Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

7 September 2016*

(Appeal — Agreements, decisions and concerted practices — Article 101 TFEU — Article 53 of the Agreement on the European Economic Area of 2 May 1992 — European market for automotive glass — Market-sharing agreements and exchanges of commercially sensitive information — Fines — 2006 Guidelines on the method of setting fines — Point 13 — Value of sales — Regulation (EC) No 1/2003 — Second subparagraph of Article 23(2) — Statutory ceiling of the fine — Exchange rate for the calculation of the ceiling of the fine — Amount of the fine — Unlimited jurisdiction — Mono-product undertakings — Proportionality — Equal treatment)

In Case C-101/15 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 27 February 2015,

Pilkington Group Ltd, established in Lathom (United Kingdom),

Pilkington Automotive Ltd, established in Lathom,

Pilkington Automotive Deutschland GmbH, established in Witten (Germany),

Pilkington Holding GmbH, established in Gelsenkirchen (Germany),

Pilkington Italia SpA, established in San Salvo (Italy),

represented by S. Wisking and K. Fountoukakos-Kyriakakos, Solicitors, and by C. Puech Baron, avocat,

appellants,

the other party to the proceedings being:

European Commission, represented by A. Biolan, M. Kellerbauer and H. Leupold, acting as Agents,

defendant at first instance,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Lycourgos, E. Juhász, C. Vajda and K. Jürimäe (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

* Language of the case: English.

having regard to the written procedure and further to the hearing on 2 March 2016,

after hearing the Opinion of the Advocate General at the sitting on 14 April 2016,

gives the following

Judgment

1 By their appeal, Pilkington Group Ltd, Pilkington Automotive Ltd, Pilkington Automotive Deutschland GmbH, Pilkington Holding GmbH and Pilkington Italia SpA ('the appellants') ask the Court to set aside the judgment of the General Court of the European Union of 17 December 2014, *Pilkington Group and Others* v *Commission* (T-72/09, not published, EU:T:2014:1094) ('the judgment under appeal'), by which the latter dismissed their action, primarily, for annulment of Commission Decision C(2008) 6815 final of 12 November 2008 relating to a proceeding pursuant to Article [81 EC] and Article 53 of the EEA Agreement (COMP/39.125 — Carglass), as amended by Commission Decision C(2009) 863 final of 11 February 2009 and by Commission Decision C(2013) 1119 final of 28 February 2013 ('the decision at issue'), in so far as it concerns the appellants, and, in the alternative, for annulment of Article 2 of that decision in that it imposes a fine on the appellants, or, in the further alternative, for a reduction of that fine.

Legal context

Regulation (EC) No 1/2003

2 Under the heading 'Fines', 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 [81 EC and 82 EC] (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 [Articles 81 EC or 82 EC]; …

…

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

…'

The 2006 Guidelines

3 Points 4 to 6, 13 and 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') state as follows:

'4. … Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles [81 EC and 82 EC] (general deterrence).

5. In order to achieve these objectives, it is appropriate for the Commission to refer to the value of the sales of goods or services to which the infringement relates as a basis for setting the fine. The duration of the infringement should also play a significant role in the setting of the appropriate amount of the fine. …

6. The combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement. …

…

13. In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates [such will be the case for instance for horizontal price fixing arrangements on a given product, where the price of that product then serves as a basis for the price of lower or higher quality products)] in the relevant geographic area within the [European Economic Area (EEA)]. …

…

35. 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 and the decision at issue

4 As is apparent from paragraphs 1 to 12 and 36 of the judgment under appeal, the Commission, in the decision at issue, found that a number of undertakings, including the appellants, had participated in a single and continuous infringement of Article 81(1) EC, consisting in the concerted allocation, in the automotive glass sector, of contracts concerning the supply of carglass pieces and/or carsets, generally consisting of a windscreen, sidelights and backlights, to the major car manufacturers in the EEA. With regard to the appellants, the Commission found that there had been an infringement over the period from 10 March 1998 to 3 September 2002 and for that reason imposed on them, jointly and severally, a fine of EUR 370 million (Article 2(c) of the decision at issue).

