Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 8 October 2020 [1]

Case C-440/19 P

Pometon SpA
v

European Commission

(Appeal — Agreements, decisions and concerted practices — European steel abrasives market — Participation in bilateral and multilateral contacts with the aim of coordinating prices throughout the European Economic Area (EEA) — Chronologically staggered 'hybrid' procedure — Charter of Fundamental Rights of the European Union — Article 41 — Principle of impartiality of the Commission — Article 48 — Presumption of innocence — Obligation to state reasons — Single and continuous infringement — Equal treatment — Unlimited jurisdiction)

I. Introduction

1. By its appeal, Pometon SpA ('Pometon' or 'the appellant') seeks the setting aside of the judgment of the General Court of the European Union of 28 March 2019, *Pometon* v *Commission* (T-433/16, EU:T:2019:201; 'the judgment under appeal'). In that judgment, the General Court annulled Article 2 of Commission Decision C(2016) 3121 final of 25 May 2016 relating to a proceeding under Article 101 TFEU and Article 53 of the [Agreement on the European Economic Area (EEA)] (Case AT.39792 – Steel Abrasives) ('the contested decision') and fixed the fine imposed on Pometon in the sum of EUR 3 873 375. In the alternative, Pometon asks the Court for a reduction of the fine imposed.

2. Although I propose to concentrate my analysis in this Opinion on the first and fourth grounds of appeal (together with the two questions of law raised by the appellant in support of these grounds), my response to the first plea will also lead me to consider the second and third grounds of appeal in the context of the first. The latter concerns the scope of the Commission's duty of impartiality in the specific context of a so-called 'hybrid' procedure. The fourth ground of appeal, for its part, concerns the application of the principle of equality in the calculation of the fine in the context of that kind of procedure.

3. A 'hybrid procedure' is a proceeding in which a settlement procedure under Article 10a of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101] and [102 TFEU] (OJ 2004 L 123, p. 18), as amended by Commission Regulation (EC) No 622/2008 of 30 June 2008 as regards the conduct of settlement procedures in cartel cases, [2] and a standard administrative procedure under Article 7 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition

1 Original language: English.

2 OJ 2008 L 171, p. 3.

laid down in Articles [101] and [102 TFEU][3] are conducted in parallel by the Commission. While this procedure has already given rise to Commission decisions whose legality has been contested before the General Court (as well as in appeals),[4] this is the first time that the Court will actually have to deal with some of the specific issues raised by this 'hybrid procedure'.

II. Legal context

A. Regulation No 1/2003

4. Article 7(1) of Regulation No 1/2003 provides:

'Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article [101] or of Article [102 TFEU], it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. …'

5. The wording of Article 23(2) and (3) of that regulation is as follows:

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

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

…

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

…

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

B. Regulation No 773/2004

6. Article 10a of Regulation No 773/2004, entitled 'Settlement procedure in cartel cases', provides:

'1. After the initiation of proceedings pursuant to Article 11(6) of Regulation [No 1/2003], the Commission may set a time limit within which the parties may indicate in writing that they are prepared to engage in settlement discussions with a view to possibly introducing settlement submissions. The Commission shall not be obliged to take into account replies received after the expiry of that time limit.

…

3 OJ 2003 L 1, p. 1.

4 One thinks here of the judgments of the General Court of 20 May 2015, *Timab Industries and CFPR* v *Commission* (T-456/10, EU:T:2015:296) (on appeal, judgment of 12 January 2017, *Timab Industries and CFPR* v *Commission*, C-411/15 P, EU:C:2017:11), and of 10 November 2017, *Icap and Others* v *Commission* (T-180/15, EU:T:2017:795) (on appeal, judgment of 10 July 2019, *Commission* v *Icap Management Services and Icap New Zealand*, C-39/18 P, EU:C:2019:584).

2. Parties taking part in settlement discussions may be informed by the Commission of:

(a) the objections it envisages to raise against them;

(b) the evidence used to determine the envisaged objections;

(c) non-confidential versions of any specified accessible document listed in the case file at that point in time, in so far as a request by the party is justified for the purpose of enabling the party to ascertain its position regarding a time period or any other particular aspect of the cartel; and

(d) the range of potential fines.

…

Should settlement discussions progress, the Commission may set a time limit within which the parties may commit to follow the settlement procedure by introducing settlement submissions reflecting the results of the settlement discussions and acknowledging their participation in an infringement of Article 101 [TFEU] as well as their liability. …

…

3. When the statement of objections notified to the parties reflects the contents of their settlement submissions, the written reply to the statement of objections by the parties concerned shall, within a time limit set by the Commission, confirm that the statement of objections addressed to them reflects the contents of their settlement submissions. The Commission may then proceed to the adoption of a Decision pursuant to Article 7 and Article 23 of Regulation [No 1/2003] after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 14 of Regulation [No 1/2003].

4. The Commission may decide at any time during the procedure to discontinue settlement discussions altogether in a specific case or with respect to one or more of the parties involved, if it considers that procedural efficiencies are not likely to be achieved.'

C. The settlements notice

7. The arrangements for implementing Regulation No 773/2004 were set out in the Commission Notice of 2 July 2008 on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases [5] ('the settlements notice').

8. According to point 32 of the settlements notice, 'should the Commission decide to reward a party for settlement in the framework of this Notice, it will reduce by 10% the amount of the fine to be imposed after the 10% cap has been applied having regard to the 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; 'the 2006 Guidelines')]. …'

5 OJ 2008 C 167, p. 1.

D. The 2006 Guidelines

9. The 2006 Guidelines determine the methodology used by the Commission for setting the fine to be imposed on undertakings and associations of undertakings where, intentionally or negligently, they infringe the provisions of Articles 101 or 102 TFEU.

10. Point 37 of the 2006 Guidelines specifies that 'although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in point 21'.

III. Background to the dispute and the contested decision

11. The background to the dispute and the essential elements of the contested decision were set out in paragraphs 1 to 21 of the judgment under appeal. They can be summarised as follows.

12. Pometon is an Italian company which specialised in metal treatment. It was active in the steel abrasive market until 16 May 2007, when it sold its steel abrasive business to one of its competitors, the French company Winoa SA. On that date, Pometon's abovementioned activity was in fact transferred to Pometon Abrasives Srl, a company owned by the Winoa group.

13. Steel abrasives are loose steel particles, which are either in round (steel shot) or angular (steel grit) form. They are mainly used in the steel, automotive, metallurgical, petrochemical and stonecutting industries and they are produced from steel scrap residue.

A. The investigation procedure until the settlement decision

14. On 16 January 2013, the Commission initiated, in accordance with Article 2 of Regulation No 773/2004, the investigation proceeding pursuant to Article 11(6) of Regulation No 1/2003 against Pometon, United States group Ervin Industries Inc. ('Ervin'), Winoa and the German companies MTS GmbH and Würth GmbH, with a view to engaging in settlement discussions with them.

15. The five parties had confirmed their willingness to engage in settlement discussions. From February 2013 to December 2013, settlement meetings took place between each party and the Commission. During those meetings, the Commission informed the parties of the objections it envisaged raising against them and disclosed the main pieces of evidence in the Commission file relied on to establish these potential objections. The Commission also provided the parties with an estimation of the range of fines likely to be imposed.

16. In January 2014, the companies concerned submitted their formal request to settle within the deadline, with the exception of Pometon, which decided to withdraw from the procedure. On 13 February 2014, the Commission sent a statement of objections to each of the other four parties to the alleged cartel and, on 2 April 2014, it adopted settlement decision C(2014) 2074 final against them, on the basis of Articles 7 and 23 of Regulation No 1/2003 ('the settlement decision').

