 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2).

8 Recylex claims that the fine should be reduced to: EUR 5 876 512 in the event that the three grounds of appeal are upheld; EUR 17 677 434 in the event that the first ground of appeal is upheld; EUR 13 302 718 in the event that the second ground of appeal is upheld; EUR 19 099 000 in the event that only the third ground of appeal is upheld; EUR 8 227 117 in the event that the first and second grounds of appeal are upheld; EUR 12 626 738 in the event that the first and third grounds of appeal are upheld; EUR 9 501 941 in the event that the second and third grounds of appeal are upheld.

– order the Commission to pay the costs, including those relating to the proceedings before the General Court.

24. The Commission contends that the Court should dismiss the appeal and order Recylex to pay the costs.

V. Analysis

A. Preliminary observations

25. The aim of leniency programmes is to persuade undertakings implicated in a secret cartel, which by its very nature is difficult to detect and investigate, to denounce it and to cooperate with the competition authority, thereby enabling the infringement to be brought to a swift end. The idea behind such programmes is that the objective of detecting and punishing cartels, in the interests of the markets, consumers and the victims of such illegal practices, outweighs that of fining those undertakings that decide to cooperate. [9]

26. The 2006 Leniency Notice sets out the guidelines that the Commission intends to follow in dealing with leniency applications in the interests of transparency, aware of the expectations this creates for undertakings seeking to cooperate. [10] Therefore, these are rules of conduct designed to produce external effects and form rules of practice from which the Commission may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment. [11]

27. It should also be noted that the rules on leniency are an exception to the provisions of EU law prohibiting anticompetitive agreements and must, therefore, be interpreted strictly. [12]

28. Recylex relies on three grounds in support of its appeal.

29. The first and second grounds of appeal both seek to challenge the General Court's interpretation of the third paragraph of point 26 of the 2006 Leniency Notice and the application of that rule to the appellants' situation. I will, therefore, deal with those two grounds together.

30. By its third ground of appeal, Recylex submits that the General Court wrongly concluded that the Commission had not erred in failing to grant it a reduction within the band of 30% to 50%, pursuant to the first indent of the first paragraph of point 26 of the 2006 Leniency Notice.

B. The first and second grounds of appeal

31. The first ground of appeal concerns paragraphs 79 to 99 of the judgment under appeal and is divided into three parts. In the first part, Recylex argues that the General Court's reasoning is incoherent and unclear as regards the legal test for the granting of partial immunity in terms of the third paragraph of point 26 of the 2006 Leniency Notice. In the second and third parts of the first ground of appeal, Recylex alleges, respectively, a distortion of the evidence and a breach of the rules on the burden of proof, in so far as the General Court held that Campine's handwritten notes enabled the Commission to establish the existence of the anticompetitive multilateral meeting held in Windhagen on 23 September 2009.

9 See, to that effect, point 3 of the 2006 Leniency Notice.

10 See point 38 of the 2006 Leniency Notice.

11 See, by analogy, judgments of 18 May 2006, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* (C-397/03 P, EU:C:2006:328, paragraph 91), and of 8 December 2011, *Chalkor* v *Commission* (C-386/10 P, EU:C:2011:815, paragraph 60).

12 See, to that effect, judgment of 27 February 2014, *LG Display and LG Display Taiwan* v *Commission* (T-128/11, EU:T:2014:88, paragraph 167).

32. By the second ground of appeal, which is directed at paragraphs 100 to 108 of the judgment under appeal, Recylex alleges an error in the interpretation and application of the conditions for granting partial immunity in terms of the third paragraph of point 26 of the 2006 Leniency Notice, in so far as the General Court held that the Commission had correctly refused to apply that rule to the appellants on the sole ground that the Commission was already aware that the anticompetitive cartel also existed in France.

1. The first part of the first ground of appeal and the second ground of appeal: incoherent reasoning and error in the interpretation of the relevant legal test for granting partial immunity

(a) Judgment under appeal

33. In paragraphs 79 to 99 of the judgment under appeal, the General Court examined the first plea in law by which Recylex challenged the Commission's decision to refuse to grant it partial immunity in relation to the evidence Recylex submitted concerning the Windhagen meeting of 23 September 2009.

34. In paragraphs 84 and 85 of the judgment under appeal, the General Court referred, first, to the purpose of the third paragraph of point 26 of the 2006 Leniency Notice. It then clarified what had already been affirmed in the judgment of 29 February 2016, *Deutsche Bahn and Others* v *Commission* ('*Deutsche Bahn*'),[13] namely that the use of the phrase 'first to submit compelling evidence' allowed a restrictive interpretation of that provision, limiting it to cases where an undertaking that is party to a cartel provides 'new information' to the Commission. In paragraph 86 of the judgment under appeal, the General Court affirmed that the logic of partial immunity, as interpreted by the case-law relating to the third paragraph of point 23 of the 2002 Leniency Notice and, in particular, by the judgment of 23 April 2015, *LG Display and LG Display Taiwan* v *Commission* ('*LG Display*'),[14] was not changed by the wording of the third paragraph of point 26 of the 2006 Leniency Notice. In addition, the General Court ruled that the test for the application of that provision was still based on the submission of evidence concerning a 'new fact' increasing the gravity or duration of the infringement, excluding cases where an undertaking has merely provided information which strengthens the evidence of the existence of the infringement. Citing paragraph 81 of *LG Display*, the General Court also held that, where the information provided by an undertaking concerns 'facts which were not previously unknown to the Commission', the application for partial immunity under the third paragraph of point 26 of the 2006 Leniency Notice must be refused, and there is no need to compare the evidential value of the information provided with that of the information previously provided by other parties (paragraph 88 of the judgment under appeal). The assessment of the evidential value of the evidence submitted by an applicant for partial immunity is, according to the General Court, required only in circumstances in which that information concerns a new fact which increases the gravity or the duration of the infringement (paragraph 89 of the judgment under appeal).