5 On 28 February 2013, the Commission adopted Decision C(2013) 1119 final, amending Decision C(2008) 6815 final with respect to, inter alia, the calculation of the fine imposed on the appellants. By that decision, the Commission essentially sought to correct two errors which it believed it had made in that calculation. As a result of that decision, the new amount of the fine imposed on the appellants was set at EUR 357 million instead of the original amount of EUR 370 million.

The procedure before the General Court and the judgment under appeal

6 By application lodged at the Registry of the General Court on 18 February 2009, as modified by a letter received at the Registry of the General Court on 15 March 2013, the appellants lodged an application for annulment of the decision at issue, raising six pleas in law in support. Only the third, fifth and sixth pleas in law, relating to the calculation of the fine imposed on the appellants, are relevant for the purposes of the present appeal. The appellants also requested the General Court, independently of those grounds of annulment, where applicable, to exercise its unlimited jurisdiction by reducing the fine imposed on them.

7 By the judgment under appeal, the General Court dismissed the action in its entirety.

Forms of order sought by the parties to the appeal

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

— set aside the judgment under appeal, to the extent that it dismisses the action brought against Article 2(c) of the decision at issue;

— reduce the fine imposed on them in Article 2(c) of the decision at issue; and

— order the Commission to pay the costs.

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

The appeal

10 The appellants put forward three grounds in support of their appeal.

The first ground of appeal, alleging an error of law in the interpretation of point 13 of the 2006 Guidelines

Arguments of the parties

11 By their first ground of appeal, directed against paragraphs 217 to 227 of the judgment under appeal, the appellants criticise the General Court for finding that the Commission was fully entitled, when determining the basic amount of the fine imposed on them, to take into account sales made pursuant to contracts that pre-dated the infringement period and that were not renegotiated during the infringement period ('the sales at issue').

12 The appellants submit that the General Court thus relied on an incorrect interpretation of the concept of 'the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates' within the meaning of point 13 of the 2006 Guidelines. According to the appellants, this concept does not entitle the Commission to take into account the sales at issue, in so far as it is obvious, in the appellants' opinion, that these could not in any way have formed part of the infringement, even though the objective of the latter was the overall stabilisation of the infringement market. Therefore, the appellants claim that taking those sales into account does not serve as an 'appropriate proxy', within the meaning of point 6 of the 2006 Guidelines, because it overestimates the economic importance of the infringement, the relative weight of the undertaking that achieved such sales in the context of the infringement, and the harm caused by the infringement.

13 The appellants emphasise that none of the reasons given by the General Court in paragraph 225 of the judgment under appeal, relating to the mode of operation of the infringement and the objective which it pursues, can prove that the sales at issue formed part of the infringement.

14 The Commission contends that the appellants' arguments should be rejected as unfounded.

Findings of the Court

15 By their first ground of appeal, the appellants submit, in essence, that the General Court erred in law in finding that, under 'the undertaking's sales of goods or services to which the infringement directly or indirectly relates', within the meaning of point 13 of the 2006 Guidelines, the Commission could include the sales at issue in the sales to be taken into account when determining the amount of the fine imposed on them.

16 With regard to the imposition of a fine pursuant to Article 23(2) of Regulation No 1/2003, the Court has held that the Commission must assess, in each specific case and having regard to both the context and the objectives pursued by the scheme of penalties created by that regulation, the intended impact on the undertaking concerned, in particular by taking into account a turnover which reflects the undertaking's real economic situation during the period in which the infringement was committed (judgment of 9 July 2015, *InnoLux* v *Commission*, C-231/14 P, EU:C:2015:451, paragraph 46 and the case-law cited).

17 In that context, it is permissible, for the purpose of setting the amount of the fine, to have regard both to the overall turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of its size and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement (judgment of 9 July 2015 in *InnoLux* v *Commission*, C-231/14 P, EU:C:2015:451, paragraph 47 and the case-law cited).

18 As provided in point 13 of the 2006 Guidelines: 'in determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly ... relates in the relevant geographic area within the EEA'. In the introductory section of the 2006 Guidelines, point 6 specifies that 'the combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement'.