B. The contested decision

17. On 3 December 2014, the Commission notified to Pometon a statement of objections. On 25 May 2016, the Commission adopted, on the basis of Articles 7 and 23 of Regulation No 1/2003, the contested decision.

18. By this decision, the Commission found that, during the period from 3 October 2003 to 16 May 2007, Pometon had participated, either directly or through its representatives or the representatives of two of its subsidiaries, Pometon España SA and Pometon Deutschland GmbH, in a cartel consisting of agreements or concerted practices with the four abovementioned other undertakings – namely, Ervin, Winoa, MTS and Würth –, with the principal aim of coordinating the prices of steel abrasives throughout the European Economic Area ('EEA').

19. The operative part of the contested decision is worded as follows:

'Article 1

Pometon SpA has infringed Article 101(1) [TFEU] and Article 53(1) of the EEA Agreement by participating in a single and continuous infringement concerning prices in the steel abrasives sector, which consisted of the coordination of its pricing behaviour and covered the entire EEA.

The duration of the infringement was from 3 October 2003 until 16 May 2007.

Article 2

For the infringement referred to in Article 1, the following fine is imposed on Pometon SpA: EUR 6 197 000 …'

20. It follows, in essence, from the contested decision as a whole that Pometon and the other participants in the cartel, on the one hand, introduced (first part of the cartel) a uniform calculation model enabling them to arrive at a coordinated increase in the price of steel abrasives based on scrap metal price indices ('the common scrap surcharge'). On the other hand, and at the same time, they agreed (second part of the cartel) to coordinate their behaviour with regard to the selling prices of steel abrasives to individual customers, in particular by undertaking not to compete with each other by means of price reductions (recitals 32, 33, 37 and 57 of the contested decision).

21. As regards the classification of the infringement in question, the Commission considered that it was a single and continuous infringement of Article 101 TFEU and Article 53 of the EEA Agreement. Not only did the participants' anti-competitive arrangements all relate to price coordination and concerned the same products, but they took place under the same terms and conditions throughout the infringement period from 3 October 2003 until 16 May 2007, when Pometon sold its steel abrasive business to Winoa. Finally, the undertakings participating in the infringement and the persons acting on their behalf would have been essentially the same (recitals 107 and 166 of the contested decision).

22. Ultimately, the Commission considers that the object of such a cartel was to restrict competition, with significant effects on trade in the product concerned between the Member States and the parties to the EEA Agreement (recitals 142 and 154 of the contested decision).

23. As regards the duration of Pometon's participation in the infringement, the Commission fixed the commencement date of Pometon's participation as that of 3 October 2003. On the basis of the fact that Pometon had not formally disassociated itself from the cartel, the Commission considered that Pometon's participation in the cartel continued until 16 May 2007, which is the date on which Pometon sold its steel abrasive business to Winoa (recitals 160 and 166 of the contested decision).

24. On the basis of the 2006 Guidelines, the Commission fixed the basic amount of Pometon's fine at 16% of the value of Pometon's sales in the EEA markets during 2006, the last full year of Pometon's participation in the infringement before it sold its steel abrasive business to its French competitor.

25. This percentage corresponds to a basic rate of 15%, which was further increased by 1% to take account of the geographic scope of the infringement throughout the EEA. The variable part of the basic amount of the fine was subsequently increased by a fixed additional amount of 16%, applied to deter undertakings from entering into price coordination agreements, in accordance with point 25 of the 2006 Guidelines (recital 220 of the contested decision).

26. Finally, pursuant to point 37 of the 2006 Guidelines, which allows the Commission to depart from the methodology laid down in those guidelines where the 'particularities of a given case' may justify it, that institution has made a change to the adjusted basic amount of the fine (recitals 228 to 231 of the contested decision), consisting of a reduction of 60%.

27. In the end, as is apparent from Article 2 of the contested decision, after that calculation the amount of the fine imposed on Pometon was EUR 6 197 000.

IV. The procedure before the General Court and the judgment under appeal

28. By application lodged at the Registry of the General Court on 3 August 2016, the appellant brought an action, primarily for annulment of the contested decision and, in the alternative, for a reduction of the fine imposed on it.

29. In support of its action, the appellant put forward five pleas in law.

30. The first plea alleged the breach of the principle of impartiality of the procedure, of the principle of the presumption of innocence and of the rights of the defence, in that the Commission attributed specific conduct to the appellant already in the settlement decision, thus predetermining the accusations subsequently made against it in the contested decision.

31. The second plea alleged infringement of Article 101 TFEU and Article 53 of the EEA Agreement, the inadequacy and contradictory nature of the statement of reasons and infringement of the rights of the defence and the rules on the burden of proof, in that the Commission attributed to it, in the absence of evidence, participation in a cartel in which it never took part.

32. The third plea alleged infringement of Article 101 TFEU and Article 53 of the EEA Agreement, in that the Commission considered that the cartel constituted a restriction of competition by object.

33. By its fourth plea, Pometon contested the duration of its participation in the cartel.

34. Finally, by its fifth plea in law in support of its application for annulment or reduction of the amount of the fine, Pometon alleged a breach of the duty to state reasons and of the principles of proportionality and equal treatment, as regards the exceptional adjustment of the basic amount of the fine made by the Commission pursuant to point 37 of the 2006 Guidelines.

35. By the judgment under appeal, the General Court dismissed the first four pleas in law but upheld the fifth plea raised before it. It therefore annulled Article 2 of the contested decision and reduced the fine imposed on Pometon from the original sum of EUR 6 197 000 to EUR 3 873 375.

V. Forms of order sought and procedure before the Court of Justice

36. By its appeal, the appellant claims that the Court should:

– set aside the judgment under appeal and annul the contested decision;

– in the alternative, set aside the judgment under appeal and reduce the fine imposed on the appellant and, in any event, reduce this fine; and

– order the Commission to pay the costs of the present proceedings and of the proceedings before the General Court.

37. The Commission contends that the Court should:

– dismiss the appeal as inadmissible in part and unfounded in part;

– order the appellant to pay the costs.

VI. The appeal

38. The appellant raises four grounds in support of its appeal. By its first ground of appeal, Pometon alleges a breach of the principle of impartiality of the procedure and of the principle of the presumption of innocence. By its second ground of appeal, Pometon submits that the General Court misapplied the principles relating to the burden of proof and the principle of the presumption of innocence and gave contradictory or insufficient reasoning. In the alternative, those latter elements are also relied in support of the third ground of appeal in order to obtain a reduction of the fine imposed in relation to the duration of Pometon's participation in the cartel. Finally, by its fourth ground of appeal, Pometon alleges a violation of the principle of equality in the context of the determination of the fine, as well as contradictory or insufficient reasoning in this regard.

39. The questions of law which the Court wishes to see dealt with in this Opinion are discussed under the first and fourth grounds of appeal. I will therefore focus, firstly, on the scope of the Commission's duty of impartiality and, secondly, on the application of the principle of equality in the calculation of the fine but, as indicated in the introductory part of this Opinion, in the specific context of the so-called 'hybrid' procedure.

A. First ground of appeal relating to the principle of impartiality of the procedure and to the principle of the presumption of innocence

1. Arguments of the parties

40. By its first ground of appeal, Pometon submits that, in paragraphs 63 to 103 of the judgment under appeal, the General Court erred in law in that it did not find that the Commission had infringed the principle of procedural impartiality and the presumption of innocence. In so doing, the General Court itself disregarded the principle of impartiality and the presumption of innocence.

41. According to Pometon, the procedure which led to the adoption of the contested decision was vitiated by a defect leading to the unlawfulness of that decision. That defect allegedly resulted from the settlement decision, which, although it concerns the participants in the alleged cartel other than Pometon, refers to the latter in recitals 26, 28, 29, 31 and 36 to 38 thereof.