35. On the basis of the abovementioned principles, the General Court rejected all the arguments put forward by Recylex in its first plea in law.

36. In paragraphs 100 to 108 of the judgment under appeal, the General Court examined the second plea in law by which Recylex contested the Commission's decision not to grant it partial immunity in respect of the evidence it had produced relating to the infringement in France. In paragraph 104 of the judgment under appeal, the General Court referred to the principles set out in paragraphs 82 to 89 of that judgment and, in paragraphs 105 to 107, applied those principles and dismissed the second plea in law.

13 T-267/12, not published, EU:T:2016:110, paragraph 377.

14 C-227/14 P, EU:C:2015:258, paragraph 79.

(b) Arguments of the parties

37. In the first part of its first ground of appeal, Recylex submits that the General Court's reasoning is incoherent and unclear as to the legal test applicable for the purpose of granting partial immunity referred to in the third paragraph of point 26 of the 2006 Leniency Notice. It argues that in several paragraphs of the judgment under appeal the General Court referred to a test based on the Commission's ignorance of the facts to which the evidence provided by the undertaking relates (paragraphs 88, 91 and 96) and, in others, to a test based on the Commission's ability to establish those facts on the basis of evidence provided by the undertaking (paragraphs 93 and 95).

38. In its second ground of appeal, Recylex submits that the General Court based its reasoning on a test of 'awareness' by the Commission of the facts to which the evidence provided by the undertaking applying for partial immunity relates. However, although that test had indeed been adopted in the third paragraph of point 23 of the 2002 Leniency Notice, it had no basis in the 2006 Leniency Notice.

39. According to Recylex, the applicable test on the basis of the third paragraph of point 26 of that notice is whether an undertaking is the first to provide compelling evidence enabling the Commission to demonstrate to the requisite legal standard additional facts capable of increasing the gravity or duration of the infringement. According to that provision, what matters, therefore, is not whether, when the application for partial immunity was made, the Commission already had information on the facts to which the evidence supporting that application related, but whether or not the Commission was already in a position to prove those facts to the requisite legal standard, without recourse to that evidence.

40. Contrary to the General Court's reasoning, in Recylex's view the application of the third paragraph of point 26 of the 2006 Leniency Notice requires a genuine comparison between the evidential value of the information provided by the undertaking applying for partial immunity and that of the information already in the Commission's possession. In support of its argument, Recylex refers to paragraphs 405 and 406 of *Deutsche Bahn*, as well as to the judgments of 29 February 2016, *Schenker* v *Commission*,[15] and of 17 May 2013, *MRI* v *Commission*.[16]

41. Lastly, Recylex submits that, in paragraphs 88 and 89 of the judgment under appeal, the General Court incorrectly relied on the case-law relating to the third paragraph of point 23 of the 2002 Leniency Notice, since that provision and the third paragraph of point 26 of the 2006 Leniency Notice are based on different tests for granting partial immunity.

42. The Commission notes that the objective of partial immunity – as an exception to the rule that an undertaking must be punished for the infringement of competition rules – is to expedite the cooperation of undertakings by creating a climate of uncertainty by granting less substantial reductions in fines to those who are less quick to cooperate.

43. In line with that objective, the test applicable to the granting of partial immunity under the third paragraph of point 26 of the 2006 Leniency Notice requires, according to the Commission, two conditions to be met: (i) the undertaking applying for immunity must be the first to prove facts of which the Commission was previously unaware, and (ii) those facts must enable the Commission to make new findings concerning the gravity and duration of the infringement. Pursuant to the third paragraph of point 26 of the 2006 Leniency Notice, it is, therefore, only the evidence provided by the undertaking that must be compelling, not that already in the Commission's possession.

15 T-265/12, EU:T:2016:111, paragraph 386.

16 T-154/09, EU:T:2013:260, paragraphs 117 and 127.

44. Although the wording of the third paragraph of point 26 of the 2006 Leniency Notice is not identical to that of the third paragraph of point 23 of the 2002 Leniency Notice, the new 2006 Leniency Notice did not seek, in the Commission's view, to call into question the test on which that provision was based, nor its interpretation or purpose.

45. Lastly, the Commission notes that the test considered relevant by Recylex is at odds with the objectives of the 2006 Leniency Notice. First, it would be difficult to apply in practice, since it would require a comparison of the evidential value of the information provided by an undertaking with that already held by the Commission in relation to the same fact, in order to verify whether that latter information was compelling within the meaning of point 25 of the 2006 Leniency Notice – that is to say, not requiring corroboration by other evidence. Secondly, if applied by analogy to applications for full immunity, such a test could lead to a situation in which two undertakings were simultaneously eligible for full immunity,[17] even though the purpose of the Leniency Notice is to ensure that only one undertaking can be rewarded with full immunity.

(c) Assessment

46. First, Recylex's objections to the judgment under appeal on the grounds of the coherence and clarity of the General Court's reasoning must be rejected. Paragraphs 84 to 89 of the judgment under appeal, which are the subject of that criticism, do not, in my view, present any ambiguity. It is clear from the reasons set out therein that the General Court interpreted the third paragraph of point 26 of the 2006 Leniency Notice to mean that its application is limited to the sole case where an undertaking that is party to a cartel provides 'new information' to the Commission (paragraph 85) – that is to say, it presents evidence relating to a 'new fact' (paragraph 86), 'of which the Commission had no prior knowledge' (paragraph 84). It is likewise clear from the reasoning that, according to the General Court, where that condition is not met – in other words, where the evidence adduced by the undertaking does not relate to facts previously unknown to the Commission – the application for partial immunity must be dismissed, *irrespective of any assessment of the evidential value of that evidence* (paragraph 88) and that any such assessment is not taken into account unless the undertaking has provided evidence relating to a 'new fact' (paragraph 89).