19 It follows that point 13 of the 2006 Guidelines pursues the objective of adopting, as the starting point for the calculation of the fine imposed on an undertaking, an amount which reflects the economic significance of the infringement and the size of the undertaking's contribution to it. Consequently, while the concept of the 'value of sales' referred to in point 13 of the Guidelines admittedly cannot extend to encompassing sales made by the undertaking in question which do not come within the scope of the alleged cartel, it would, however, be contrary to the goal pursued by that provision if that concept were to be understood as applying only to turnover achieved by the sales in respect of which it is established that they were actually affected by that cartel (judgments of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 76, and of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363, paragraph 57).

20 However, while, as the appellants argue, the sales at issue were made pursuant to contracts which pre-date the infringement period, the fact remains that the General Court was correct in finding, in paragraph 226 of the judgment under appeal, that the Commission was entitled to include those sales in the value of the sales calculated in accordance with point 13 of the 2006 Guidelines, for the purpose of determining the basic amount of the fine, on the same basis as the sales made pursuant to supply contracts concluded during the infringement period but which were not shown to have specifically been the subject of collusion.

21 As is apparent from paragraphs 222 to 225 of the judgment under appeal, the General Court approved the method of calculation used by the Commission, by examining the grounds relating to the mode of operation of the infringement and its objectives, which formed the basis for that institution's finding that taking the sales at issue into account was justified in so far as those sales were capable of reflecting the economic importance of the infringement.

22 The General Court thus held, inter alia, in paragraphs 224 and 225 of the judgment under appeal, that taking the sales at issue into account was justified in view of the scope of the cartel, its mode of operation and its overall objective of stabilising market shares, with the result that it was not necessary to collude on each supply contract in order to achieve that objective. In that regard, the General Court rightly found that, in those circumstances, the need for collusion on a given supply contract depended on the allocation of supplies, the perceived need to take measures to maintain the respective market shares, and the ability of each individual contract to bring about an appreciable change in the share of the overall supplies envisaged by each cartel participant.

23 Contrary to the appellants' claims, those considerations are not irrelevant. The cartel's overall plan was to allocate supplies of automotive glass between the cartel participants, with respect to both existing supply contracts and new contracts. As is apparent from the finding of fact made by the General Court in paragraph 24 of the judgment under appeal, the allocation affected the whole activity of the cartel participants on the relevant market, which is confirmed, inter alia, by the mode of operation of the cartel, which included correcting measures which took existing supply contracts into account. It follows that the sales made pursuant to contracts predating the infringement period and not renegotiated during that period were to be regarded as falling within the scope of the cartel, for the purposes of the case-law cited in paragraph 19 above. Consequently, it must be held that, if the Commission were not entitled to include those sales in the value of the sales calculated in accordance with point 13 of the 2006 Guidelines, the amount of the resulting fine would not reflect the economic significance of the infringement. The General Court therefore did not err in law in finding that the sales at issue were covered by that infringement.

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

The second ground of appeal, alleging an error of law in the interpretation of the second subparagraph of Article 23(2) of Directive No 1/2003

Arguments of the parties

25 By their second ground of appeal, directed against paragraphs 410 to 423 of the judgment under appeal, the appellants criticise the General Court for finding that the final amount of the fine imposed on them by the Commission did not exceed the ceiling of 10% of the total turnover in the business year preceding the adoption of the decision at issue, referred to in the second subparagraph of Article 23(2) of Regulation No 1/2003 ('the statutory ceiling of the fine').

26 According to the appellants, the General Court erred in law in finding that the Commission was justified, for the purpose of converting that total turnover — which, for the appellants, is denominated in pounds sterling — in using the average exchange rate of the European Central Bank (ECB) applicable in the period between 1 April 2007 and 31 March 2008, and not the exchange rate applicable at the date on which the decision at issue was adopted, namely on 12 November 2008. In the appellants' opinion, the maximum amount that the Commission was entitled to impose on them was capped at EUR 317 547 860, that is to say, EUR 39 452 140 less than the fine ultimately imposed on them.

27 First, the appellants submit that the General Court's interpretation is not consistent with the purpose of the statutory ceiling of the fine set out in Article 23(2) of Regulation No 1/2003, which is designed to offer protection against currency fluctuations preceding the adoption of the Commission decision, in other words, the date on which the fine becomes payable.