42. In the settlement decision, the Commission attributed specific conduct to Pometon, which, contrary to the conclusion of the General Court in paragraph 103 of the contested judgment, would have undermined the Commission's ability to carry out an impartial assessment in the proceedings leading to the contested decision. Thus, the General Court infringed the relevant case-law, in

particular the judgment of the European Court of Human Rights ('the ECtHR') of 27 February 2014, *Karaman v. Germany* (EC:ECHR:2014:0227JUD001710310, 'the *Karaman* judgment') and the judgment of the General Court of 10 November 2017, *Icap and Others* v *Commission* (T-180/15, EU:T:2017:795, 'the *Icap* judgment of the General Court').

43. According to Pometon, the General Court based that conclusion on a formal and a substantive ground.

44. As regards form, the General Court held, in paragraph 65 of the judgment under appeal, that an infringement of the presumption of innocence and of the principle of impartiality was impeded by the fact that the Commission, in footnote 4 of the settlement decision, expressly excluded Pometon's guilt. However, Pometon submits that it follows from the *Karaman* judgment and the *Icap* judgment of the General Court that drafting precautions, such as footnote 4 of the settlement decision, are not sufficient to avoid misunderstandings as to the liability of the company outside the relevant decision.

45. On the substance, the General Court referred, in paragraph 85 of the judgment under appeal, to the *Karaman* judgment, according to which it must be ascertained whether the references to Pometon's conduct in the settlement decision were necessary to establish the liability of the addressees of that decision. In paragraphs 79, 81 and 83 of the judgment under appeal, the General Court would have found that the Commission acted in accordance with that case-law. However, in those paragraphs, it disregarded the criteria set out in paragraph 64 of the *Karaman* judgment, according to which, in order to be compatible with the presumption of innocence, references must be imperative or essential to the assessment of the guilt of the defendants. However, the General Court accepted references which are not necessary but which 'may be objectively useful' or which 'are intended to establish the sole responsibility' of the parties who have settled the case.

46. In that context, the appellant submits that it is enough that the statement of reasons for the settlement decision suggests that the Commission considers the undertaking concerned to be guilty or that the reference raises doubt as to the existence of a potential premature judgment for a violation of Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') to be established. Moreover, Pometon considers that, contrary to what the General Court decided in the judgment under appeal in disregarding the *Icap* judgment of that same court, the fact that the references to Pometon allegedly contain no legal qualification is irrelevant. Finally, the appellant submits that the Commission's premature judgment in its regard is clear from the text of the settlement proposal, which characterises some of the conduct attributed to Pometon as 'cartel[s]' or 'anti-competitive contact'.

47. For the Commission, this ground of appeal is inadmissible because it concerns the assessment of the facts by the General Court (without, however, claiming that the facts or evidence were distorted) or repeats arguments already raised before the General Court, and the arguments relating to the settlement proposal represent a new complaint. In any event, the Commission considers the first ground of appeal unfounded, since the General Court correctly applied the case-law resulting from the *Karaman* judgment and the *Icap* judgment of the General Court to the present case.

2. Analysis

(a) On the admissibility of the first ground of appeal

48. The Commission claims that the first ground of appeal is inadmissible mainly because it relates to the assessment of the facts or repeats arguments already raised before the General Court.

49. In that regard, it should be noted that, according to the Court's settled case-law, it follows from Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that the General Court has exclusive jurisdiction, first, to establish the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and, secondly, to assess those facts. When the General Court has established or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them. The Court of Justice thus has no general fact-finding jurisdiction. Nor, in principle, can it examine the evidence which the General Court accepted in support of those facts. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice. [6]

50. It is also true that, on the other hand, an appeal is inadmissible in so far as it merely repeats the pleas in law and arguments previously submitted to the General Court, including those based on facts expressly rejected by it. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the General Court, which the Court of Justice does not have jurisdiction to undertake on appeal. However, provided that the appellant challenges the interpretation or application of EU law by the General Court, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not thus base his or her appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose. [7]

51. In the present case, Pometon claims, in essence, by its arguments in support of the first ground of appeal, that the General Court has infringed the principle of impartiality of the procedure and the principle of the presumption of innocence by misapplying the teachings of the *Karaman* judgment and the *Icap* judgment of the General Court.

52. It appears to me that these claims must lead the Court to examine the applicability of those judgments in the context of a hybrid procedure and, in so doing, possibly to review the legal characterisation of the facts by the General Court and the legal conclusions it has drawn from them in the light of this case-law.

53. In those circumstances, while some of Pometon's arguments call into question certain of the General Court's findings of fact or are similar to arguments already argued before the General Court, the first ground of appeal nonetheless raises questions concerning that court's interpretation and application of legal rules and therefore relates to points of law which may be reviewed by the Court of Justice in an appeal. The Commission's plea that the first ground of appeal is inadmissible cannot, therefore, be accepted except with regard to the claim relating to the Commission's settlement proposal.

54. Indeed, this argument was raised by Pometon for the first time on appeal. It constitutes therefore, under Article 127(1) of the Rules of Procedure, which, under Article 190(1) of those rules, applies to appeals, a new plea in law, which is inadmissible since it is not based on matters of law or of fact which came to light during the procedure. [8]

6 See, to that effect, judgments of 14 December 2017, *EBMA* v *Giant (China)* (C-61/16 P, EU:C:2017:968, paragraph 33), and of 13 September 2018, *ANKO* v *Commission* (C-173/17 P, not published, EU:C:2018:718, paragraph 23).

7 See, to that effect, judgments of 18 January 2007, *PKK and KNK* v *Council* (C-229/05 P, EU:C:2007:32, paragraph 32), and of 16 January 2019, *Commission* v *United Parcel Service* (C-265/17 P, EU:C:2019:23, paragraphs 14 and 15).

8 See, to that effect, judgments of 18 December 2008, *Coop de France Bétail et Viande and Others* v *Commission* (C-101/07 P and C-110/07 P, EU:C:2008:741, paragraph 110), and of 10 April 2014, *Areva and Others* v *Commission* (C-247/11 P and C-253/11 P, EU:C:2014:257, paragraph 72).

(b) On the merits of the first ground of appeal

55. By its first ground of appeal, Pometon submits that the General Court erred in law in the judgment under appeal in that it did not find that the Commission had infringed the principle of procedural impartiality and the presumption of innocence. In so doing, the General Court itself disregarded the principle of impartiality and the presumption of innocence.

56. There is no doubt that those two principles can be invoked by the appellant in support of its appeal.

57. Indeed, while the Commission cannot be classified as a 'tribunal' within the meaning of Article 6 of the ECHR, it is nevertheless also required to respect the fundamental rights of the European Union during the administrative procedure, which include the right to good administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union ('the Charter').[9] However, this provision provides that every person has the right, inter alia, to have his or her affairs handled impartially by the institutions of the European Union. That requirement of impartiality encompasses, on the one hand, subjective impartiality, in so far as no member of the institution concerned who is responsible for the matter may show bias or personal prejudice, and, on the other hand, objective impartiality, in so far as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the institution concerned.[10]

58. Moreover, the presumption of innocence constitutes a general principle of European Union law, currently laid down in Article 48(1) of the Charter. According to the Court's case-law, this principle applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments.[11]

59. In that regard, it must also be noted that the presumption of innocence enshrined in Article 48 of the Charter corresponds to Article 6(2) and (3) of the ECHR, as is apparent from the explanations to the Charter. It follows, in accordance with Article 52(3) of the Charter, that it is necessary to take account of Article 6(2) and (3) of the ECHR for the purposes of interpreting Article 48 of the Charter, as a minimum threshold of protection.[12]

60. In those circumstances, in the context of a 'hybrid procedure' – that is to say a proceeding in which a settlement procedure and a standard administrative procedure are conducted in parallel by the Commission –, it is therefore relevant to have regard to the *Karaman* judgment, which concerns the question whether the principle of the presumption of innocence, as protected by Article 6(2) of the ECHR, may be infringed by statements contained in a judgment directed against co-suspects in separate proceedings that do not have a legally binding effect in pending or future criminal proceedings against another person.