47. The General Court's examination in paragraphs 90 to 115 of the judgment under appeal, relating to the first plea in law, and in paragraphs 105 to 108, relating to the second plea in law, strictly followed the principles set out in paragraphs 84 to 89 of the judgment under appeal and the interpretation of the third paragraph of point 26 of the 2006 Leniency Notice contained in those paragraphs. In line with that interpretation, the General Court merely assessed whether, when Recylex applied for partial immunity, the Commission 'was already aware' of the anticompetitive meeting in Windhagen and of the fact that the infringement had started in autumn 2009 (first plea in law) and that the cartel also concerned France (second plea in law)[18].

17 This would be the first undertaking to have provided the Commission with information about an infringement and the second undertaking, in chronological order, to have provided the Commission with information corroborating that infringement and enabling the Commission to demonstrate it to the requisite legal standard, even though the Commission was already aware of the existence of the infringement.

18 The General Court examined 'whether the Commission *was already aware*, before Recylex's application for leniency of 23 October 2012, of the fact that an anticompetitive meeting had taken place on 23 September 2009' (paragraph 91) and after taking into consideration the various documents held by the Commission prior to that application, reached the conclusion that 'the Commission *was already aware* of the fact that an anticompetitive meeting had taken place on 23 September 2009 before it received the information provided by Recylex' (paragraph 96). Similarly, in paragraph 106 of the judgment under appeal, the General Court concluded that 'the Commission *was already aware* of the fact that the cartel covered France before Recylex's application for partial immunity'. Emphasis added.

48. The fact that, in two different sections of the judgment under appeal, referring to Campine's handwritten notes, the General Court used different terminology, finding, first, that those notes 'contain information that *established* that this was a record of anticompetitive discussions' (paragraph 93) and, secondly, that 'it was possible *to establish* from the content and meaning of the handwritten notes that the various undertakings referred to and their representatives had participated, on 23 September 2009, in an anticompetitive meeting') (paragraph 95)[19] does not call into question the foregoing.

49. Notwithstanding the fact that the use of the verb 'to establish' in paragraph 95 of the judgment under appeal does not translate exactly the expression used in French – which, although not authentic, is the language of drafting of the judgment[20] – the General Court clearly held, in paragraph 97 of that judgment, that its examination did not extend to the assessment of the evidential value of the evidence already held by the Commission before Recylex applied for leniency. In other words, the General Court did not ask whether such evidence alone enabled the Commission to substantiate to the requisite legal standard the facts to which the evidence provided by Recylex related, let alone rule on that question, as Recylex seems to think. I will return to that point later with regard to the examination of the second and third parts of the first ground of appeal.

50. In the light of the above considerations, I consider, therefore, that the first part of the first ground of appeal, in so far as it characterises the General Court's reasoning in paragraphs 79 to 99 of the judgment under appeal as incoherent and unclear, must be rejected as unfounded.

51. Some of the arguments put forward in the first part of the first ground of appeal and in the second ground of appeal contend that the General Court has misconstrued the third paragraph of point 26 of the 2006 Leniency Notice.

52. In order to examine that contention, I must begin by putting to one side the question – albeit central to the parties' opposing arguments – of the meaning to be attributed to the changes made to the rules on partial immunity in the 2006 Leniency Notice. Rather than focusing, at least initially, on the differences in the wording adopted in the two successive versions of the Leniency Notice, it seems to me preferable to begin with a literal, systematic and teleological analysis of the third paragraph of point 26 of the 2006 Leniency Notice.

53. In accordance with a literal analysis, the wording of that point identifies four conditions that must be satisfied by an undertaking's application for partial immunity.

54. The first condition concerns the timing: the undertaking must be the first to submit evidence to the Commission that qualifies for partial immunity. The same condition is set out in point 8 of the 2006 Leniency Notice as regards full immunity from fines. The time condition is crucial for a leniency programme to be effective, since it provides the incentive for undertakings to cooperate with the competition authority and to do so as soon as possible. In the absence of that condition, undertakings would be inclined to adopt a wait-and-see approach – particularly given the negative repercussions they would be exposed to by denouncing the cartel – in the hope that other participants in the cartel decide not to cooperate. However, that type of approach becomes disadvantageous where each undertaking knows that it can qualify for immunity only by denouncing the cartel before the other participants do.[21] The introduction of a time condition is also liable to foster a degree of mutual mistrust among the cartel participants, which could help expedite the dissolution or denunciation of the cartel. This applies both to the granting of full immunity from fines and, *mutatis mutandis*, in the

19 Emphasis added.

20 The French version of paragraph 95 reads as follows: 'le contenu et le sens des notes manuscrites *permettaient de savoir* que les différentes entreprises citées et leurs représentants avaient participé, le 23 septembre 2009, à une réunion anticoncurrentielle' (emphasis added).

21 See, to that effect, *LG Display* (paragraph 84) and order of 21 November 2013, *Kuwait Petroleum and Others* v *Commission* (C-581/12 P, not published, EU:C:2013:772, paragraph 20).

case of cooperation which qualifies only for partial immunity or a reduction of the fine. The condition in question means that only one undertaking – the first in chronological order to submit evidence within the meaning of the third paragraph of point 26 of the Leniency Notice – may benefit from partial immunity, just as, as the Commission rightly notes, only one undertaking may benefit from full immunity.