28 In that regard, the appellants claim that the General Court wrongly relied on the case-law relating to the applicable exchange rate for the calculation of the basic amount of the fine, which, they maintain, cannot be transposed to the context of determining the statutory ceiling of the fine because, by setting that ceiling, the EU legislature pursues an objective that is distinct and autonomous by comparison with the criteria of the gravity and duration of the infringement. According to the appellants, the purpose of that ceiling is precisely to offer absolute protection against the harmful consequences of the monetary fluctuations that may occur up to the date of adoption of the Commission decision, as they claim is apparent from the case-law of the Court and, in particular, from paragraph 59 of the judgment of 16 November 2000, *Enso Española* v *Commission* (C-282/98 P, EU:C:2000:628), from paragraph 89 of the judgment of 16 November 2000, *Sarrió* v *Commission* (C-291/98 P, EU:C:2000:631), from paragraph 606 of the judgment of 15 October 2002, *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), and from paragraph 63 of the judgment of 4 September 2014, *YKK and Others* v *Commission* (C-408/12 P, EU:C:2014:2153).

29 Secondly, the appellants dispute the finding of the General Court in paragraph 418 of the judgment under appeal that undertakings have to bear the risk of currency fluctuations between the preceding business year and the date on which the Commission decision is adopted, which, they claim, entails significant costs for those undertakings. The appellants argue that that finding is not consistent with the objective of Article 23(2) of Regulation No 1/2003 and has no basis in the case-law of the Court.

30 Thirdly, according to the appellants, the approach of the General Court fails to ensure equal treatment between undertakings which keep their accounts in currencies other than the euro and those which keep their accounts in euros, since the former are exposed to the risk that the level of the statutory ceiling of the fine may vary substantially depending on currency fluctuations, while the latter are not exposed to that risk.

31 Fourthly, the appellants claim that the General Court's approach fails to ensure legal certainty, since it creates uncertainty with regard to the maximum financial risk borne by undertakings with an accounting currency other than the euro.

32 The Commission contends that this ground of appeal must be rejected as unfounded.

Findings of the Court

33 By their second ground of appeal, the appellants essentially criticise the General Court for having found that the Commission was entitled to determine the statutory ceiling of the fine by reference to the average exchange rate applicable in the business year preceding the adoption of the decision at issue, rather than by reference to the exchange rate applicable at the time when the decision was adopted. The appellants submit that, in doing so, the General Court misinterpreted the purpose of the statutory ceiling and the case-law of the Court, and failed to have regard for the principles of equal treatment and legal certainty.

34 The second subparagraph of Article 23(2) of Regulation No 1/2003 provides that, for each undertaking and association of undertakings participating in the infringement, the fine may not exceed 10% of its total turnover in the preceding business year.

35 The appellants, the total turnover of which in the preceding business year is denominated in pounds sterling, do not dispute the Commission's right to set in euros the fines which it imposes under Article 23 of Regulation No 1/2003. That provision does not, however, contain any indication as to the exchange rate to be used when determining the statutory ceiling of the fine, in the case where the total turnover referred to in the second subparagraph of Article 23(2) of Regulation No 1/2003 is denominated in a currency other than the euro.

36 In that regard, for the purpose of assessing the merits of the method of conversion used by the Commission, it must be noted that the General Court, without being challenged by the appellants on that point, referred to the objective pursued by the statutory ceiling of the fine, as the Court specified in paragraphs 281 and 282 of the judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408) and as the General Court recalled in paragraph 414 of the judgment under appeal. That objective is to avoid the imposition of fines in respect of which it is foreseeable that the undertakings, owing to their size, as determined — albeit approximately and imperfectly — by their total turnover, will be unable to pay them.

37 As is apparent from the case-law of the Court, the amount of the fine that may be imposed on an undertaking is subject to a quantifiable and absolute ceiling, with the result that the maximum amount of the fine that can be imposed on a given undertaking can be determined in advance (see, to that effect, judgment of 9 July 2015, *InnoLux* v *Commission*, C-231/14 P, EU:C:2015:451, paragraph 48 and the case-law cited).

38 Therefore, in the light of that objective, the General Court cannot be criticised for finding, in paragraph 415 of the judgment under appeal, that the upper limit derived from the second subparagraph of Article 23(2) of Regulation No 1/2003 must be determined, as a rule, by reference to the economic reality as it appeared in the business year preceding the adoption of the decision penalising an infringement of Article 81 EC.