61. This is all the more relevant since the Court itself has already incorporated the requirements following from this judgment in its own case-law related to Article 48 of the Charter.

9 See, to that effect, judgment of 11 July 2013, *Ziegler* v *Commission* (C-439/11 P, EU:C:2013:513, paragraph 154).

10 See, to that effect, judgment of 11 July 2013, *Ziegler* v *Commission* (C-439/11 P, EU:C:2013:513, paragraph 155).

11 See, to that effect, judgments of 22 November 2012, *E.ON Energie* v *Commission* (C-89/11 P, EU:C:2012:738, paragraphs 72 and 73), and of 16 February 2017, *Hansen & Rosenthal and H&R Wax Company Vertrieb* v *Commission* (C-90/15 P, not published, EU:C:2017:123, paragraph 18).

12 See, to that effect, judgment of 5 September 2019, *AH and Others (Presumption of innocence)* (C-377/18, EU:C:2019:670, paragraph 41).

62. Indeed, in the judgment of 5 September 2019, *AH and Others (Presumption of innocence)* (C-377/18, EU:C:2019:670), the Court recognised that the ECtHR held in the *Karaman* judgment that the principle of the presumption of innocence will be infringed if a judicial decision *or a statement by a public official* concerning a person charged with a criminal offence contains a clear declaration that the person concerned has committed the crime in question, absent a final conviction to this effect.[13]

63. As the Court has observed, the ECtHR has also acknowledged that in complex criminal proceedings involving several persons who cannot be tried together, references by the national court to the participation of third persons, who may later be tried separately, may be indispensable for the assessment of the guilt of those who are on trial. It stated, however, that if facts related to the involvement of third parties have to be introduced, the relevant court should avoid giving more information than necessary for the assessment of the legal responsibility of those persons who are accused in the trial before it.[14]

64. In that context, the Court noted that the ECtHR underlined the importance of the choice of words by the judicial authorities and of the particular circumstances in which they were made and of the nature and context of the proceedings at issue.[15] This is why, according again to the ECtHR, the reasoning of judicial decisions in those cases is particularly important: it must be worded in such a way as to avoid a potential pre-judgment about the guilt of the third parties concerned, capable of jeopardising the fair examination of the charges brought against them in the separate proceedings.[16]

65. Having regard to that case-law, the Court arrived at the conclusion that Article 4(1) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings[17] should be interpreted as meaning that it does not preclude that an agreement, which must be approved by a national court, refers to the participation of the accused persons, other than the person who entered into that agreement and thus recognised his or her guilt. This is permissible in circumstances where these other individuals will later be tried separately and that their identification is subject to two conditions. First, that reference must be necessary for the categorisation of the legal liability of the person who entered into the agreement and, second, the same agreement must clearly indicate that those other persons are being prosecuted in the context of separate criminal proceedings and that their guilt has not been legally established.[18]

66. The Court added that, in that regard, in order to review compliance with the presumption of innocence, it is necessary always to analyse a judicial decision and its reasoning *as a whole* and in light of the particular circumstances in which it has been adopted. Indeed, as explained by the Court, any explicit reference, in certain parts of a judicial decision, to the absence of guilt of the joint perpetrators would be devoid of sense if other parts of that decision were likely to be understood as a premature expression of their guilt.[19]

13 See, to that effect, judgment of 5 September 2019, *AH and Others (Presumption of innocence)* (C-377/18, EU:C:2019:670, paragraph 43), and the *Karaman* judgment, § 63.

14 See, to that effect, judgment of 5 September 2019, *AH and Others (Presumption of innocence)* (C-377/18, EU:C:2019:670, paragraph 44), and the *Karaman* judgment, § 64.

15 See, to that effect, judgment of 5 September 2019, *AH and Others (Presumption of innocence)* (C-377/18, EU:C:2019:670, paragraph 43), and the *Karaman* judgment, § 63.

16 See, to that effect, judgment of 5 September 2019, *AH and Others (Presumption of innocence)* (C-377/18, EU:C:2019:670, paragraph 44), and the *Karaman* judgment, § 65.

17 OJ 2016 L 65, p. 1. According to this provision, 'Member States shall take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being guilty. This shall be without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person, and to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence'.

18 See, to that effect, judgment of 5 September 2019, *AH and Others (Presumption of innocence)* (C-377/18, EU:C:2019:670, paragraph 45).

19 See, to that effect, judgment of 5 September 2019, *AH and Others (Presumption of innocence)* (C-377/18, EU:C:2019:670, paragraph 46).

67. That framework must obviously be transposed in the context of a 'hybrid procedure'. Indeed, it is founded on the interpretation of Article 6(2) of the ECHR by the ECtHR and already applied to a provision which transposed, in the legal order of the European Union, the guarantees provided for by Article 48 of the Charter in a similar context of two proceedings concerning the same facts but separated in time. Since it is clearly established that the presumption of innocence is a general principle of European Union law, currently laid down in Article 48(1) of the Charter, which applies to the procedures relating to infringements of the competition rules,[20] it would be inconsistent to apply other requirements to a hybrid procedure.

68. In those circumstances, it cannot be disputed that the General Court paid particular attention, in the judgment under appeal, to the choice of words used by the Commission in the settlement decision. It took care to review the two abovementioned conditions, namely, the fact that the reference to Pometon was necessary for the categorisation of the legal liability of the other undertakings which entered into the agreement and the clear indication that Pometon was being prosecuted in the context of separate proceedings and that its guilt had not yet been legally established (see paragraphs 72, 74, 77, 81, 85 of the judgment under appeal).

69. As regards the second condition, the General Court did not commit any error in holding, in paragraphs 65, 82 and 83 of the judgment under appeal, that the Commission had clearly stated in the settlement decision that Pometon was an undertaking subject to the ordinary procedure but not to the settlement procedure (see point 2.2.5. of the settlement decision) and that the Commission had expressly excluded the liability of Pometon in the context of the settlement procedure (see footnote 4 of the settlement decision).

70. I am nevertheless of the view that the General Court erred in law in its characterisation of the factors that would justify the need for references to Pometon in the settlement decision and the legal conclusions it has drawn from them in paragraphs 84, 90 and 103 of the judgment under appeal. I have reached this conclusion for the following reasons.

71. First, in insisting on the formal consideration according to which the points in the settlement decision which refer to Pometon do not have any legal classification, the General Court proceeded to a formal and limited reading of the decision, whereas it is, as I have previously pointed out, necessary to analyse this kind of decision and its reasoning as a whole and in light of the particular circumstances in which it has been adopted.

72. As the General Court has itself recognised, certain passages which appear in the part of a decision setting out the facts may nonetheless reveal very clearly the Commission's position on the participation of an undertaking in the unlawful conduct at issue.[21] Without going so far, the principle of the presumption of innocence may already be infringed if the reasoning of a judicial decision or, in that case, the Commission's decision, is not worded in a way able to avoid a potential pre-judgment about the guilt of the third parties concerned.[22] Indeed, judged by the ECtHR case-law, the principle of the presumption of innocence is even violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence *reflects an opinion* – 'le sentiment' in the French version of the *Karaman* judgment – that he or she is guilty.[23]

20 See, to that effect, judgments of 22 November 2012, *E.ON Energie* v *Commission* (C-89/11 P, EU:C:2012:738, paragraphs 72 and 73), and of 16 February 2017, *Hansen & Rosenthal and H&R Wax Company Vertrieb* v *Commission* (C-90/15 P, not published, EU:C:2017:123, paragraph 18).

