Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

26 January 2017 *

(Appeal — Competition — Agreements, decisions and concerted practices — Bathroom fittings and fixtures markets of Belgium, Germany, France, Italy, the Netherlands and Austria — Coordination of selling prices and exchange of sensitive business information — Regulation (EC) No 1/2003 — Article 31 — Obligation to state reasons)

In Case C-609/13 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 21 November 2013,

Duravit AG, established in Hornberg (Germany),

Duravit SA, established in Bischwiller (France),

Duravit BeLux SPRL/BVBA, established in Overijse (Belgium),

represented by U. Soltész and C. von Köckritz, Rechtsanwälte,

appellants,

the other parties to the proceedings being:

European Commission, represented by F. Castillo de la Torre and L. Malferrari, acting as Agents, and by A. Böhlke, Rechtsanwalt, with an address for service in Luxembourg,

defendant at first instance,

Council of the European Union,

intervener at first instance,

THE COURT (First Chamber),

composed of A. Tizzano, Vice-President of the Court, acting as President of the First Chamber, M. Berger, E. Levits, S. Rodin (Rapporteur) and F. Biltgen, Judges,

Advocate General: M. Wathelet,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 10 September 2015,

* * Language of the case: German.

after hearing the Opinion of the Advocate General at the sitting on 26 November 2015,

gives the following

Judgment

1 By their appeal, Duravit AG, Duravit SA and Duravit BeLux SPRL/BVBA ask the Court of Justice to set aside the judgment of the General Court of the European Union of 16 September 2013, *Duravit and Others* v *Commission* (T-364/10, not published, 'the judgment under appeal', EU:T:2013:477), in so far as, by that judgment, the General Court upheld only in part their action for partial annulment of Commission Decision C(2010) 4185 final of 23 June 2010 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case COMP/39092 — Bathroom Fittings and Fixtures) ('the decision at issue') and, in the alternative, for reduction of the fine imposed on them by that decision.

Legal context

2 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1) states, in Article 31:

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

Background to the dispute and the decision at issue

3 The background to the dispute was set out in paragraphs 1 to 25 of the judgment under appeal and may be summarised as follows.

4 The appellants are ceramics manufacturers.

5 By the decision at issue, the Commission found that there had been an infringement of Article 101(1) TFEU and Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3), in the bathroom fittings and fixtures sector. That infringement, in which 17 undertakings had allegedly participated, was said to have taken place over various periods between 16 October 1992 and 9 November 2004 and to have taken the form of anticompetitive agreements or concerted practices covering Belgium, Germany, France, Italy, the Netherlands and Austria.

6 On 15 July 2004, Masco Corp. and its subsidiaries, including Hansgrohe AG, which manufactures taps and fittings, and Hüppe GmbH, which manufactures shower enclosures, informed the Commission of the existence of a cartel in the bathroom fittings and fixtures sector and submitted an application for immunity from fines under the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3) or, in the alternative, for a reduction of any fines that might be imposed on them.

7 On 9 and 10 November 2004, the Commission conducted unannounced inspections at the premises of various companies and national industry associations operating in the bathroom fittings and fixtures sector. Between 15 November 2005 and 16 May 2006, the Commission sent requests for information to those companies and associations, including the appellants. The Commission then, on 26 March 2007, adopted a statement of objections, which was notified to the appellants. In the period from 15 November 2004 to 20 January 2006, several undertakings, which did not include the appellants, applied for immunity from fines or for a reduction in fines.

8 By letter of 31 July 2007, the appellants submitted to the Commission their comments on the statement of objections of 26 March 2007.

9 Following a hearing which took place from 12 to 14 November 2007 and the sending on 9 July 2009 of a letter of facts, drawing their attention to certain evidence on which it was minded to rely when adopting a final decision, the Commission adopted the decision at issue on 23 June 2010.

10 In the decision at issue, the Commission found that the infringement identified consisted in (i) the coordination, by the bathroom fittings and fixtures manufacturers, of annual price increases and other pricing elements within the framework of regular meetings of national industry associations; (ii) the fixing or coordination of prices on the occasion of particular events such as increases in raw material costs, the introduction of the euro and the establishment of road tolls in Germany; and, (iii) the disclosure and exchange of sensitive business information. Those practices had followed a recurring pattern which was consistent in each of the six Member States covered by the Commission's investigation. Price setting in the bathroom fittings and fixtures industry followed an annual cycle, more specifically, the manufacturers set price lists, which generally remained in force for a year and formed the basis for commercial relations with wholesalers.

11 The Commission also found that the practices described above formed part of an overall plan to restrict competition among the addressees of the decision at issue and had the characteristics of a single and continuous infringement, which covered three product subgroups — taps and fittings, shower enclosures and accessories and ceramics ('the three product subgroups') — and extended to the territory of Belgium, Germany, France, Italy, the Netherlands and Austria. As regards the organisation of the cartel, the Commission pointed to the existence of national industry associations with members active in all three product subgroups, which it termed 'umbrella associations', national industry associations with members active in at least two of the three product subgroups, which it termed 'cross-product associations', as well as product-specific associations with members active in only one of the three product subgroups. Lastly, it found that a central group of undertakings participated in the cartel in several Member States and in umbrella associations and cross-product associations.

12 As regards the appellants' participation in the infringement identified, first, the Commission noted that, despite being primarily ceramics manufacturers throughout the period of the infringement, they had nevertheless been aware of the various product ranges involved in the infringement, because of their participation in cartel meetings of the umbrella association in Germany, IndustrieForum Sanitär, formerly Freundeskreis der deutschen Sanitärindustrie ('the IFS'), which covered the three product subgroups. Second, as regards the geographic scope of the cartel, the Commission considered that, during the periods of their participation in it, the appellants, as members of the IFS, of the Fachverband Sanitärkeramische Industrie, the coordination body of the product-specific association in the ceramics product subgroup in Germany ('the FSKI'), of the Vitreous China-group, the product-specific association in the ceramics product subgroup in Belgium ('the VCG'), and of the Association française des industries de céramique sanitaire, the product-specific association in the ceramics product subgroup in France ('the AFICS'), had directly participated in Belgium, Germany and France in the infringement found. The Commission found that there was objective evidence that the appellants could reasonably have foreseen that the geographic scope of the infringement identified extended not only to Belgium, Germany and France, but also to Italy and Austria. As regards the Netherlands, the Commission stated that it did not conclude that a cartel had existed in the Netherlands after 1999.

13 For the purposes of setting the fine imposed on each undertaking, the Commission took as its basis 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'). It determined the basic amount of the fine, explaining that this calculation was based, for each undertaking, on its sales by Member State concerned, multiplied by the number of years of participation in the infringement found in the

Member State in question for the relevant product subgroup, so that account was taken of the fact that certain undertakings were active only in certain Member States or in only one of the three product subgroups.