55. The second condition laid down in the third paragraph of point 26 of the 2006 Leniency Notice concerns the value of the evidence provided by the undertaking applying for partial immunity: this must be 'compelling evidence'. It emerges from point 25 of that notice that evidence that does not need to be corroborated if contested is to be regarded as 'compelling'. In other words, in order to qualify for partial immunity, the undertaking must submit evidence which, on its own, enables the Commission to demonstrate to the requisite legal standard the facts alleged by the undertaking. [22]

56. According to the third condition, an undertaking applying for partial immunity must submit evidence to the Commission relating to 'additional facts'. As is similarly evident in other language versions, such as the French version ('éléments de fait supplémentaires') and the Spanish version ('hechos adicionales'), that term refers to further and additional facts which serve to *complete or supplement* those already known to the Commission. [23] It should be emphasised that that condition requires the *factual basis* on which the Commission's assessment of the infringement is founded to be 'supplemented', not the evidentiary basis. [24]

57. The fourth condition concerns the ability of the facts to which the evidence submitted by the undertaking relates to increase the gravity or duration of the infringement. The cooperation provided must supplement the existing factual basis in such a way as to enable the Commission to make *new findings* [25] concerning the infringement as compared to the findings it had made previously on the basis of the information provided by other undertakings or its own investigations.

58. Those conditions are cumulative.

59. If we now consider the systemic position of the third paragraph of point 26 of the Leniency Notice, the aspect that immediately stands out is the inclusion of the rules on partial immunity in the point defining the consequences, in terms of the reduction of the fine, of the cooperation governed by point 24 of that notice. However, I do not consider, for reasons which I will explain, that that systemic position should have a decisive influence on the interpretation of the rules on partial immunity, in particular by including the cooperation that gives rise to that type of immunity within the scope of that provided for in point 24 of that notice.

60. The third paragraph of point 26 of the 2006 Leniency Notice follows a different logic to point 24 of that notice, not only regarding the eligibility conditions described above, [26] but also the means by which the undertaking's cooperation is rewarded. Although, under the first paragraph of point 26 of the 2006 Leniency Notice, the application of point 24 of that notice reduces the fine by applying percentage discounts decided on the basis of the actual contribution – in terms of quality and timing of the

22 I note that the same condition is laid down in Article 18(3) of Directive 2019/1, which requires the submission of 'compelling evidence'.

23 The Italian version of Article 18(3) of Directive 2019/1, which lays down the same condition, is more explicit than the Italian version of the third paragraph of point 26 of the 2006 Leniency Notice, in stating that the evidence submitted by the undertaking must prove 'ulteriori circostanze' ('additional facts').

24 I note, however, that in its judgment of 17 May 2013, *MRI* v *Commission* (T-154/09, EU:T:2013:260, paragraph 117), on which Recylex relies in support of its argument, the General Court interpreted that condition as meaning that the evidence provided by the undertaking must make it possible to 'establish facts in addition *to those which the Commission is in a position to establish*'. Emphasis added.

25 See, to that effect, with reference to the less explicit wording of the third paragraph of point 23 of the 2002 Leniency Notice, *LG Display*, paragraph 78. The wording of Directive 2019/1 is different from that of the third paragraph of point 26 of the 2006 Leniency Notice, merely providing that the information supplied by the undertaking must make it possible to determine 'an increase in fines as compared to the fines that would otherwise have been imposed on the participants in the secret cartel'.

26 On the different tests for granting partial immunity or a reduction of a fine under the 2002 Leniency Notice, see judgment of 27 February 2014, *LG Display and LG Display Taiwan* v *Commission* (T-128/11, EU:T:2014:88, paragraph 190).

intervention – of each undertaking, the third paragraph of point 26 of that notice requires the Commission to disregard, when determining the amount of any fine to be imposed on the undertaking, the facts on which the application for partial immunity is based and therefore, in essence, some of the illegal practices of the undertaking concerned. In that respect, the benefit of partial immunity is similar to that of full immunity, granted to the undertaking which makes a 'decisive contribution to the opening of an investigation or to the finding of an infringement'.[27]

61. The different tests for the application of partial immunity as opposed to the reductions in fines provided for in point 24 of the 2006 Leniency Notice, in conjunction with the first paragraph of point 26 of that notice, as well as the different rewards set out, reflect a *qualitative difference* in the cooperation provided by the undertaking. For an undertaking to be eligible for partial immunity, it is not sufficient for it to provide 'evidence … which represents significant added value with respect to the evidence already in the Commission's possession', which 'strengthens … the Commission's ability to prove the alleged cartel',[28] even if it is compelling within the meaning of the last sentence of point 25 of that notice. Something more is required. The Commission must, therefore, receive evidence from the undertaking revealing a different dimension of the infringement in terms of its duration or gravity.

62. If that were not the case, then apart from the nature of the facts to which the evidence relates, the scenario covered by the third paragraph of point 26 of the 2006 Leniency Notice would not differ from that provided for in points 24 and 25 of that notice, which already addresses cases in which the undertaking provides 'compelling evidence'. Moreover, any such assimilation is precluded by the absence of any explicit reference, in the third paragraph of point 26, to the evidence available to the Commission at the time of the application for partial immunity, unlike point 24, which expressly states that undertakings must provide evidence which represents significant added value 'with respect to the evidence already in the Commission's possession'.