21 See, to that effect, the *Icap* judgment of the General Court, paragraph 259.

22 See, to that effect, judgment of 5 September 2019, *AH and Others (Presumption of innocence)* (C-377/18, EU:C:2019:670, paragraph 44), and the *Karaman* judgment, § 65.

23 The *Karaman* judgment, § 63.

73. The settlement decision must, of course, be read holistically. Just because, for example, the occasional infelicitous word or phrase has been used in the document does not mean that this word or phrase should be seized upon as suggestive of pre-judgment by the decision-maker if, on a fair reading, the settlement decision as a whole does not lend itself to that interpretation.

74. Applying this principle to the present case and analysing the settlement decision as a whole, one is nonetheless left with the impression that the Commission's reasoning was worded in such a way as to raise doubts as to a potential pre-judgment about Pometon's guilt, and thus to compromise the fair examination of the charges brought against it in the ordinary proceeding.

75. Indeed, contrary to what the General Court decided in paragraph 87 of the judgment under appeal, it could not be excluded that the terms of recital 38 of the settlement decision raised doubts as to a potential pre-judgment about Pometon's guilt, whereas the Commission states, on the one hand, in recital 49 of the settlement decision that it 'considers that Ervin, Winoa and Würth, in participating in the conduct described in Section 4, participated in a single and continuous infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement' and that, on the other hand, the agreement on the main element of that infringement – a common scrap surcharge – is precisely described in recital 38 of Section 4 of the settlement decision in a formulation that includes Pometon. The impression that Pometon participated in this infringement is further increased by recital 39 of the same decision, in which the Commission states that 'the participants of the meeting of 3 October [– expressly referred to in recital 38 as Winoa, Ervin and Pometon –] were subsequently in contact with the two German steel abrasives producers, MTS and Würth, with a view to *including them* within the new scrap surcharge calculation system'.[24] The use of the term 'include' suggests that the three others – without exception – were already participating in this system.

76. The doubts concerning the guilt of Pometon are also due to recital 59 of the settlement decision, which states that 'it is clear from the facts described in Section 4, that Ervin, Winoa, MTS and Würth were involved in horizontal anticompetitive arrangements which formed part of an overall scheme pursuing a single anti-competitive object of restricting competition on the price of steel abrasives. Within the overall scheme, described in recitals (26)-(36), Ervin, Winoa, MTS and Würth coordinated their behaviour to remove uncertainty between themselves in relation to pricing in the steel abrasives market'.

77. However, in these recitals 26 to 36 of the settlement decision, it is stated, in particular, that 'Winoa, Ervin and Pometon met at the Lago di Garda (Italy) to agree on a uniform calculation model for a common scrap surcharge to be applied by all of them. *They agreed to use a single formula* … After that meeting the participants exchanged several emails coordinating in detail the introduction of the new scrap surcharge system and *the common starting date*'.[25] It is also stated that MTS and Würth 'did not participate in the initial stages of the process *when the agreement between Winoa, Ervin and Pometon was concluded*'[26] and that 'during the whole duration of the contacts, *the parties* [– without any exception in relation to Pometon –] also coordinated their activities with respect to individual customers'.[27]

78. Although they are findings of fact, those statements – which expressly refer to Pometon – are nevertheless the basis for the legal characterisation in recital 59 of the settlement decision of the existence of horizontal anticompetitive agreements.

24 Emphasis added.

25 Settlement decision, recital 28 (emphasis added).

26 Settlement decision, recital 29 (emphasis added).

27 Settlement decision, recital 36 (emphasis added).

79. Furthermore, it does not appear from the reasoning of the settlement decision in what way the references to Pometon were in fact *necessary* for the categorisation of the legal liability of the four undertakings that entered into the agreement. On the contrary, the participation of these four undertakings in the system described by the Commission was sufficient to constitute the cartel in question. Contrary to what was stated in the contested decision,[28] it does not appear from the settlement decision that Pometon played an indispensable role, or even a specific role, in the establishment of that system (unlike, for example, Winoa, which was in charge of communicating the new surcharge to the participants each month and, as of May 2004, also published the surcharge on its own website as explained in recital 30 of the settlement decision).

80. Similarly, with regard to recital 37 of the settlement decision, I do not, with respect, find the explanation given by the General Court in paragraph 88 of the judgment under appeal to be convincing. In this context, the General Court merely stated that, since the Commission had concluded that there was a single and continuous infringement, it was necessary to specify the territorial scope of the cartel as a whole. It is, however, not apparent from the settlement decision to what extent Pometon's participation would have played a decisive – and therefore 'necessary' within the meaning of the *Karaman* judgment – role in the territorial scope of the infringement, although this undertaking is clearly included in recital 37 of the settlement decision on the geographic scope of the agreement.

81. In those circumstances, when the settlement decision is analysed as a whole, I am of the view that the General Court could not properly have concluded when it did, in paragraph 84 of the judgment under appeal, that the references to Pometon could not objectively lead to a suspicion that the Commission prejudged the guilt and liability of that undertaking in the cartel in question as early as the stage of the settlement decision addressed to the other four undertakings involved in the cartel in question. Consequently, the General Court erred in law by stating, in paragraphs 90 and 103 of the judgment under appeal that the Commission could not be accused of having breached its duty of impartiality towards Pometon and of having infringed the principle of the presumption of innocence in the contested decision.

82. However, the plea relating to this error of law is not necessarily effective. Indeed, it must be borne in mind that the contested decision is not the settlement decision but rather the decision adopted at the end of the normal administrative procedure pursuant to Article 7 of Regulation No 1/2003. The settlement decision is not the legal basis of the contested decision and the two decisions were adopted in the context of two separate and independent proceedings. The violation of Pometon's presumption of innocence at the time of the adoption of the settlement decision therefore does not necessarily have a direct impact on the legality of the contested decision.

83. As the General Court explained in its judgment in *Icap*, the issue of whether a possible lack of objective impartiality on the part of the Commission could have affected the legality of the contested decision is inseparable from the question of whether the findings made in that decision are properly supported by the evidence adduced by the Commission.[29] In other words, as it clearly follows from the established case-law, the irregularity relating to a possible lack of objective impartiality on the part of the Commission would entail the annulment of the contested decision only if it were established that, were it not for that irregularity, that decision would have been different in content.[30]

84. That finding therefore depends on an assessment of the other grounds of appeal raised by the appellant and which relate to the establishment to the requisite legal standard of its participation in the infringement in question, namely the second and third grounds of appeal. It is these issues to which we may now turn.

28 See, for example, recitals 35 and 36 of the contested decision in relation to the specific role of Pometon in the origin of the cartel.

29 See, to that effect, the *Icap* judgment of the General Court, paragraph 276.

30 See, to that effect, the *Icap* judgment of the General Court, paragraph 278.

(1) Second ground of appeal alleging misapplication by the General Court of the principles relating to the burden of proof, the presumption of innocence and the existence of contradictory or insufficient reasoning in the judgment under appeal in relation to the Pometon's participation in the first part of the cartel

85. By its second ground of appeal, Pometon submits, in substance, that, contrary to the finding in paragraph 129 of the judgment under appeal, it disputed its liability in respect of the first part of the cartel in its application, in particular in footnote 23 thereof. Secondly, Pometon contests the General Court's finding that the Commission had established to the requisite legal standard that the common scrap surcharge was automatically applicable, in that Pometon could apply it without receiving regular information from one of its competitors. In Pometon's view, that conclusion is based only on the likelihood or presumption of certain events, as is apparent from paragraphs 142, 144 and 145 of the judgment under appeal.

86. However, while it is true that Pometon denied participation in any cartel in the footnote in question, one cannot overlook the fact that it nonetheless expressly admitted in its reply before the Court that it had participated in the meeting of 3 October 2003. It was during that meeting that agreement was reached on the common scrap surcharge system.