14 As regards the gravity of the infringement, the Commission set the multiplier at 15%, taking account of four criteria for assessing the infringement, that is to say, the nature of the acts alleged, the combined market shares, the geographic scope of the infringement and its implementation. In addition, the Commission set the multiplier to be applied, to take account of the duration of the infringement, to the basic amount determined for the appellants, at 4.33 for Germany, at 3 for Belgium and at 0.66 for France. Finally, in order to deter the undertakings at issue from participating in the collusive practices with which the decision at issue was concerned, the Commission decided to increase the basic amount of the fine by an additional amount set at 15%.

15 After determining the basic amount, the Commission considered whether there were any aggravating or mitigating circumstances capable of justifying an adjustment to that amount. It did not find that any aggravating or mitigating circumstances applied in the appellants' cases and, after application of the ceiling of 10% of turnover, the amount of the fine imposed on the appellants, in Article 2 of the decision at issue, was EUR 29 266 325.

Proceedings before the General Court and the judgment under appeal

16 By application lodged at the Registry of the General Court on 2 September 2010, the appellants brought an action for annulment in part of the decision at issue, relying on nine pleas in law.

17 By the first six pleas they sought annulment in part of the decision at issue. Those pleas alleged, first, a failure to meet the standard of proof required to establish an infringement of Article 101(1) TFEU, second, infringement of the appellants' rights of defence and an error of assessment regarding their alleged participation in a multi-product cartel in the bathroom fittings and fixtures sector, third, an error of assessment regarding the appellants' alleged participation in an infringement of the competition rules in the German sanitary ceramics sector, fourth, an error of assessment regarding the appellants' alleged participation in price concertation in Belgium and France, fifth, an error of assessment regarding the characterisation of the practices at issue as a single and continuous infringement and, sixth, infringement of the right to be heard, on account of the length of time that had elapsed in the administrative proceedings between the time when the appellants were heard and the time when the decision at issue was adopted.

18 The seventh plea in law concerned the alleged illegality of the provisions of Article 23(2) and (3) of Regulation No 1/2003 and of the 2006 Guidelines and contained two objections of illegality.

19 The eighth and ninth pleas in law, raised in the alternative, were aimed at obtaining a reduction in the fine and alleged, respectively, a failure to have regard, when determining the basic amount of the fine, to the low level of the appellants' involvement in the infringement compared with that of the other participants and the disproportionate nature of the amount of the fine ultimately imposed on the appellants after application of the ceiling of 10% of turnover.

20 In paragraph 338 of the judgment under appeal, the General Court upheld only partly the second to the fourth pleas in law, considered in the light of the first plea, holding that the Commission had made an error of assessment in concluding that the appellants had participated in the infringement established in Italy, the Netherlands and Austria. Consequently, in paragraphs 352 to 357 of the judgment under appeal, the General Court upheld in part the claim for partial annulment of the decision at issue.

21 As regards the claims, put forward in the alternative, for a reduction in the fine imposed on the appellants, the General Court first of all rejected, in paragraphs 376 and 384 of the judgment under appeal, the eighth and ninth pleas by which the appellants argued that the method used to calculate the basic amount of the fine infringed the principle of equal treatment and the principle that penalties must be specific to the offender and the offence and that the final amount of the fine imposed on them was disproportionate and unfair.

22 Second, in the exercise of its unlimited jurisdiction, the General Court held, in paragraphs 385 and 386 of the judgment under appeal, that there was no justification for it to reduce the fine of EUR 29 266 325 imposed on the appellants and that that sum represented an appropriate penalty in view of the duration and gravity of the infringement at issue.

Forms of order sought by the parties

23 The appellants claim that the Court should:

— set aside the judgment under appeal in so far as their action was dismissed;

— in accordance with the fourth paragraph of Article 263 TFEU, declare Article 1(1) and Articles 2 and 3 of the decision at issue to be void, in so far as they concern the appellants;

— in the alternative, cancel or significantly reduce the fine;

— in the further alternative, set aside the judgment under appeal and refer the case back to the General Court for reconsideration in accordance with the legal assessment of the Court; and

— order the Commission to pay the costs.

24 The Commission contends that the Court should:

— dismiss the appeal; and

— order the appellants to pay the costs.

The appeal

25 In support of their appeal, the appellants put forward six grounds of appeal.

The first ground of appeal

26 By their first ground of appeal, which is divided into two parts, the appellants plead an infringement of Article 31 of Regulation No 1/2003, of the presumption of innocence and of the right to a fair hearing, guaranteed by the Charter of Fundamental Rights of the European Union ('the Charter') and the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), as a result of the General Court's refusal to exercise its powers of unlimited jurisdiction, and an infringement of the obligation to state reasons.

The first part of the first ground of appeal

– Arguments of the parties

27 By the first part of the first ground of appeal, relating, in particular, to paragraphs 48, 55, 98, 109, 113, 132, 146, 192, 195, 201, 293 and 308 of the judgment under appeal, the appellants submit that the General Court infringed Article 31 of Regulation No 1/2003 by refusing to exercise its powers of unlimited jurisdiction in relation to the findings of fact and of law made by the Commission in the decision at issue.

28 They are of the view that the General Court merely checked whether they had complained that the Commission had made an error of assessment. It follows from several paragraphs of the judgment under appeal that the General Court was willing to review the decision at issue from a legal and substantive standpoint only in so far as specific complaints were made and as in so far as it was proved, at the same time, that the findings in that decision were false. In the absence of such proof, the General Court found that the findings of the Commission at issue had not been called into question even though they were expressly challenged. Thus, the General Court based its decision on a presumption that the Commission's findings of fact were correct and its arguments well founded. The General Court did not carry out a review of all the elements of the decision at issue and waived its right to substitute its own appraisal for that of the Commission. As regards the legal findings, in accordance with the principle *iura novit curia*, the General Court was required to carry out the legal classifications itself and not simply to check whether the Commission had made errors in that regard.

29 The Commission, for its part, points out that the exercise of unlimited jurisdiction covers only the penalty imposed, in respect of which the General Court carries out a full review of legality. The powers of unlimited jurisdiction are not intended to replace the review of legality, so that the General Court must, on request, substitute its own appraisal for that of the Commission, both in relation to the findings of fact and in relation to their legal classification. The General Court found, correctly, that the exercise of unlimited jurisdiction is not equivalent to an own-motion review.