39 As the Advocate General emphasised in point 51 of her Opinion, that finding is consistent with the choice made by the EU legislature to take, as a rule, the turnover figures for the last full business year preceding the adoption of the decision setting the amount of the fine as the reference value, ascertainable in advance, that is most likely to reflect the financial capacity of an undertaking at the time when the undertaking is identified as responsible for the infringement and a financial penalty is imposed on it by the Commission.

40 However, contrary to the appellants' assertions, the choice made by the EU legislature also justifies the use of the exchange rate applicable during that period to convert the reference value in the case where that value is expressed in a currency other than the euro.

41 The Court notes, first, that, with regard to the assessment of an undertaking's financial capacity, it is consistent with the choice of the EU legislature to refer, for that purpose, not to the exchange rate applicable at the time of the decision imposing the fine but to the average exchange rate in the business year preceding the adoption of that decision, since the latter is more likely to reflect the economic reality as it appeared in the course of that business year.

42 In that regard, contrary to the assertions of the appellants, it cannot be inferred from the case-law of the Court that, with regard to the conversion of the maximum amount of the fine, it has held it necessary to refer to the exchange rate applicable at the time when the decision imposing the fine was adopted. On the contrary, the Court notes that that line of case-law confirms the finding of the General Court, in paragraph 415 of the judgment under appeal, that, in essence, where the economic reality is to be assessed as it appeared at a given time, it is reasonable to refer to the exchange rates applicable during that period. Otherwise, the assessment of the economic reality would necessarily be

distorted by extrinsic and uncertain factors, such as the changes in exchange rates over a period subsequent to that business year (see, by analogy, judgement of 16 November 2000, *Sarrió* v *Commission*, C-291/98 P, EU:C:2000:631, paragraphs 86 and 88).

43 Secondly, the method of conversion endorsed by the General Court in paragraph 416 of the judgment under appeal meets the requirement of predictability for the statutory ceiling of the fine, referred to in paragraph 37 above, in so far as that method is based on an exchange rate ascertainable prior to the adoption of the decision of the Commission imposing the fine, and according to which the upper limit of the fine can be determined in advance.

44 Thirdly, the Court must reject the appellants' argument that the General Court misinterpreted the purpose of the statutory ceiling in that, they claim, it is designed to ensure absolute protection against monetary fluctuations up to the date on which the decision imposing the fine is adopted.

45 As the Advocate General observed in point 55 of her Opinion, such protection is not an independent purpose of the statutory ceiling of the fine, but rather a feature of the protection offered by that ceiling against excessive and disproportionate fines (see, by analogy, judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 281). Thus, as regards the purpose of the statutory ceiling of the fine, the appellants cannot rely on the case-law cited in paragraph 28 above to support their claim. While that case-law relating to the conversion of the value of sales in the context of determining the basic amount of the fine acknowledges that the statutory ceiling limits the possible harmful consequences of monetary fluctuations, it does not follow from that line of authority that that ceiling constitutes an absolute protection against such fluctuations, nor that the relevant exchange rate for determining that ceiling is that applicable at the time when the decision imposing the fine is adopted.

46 As regards the alleged impact of monetary fluctuations on the level of the statutory ceiling of the fine, converted into euros, the Court notes that the appellants have failed to provide any particulars capable of demonstrating that the General Court erred in finding, in paragraph 415 of the judgment under appeal, that the method for calculating the statutory ceiling of the fine chosen by the Commission limits the possible harmful consequences of those monetary fluctuations. As is apparent from paragraph 42 of the present judgment, that method, which is based on the average historical rates applicable over the course of the business year preceding the adoption of the decision imposing the fine, rather than on the exchange rate applicable at the time of the decision, tends, by its very nature, to neutralise the effect which those fluctuations have on the level of the statutory ceiling of the fine up to the date on which that decision is adopted. The Court cannot accept the appellants' arguments in that respect, since a method of conversion based on a daily exchange rate is bound to be uncertain and unpredictable, unlike the method chosen by the General Court.

47 The Court consequently finds that the General Court did not err in law in holding, in paragraph 416 of the judgment under appeal, that the method of conversion used by the Commission to determine the statutory ceiling of the fine was consistent with the purpose of that ceiling.