87. It is from this indisputable starting point that, on the basis of the various elements of the file identified in paragraphs 143 to 145 of the judgment under appeal, the General Court reached the conclusion, in paragraph 160 of the same judgment, that the appellant's participation in the first part of the cartel was established. To that end, contrary to the appellant's allegations, the General Court did not rely on the likelihood or presumption of certain events. On the contrary, in the examples given by Pometon, the General Court made a finding on the basis of clearly identified evidence. It is only for a second time, in order to reject the argument raised against the first finding, that the General Court uses, in a negative form, an adverb such as 'likely' ('it is unlikely that', paragraph 142 of the judgment under appeal) or an expression such as 'there is nothing to suggest' (paragraph 144).

88. In those circumstances, without even having regard to the fact that Pometon appears to be asking the Court for a new assessment of the facts by its second ground of appeal – for which the Court has no jurisdiction in an appeal procedure, save where the clear sense of the evidence has been distorted, [31] something which is not alleged by Pometon –, I am of the opinion that it follows from a reading of paragraphs 129 to 160 of the judgment under appeal as a whole that the liability of Pometon and its participation in the first part of the cartel was indeed inferred from a number of coincidences or indicia which, taken together, may constitute evidence of an infringement of the competition rules. [32]

89. Consequently, in the light of the foregoing considerations, I consider that the Commission has demonstrated Pometon's participation in the first part of the cartel to the requisite legal standard of proof and that the General Court did not breach the principles relied on in support of the second ground of appeal.

31 See, to that effect, judgments of 14 December 2017, *EBMA* v *Giant (China)* (C-61/16 P, EU:C:2017:968, paragraph 33), and of 13 September 2018, *ANKO* v *Commission* (C-173/17 P, not published, EU:C:2018:718, paragraph 23).

32 See, to that effect, judgment of 26 January 2017, *Commission* v *Keramag Keramische Werke and Others* (C-613/13 P, EU:C:2017:49, paragraph 51).

(2) Third ground of appeal alleging misapplication by the General Court of the principles relating to the burden of proof and the presumption of innocence in relation to the duration of the Pometon's participation in the cartel

90. By its third ground of appeal, raised in the alternative in order to obtain a reduction of the fine imposed, Pometon submits that the General Court misapplied the principles relating to the burden of proof and the presumption of innocence in relation to the duration of Pometon's participation in the cartel. In substance, the appellant submits that the General Court reversed the burden of proof when it considered that Pometon had not provided sufficient elements to prove the interruption of the cartel, despite the absence of collusive contact between Pometon and the other participants in the cartel between 18 November 2005 and 20 March 2007.

91. I do not think that the General Court made an error in law in the judgment under appeal in that regard. On the contrary, I share the view of its case-law according to which the question of whether or not a period is long enough to constitute an interruption of an infringement cannot be examined in the abstract but needs to be assessed, on the contrary, in the context of the functioning of the cartel in question. [33]

92. However, in the present case, the General Court held, in paragraph 308 of the judgment under appeal, without being validly contradicted, that the cartel in question was characterised by the automatic application of the common scrap surcharge, the close links between the two parts of the cartel and the absence, save for the German market, of a structured organisation of contact between the participants in order to implement the coordination in relation to individual clients, with occasional contact only taking place in the event of disagreements.

93. On the other hand, it follows from a settled case-law that a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement, which is therefore capable of rendering the undertaking liable in the context of a single agreement. Nor is the fact that an undertaking does not act on the outcome of a meeting having an anticompetitive object such as to relieve it of responsibility for the fact of its participation in a cartel, unless it has publicly distanced itself from what was agreed in the meeting. [34] In this regard, in order to assess whether an undertaking has actually distanced itself, it is the understanding that the other participants in a cartel have of that undertaking's intention which is of critical importance when assessing whether it sought to distance itself from the unlawful agreement. [35]

94. In the present case, the General Court therefore correctly stated, in paragraph 306 of the judgment under appeal, that the question is if the absence of contact between Pometon and the other participants was of a sufficient duration in order that the latter parties understood Pometon's intention to interrupt its participation in the cartel.

95. In that context, it should be noted that the concept of 'public distancing' reflects a factual situation, the existence of which is found by the General Court, on a case-by-case basis, taking account of a number of coincidences and indicia submitted to it and accordingly an overall assessment of all the relevant evidence and indicia. Provided that that evidence has been properly obtained and that the general principles of law and the rules of procedure in relation to the burden of proof and the taking

33 See, to that effect, judgment of 19 May 2010, *IMI and Others* v *Commission* (T-18/05, EU:T:2010:202, paragraph 89), cited in paragraph 305 of the judgment under appeal.

34 See, to that effect, judgments 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, paragraphs 84 and 85); 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, paragraphs 143 and 144); and of 26 January 2017, *Duravit and Others* v *Commission* (C-609/13 P, EU:C:2017:46, paragraph 136).

35 See, to that effect, judgment of 20 January 2016, *Toshiba Corporation* v *Commission* (C-373/14 P, EU:C:2016:26, paragraph 62).

of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced before it. As already mentioned, save where the clear sense of the evidence has been distorted, that assessment does not therefore constitute a point of law which is subject as such to review by the Court.[36]

96. In the present case, it must be noted that, in paragraph 309 of the judgment under appeal, the General Court observed, first of all, that the appellant did not rely on any elements which might suggest that collusive contacts were indispensable for its continued participation in the cartel between 9 June 2005 and March 2007. Next, in paragraph 310 of the judgment under appeal, the General Court inferred from the fact that Pometon was at the origin of the common scrap surcharge system and had actively contributed to its implementation such that the absence of the appellant from certain meetings or collusive contacts during that period would not have been interpreted by the other participants as distancing itself from the cartel. Lastly, in paragraph 311 of the judgment under appeal, the General Court stated that the fact that Pometon played an active role in the preparation of the meeting which took place in Milan (Italy) on 16 May 2007 and that it also did not announce to the other participants its sale of that part of its steel abrasive business confirms the continuity of Pometon's illegal conduct.

97. On the basis of its assessment of the facts and evidence, the General Court therefore concluded, in paragraph 313 of the judgment under appeal, that there was no indication that Pometon had distanced itself from the cartel and that the Commission had proved to the requisite legal standard that Pometon had not interrupted its participation in the single and continuous infringement in question.

98. In the light of those considerations, I consider that, by the third ground of appeal, Pometon is attempting, at least in part, to invite the Court to substitute its own assessment of the evidence for that of the General Court in the judgment under appeal. In this regard, it must be noted that the examination of the documents at issue does not reveal any clear distortion. Consequently, since I also found no error of law in the General Court's assessment of the duration of Pometon's participation in the infringement in question, I am of the view that the third ground of appeal must be dismissed as, in part, unfounded and, in part, inadmissible.

(c) Conclusion on the first ground of appeal

99. Having regard to the settlement decision as a whole, I have come to the conclusion that the General Court could not conclude, in paragraph 84 of the judgment under appeal, that the references to Pometon could not objectively lead to a suspicion that the Commission had prejudged the guilt and liability of that undertaking in the cartel in question as early as the stage of the settlement decision addressed to the other four undertakings involved.

100. Consequently, I consider that the General Court erred in law by stating, in paragraphs 90 and 103 of the judgment under appeal, that the Commission could not be accused of having breached its duty of impartiality towards Pometon and of having infringed the principle of the presumption of innocence in the contested decision.

101. I am nevertheless of the opinion that the first ground of appeal is ineffective. Indeed, the lack of objective impartiality on the part of the Commission at the stage of the settlement decision did not affect the legality of the contested decision since the findings made in the latter decision are themselves duly supported by the evidence adduced by the Commission.