– Findings of the Court

30 According to settled case-law, the review of legality provided for in Article 263 TFEU entails the EU judicature conducting a review, in respect of both the law and the facts, of the contested decision in the light of the arguments relied on by the applicant, which means that it has the power to assess the evidence, annul the decision and alter the amount of the fine (see judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission* , C-295/12 P, EU:C:2014:2062, paragraph 53 and the case-law cited).

31 The review of legality is supplemented by the unlimited jurisdiction conferred on the EU judicature by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU. That jurisdiction empowers the competent Court, in addition to carrying out a mere review of legality with regard to the penalty, to substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed (see judgment of 8 December 2011, *Chalkor* v *Commission* , C-386/10 P, EU:C:2011:815, paragraph 63 and the case-law cited).

32 However, the exercise of unlimited jurisdiction is not equivalent to an own-motion review, and proceedings are *inter partes*. It is, in principle, for the applicant to raise pleas in law against the contested decision and to adduce evidence in support of those pleas (see judgment of 18 December 2014, *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin* , C-434/13 P, EU:C:2014:2456, paragraph 76 and the case-law cited).

33 It should be noted in that regard that the absence of an own-motion review of the whole of the contested decision does not contravene the principle of effective judicial protection. Compliance with that principle does not require that the General Court — which is indeed obliged to respond to the pleas in law raised and to carry out a review of both the law and the facts — should be obliged to undertake of its own motion a new and comprehensive investigation of the file (see judgment of 8 December 2011, *Chalkor* v *Commission* , C-386/10 P, EU:C:2011:815, paragraph 66).

34 It is necessary to examine the first part of the first ground of appeal in the light of that case-law.

35 It should be noted that the appellants submit, in essence, that incorrect conclusions have been drawn in several paragraphs of the judgment under appeal as a result of the erroneous exercise by the General Court of its power of review, in particular its refusal to exercise its powers of unlimited jurisdiction in relation to the findings of fact and of law made by the Commission in the decision at issue.

36 It is clear from the case-law cited in paragraphs 30 to 33 of the present judgment, in the first place, that a review in the exercise of unlimited jurisdiction concerns only the penalty imposed and not the entirety of the decision at issue and, in the second place, that neither the exercise of unlimited jurisdiction nor the review of legality are equivalent to an own-motion review and they therefore do not require the General Court to undertake of its own motion a new and comprehensive investigation of the case, independently of the claims put forward by the applicant.

37 Since the first part of the first ground of appeal is based on an incorrect presumption that the General Court was required to undertake, of its own motion, a review of the decision at issue in its entirety, it should be rejected as unfounded.

The second part of the first ground of appeal

– Arguments of the parties

38 By the second part of the first ground of appeal, which relates to paragraphs 275, 285, 359 and 360 of the judgment under appeal, the appellants criticise the General Court for having merely examined the consequences of the partial illegality of the decision at issue and of the arguments relied upon concerning the fine, without carrying out an autonomous and free assessment, taking into account all the circumstances of the case. They submit that, for that reason, the General Court infringed its obligation to exercise its powers of unlimited jurisdiction, as provided for in Article 31 of Regulation No 1/2003, according to which it is required to take an independent, discretionary decision on the fine, in the light of all the factual circumstances and without confining itself to the content of the file. However, by failing to examine all the stages of the calculation, by failing to state reasons for the outcome of that examination and by failing to examine either the proportionality of the fine or its compatibility with the principle of equal treatment, through a comparison with the fines imposed in parallel proceedings, the General Court failed to fulfil its obligation to exercise its powers of unlimited jurisdiction and its obligation to state reasons.

39 The Commission argues that the appellants wrongly submit that the General Court should have ruled on pleas in law which were not relied upon or which were not given concrete expression by the appellants. Furthermore, as regards the amount of the fine, the mere fact that the General Court acted on the basis of the 2006 Guidelines and reviewed the way they had been applied does not call into question the merits of the judgment under appeal.

– Findings of the Court

40 It is not disputed that the General Court is empowered, in addition to carrying out a mere review of legality with regard to fines imposed by the Commission, to substitute its own appraisal for that of the Commission and, consequently, to cancel, reduce or increase the fine or penalty payment imposed (see judgment of 22 November 2012, *E.ON Energie* v *Commission* , C-89/11 P, EU:C:2012:738, paragraph 124 and the case-law cited).

41 In order to satisfy the requirements of Article 47 of the Charter when conducting a review in the exercise of its powers of unlimited jurisdiction with regard to the fine, the EU judicature is bound, in the exercise of the powers conferred by Articles 261 and 263 TFEU, to examine all complaints based on issues of fact and law which seek to show that the amount of the fine is not commensurate with the gravity or the duration of the infringement (see judgment of 18 December 2014, *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin* , C-434/13 P, EU:C:2014:2456, paragraph 75 and the case-law cited).

42 Nevertheless, as is clear from the settled case-law recalled in paragraph 32 of the present judgment, the exercise of unlimited jurisdiction is not equivalent to an own-motion review and proceedings are *inter partes*. It is, in principle, for the applicant to raise pleas in law against the contested decision and to adduce evidence in support of those pleas.

43 Consequently, and contrary to what the appellants claim, with the exception of pleas involving matters of public policy, the task of the General Court is not to carry out an examination of its own motion, irrespective of the specific pleas relied on by the applicants, and to take an independent, discretionary decision concerning the fine set by the Commission, but is rather to rule on the pleas in law which are raised before it by the applicants.

44 As regards the appellants' argument that the General Court failed to provide reasons for its examination concerning the amount of the fine imposed on them, the General Court found, first of all, in paragraph 362 of the judgment under appeal, that annulment of the decision at issue as regards the infringement in Italy, the Netherlands and Austria cannot result in the alteration of that fine, since the Commission took into consideration, in calculating the amount of that fine, not the appellants' sales in Italy, the Netherlands and Austria, but only their sales in Belgium, Germany and France.

45 Next, the General Court considered, in paragraphs 368 to 376 of the judgment under appeal, the plea based on errors allegedly made by the Commission when calculating the basic amount of the fine imposed, in particular the alleged error relating to the setting of a rate of 15% for the multiplier for 'gravity of the infringement'. The General Court concluded that, since the single and continuous infringement, which was committed for several years on the territories of the three Member States concerned and which consisted in cyclical price fixing, was among the most serious, a rate of 15% for the multiplier for 'gravity of the infringement' was to be regarded as an appropriate amount, in particular in view of the fact that the rates proposed for that type of infringement range from 0% to 30%.

46 Finally, the General Court examined, in paragraphs 377 to 384 of the judgment under appeal, the plea alleging that the fine imposed was disproportionate and unfair on account of its amount, which is equivalent to 10% of the appellants' annual turnover. The General Court concluded that, having regard to the established case-law, application of the ceiling of 10% of turnover does not infringe the principles of proportionality and equal treatment.