48 Furthermore, the appellants cannot argue that undertakings which keep their accounts in a currency other than the euro face unequal treatment as against undertakings which keep their accounts in euros, as a result of the former being exposed to currency risk. Since the appellants do not dispute that the fine imposed on them may be set in euros, they are inevitably exposed to currency fluctuations. In that context, the General Court was fully entitled to find, in paragraph 418 of the judgment under appeal, that currency fluctuations are an element of chance which may produce advantages and disadvantages which undertakings realising part of their sales on export markets have to deal with regularly in the course of their business activities and the very existence of which is not such as to render inappropriate the amount of a fine lawfully fixed on the basis of the gravity and the duration of the infringement.

49 Moreover, the appellants' contention alleging infringement by the General Court of the principle of legal certainty is based, as established in paragraph 46 above, on the false premise that the method of calculation approved by the General Court exposed them to the risk of changes in the level of the statutory ceiling of the fine depending on currency fluctuations between the end of the previous business year and the date of the decision at issue.

50 Those arguments must therefore be rejected as unfounded.

51 In the light of all of the foregoing, the General Court did not err in law in finding, in paragraph 421 of the judgment under appeal, that the Commission was entitled to calculate the statutory ceiling of the fine by reference to the appellants' total turnover in the preceding business year, which was converted into euros by application of the average exchange rate applicable in that business year.

52 The appellants' second ground of appeal must therefore be rejected as unfounded.

The third ground of appeal, alleging infringement of the principles of equal treatment and proportionality and also failure by the General Court to exercise its unlimited jurisdiction

Arguments of the parties

53 The appellants' third ground of appeal, directed against paragraphs 396 to 402, 434, 438 and 440 to 444 of the judgment under appeal, is divided into two parts.

54 By the first part of this ground of appeal, the appellants claim that the General Court erred in law by misapplying the principles of equal treatment and proportionality when it rejected their plea in law alleging that the fine imposed on them by the Commission was proportionally higher than that imposed on other cartel participants by reason of the less diversified nature of the appellants' activity.

55 According to the appellants, the General Court thus ignored their argument that, when the harmful consequences of a fine on an undertaking are disproportionate in comparison with the fine imposed on the other addressees of the decision, as illustrated by the proportion of the amount of the fine in relation to the total annual turnover of those undertakings, the Commission must ensure that there is compliance with the principles of proportionality and equal treatment. In the present case, the appellants submit, that state of affairs was predictable at the time when the decision at issue was adopted, as is indicated in the report of the consulting firm submitted to the General Court. In that regard, the appellants claim that the General Court misinterpreted the purpose of that report, which was submitted not as evidence of facts that occurred after the decision at issue had been adopted but as evidence of the fact that the imposition of a large fine on the appellants would have a disproportionate impact and would lead to a serious deterioration of their financial situation in comparison with the other participants in the infringement.

56 The appellants also maintain that the General Court misinterpreted their argument alleging that the Commission should have taken into account not the possible financial losses of undertakings that are less well adapted to market conditions but the impact that a large fine might have on the financial situation of the undertakings and, in particular, of those with the least diversified activity.

57 Lastly, in the appellants' opinion, the General Court overlooked the fact that arguments similar to those which they raised have been taken into account by the Commission in previous decisions, and by the General Court, inter alia, in the judgment of 12 December 2012, *Novácke chemické závody* v *Commission* (T-352/09, EU:T:2012:673).

58 By the second part of their third ground of appeal, the appellants allege that the General Court erred in law in failing to exercise its unlimited jurisdiction with the intensity required in order to remedy the unequal treatment to which they were subject as against the other participants in the infringement that resulted in the decision at issue. The appellants submit that the General Court, when exercising its unlimited jurisdiction, should have taken into account the financial difficulties which the payment of that fine might entail for them, without those difficulties having necessarily to amount to exceptional circumstances, as the General Court held in paragraph 443 of the judgment under appeal. According to the appellants, in order for the amount of the fine to be rectified, it suffices that those difficulties might have a significant impact on the appellants, resulting in unequal treatment in comparison with the other cartel participants.

59 The Commission contends that this ground of appeal must be rejected as unfounded.

Findings of the Court

60 By the first part of this ground of appeal, the appellants essentially claim that, in the context of reviewing the legality of the decision at issue under Article 263 TFEU, the General Court misapplied the principles of equal treatment and proportionality. The appellants are of the opinion that those principles required the General Court to hold that, when determining the amount of the fines, the Commission ought to have taken into consideration that the impact of the fine imposed on the appellants would evidently be more detrimental than the impact on the other cartel participants because their activity was less diversified, as reflected by the difference in the proportion represented by the fine in relation to the total turnover of the undertakings concerned.