102. In conclusion, I therefore consider that the first ground of appeal, as well as the second and third grounds of appeal, should be dismissed.

36 See, to that effect, judgment of 20 January 2016, *Toshiba Corporation* v *Commission* (C-373/14 P, EU:C:2016:26, paragraph 63).

B. Fourth ground of appeal relating to a violation of the principle of equality in the context of the determination of the fine and contradictory or insufficient reasoning in this regard

1. Arguments of the parties

103. By its fourth ground of appeal, Pometon submits that, in paragraphs 365 to 396 of the judgment under appeal, the General Court breached the principle of equality and/or its duty to state reasons in the manner in which it fixed the fine. Thus, the General Court is alleged to have applied a rate of reduction to the fine which is not in conformity with the rates of reduction granted to the parties which agreed to settle.

104. While the General Court has annulled the fine fixed by the Commission for failure to state reasons and recalculated the amount of the fine imposed on Pometon on the basis of point 37 of the 2006 Guidelines, the appellant submits that the new rate of reduction applied – 75% instead of 60% – is still not in line with the rates of reduction granted to the other parties involved in the cartel in question. [37]

105. Relying on the assessments of the General Court according to which Pometon's individual liability, the impact of its infringing conduct on price competition and its size were less significant than Winoa's, the appellant argues that the infringement attributable to it is much less serious than that of Winoa. In those circumstances, Pometon considers that the General Court breached the principle of equality by treating different situations in the same way. It should have applied to it, on the contrary, a rate of reduction between that granted by the Commission to Winoa, namely 75%, and that granted to MTS, namely 90%.

106. For the Commission, this ground of appeal is inadmissible because, by that plea, the appellant seeks a review by the Court of the substance of the fine imposed by the General Court, which is not within its jurisdiction. According to the Commission, the Court cannot, on grounds of fairness, substitute its own assessment for that of the General Court ruling, in the exercise of its unlimited jurisdiction, on the amount of the fines imposed on undertakings on account of their infringement of EU law.

107. In any event, the Commission considers the fourth ground of appeal unfounded since the General Court has correctly applied its unlimited jurisdiction and respected the principle of equality by taking into account all the factual circumstances. In addition, in providing a detailed explanation of the methodology used and the factors taken into account in its decision on the setting of the amount of the fine, the General Court gave sufficient reasons for the decision it adopted in the exercise of its unlimited jurisdiction.

2. Analysis

(a) On the admissibility of the fourth ground of appeal

108. For the Commission, the fourth ground of appeal is inadmissible because the appellant seeks a review by the Court of the substance of the fine imposed by the General Court.

37 In the settlement decision, the Commission granted a rate of reduction of 67% to Würth, 75% to Winoa and Ervin and 90% to MTS.

109. It is true that it is not for the Court, 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.[38] Accordingly, only inasmuch as the Court considers that the level of the penalty is not merely inappropriate, but also excessive to the point of being disproportionate, would it have to find that the General Court erred in law, due to the inappropriateness of the amount of a fine.[39]

110. However, if, by its fourth ground of appeal, the appellant requests, in the alternative, that the Court uses its own unlimited jurisdiction to reduce the amount of the fine fixed, that is only as a result of the infringement by the General Court of the principle of equality.

111. In that regard, it is established case-law that the exercise of unlimited jurisdiction in respect of the determination of fines cannot result in discrimination between undertakings which have participated in an agreement contrary to Article 101(1) TFEU.[40] As such, the allegation of breach of the principle of equality by the General Court is therefore a question of law capable of being brought before the Court in the context of an appeal.

(b) On the merits

112. First, Article 23(3) of Regulation No 1/2003 provides that, in fixing the amount of a fine for infringement of competition law, regard is to be had both to the gravity and to the duration of the infringement.

113. In this regard, it follows from settled case-law that in order to determine the amount of a fine, it is necessary to take account of the duration of the infringements and of all the factors capable of affecting the assessment of their gravity, such as the conduct of each of the undertakings, the role played by each of them in the establishment of the concerted practices, the profit which they were able to derive from those practices, their size, the value of the goods concerned and the threat that infringements of that type pose to the European Union.[41]

114. However, the Court has also recalled that, on the one hand, the gravity of the infringement must be assessed on an individual basis and, on the other hand, there is no binding or exhaustive list of criteria to be taken into account when assessing the gravity of an infringement.[42]

115. Second, as regards more specifically the substance of the fourth ground of appeal, there is no doubt that the principle of equal treatment is ensured by the Court of Justice and the General Court, particularly where fines for infringements of competition law are concerned.[43]

38 See, to that effect, judgment of 22 November 2012, *E.ON Energie* v *Commission* (C-89/11 P, EU:C:2012:738, paragraph 125).

39 See, to that effect, judgments of 22 November 2012, *E.ON Energie* v *Commission* (C-89/11 P, EU:C:2012:738, paragraph 126), and of 26 January 2017, *Zucchetti Rubinetteria* v *Commission* (C-618/13 P, EU:C:2017:48, paragraph 43).

40 See, to that effect, judgments of 10 April 2014, *Commission* v *Siemens Österreich and Others* and *Siemens Transmission & Distribution and Others* v *Commission* (C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 105); of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission* (C-580/12 P, EU:C:2014:2363, paragraph 75); and of 18 December 2014, *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin* (C-434/13 P, EU:C:2014:2456, paragraph 77).

41 See, to that effect, judgments of 8 December 2011, *Chalkor* v *Commission* (C-386/10 P, EU:C:2011:815, paragraph 56); of 26 January 2017, *Zucchetti Rubinetteria* v *Commission* (C-618/13 P, EU:C:2017:48, paragraph 42), and of 26 September 2018, *Infineon Technologies* v *Commission* (C-99/17 P, EU:C:2018:773, paragraph 196).

42 See, to that effect, judgment of 26 September 2018, *Infineon Technologies* v *Commission* (C-99/17 P, EU:C:2018:773, paragraphs 196 and 198).

43 See, to that effect, judgment of 12 June 2014, *Deltafina* v *Commission* (C-578/11 P, EU:C:2014:1742, paragraph 75).

116. Indeed, the principle of equal treatment is a general principle of EU law, enshrined in Articles 20 and 21 of the Charter. According to settled case-law, that principle requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.[44] Moreover, it is also settled case-law that, 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.[45]

117. Third, as already mentioned, the same principle applies to the EU Courts in the exercise of their unlimited jurisdiction. Indeed, in this exercise, they may substitute their own appraisal for the Commission's and, consequently, cancel, reduce or increase the fine imposed,[46] without being bound by the indicative rules defined by the Commission in its guidelines, even where the latter may give guidance to the EU Courts when they exercise their unlimited jurisdiction.[47]

118. Nevertheless, although it is for the Court of Justice or the General Court to assess for themselves the circumstances of the case and the nature of the infringement in question in order to determine the amount of the fine, the exercise of unlimited jurisdiction cannot result, when the amount of the fines to be imposed is determined, in discrimination between undertakings which have participated in an agreement or concerted practice contrary to Article 101(1) TFEU.[48]

119. In those circumstances, it appears to me that the General Court did not err in law in ruling:

– first, that it was within its unlimited jurisdiction to determine the appropriate amount of the exceptional adaptation of the basic amount of the fine taking into account all the circumstances of the case (paragraph 369 of the judgment under appeal),

– second, that it was bound only by the gravity and the duration of the infringement (paragraph 371 of the judgment under appeal) and,

– third, that, since duration was taken account in the basic amount – which was not contested by Pometon –, it was appropriate in assessing the gravity of the infringement to take into consideration Pometon's individual liability, its capacity to influence, through its infringing conduct, competition in the abrasive scrap metal market and its size, and to compare each of these factors with the liability and individual situation of the other undertakings involved in the cartel (paragraph 376 of the judgment under appeal).