47 In that regard, it is settled case-law that the obligation to state reasons does not require the General Court to provide an account that follows exhaustively and one by one all the arguments articulated by the parties to the case. The reasoning may therefore be implicit, provided that it enables the persons concerned to ascertain why the General Court has not upheld their arguments and provides the Court

of Justice with sufficient material for it to exercise its power of review (see judgment of 11 July 2013, *Gosselin Group* v *Commission* , C-429/11 P, not published, EU:C:2013:463, paragraph 53 and the case-law cited).

48 In those circumstances, it is clear that the General Court conducted a thorough review of the pleas in law relating to the amount of the fine imposed by the Commission and gave adequate reasons in its examination in this respect.

49 Moreover, it is the task of the General Court to examine whether the amount of a fine is appropriate and, as a general rule, 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 their infringement of EU law (see, to that effect, judgment of 4 September 2014, *YKK and Others* v *Commission* , C-408/12 P, EU:C:2014:2153, paragraph 29 and the case-law cited).

50 Consequently, the second part of the first ground of appeal and the first ground of appeal in its entirety are unfounded.

The second ground of appeal

51 The second ground of appeal, which comprises two parts, alleges infringement of Article 263 TFEU and of the right to an effective remedy provided for in the first paragraph of Article 47 of the Charter, on the ground that the General Court's examination of the Commission's findings in the context of the review of legality was insufficient and that the limits of that review were exceeded.

The first part of the second ground of appeal

– Arguments of the parties

52 By the first part of the second ground of appeal, the appellants claim that the General Court infringed Article 263 TFEU and the right to an effective remedy in that it imposed on them, in the context of the review of legality, in particular in paragraphs 98, 146, 195, 293 and 308 of the judgment under appeal, excessive requirements in relation to the burden of making out and proving their claim. The General Court should have reviewed whether the Commission correctly interpreted the evidence relied upon and whether the conclusions drawn from it were justified. In that regard, there could be no presumption that the Commission's findings or legal assessments were correct. The appellants submit that the General Court imposed the burden of proof on the appellants before it carried out its own assessment of the body of evidence. An applicant cannot be expected to adduce evidence contrary to the Commission's allegations when the latter has not put forward evidence in support of its allegations in the decision at issue.

53 The appellants conclude that the General Court, by rejecting, in paragraphs 134, 138, 141, 144, 146, 187, 252, 293 and 308 of the judgment under appeal, their arguments by reference to an alleged burden of proof resting on them, inadequately performed its review of legality and thus infringed Article 263 TFEU and the right to an effective remedy.

54 The Commission points out, as regards the alleged existence of a 'presumption of correctness', that it follows from the case-law that, when the Commission relies on evidence which is in principle sufficient to demonstrate an infringement, it is for the undertaking concerned to prove to the requisite legal standard, on the one hand, the existence of the circumstance relied on by it and, on the other, that that circumstance calls in question the probative value of the evidence relied on by the Commission.

55 Unlike the appellants, the Commission considers that the decision at issue was based to the requisite legal standard on evidence and that it is for the appellants to identify the impugned elements, to formulate grounds of challenge and to adduce evidence in that regard. Since that requirement, which is procedural in nature, does not conflict with the burden of proof incumbent upon the Commission, the first part of the second ground of appeal should be rejected.

– Findings of the Court

56 It is settled case-law that it is for the party or the authority alleging an infringement of the competition rules to prove it and that it is for the undertaking or association of undertakings raising a defence against a finding of an infringement of those rules to demonstrate that the conditions for applying the rule on which such defence is based are satisfied, so that the authority will then have to resort to other evidence (see judgment of 17 June 2010, *Lafarge* v *Commission* , C-413/08 P, EU:C:2010:346, paragraph 29 and the case-law cited).

57 Even if the burden of proof rests, according to those principles, on the Commission or on the undertaking or association concerned, the factual elements on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the rules on the burden of proof have been satisfied (see judgment of 17 June 2010, *Lafarge* v *Commission* , C-413/08 P, EU:C:2010:346, paragraph 30 and the case-law cited).

58 Moreover, what the applicant is required to do in the context of a legal challenge is to identify the impugned elements of the contested decision, to formulate grounds of challenge in that regard and to adduce evidence — direct or circumstantial — to demonstrate that its objections are well founded (see, to that effect, judgment of 8 December 2011, *KME Germany and Others* v *Commission* , C-272/09 P, EU:C:2011:810, paragraph 105).

59 In the present case, it should be noted that the General Court recalled, in the first place, in paragraphs 90 to 92 of the judgment under appeal, the case-law relating to the concept of a ‘single and continuous infringement’. In the second place, it recalled, in paragraphs 93 to 108 of that judgment, the rules of evidence applicable in the context of procedures relating to the infringement of Article 101(1) TFEU.

60 More specifically, relying on the settled case-law of the Court of Justice, the General Court found, in paragraph 97 of the judgment under appeal, that, where the Commission has been able to establish that an undertaking had taken part in meetings of a manifestly anticompetitive nature, the General Court is entitled, without either unduly reversing the burden of proof or setting aside the presumption of innocence, to consider that that undertaking is required to provide another explanation of the tenor of those meetings. Moreover, the General Court noted in paragraph 98 of that judgment, that it is for that undertaking not merely to invoke a circumstance which calls into question the probative value of the evidence relied on by the Commission; rather, it must adduce evidence of the existence of that circumstance and also demonstrate that the latter calls into question the probative value of the evidence relied on by the Commission.

61 Since the General Court reviewed, in paragraphs 111 to 147 of the judgment under appeal, the classification of the conduct at issue as a single and continuous infringement and, while considering that the Commission could rightly arrive at such a classification, required the appellants to furnish proof of the circumstances which call into question the Commission’s conclusions concerning that classification, the General Court did not infringe the rules relating to the burden of proof.

62 It follows from the foregoing that the first part of the second ground of appeal is unfounded.

The second part of the second ground of appeal

– Arguments of the parties

63 By the second part of the second ground of appeal, the appellants argue that the General Court exceeded the limits of the review of legality in that it carried out a unilateral review exercising its powers of unlimited jurisdiction to their detriment. They submit that the General Court went beyond the Commission's findings in the decision at issue and exceeded the limits of the review of legality by reclassifying facts which the Commission had classified incorrectly from a legal perspective.