63. Lastly, the objectives of the third paragraph of point 26 of the 2006 Leniency Notice, consist, on the one hand, in allowing the Commission to reward an undertaking that provides new evidence increasing the duration or gravity of a cartel of which the Commission was already aware and in respect of which cartel it has already granted full immunity to another participating undertaking, and, on the other, in assuring an undertaking that can no longer qualify for immunity that, if it cooperates by providing new evidence for the investigation, its contribution will not lead to an increase in the fine that would have been imposed on it had it not disclosed such evidence.[29] An undertaking that has merely improved the Commission's knowledge of a particular period or aspect of the infringement does not qualify, in the light of those objectives, for partial immunity, notwithstanding the importance and value of the documents provided in order to corroborate the evidentiary framework available to the Commission with regard to the nature, extent or mechanisms of the cartel already known to the Commission.[30]

64. In the light of the foregoing considerations, it is my belief that, according to a literal, systemic and teleological interpretation of the third paragraph of point 26 of the 2006 Notice, that provision must be interpreted as meaning that for an undertaking to be eligible for partial immunity, it is not sufficient for it to provide compelling evidence enabling the Commission to establish facts increasing the gravity or duration of the infringement, but it is also necessary that, at the time the application is submitted, those facts were not already known to the Commission, in the sense clarified below.

27 See point 4 of the 2006 Leniency Notice.

28 See points 24 and 25 of the 2006 Leniency Notice.

29 See, to that effect, with reference to the 2002 Leniency Notice, judgment of 5 October 2011, *Transcatab* v *Commission* (T-39/06, EU:T:2011:562, paragraph 381).

30 See, to that effect, with reference to the 2002 Leniency Notice, judgment of 5 October 2011, *Transcatab* v *Commission* (T-39/06, EU:T:2011:562, paragraph 382).

65. In my view, that finding is not disproved by the fact that the third paragraph of point 26 of the 2006 Leniency Notice did not use the more explicit terms contained in the third paragraph of point 23 of the 2002 Leniency Notice.

66. There is no doubt that the expression 'facts previously unknown to the Commission' is unambiguous as to the requirement for the application for partial immunity to provide the Commission with 'new information'.[31] However, it would not, in my view, be correct to infer from the mere fact that the same expression was not reproduced in the 2006 Notice that the Commission intended to remove that requirement from the conditions of eligibility for partial immunity.

67. First, as has been seen above, the wording of the third paragraph of point 26 of the 2006 Leniency Notice, although less explicit where it uses the expression 'additional facts', still lends itself to an interpretation whereby the application for partial immunity must bring to the Commission's attention additional facts that were previously unknown to it.

68. Secondly, it appears from the Commission's statements accompanying the adoption of the 2006 Leniency Notice that the test for granting partial immunity has not been changed but only clarified, particularly as regards the probative value of the evidence provided by the undertakings.[32]

69. Contrary to the appellants' arguments, it is not, therefore, possible to attribute decisive value to the comparison between the different wording used in the third paragraph of point 26 of the 2006 Leniency Notice and in the third paragraph of point 23 of the 2002 Leniency Notice.

70. On the basis of all the foregoing considerations, I have, therefore, concluded that the General Court correctly interpreted the third paragraph of point 26 of the 2006 Notice in finding that one of the conditions for its application was that the evidence adduced by the undertaking should relate to facts previously unknown to the Commission.

71. However, it should be clarified that the fact that the Commission is able to presume, on the basis of pure speculation, the facts to which the information provided by the undertaking relates, is not sufficient to exclude the benefit of partial immunity: the Commission must already have evidence, even if only circumstantial, enabling it to conclude that those facts have occurred, even if it is not yet in a position to prove them to the requisite legal standard. In such cases, the evidence provided by the undertaking does not 'establish' new evidence, but merely strengthens the Commission's ability to prove the facts to which that evidence relates and thus qualifies solely for a reduction of the fine.[33]

72. In conclusion, in order to qualify for partial immunity, the undertaking must be the first to bring to the Commission's attention facts that increase the duration or gravity of the infringement and to produce evidence enabling the Commission to establish those facts. If the Commission was already aware of those facts in the sense clarified in the preceding paragraph or if the evidence produced does not reach that standard of proof, the undertaking may, where appropriate, qualify for a reduction of the fine within the meaning of the first paragraph of point 26 of the notice on fines.

31 See *LG Display*, paragraph 79.

32 See, to that effect, the Commission's press release of 7 December 2006 (IP/06/1705). The revised Leniency Notice was adopted, inter alia, to align that notice with the objectives set out in the ECN [European Competition Network] Model Leniency Programme; see the Commission's press release of 29 September 2006 (IP/06/1288), which states that one of the changes proposed during the debate within the ECN should ensure that the Leniency Notice will 'pronounce clearly that only compelling evidence will be rewarded outside the bands for reduction of fines', available at the address https://ec.europa.eu/competition/cartels/legislation/leniency_legislation.html; see also the document Competition: Revised Leniency Notice – Frequently Asked Questions, available at the address https://ec.europa.eu/commission/presscorner/detail/en/MEMO_06_469, on the concept of compelling evidence for the purpose of granting partial immunity. On the relationship between leniency programmes adopted at national, EU and ECN level, see, in particular, judgment of 20 January 2016, *DHL Express (Italy) and DHL Global Forwarding (Italy)* (C-428/14, EU:C:2016:27).

33 In that regard, it is not precluded that partial immunity may also be granted where the Commission has evidence but is unable to interpret it in the absence of the information provided by the undertaking which applied for partial immunity. See, to that effect, Opinion of Advocate General Jääskinen in *Repsol Lubricantes y Especialidades and Others* v *Commission* (C-617/13 P, EU:C:2015:487, point 31).

73. Accordingly, Recylex's argument that it is not necessary, for the purpose of applying the third paragraph of point 26 of the 2006 Leniency Notice, for the facts covered by the application for partial immunity to be unknown to the Commission must, in my view, be rejected.[34] It follows that, contrary to what Recylex claimed in its second ground, and as the General Court correctly stated in paragraph 88 of the judgment under appeal, a comparison of the evidential value of the evidence provided by it in support of its application for partial immunity with that already in the Commission's possession at the date on which that application was submitted is not, therefore, relevant where such evidence relates to facts already known to the Commission in the sense clarified above. In that case, the application of the third paragraph of point 26 of the 2006 Notice is at all events precluded.