61 With regard to the information contained in the consulting firm's report referred to in paragraph 400 of the judgment under appeal, it is apparent from paragraph 401 of that judgement that it was, in essence, for the reasons set out in paragraphs 274 and 275 of the judgment under appeal, namely that the report concerned the development of the appellants' financial situation after the decision at issue had been adopted and that it could therefore not have had any effect on the legality of that decision in the context of the review carried out under Article 263 TFEU, that the General Court held that there was no need to take this information into account when assessing the legality of the fine.

62 While it is indeed true that the appellants implicitly invoked a distortion of that evidence, in particular by claiming that the General Court misinterpreted the purpose of that report, a mere allusion to such a distortion does not satisfy the requirements laid down by the case-law of the Court under which an appellant must indicate precisely the evidence alleged to have been distorted and must show the errors of appraisal which, in that appellant's view, led the General Court to make that distortion (see, to that effect, judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 50).

63 Next, with regard to the argument concerning the failure to take account of the proportion represented by the amount of the fine imposed on the appellants in relation to their overall turnover in comparison with the other addressees of the decision at issue, and the alleged resulting unequal treatment, the Court finds that, contrary to the appellants' assertions, the General Court did address that issue, in paragraphs 397 to 399 of the judgment under appeal.

64 In particular, the General Court was fully entitled to hold, in paragraph 398 of the judgment under appeal, that it is not contrary to the principles of proportionality and equal treatment that, through the application of the method of calculation of the basic amount of fines set out in point 13 of the 2006 Guidelines, an undertaking, the activities of which are more focused than others on the sale of goods or services connected directly or indirectly to the infringement, may receive a fine which represents a proportion of its overall turnover that is greater than that represented by the fines imposed respectively on each of the other undertakings. The General Court found that it is inherent

in that method of calculation, which is not based on the overall turnover of the undertakings concerned, that disparities may appear between those undertakings as to the relationship between their overall turnover and the amount of the fines imposed on them.

65 As the General Court found in paragraph 397 of the judgment under appeal, it is apparent from the case-law of the Court that the Commission is not required, when determining the amount of fines, to ensure, where such fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines reflect any distinction between the undertakings concerned in terms of their overall turnover (judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 312).

66 With regard to the alleged infringement of the principle of equal treatment invoked by the appellants, on the assumption that this ground of appeal seeks to demonstrate that the Commission ought to have departed from that method by deciding, as regards the appellants, to reduce the amount of the fine because of the less diversified nature of their activity, the Court notes, as did the Advocate General in point 100 of her Opinion, that the difference in the proportion represented by the fine in relation to the total turnover of the undertakings concerned does not, as such, constitute a sufficient justification for departing from the method of calculation that the Commission imposed on itself. That would be tantamount to conferring an advantage on the least diversified undertakings on the basis of criteria that are irrelevant in the light of the gravity and the duration of the infringement. When the amount of the fine is determined, there cannot, by the application of different methods of calculation, be any discrimination between the undertakings which have participated in an agreement or a concerted practice contrary to Article 101(1) TFEU (see, to that effect, judgment of 19 July 2012, *Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 58 and the case-law cited).

67 With regard to the appellants' argument based on the alleged impact that a large fine would have on their financial situation, it must be noted that the Court has repeatedly held that the Commission is not required, when determining the amount of the fine, to take account of the economic situation of the undertaking concerned, and, in particular, of its financial capacity, since recognition of such an obligation would be tantamount to conferring unfair competitive advantages on the undertakings least well adapted to market conditions (judgment of 10 May 2007, *SGL Carbon* v *Commission*, C-328/05 P, EU:C:2007:277, paragraph 100 and the case-law cited).

68 Lastly, the appellants cannot reasonably argue that account was taken of such considerations in other decisions of the Commission, given that, according to the Court's settled case-law, the Commission's practice in previous decisions does not serve as a legal framework for the fines imposed in competition matters (judgement of 23 April 2015, *LG Display and LG Display Taiwan* v *Commission*, C-227/14 P, EU:C:2015:258, paragraph 67 and the case-law cited).