64 In particular, they claim that the General Court, first, in paragraph 213 of the judgment under appeal, changed the Commission's classification in the decision at issue of the practice of exchanging information and transformed it into a multi-product agreement on prices. Second, the General Court, in paragraphs 261, 311 and 312 of that judgment, accorded a high level of probative value to the appellants' participation in meetings which were not examined in the decision at issue. Third, in paragraphs 235, 239 and 298 of that judgment, the General Court, rejecting the appellants' argument that the evidence failed to establish the existence of agreements concluded at the events concerned, held that an attempt to reach an agreement already constitutes an infringement of Article 101 TFEU. Thus, the General Court worked on the assumption that an 'attempt to reach an agreement' already constitutes a concerted practice and accepted that attempt as evidence against the appellants. The General Court therefore changed the Commission's classification of the facts and exceeded the limits of the review of legality.

65 The Commission points out, first of all, as regards the disputed meetings, that the General Court at no time examined the three meetings concerned. With regard, next, to the alleged reclassification of the exchange of information as an agreement, even assuming it to be established, that factor cannot in itself lead to the setting aside of the judgment under appeal, given the anticompetitive purpose of those meetings. The concepts of 'agreement' and 'concerted practice' are intended to catch forms of collusion having the same nature and are distinguishable from each other only by their intensity and the forms in which they manifest themselves. It is therefore sufficient, according to the Commission, to adduce evidence of either to establish an infringement of Article 101 TFEU. Finally, the allegedly unlawful reclassification of the decision at issue, which the General Court is claimed to have carried out in paragraphs 235, 239 and 298 of the judgment under appeal, is only a simple supposition on the part of the appellants.

66 It is therefore necessary, according to the Commission, to reject the second part of the second ground of appeal and that ground of appeal in its entirety.

– Findings of the Court

67 First of all, as regards the appellants' argument that the General Court exceeded the limits of the review of legality by reclassifying facts which the Commission had classified incorrectly from a legal point of view, namely that it reclassified the practice of exchanging pricing information as an agreement, it should be pointed out that it can be clearly inferred from paragraphs 211 and 212 of the judgment under appeal, in view of the case-law which is cited therein, that the General Court referred to the practice of exchanging information as a concerted practice. There is no ground for maintaining, solely because the word 'agreement' appears in paragraph 213 of that judgment, that the General Court reclassified the conduct alleged against the appellants.

68 Furthermore, the concepts of 'agreement' and 'concerted practice' within the meaning of Article 101(1) TFEU are intended, from a subjective point of view, to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves. It is therefore sufficient that proof of the constituent elements of either of those forms of

infringement referred to in Article 101(1) TFEU has been established in order in any event for that provision to apply (see, to that effect, judgment of 5 December 2013, *Solvay Solexis* v *Commission* , C-449/11 P, not published, EU:C:2013:802, paragraph 52 and the case-law cited).

69 Next, as regards the argument that the General Court accorded a high level of probative value, in paragraphs 261, 311 and 312 of the judgment under appeal, to certain evidence relating to the appellants' participation in meetings which were not examined in the decision at issue, it should be noted that it is clear, on the one hand, from the wording of paragraphs 206 and 264 of the judgment under appeal, that the General Court was referring to the lists of meetings in Annexes 1 and 4 of the decision at issue, respectively, and, on the other hand, that paragraphs 261 and 311 of that judgment enumerate all the meetings contained in those lists. Although the General Court refers to the IFS meeting of 14 November 2001 and the FSKI meetings of 23 January and 5 July 2002, in paragraphs 264, 311 and 312 of the judgment under appeal, the General Court, contrary to what the appellants claim, did not examine those meetings and did not accord a high level of probative value to the evidence relating to them. Furthermore, although those meetings are referred to in the complete list of meetings, contained in paragraph 312 of the judgment under appeal, the General Court concluded, in paragraph 313 of that judgment, that almost all, and not all, the evidence supports the conclusion that the appellants participated in the single and continuous infringement at issue. It follows that the General Court did not in fact rely on the IFS meeting of 14 November 2001 and the FSKI meetings of 23 January and 5 July 2002 in concluding that the Commission had adduced proof of the appellants' participation in the infringement in Germany during the period from 7 July 2000 to 9 November 2004.

70 Finally, as regards the appellants' argument that the General Court erred in finding, in paragraphs 235, 239 and 298 of the judgment under appeal, that an attempt to reach an agreement already constitutes an infringement of Article 101 TFEU, it should be borne in mind that a 'concerted practice', within the meaning of Article 101(1) TFEU, refers to a form of coordination between undertakings which, without having been taken to a stage where an agreement properly so called has been concluded, knowingly substitutes for the risk of competition practical cooperation between them (see, to that effect, judgment of 8 July 1999, *Commission* v *Anic Partecipazioni* , C-49/92 P, EU:C:1999:356, paragraph 115 and the case-law cited).

71 Accordingly, the criteria of coordination and cooperation which are constituent elements of a 'concerted practice' within the meaning of that provision must be understood in the light of the concept inherent in the provisions of the FEU Treaty relating to competition, to the effect that each economic operator must determine independently the policy which he intends to adopt on the internal market (see, to that effect, judgment of 22 October 2015, *AC-Treuhand* v *Commission* , C-194/14 P, EU:C:2015:717, paragraph 32 and the case-law cited).

72 Furthermore, although that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, which is such as either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which the operator concerned himself has decided to adopt on the market or which he contemplates adopting, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market (see judgment of 8 July 1999, *Commission* v *Anic Partecipazioni* , C-49/92 P, EU:C:1999:356, paragraph 117 and the case-law cited).

73 It thus follows that contact, consisting in an attempt to reach an agreement on prices, constitutes a concerted practice prohibited by Article 101(1) TFEU (see, to that effect, judgment of 5 December 2013, *Solvay* v *Commission* , C-455/11 P, not published, EU:C:2013:796, paragraph 40).

74 It follows that the second part of the second ground of appeal and the second ground of appeal in its entirety must be rejected as unfounded.

The third ground of appeal

Arguments of the parties

75 In the context of their third ground of appeal, comprising 14 parts which must be considered together, the appellants claim that the General Court, on several occasions, manifestly and decisively distorted the content of the file and, at the same time, made errors of law and infringed recognised principles relating to the taking of evidence.