120. In so doing, the General Court *formally* complied with the rules governing its unlimited jurisdiction, while preserving, a priori, equality between the undertakings concerned, the specificity due to their participation in the settlement procedure having been taken into account by the specific reduction of 10% provided for in point 32 of the settlements notice. Having said that, I nevertheless believe that the General Court breached the principle of equality by according disproportionate importance to the criterion of the size of the undertaking in the assessment of the reduction of the fine.

44 See, to that effect, judgments of 11 July 2013, *Ziegler* v *Commission* (C-439/11 P, EU:C:2013:513, paragraph 132), and of 26 January 2017, *Zucchetti Rubinetteria* v *Commission* (C-618/13 P, EU:C:2017:48, paragraph 38).

45 See, to that effect, judgments of 11 July 2013, *Ziegler* v *Commission* (C-439/11 P, EU:C:2013:513, paragraph 133); of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission* (C-580/12 P, EU:C:2014:2363, paragraph 62), and of 26 January 2017, *Zucchetti Rubinetteria* v *Commission* (C-618/13 P, EU:C:2017:48, paragraph 38).

46 See, to that effect, judgments of 6 November 2012, *Otis and Others* (C-199/11, EU:C:2012:684, paragraph 62), and of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission* (C-580/12 P, EU:C:2014:2363, paragraph 78).

47 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 90).

48 See case-law cited in footnote 40.

121. Indeed, at the end of its analysis of the first two of the abovementioned criteria – namely Pometon's individual liability and the concrete influence of its infringing conduct on price competition –, the General Court concludes, on the one hand, in paragraph 382 of the judgment under appeal, that Pometon, 'unlike Ervin and Winoa, but like MTS and Würth, had a more limited role overall in the cartel' and, on the other hand, in paragraph 386 of the judgment under appeal, that the comparison of the value of specific sales in the EEA shows that 'Pometon's weight in the infringement is four times less than that of Winoa, but is relatively close to that of MTS and far higher than that of Ervin and Würth'. It is therefore only in the light of the third criterion – namely the size of the undertaking – that the General Court observes, in paragraph 390 of the judgment under appeal, that the appellant was in a different situation from that of MTS since its turnover in the last year of full participation in the cartel was EUR 99 890 000 instead of EUR 25 082 293 for MTS.

122. However, the General Court concludes this analysis by holding, in paragraph 393 of the judgment under appeal, that it 'will make an equitable assessment of all the abovementioned circumstances of the case by granting Pometon an exceptional reduction of 75% of the basic amount of the fine adjusted on account of mitigating circumstances'.

123. By granting Pometon the same exceptional rate of reduction as Ervin and Winoa when it had found, on the basis of two out of three criteria, that the situation of Pometon was similar to that of MTS, I consider that the General Court breached the principle of equality. By inconsistently applying its own method of calculation, I believe that the General Court created a form of discrimination between the different undertakings which participated in the same cartel.

124. In this regard, I would observe that the only criterion for distinguishing Pometon's situation from that of MTS is based on total turnover, whereas the General Court expressly explained, in paragraphs 384 and 392 of the judgment under appeal, that the Commission's predominant consideration of another criterion at worldwide level – namely the value of the specific sales – was not adequate, since the specific sales made in the EEA more appropriately reflected the economic weight of the undertaking in the infringement and the harm caused to competition.

125. In addition, while it is true that it is permissible, according to settled case-law, for the purposes of setting the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking 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,[49] disproportionate importance must not be attributed to that turnover by comparison with other relevant factors.[50] However, that appears to be the clear consequence which the General Court reaches in paragraph 393 of the judgment under appeal, since Pometon sees the rate of the exceptional reduction of its fine set at the same level as that of Winoa, whereas Winoa's conduct in the infringement in question is more serious than that of Pometon in the light of two out of the three criteria used.

126. In those circumstances, in the light of the foregoing considerations, I conclude that the fourth ground relied on by Pometon in support of its appeal must be upheld in so far as it alleges an infringement to the principle of equal treatment. Consequently, I consider that the appeal must be allowed and the judgment under appeal should be set aside in so far as it fixes the rate of the exceptional reduction at 75% of the basic amount of the fine and, consequently, in so far as it fixes the amount of the fine imposed on Pometon at EUR 3 873 375.

49 See, to that effect, judgments of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission* (C-580/12 P, EU:C:2014:2363, paragraph 54); of 9 July 2015, *InnoLux* v *Commission* (C-231/14 P, EU:C:2015:451, paragraph 47), and of 7 September 2016, *Pilkington Group and Others* v *Commission* (C-101/15 P, EU:C:2016:631, paragraph 17).

50 See, to that effect, 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 257).

VII. The action before the General Court

127. In accordance with Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded, the Court may, if it quashes the decision of the General Court, give final judgment in the action, where the state of the proceedings so permits.

128. That is the position in the present case since the criterion and the information necessary for assessing the amount of the exceptional reduction of the fine were set out by the General Court without any error of law being committed in that regard. The Court has therefore at its disposal all the necessary information to rule on the action.

129. As regards the reduction of the amount of the fine and, more specifically, the gravity of the infringement – Pometon confirmed that it did not contest the duration of the infringement in the context of the fourth ground of appeal –,[51] it appears from the information available to the Court concerning the five undertakings involved in the cartel at issue that Pometon's situation is similar to that of MTS as regards its individual liability and the concrete influence of its infringing conduct on price competition. However, if account is taken of the relevant total turnover, which gives an indication of the size and of the economic power of the undertakings concerned, Pometon's turnover is four times greater than that of MTS.

130. On the basis of these criteria and in order to respect the principle of equality between the undertakings involved in the cartel at issue, I believe that the reduction granted to Pometon under point 37 of the 2006 Guidelines, should be between 75% and 90%, that is to say, between the rate granted to Winoa and the rate granted to MTS.

131. In those circumstances, in the light of all the considerations of fact and law in the present case, I suggest that the Court should reduce the amount of the fine imposed on Pometon to the figure of 83%, that is to say, between the 75% figure for Winoa and 90% for MTS. In the light of this proposed reduction, I would accordingly suggest that the fine as so reduced should be EUR 2 633 895.

VIII. Costs

132. Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

133. Under Article 138(1) of those rules, applicable to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 138(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the parties are to be ordered to bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

134. In this appeal, since Pometon's appeal has been granted in part, it seems to be appropriate to decide that the Commission must, in addition to bearing its own costs in respect of both the proceedings at first instance and the appeal, be ordered to pay one half of the costs incurred by the appellant relating to those two sets of proceedings. Consequently, Pometon must bear one half of its own costs relating to those proceedings.

51 Paragraph 31 of Pometon's reply.

IX. Conclusion

135. In the light of the foregoing considerations, I propose that the Court should:

– set aside the judgment of the General Court of the European Union of 28 March 2019, *Pometon* v *Commission* (T-433/16, EU:T:2019:201), in so far as the General Court breached the principle of equal treatment as regards the calculation of the amount of the fine imposed on Pometon SpA, fixed the rate of the exceptional reduction at 75% of the basic amount of the fine, fixed the amount of the fine imposed on Pometon at EUR 3 873 375 and decided that the parties should bear their own costs;

– reduce the basic amount of the fine imposed on Pometon to the figure of 83% and set the fine accordingly in the sum of EUR 2 633 895;

– dismiss the appeal as to the remainder;

– order the European Commission, in addition to bearing its own costs in respect of both the proceedings at first instance and the appeal, to pay one half of the costs incurred by Pometon relating to those two sets of proceedings;

– order Pometon to bear one half of its own costs relating to those proceedings.