74. Furthermore, even if it were accepted, Recylex's interpretation of that provision remains, in my view, incorrect. Recylex maintains, in essence, that the undertaking is entitled to partial immunity whenever, at the time the application is submitted, the Commission is not already in a position to prove to the requisite legal standard the facts to which the evidence adduced in support of that application relates. However, such an interpretation, which essentially makes the refusal to grant partial immunity contingent on the Commission already being in possession of compelling evidence with regard to those facts, is neither reflected in the wording of the third paragraph of point 26 of the 2006 Leniency Notice, nor is it one of the conditions for the application of point 24. Point 24 requires the evidence provided by the undertaking to have significant added value for the Commission, strengthening its ability to prove the existence of the alleged cartel; it does not require the application for a reduction of the fine to be accepted automatically whenever the Commission is not yet in a position to prove the facts to which that evidence relates. Although it is clear that the application for a reduction of the fine may be rejected if the Commission already has sufficient evidence, in all other cases the ability of the evidence provided by the undertaking to reduce the fine depends on a case-by-case assessment of its value.

(d) Conclusions on the first part of the first ground of appeal and the second ground of appeal

75. On the basis of all of the foregoing considerations, I propose that the Court should reject the first part of the first ground of appeal.

76. By its second ground of appeal, Recylex submits, first, that the General Court misconstrued the legal test governing the application of the third paragraph of point 26 of the 2006 Leniency Notice and, secondly, that it failed to examine – using the different test that Recylex considers material – whether the evidence available to the Commission prior to Recylex's leniency application would have enabled it to prove to the requisite legal standard the existence of an infringement relating to France. In view of the considerations set out above, both those complaints, and therefore the second ground of appeal in its entirety, must be rejected.

34 Of the judgments of the General Court cited by Recylex in support of its argument, only the judgment of 17 May 2013, *MRI* v *Commission* (T-154/09, EU:T:2013:260, paragraphs 117, 127 et seq.), seems to support that argument. The judgment in *Deutsche Bahn*, cited by the General Court in paragraph 89 of the judgment under appeal, essentially adopts the same interpretation as the one proposed in this Opinion (see paragraphs 377, 381, 385 and 386). As regards paragraph 386 of the judgment of 29 February 2016, *Schenker* v *Commission* (T-265/12, EU:T:2016:111), it only paraphrases the third paragraph of point 26 of the 2006 Notice.

2. The second and third parts of the first ground of appeal: distortion of evidence and breach of the rules on the burden of proof

(a) Judgment under appeal

77. In paragraphs 91 to 96 of the judgment under appeal, which concern the second and third parts of the first ground of appeal, the General Court found that the handwritten notes taken by an employee of Campine – obtained during an inspection carried out at the premises of Campine between 26 and 28 September 2012 and read in the light of the general information on the cartel provided by JCI in its leniency application – already demonstrated the existence of an anticompetitive multilateral meeting which took place around 23 September 2009. Although those notes did not expressly state where the meeting was held and mentioned the date of 24 September 2009 rather than 23 September 2009, the General Court considered that they contained miscellaneous information from which it could be concluded that this was a record of a meeting at which the purchase price of scrap batteries had been discussed and not, as Campine argued, a record of the negotiations on the renewal of a tolling agreement between JCI and Campine. In paragraph 94 of the judgment under appeal, the General Court pointed out that it is not essential, in order to determine the commencement date of a cartel, to have information about where the first anticompetitive meeting took place. On the basis of the abovementioned factors, the General Court held that the Commission 'was already aware' that an anticompetitive meeting had taken place on 23 September 2009 before receiving the information from Recylex in its application for leniency, which instead merely strengthened the Commission's ability to prove that fact (see paragraph 96 of the judgment under appeal).

(b) Arguments of the parties

78. In the second part of the first ground of appeal, Recylex submits that the General Court manifestly distorted Campine's handwritten notes and the information provided by JCI, in so far as it considered that that evidence enabled the Commission to establish the existence of an anticompetitive multilateral meeting held on 23 September 2009 and to take that date as the commencement date of the infringement. First, Recylex submits that the information provided by JCI on 28 June 2012 makes no reference to any meeting or anticompetitive contacts that took place in September 2009 and in no way suggests that the cartel commenced at that time. Secondly, Recylex notes that Campine's handwritten notes referred to a date other than 23 September 2009 (24 September 2009), that they give no indication either of the participants at the meeting or its anticompetitive nature and, lastly, that Campine denied throughout the administrative procedure that those notes concerned anticompetitive contacts and in any case it was obliged, as a leniency applicant, to cooperate genuinely with the Commission.

79. In the third part of its first ground of appeal, Recylex submits that it is for the Commission to prove the existence of the facts constituting an infringement. Campine's handwritten notes, read in the light of the information provided by JCI on 28 June 2012, do not represent precise and consistent evidence of the existence of an infringement committed by the holding of an anticompetitive meeting in Windhagen on 23 September 2009. By concluding that those notes enabled the Commission to prove the existence of that meeting, the General Court infringed the rules on the burden of proof.

80. In the Commission's view, the arguments put forward by Recylex in its complaints referred to above are inadmissible, since they essentially require the Court to re-assess the evidence. It also contests the substance of those arguments.