76 The appellants submit that, first, the General Court distorted, in paragraph 87 of the judgment under appeal, the requests for measures of inquiry set out in point 117 of the application and in point 24 of the reply, as well as their submissions at the hearing. Second, in paragraph 119 of that judgment, the General Court is said to have distorted certain passages of the decision at issue concerning alleged discussions relating to increasing the prices of taps and fittings within the FSKI. Third, the appellants claim that, in paragraph 130 of that judgment, the General Court distorted recital 852 of the decision at issue with regard to the appellants' alleged membership of several cross-product associations. Fourth, they allege that, in paragraphs 152 to 155 of the judgment under appeal, the General Court distorted certain passages of the statement of objections of 26 March 2007 in connection with the complaint of regular price agreements within the framework of the IFS. Fifth, the appellants claim that, in paragraph 193 of that judgment, the General Court distorted their statement concerning the first plea in the application. Sixth, it is argued that, in paragraph 208 of that judgment, the General Court distorted the request for measures of inquiry set out in point 46 of the application, which concerned the examination of the witnesses Schinle and Kook in connection with the IFS meeting of 5 October 2000. Seventh, the appellants allege that, in paragraph 213 of the judgment under appeal, the General Court distorted the clear sense of the evidence and infringed the principles of the taking of evidence in so far as concerns the content of the notes which the Hansgrohe employee, Mr Schinle, made of the IFS meeting of 5 October 2000. Eighth, the appellants claim that, in paragraph 218 of that judgment, the General Court distorted the clear sense of the evidence relating to the IFS meeting of 20 November 2002 and disregarded the requests for measures of inquiry in point 27 of the reply. Ninth, the appellants submit that, in paragraph 230 of the judgment under appeal, the General Court distorted the requests for measures of inquiry contained in points 57, 59 and 61 of the application as well as appellants' arguments concerning price increases 'on occasions connected to specific events'. Tenth, they claim that, in paragraphs 277 to 282 of that judgment, the General Court distorted the evidence, the appellants' arguments and the request for measures of inquiry set out in point 90 of the application in connection with the FSKI meetings of 7 and 8 July 2000. Eleventh, the appellants submit that, in paragraph 299 et seq. of that judgment, the General Court distorted (i) the content of the minutes of the FSKI meeting of 17 January 2003 relating to the alleged concerted action concerning road tolls and (ii) the appellants' request for measures of inquiry in point 101 of the application. Twelfth, they allege that, in paragraph 312 et seq. of the judgment under appeal, the General Court distorted the decision at issue in relation to the probative value of the evidence relating to the IFS meeting of 24 April 2001 and to the FSKI meetings of 23 January and 5 July 2002. Thirteenth, they submit that, in paragraph 321 of that judgment, the General Court distorted the appellants' statement in point 110 of the application and point 43 of the reply, by holding, incorrectly, that the appellants had raised no argument relating to the VCG meeting on 30 October 2001. Fourteenth, it is alleged that, in paragraph 324 of that judgment, the General Court distorted recital 572 et seq. of the decision at issue in connection with the alleged accusation of price concertation in relation to 2005 within the AFICS.

77 In that regard, in the context of the seventh and twelfth instances of distortion alleged by the appellants, they submit that the General Court's assessment of the evidence in the present case differed from its assessment of that same evidence in the cases giving rise to the judgments of 16 September 2013, *Villeroy & Boch Austria and Others* v *Commission* (T-373/10, T-374/10, T-382/10 and T-402/10, not published, EU:T:2013:455), and of 16 September 2013, *Keramag Keramische Werke and Others* v *Commission* (T-379/10 and T-381/10, not published, EU:T:2013:457), with regard, in particular, to the tenor and the taking into account of certain meetings in which the appellants participated, for the purpose of establishing the existence of anticompetitive practices.

78 According to the Commission, each of those allegations of distortion of the evidence should be rejected, (i) because they are based on a misreading of the judgment under appeal, (ii) because nothing came of the criticised passages of that judgment and those passages cannot adversely affect its legality or (iii) because, in part, the appellants are in fact seeking, by means of the third ground of appeal, to have the facts re-examined, without having demonstrated that the General Court manifestly distorted the sense of the evidence.

79 Regarding, in particular, the alleged distortions concerning requests for measures of inquiry, the Commission notes that the General Court alone has jurisdiction to assess the need to supplement the information available to it and that the fact that a request by the appellants could not have an effect on the General Court's assessment and consequently was rejected does not mean that that request was distorted. Moreover, the decisive element is not so much whether the request for measures was manifestly distorted as whether the evidence was manifestly distorted, which the appellants did not plead. The Commission submits that, in any event, as regards any distortion of the evidence, such a distortion should be manifest.

80 In conclusion, in the judgment under appeal, the General Court has not, according to the Commission, exceeded the limits of a reasonable assessment of the evidence and the General Court's assessment is consistent with that carried out in paragraph 133 of the judgment of 16 September 2013, *Keramag Keramische Werke and Others* v *Commission* (T-379/10 and T-381/10, not published, EU:T:2013:457).

Findings of the Court

81 In the first place, as regards the parts of the third ground of appeal relating to the measures of inquiry, it is settled case-law that it is for the EU judicature to decide, in the light of the circumstances of the case and in accordance with the provisions of the Rules of Procedure on measures of inquiry, whether it is necessary for a document to be produced. With regard to the General Court, it follows from Article 49 read in conjunction with Article 65(b) of its Rules of Procedure, in the version applicable when the judgment under appeal was delivered, that a request for production of any document relating to the case is a measure of inquiry which the General Court may order at any stage of the proceedings (see, to that effect, judgments of 2 October 2003, *Salzgitter* v *Commission* , C-182/99 P, EU:C:2003:526, paragraph 41 and the case-law cited; of 2 October 2003, *Aristrain* v *Commission* , C-196/99 P, EU:C:2003:529, paragraph 67 and the case-law cited; of 2 October 2003, *Ensidesa* v *Commission* , C-198/99 P, EU:C:2003:530, paragraph 28 and the case-law cited; and of 2 October 2003, *Corus UK* v *Commission*, C-199/99 P, EU:C:2003:531, paragraph 67 and the case-law cited).

82 Accordingly, it is necessary to reject the sixth part of the third ground of appeal in its entirety and the first and the eighth to eleventh parts of that ground of appeal to the extent that they concern the measures of inquiry, in so far as the General Court rejected the appellants' requests for the examination of the witnesses, considering such measures not to be necessary, first, in view of the examination of the evidence demonstrating the existence of a single and continuous infringement in paragraphs 109 to 147 of the judgment under appeal; second, in view of the finding, in paragraph 213 of that judgment, that the Hansgrohe notes were sufficient to demonstrate the existence of unlawful conduct at the IFS meeting on 5 October 2000; third, in view of the finding, in paragraph 218 of that

judgment, that the minutes of the IFS meeting of 20 November 2002 demonstrate direct contact between economic operators capable of distorting the rules of competition; fourth, in view of the analysis of the appellants' liability for the anticompetitive conduct in the context of particular events, contained in paragraphs 231 to 253 of the judgment under appeal; fifth, in view of the examination of evidence demonstrating the unlawful nature of the FSKI meetings of 7 and 8 July 2000, contained in paragraphs 275 to 284 of that judgment and, sixth, in view of the analysis, in paragraphs 296 to 306 of that judgment, resulting from the General Court's finding that it had been established that there was an attempt to reach an agreement as to the consequences, in terms of price increases, of the introduction of road tolls in Germany at the FSKI meetings of 17 January and 4 July 2003.