69 In those circumstances, the first part of the third ground of appeal cannot be accepted.

70 By the second part of the third ground of appeal, the appellants claim that the General Court failed adequately to exercise its unlimited jurisdiction under Article 261 TFEU, read in combination with Article 31 of Regulation No 1/2003, by not reducing the amount of the fine in order to ensure equal treatment between the cartel participants.

71 It must be borne in mind that, in accordance with the provisions referred to in the previous paragraph, the General Court is empowered, in addition to the mere review of the legality of the fines imposed by the Commission, to substitute its own assessment for that of the Commission, and, consequently, to cancel, reduce or increase the fine or penalty payment imposed (see, to that effect, judgment of 21 January 2016, *Galp Energía España and Others* v *Commission*, C-603/13 P, EU:C:2016:38, paragraph 75 and the case-law cited).

72 By contrast, it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the General Court exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of EU law (judgment of 18 July 2013, *Schindler Holding and Others* v *Commission*, C-501/11 P, EU:C:2013:522, paragraph 164 and the case-law cited).

73 It is only in so far as the Court of Justice considers that the level of the penalty is not merely inappropriate, but also excessive to the point of being disproportionate, that it would have to find that the General Court erred in law, due to the inappropriateness of the amount of a fine (judgment of 18 July 2013, *Schindler Holding and Others* v *Commission*, C-501/11 P, EU:C:2013:522, paragraph 165 and the case-law cited).

74 In that respect, as is apparent from paragraphs 433, 438 and 441 of the judgment under appeal, with regard to the allegedly disproportionate nature of the fine imposed on the appellants, the General Court, under its unlimited jurisdiction, examined the appellants' arguments alleging, in the first place, that, due to the less diversified nature of their activity, the amount of the fine would have a greater impact on their financial situation in comparison with the fine imposed on the other undertakings concerned, and, in the second place, that the fine would lead to a deterioration of their financial situation. In that context, the General Court took into account the information contained in the consulting firm's report referred to in paragraph 55 above.

75 With regard to the first argument, as is apparent from paragraph 64 above, the General Court was fully entitled to find, in paragraph 438 of the judgment under appeal, that the circumstances invoked by the appellants, were they established, would not have been relevant for the purpose of assessing whether the fine was proportionate.

76 As for the second argument, it is apparent from paragraphs 441 and 442 of the judgment under appeal that the General Court acted correctly in taking the view that the existence of possible financial difficulties is capable of justifying, as such, a reduction of the fine only in exceptional circumstances, where justified by an overriding interest. As the General Court observed, in essence, in paragraph 441 of the judgment under appeal, the fines imposed on undertakings by the Commission pursuant to Article 23(2) of Regulation No 1/2003 would be deprived of their deterrent effect if such difficulties were automatically to be taken into account.

77 Thus, contrary to what the appellants contend, the finding of the General Court was not that its unlimited jurisdiction may be exercised only in exceptional circumstances but that the reduction of a fine based on the existence of alleged financial difficulties may be carried out only if those difficulties are exceptional in nature. In paragraphs 434 and 443 of the judgment under appeal, the General Court found that, on the basis of the available information, that was not the position in the case before it.

78 Therefore, the second part of the third ground of appeal must be rejected to the extent to which, on the one hand, it is based on a misinterpretation of the judgment under appeal and, on the other hand, its objective is to secure a re-examination of the appraisal of the facts by the General Court, something which the Court of Justice cannot do in the context of an appeal.

79 In the light of all of the foregoing, the third ground of appeal must be rejected as being in part inadmissible and in part unfounded.

80 Since none of the three grounds of appeal raised by the appellants in support of their appeal can be upheld, the appeal must be dismissed in its entirety.

Costs

81 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those rules, which applies to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the appellants have been unsuccessful and the Commission has applied for costs to be awarded against them, the appellants must be ordered to pay the costs relating to the present appeal proceedings.

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

1. **Dismisses the appeal;**

2. **Orders Pilkington Group Ltd, Pilkington Automotive Ltd, Pilkington Automotive Deutschland GmbH, Pilkington Holding GmbH and Pilkington Italia SpA to pay the costs.**

[Signatures]