(c) Assessment

81. In my view, both of Recylex's complaints are based on a misinterpretation of the judgment under appeal. Contrary to Recylex's contention, the General Court did not find, in paragraphs 93 to 97 of the judgment under appeal, that the evidence held by the Commission prior to Recylex's leniency application – namely Campine's handwritten notes and the information provided by JCI on 28 June 2012 – was sufficient proof that an anticompetitive meeting between the undertakings participating in the cartel had taken place in Windhagen on 23 September 2009.[35]

82. Instead, the General Court – as I have observed in point 49 of this Opinion – merely concluded that those documents, taken together, had enabled the Commission to *become aware* of the fact that an anticompetitive meeting had taken place on 23 September 2009. This is apparent both from the points made by the General Court in paragraphs 85 to 89 of the judgment under appeal concerning the interpretation of the third paragraph of point 26 of the 2006 Leniency Notice, applied in paragraphs 91 to 97 of that judgment,[36] and from paragraphs 96 and 97 in particular.

83. In paragraph 96 of the judgment under appeal, having analysed Campine's handwritten notes in the light of the documents provided by JCI, the General Court concluded that 'the Commission *was already aware* of the fact that an anticompetitive meeting had taken place on 23 September 2009 before it received the information provided by Recylex'.[37] Admittedly, in the same paragraph, the General Court goes on to state that the information provided by Recylex '… strengthened the Commission's ability to prove that fact'. However, I do not believe that it can be inferred from that sentence, read in particular in the light of all the grounds of which it forms part, that the General Court meant that those notes and documents were *in themselves* sufficient to demonstrate to the requisite legal standard that the meeting in question had taken place.

84. In paragraph 97 of the judgment under appeal, the General Court held that the arguments put forward by Recylex on the basis of a comparison between the evidential value of the documents supplied by Recylex and those already in the Commission's possession were ineffective. In line with the interpretation of the third paragraph of point 26 of the 2006 Leniency Notice in paragraphs 85 to 89 of the judgment under appeal, the General Court did not see fit to make such a comparison. Accordingly, it cannot have concluded, as Recylex incorrectly considers, that the evidence in the Commission's possession was sufficient in itself to prove the commencement date of the infringement, irrespective of the information provided by Recylex in its application for leniency.

(d) Conclusions on the second and third parts of the first ground of appeal and on that ground in its entirety

85. On the basis of the foregoing considerations, I consider that the second and third parts of Recylex's first ground of appeal must also be rejected, without the need to analyse whether, as Recylex claims, the General Court distorted the evidence examined. In that connection, I note that in the second part of that ground, Recylex has not denied that that evidence enabled the Commission to become aware that an anticompetitive meeting took place between the participants in the cartel on 23 September 2009, as found by the General Court, but only that the Commission was already in a position to prove that fact to the requisite legal standard before it obtained the information from Recylex.

86. In the light of all the foregoing considerations, the first ground of appeal should, in my view, be rejected in its entirety.

35 I note that the Commission also seems to share an interpretation of the judgment under appeal according to which the General Court concluded that the documents already available to the Commission at the time of Recylex's leniency application were sufficient to establish that the Windhagen meeting took place on 23 September 2009.

36 See paragraph 91 of the judgment under appeal.

37 Emphasis added.

C. The third ground of appeal: error in the application of the first paragraph of point 26 of the 2006 Leniency Notice

1. Judgment under appeal

87. The third ground of appeal is directed against paragraphs 136 to 154 of the judgment under appeal, by which the General Court dismissed Recylex's fourth plea in law. In that plea, Recylex argued that Eco-Bat, which the Commission regarded as the first undertaking to provide evidence with significant added value, had failed to fulfil its duty of cooperation with the Commission, since it had provided incomplete and misleading information with regard to the territories covered by the infringement, and should, therefore, have been excluded from the benefit provided for in the first paragraph of point 26 of the 2006 Leniency Notice. Recylex argued that, further to the exclusion of Eco-Bat, it should have taken the place of Eco-Bat and qualified for the maximum reduction of the fine of 50% pursuant to the first indent of the first paragraph of point 26 of the 2006 Leniency Notice.

88. Without examining Recylex's arguments regarding Eco-Bat's cooperation, the General Court answered in the negative the question whether, where two undertakings have both provided evidence of significant added value, the undertaking that provided the evidence second could take the place of the first undertaking if it transpired that the latter's cooperation did not meet the requirements of point 12 of the 2006 Leniency Notice.[38] On the basis of a restrictive interpretation of the rules on leniency, the General Court held, at paragraphs 147 to 150 of the judgment under appeal, that it was not apparent from the wording of that notice, let alone from its logic, that a failure to comply with the duty to cooperate affects the chronological order of arrival assigned to leniency applications.

89. Consequently, the General Court held that the Commission had not erred in refusing to grant Recylex a reduction of the fine within the band of 30% to 50%.

2. Arguments of the parties

90. Recylex submits that the General Court incorrectly applied the 2006 Leniency Notice and erred in law by concluding that, even if Eco-Bat's cooperation had not met the conditions laid down in point 12 of that notice, Recylex could not have taken its place in the scale for the reduction of fines referred to in the first paragraph of point 26 of that notice. According to Recylex, it follows from the wording, structure and objectives of the 2006 Leniency Notice that an undertaking whose cooperation does not meet the conditions laid down in point 12 of that notice must be disregarded for the purposes of the classification provided for in the first paragraph of point 26 of that notice and that the question of its ranking within that classification does not arise. Contrary to what the General Court stated, such an approach would in no way weaken the incentive for undertakings to cooperate with the Commission as quickly as possible, but instead would encourage them to cooperate genuinely, fully and expeditiously.

91. The Commission contends that the third ground of appeal is unfounded. Even if Eco-Bat had failed to comply with its duty to cooperate, this would only disqualify it from the benefit of the reduction of its fine, without bringing any benefit to Recylex, which could not take the place of Eco-Bat since it does not in any event fulfil the condition of being the 'first' undertaking to have provided evidence with significant added value. In the Commission's view, the interpretation proposed by Recylex is at odds with the objective of the 2006 Leniency Notice, since not only would it not increase the incentive for members of an anticompetitive cartel to cooperate as quickly as possible with the Commission, but could even lead to a hypothetical situation where two companies qualify for a reduction of their fine within the same band.