83 In the second place, as regards the parts of the third ground of appeal relating to distortions of the appellants' arguments, it should be noted that the appellants, with the exception of what they submit in support of the thirteenth part of that ground of appeal, claim in those parts of the ground of appeal not that the General Court failed to examine the pleas in law relied on at first instance, but that it misinterpreted and erroneously summarised their arguments.

84 It is sufficient to point out that, since the appellants do not claim that the General Court failed to examine the pleas in law relied on at first instance, the question whether the General Court erroneously summarised the appellants' arguments is irrelevant to the result of the present proceedings and, accordingly, the fifth and tenth parts of the third ground of appeal, in their entirety, and the first and ninth parts of that ground of appeal, in so far as they concern distortions of the appellants' arguments, must be rejected (see, to that effect, judgment of 1 July 2010, *Knauf Gips* v *Commission* , C-407/08 P, EU:C:2010:389, paragraph 32).

85 In the third place, as regards the thirteenth part of the third ground of appeal, by which the appellants allege that the General Court erroneously concluded that they had raised no argument concerning the VCG meeting on 30 October 2001, it should be noted, first, that the General Court found, in paragraph 316 of the judgment under appeal, that the appellants did not deny that they had participated in the meetings of national industry associations in Belgium and France, but did dispute the nature of the conduct which took place at those meetings. Thus, the appellants submitted that, since the decisions within each undertaking were taken at the level of the parent company and their representatives at those meetings did not have any margin for negotiation, the exchanges of information on prices occurring on those occasions could not be equated to coordination of price increases and therefore had no anticompetitive object. Second, although the appellants, in point 110 of their application for annulment and in point 43 of their reply before the General Court, which have been invoked in support of the present appeal, formally disputed the existence of price concertation at the VCG meeting of 30 October 2001, it is essentially for the above-mentioned reasons. Those reasons were rejected, rightly, by the General Court in paragraph 318 of the judgment under appeal. In those circumstances, it should be considered that, despite the wording of paragraph 321 of the judgment under appeal which suggests that the appellants had not challenged the anticompetitive nature of the meeting of 30 October 2001, that wording is irrelevant to the outcome of the present case. Therefore, the thirteenth part of the third ground of appeal is unfounded.

86 In the fourth place, as regards the parts of the third ground of appeal relating to the distortion of evidence, it should be recalled that there is distortion where, without recourse to new evidence, the assessment of the existing evidence is manifestly incorrect. However, such distortion must be obvious from the documents on the Court's file, without it being necessary to undertake a fresh assessment of the facts and the evidence. Moreover, where an appellant alleges distortion of the evidence by the General Court, he must indicate precisely the evidence alleged to have been distorted by that Court and show the errors of appraisal which, in his view, led to that distortion (see, to that effect, judgment of 3 December 2015, *Italy* v *Commission* , C-280/14 P, EU:C:2015:792, paragraph 52).

87 However, the seventh part of the third ground of appeal, in its entirety, and the eighth, tenth and eleventh parts of that ground of appeal, in so far as they concern the distortion of evidence, are based on a fragmentary and erroneous reading of the judgment under appeal. The appellants' aim is, in essence, to obtain from the Court of Justice a fresh assessment of the facts and the evidence, which falls outside its jurisdiction at the appeal stage. Therefore, the seventh, eighth, tenth and eleventh parts of the third ground of appeal, in so far as they concern the distortions of evidence, are inadmissible.

88 In the fifth place, as regards the parts of the third ground of appeal relating to the distortion of the decision at issue and of the statement of objections of 26 March 2007, it should be noted that, first, as regards the second and third parts of that ground of appeal, although the appellants submit that the General Court used imprecise wording in paragraph 119 of the judgment under appeal, in which it held that price increases in respect of taps and fittings, and not just sales figures, were discussed at the two FSKI meetings, and that the wording in paragraph 130 of that judgment can be understood as indicating that they participated in more than one multi-product association, that wording, albeit imprecise, is not capable of calling into question the conclusion that (i) the bilateral contacts between undertakings confirmed the existence of close links between the three product subgroups, (ii) the appellants were aware of the overall collusive conduct alleged or could have reasonably foreseen that the infringement found concerned those three subgroups and (iii) the appellants participated in the single and continuous infringement at issue on account of their participation in IFS meetings which concerned those three subgroups. Consequently, the second and third parts of the third ground of appeal cannot be upheld.

89 Second, as regards the fourth part of the third ground of appeal, it is sufficient to note that a reading of paragraphs 150 to 159 of the judgment under appeal reveals no manifest distortion of the content of the statement of objections of 26 March 2007. The appellants' aim is, in essence, that the Court should undertake a fresh assessment of the facts and the evidence, which is inadmissible at the appeal stage. Therefore, that fourth part is inadmissible.

90 Third, as regards the twelfth part of the third ground of appeal, in the first place, as is clear from paragraph 69 of the present judgment, the General Court neither examined the IFS meeting of 14 November 2001 and the FSKI meetings of 23 January and 5 July 2002 nor based its findings concerning the alleged infringement on those meetings and, in the second place, as regards the argument as to the approach taken in the judgments of 16 September 2013, *Villeroy & Boch Austria and Others* v *Commission* (T-373/10, T-374/10, T-382/10 and T-402/10, not published, EU:T:2013:455), and of 16 September 2013, *Keramag Keramische Werke and Others* v *Commission* (T-379/10 and T-381/10, not published, EU:T:2013:457), which was raised also in the context of the seventh part of the third ground of appeal, it is settled case-law that the General Court's obligation to state the reasons for its judgments does not in principle extend to requiring it to justify the approach taken in one case as against that taken in another case, even if the latter concerns the same decision (see judgment of 11 July 2013, *Team Relocations and Others* v *Commission* , C-444/11 P, not published, EU:C:2013:464, paragraph 66 and the case-law cited). Consequently, the twelfth part of the third ground of appeal in its entirety and the seventh part of that ground of appeal, in so far as it concerns the argument relating to the approach taken by the General Court in the judgments of 16 September 2013, *Villeroy & Boch Austria and Others* v *Commission* (T-373/10, T-374/10, T-382/10 and T-402/10, not published, EU:T:2013:455), and of 16 September 2013, *Keramag Keramische Werke and Others* v *Commission* (T-379/10 and T-381/10, not published, EU:T:2013:457), are unfounded.