38 See paragraphs 141 and 150 of the judgment under appeal.

3. Assessment

92. In order to qualify for a reduction of a fine within the meaning of point 24 of the 2006 Leniency Notice, an undertaking must provide the Commission with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the Commission's possession.

93. The last sentence of that point provides that the undertaking must also meet the cumulative conditions set out in points 12(a), (b) and (c) of that notice. It must cooperate 'genuinely, fully, on a continuous basis and expeditiously from the time it submits its application throughout the Commission's administrative procedure' (point 12(a)), must 'have ended its involvement in the alleged cartel immediately following its application' (point 12(b)), and, when contemplating its application for leniency, must not 'have destroyed, falsified or concealed evidence … nor disclosed the fact or any of the content of its contemplated application' (point 12(c)). According to the second paragraph of point 30 of the 2006 Leniency Notice, if the Commission finds that the undertaking has not met the conditions set out in point 12 of that notice, the undertaking 'will not benefit from any favourable treatment'.

94. Point 24 of the 2006 Leniency Notice therefore lays down, on the one hand, the substantive requirement in order to qualify for a reduction of the fine – that is, the submission to the Commission of evidence with particular evidential value – and, on the other, requires certain conditions to be met which can be described as based on merit and which pertain to the undertaking's conduct both before and after the submission of the application for a reduction of the fine. If the first condition is not met, the undertaking does not qualify for a reduction of the fine, in accordance with point 29 of that notice, whereas if the second set of conditions are not met, the undertaking, while qualifying for the reduction, will not benefit from any favourable treatment under the second paragraph of point 30.

95. Point 26 of the 2006 Leniency Notice lays down the criteria for determining the level of reduction of the fine to be granted to an undertaking qualifying for such a reduction and fulfilling the conditions based on merit set out in point 12.

96. In that regard, it is important to note that, in the system of that notice, the reduction of the fine to which the individual undertaking may be entitled is defined initially within a band according to the timing, and it is only subsequently that the actual reduction of the fine within that band is determined on the basis of the added value of the evidence provided. [39]

97. That approach reinforces the timing aspect as an incentive for cooperation. The importance of this for the effectiveness of a leniency programme has been discussed above. [40] The undertakings know that they will only qualify for the maximum reduction by cooperating before the others do, irrespective of the actual added value of the evidence provided; this will only be assessed at a second stage in order to determine the amount of the reduction within the band allocated.

98. It follows that the timing of the cooperation and, therefore, the chronological order in which applications for a reduction of the fine are submitted takes on fundamental importance in the system of the 2006 Leniency Notice. [41]

39 See first and second paragraphs of point 26 of the 2006 Leniency Notice.

40 See point 54 above.

41 See, to that effect, as regards the 2002 Leniency Notice, judgment of 5 October 2011, *Transcatab* v *Commission* (T-39/06, EU:T:2011:562, paragraphs 378 to 380).

99. Consequently, accepting Recylex's argument would mean not only disregarding the wording of the first paragraph of point 26 of the 2006 Leniency Notice, which sets the bands for the reduction of fines solely according to the chronological order in which applications are lodged, but would also run counter to the very system of that notice.

100. As the Commission correctly contends, even if Eco-Bat had not met the abovementioned conditions based on merit, thereby forfeiting any favourable treatment, Recylex would still be ineligible for the reduction band provided for in the first indent of that point for the simple reason that it was not the first undertaking to submit evidence with significant added value and so did not meet the conditions laid down in the first indent of the first paragraph of point 26 of the 2006 Leniency Notice.

101. Losing the benefit of the reduction of the fine for failing to meet the conditions set out in point 12 of the 2006 Leniency Notice does not amount to a finding that the substantive requirement laid down in point 24 of that notice has not been met, and so cannot benefit the other participants in the Commission's leniency programme who applied later, by calling into question the chronological order of applications on which the determination of the reduction bands is based under the first paragraph of point 26 of that notice. [42]

102. On the basis of the foregoing considerations, I consider, therefore, that Recylex's third ground of appeal must also be rejected as unfounded.

VI. Interim conclusions

103. In the light of all the foregoing considerations, I am of the view that all the grounds of appeal advanced by Recylex must be rejected and the appeal dismissed in its entirety.

VII. Costs

104. In accordance with Article 184(2) of the Rules of Procedure of the Court, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 137(1) of the Rules of Procedure of the Court of Justice, applicable to appeal proceedings by virtue of Article 184(1) 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.

105. Since I propose that the Court should dismiss the appeal and the Commission has applied for costs, the appellants must, in my view, be ordered to pay the costs.

VIII. Conclusion

106. On the basis of all the foregoing considerations, I propose that the Court should:

– dismiss the appeal;

42 As the Commission observes, *mutatis mutandis*, a similar – and, I believe, valid – interpretation was accepted by the General Court as regards point 8(a) of the 2002 Leniency Notice, concerning full immunity from the fine in the judgment of 16 September 2013, *Repsol Lubricantes y Especialidades and Others* v *Commission* (T-496/07, not published, EU:T:2013:464, paragraphs 325 to 336). The General Court emphasised in particular the chronological presentation of the facts as established in the decision challenged in the action which gave rise to that judgment and the applicant's inability to contest the merits of such a presentation (see paragraphs 329 to 333). On the basis of those considerations, it concluded that the applicant could not, in any event, have claimed immunity from the fine, even if the first undertaking to denounce the cartel had forfeited that benefit because the conditions laid down in point 11(a) of the 2002 Leniency Notice had not been met (see paragraphs 335 and 336 of the judgment).

– order the appellants to pay the costs.