91 Fourth, as regards the fourteenth part of the third ground of appeal, it must be observed that it is based on a misreading of the judgment under appeal. It is not apparent from the terms in which paragraph 324 of that judgment is cast that the wording used by the General Court manifestly distorts the content of the decision at issue, in particular in the light of the nature of the actions complained of,

namely cyclical price increases. In any event, that wording does not cast doubt on either the anticompetitive nature of the AFICS meeting of 25 February 2004 or the appellants' participation at that meeting. Therefore, the fourteenth part of the third ground of appeal is unfounded.

92 It is clear from all of the foregoing considerations that the third ground of appeal must be rejected as in part inadmissible and in part unfounded.

The fourth ground of appeal

93 By their fourth ground of appeal, comprising two parts, the appellants plead procedural errors and an infringement of Article 48(2) of the Rules of Procedure of the General Court and of Article 48(2), the first paragraph of Article 47 and Article 52(3) of the Charter, read in conjunction with Article 6(1) and (3) of the ECHR, resulting from the admission of evidence which could not be relied on as against them, the taking into account of arguments submitted out of time by the Commission and the rejection of the requests for measures of inquiry without an adequate statement of reasons.

The first part of the fourth ground of appeal

– Arguments of the parties

94 By the first part of the fourth ground of appeal, the appellants argue that the General Court accepted and assessed essential evidence adverse to them which had been referred to neither in the statement of objections of 26 March 2007 nor in the decision at issue, and which had even, in part, been introduced too late in the proceedings. In that context, the General Court, moreover, took into account and used against the appellants in the judgment under appeal written arguments submitted out of time, relied upon by the Commission after the close of the written procedure, and did not give the appellants the opportunity to respond to the Commission's allegations.

95 They argue more particularly in that regard that the General Court, in the first place, in paragraphs 162 to 167 of the judgment under appeal, erred in law by denying that the appellants' rights of defence had been infringed as a result of the use of the notes relating to the IFS meeting of 5 October 2000 in the decision at issue and, in allowing and in using that evidence, itself also infringed their rights of defence. Moreover, that part of the judgment under appeal is based entirely on a line of argument submitted out of time by the Commission, inasmuch as that line of argument was invoked, for the first time, more than a year and a half after the close of the written procedure. Therefore, in taking that line of argument into account, without having given the appellants at least the opportunity to respond to it, afresh, in writing, the General Court allegedly infringed Article 48(2) of its Rules of Procedure, the principle of equality of arms and the right of the appellants to be heard.

96 In the second place, the appellants submit that General Court, in paragraph 226 et seq. of the judgment under appeal, first, erred in law in rejecting, wrongly, an infringement of the rights of defence of the appellants by the Commission on account of the taking into account of the notes relating to the IFS meeting of 9 April 2003 and, second, itself made a procedural error and infringed the appellants' rights of defence, by taking into account those notes and the belated account given by the Commission concerning the possibility of finding those notes in the administrative file.

97 In the third place, they argue that the judgment under appeal is based on infringements of the rights of the defence with regard to the notes relating to the IFS meetings of 5 October 2000 and 9 April 2003 referred to above, given that the General Court used those notes and drew conclusions from them in paragraphs 213, 215, 228, 281 et seq. and 313 of the judgment under appeal, even though that evidence cannot be relied on as against them.

98 The Commission contends that the appellants had access to the non-confidential versions of the documents to which they referred and that the Commission's line of argument based on those documents was not a new plea in law, but was rather a clarification in response to a request from the General Court. In particular, it simply responded to the appellants' inaccurate line of argument and they had the opportunity to present argument on the issues involved at the hearing.

– Findings of the Court

99 It is common ground that the right of access to the Commission's file is designed to ensure effective exercise of the rights of the defence. Those rights are not only fundamental principles of EU law but are also enshrined in Article 6 of the ECHR. Moreover, failure to respect that right of access during the procedure prior to adoption of a contested decision can, in principle, cause the decision to be annulled if the rights of defence of the undertaking concerned have been infringed (see, to that effect, judgment of 2 October 2003, *Corus UK* v *Commission* , C-199/99 P, EU:C:2003:531, paragraphs 126 and 127 and the case-law cited).

100 In such a case, the infringement committed is not remedied by the mere fact that access to the file was made possible during the judicial proceedings relating to an action by which annulment of the contested decision is sought. Where access has been granted at that stage, the undertaking concerned must show not that, if it had had access to the non-disclosed documents, the Commission decision would have been different in content, but only that those documents could have been useful for its defence (see judgment of 2 October 2003, *Corus UK* v *Commission* , C-199/99 P, EU:C:2003:531, paragraph 128 and the case-law cited).

101 In that regard, in the first place, as regards the notes relating the IFS meeting of 5 October 2000, it is clear from paragraphs 165 to 167 of the judgment under appeal, first, that those notes were made available to the appellants before the judicial proceedings, second, that they were referred to in the statement of objections of 26 March 2007 and, third, that they were the subject of argument before the General Court.

102 In the second place, as regards the notes relating to the IFS meeting of 9 April 2003, it is clear from paragraph 226 of the judgment under appeal, first, that the non-confidential version of those notes was available to the appellants before the judicial proceedings and, second, that the Commission confirmed, in its letter of 12 March 2013, that the first page of those notes was available without restriction and that the non-confidential version of the second page could be accessed in its case file. Those pages were also the subject of argument before the General Court.

103 Moreover, it should be emphasised that, contrary to what the appellants allege, the fact that the decision at issue refers not to those notes in their entirety but only to a page or to an annex to them is not such as to give rise to an infringement of the rights of defence. Indeed, such references are sufficient to identify the relevant document.

104 In the third place, as regards the allegedly belated line of argument of the Commission relating to the above documents, it is sufficient to note that it follows from paragraphs 29 to 38 of the judgment under appeal that the General Court put written questions to the appellants and to the Commission and that a hearing was organised on 20 March 2013. Accordingly, the line of argument put forward in writing in response to the General Court's request and serving to clarify certain points of discussion before they were debated at a hearing cannot be considered to be out of time. Furthermore, the alleged lateness of that line of argument does not call into question the fact that the appellants actually had access to the notes relating to the IFS meetings of 5 October 2000 and 9 April 2003.

105 In such circumstances, the General Court cannot be criticised for having infringed Article 48(2) of its Rules of Procedure or the appellants' rights of defence. Therefore, the first part of the fourth ground of appeal must be rejected as unfounded.

The second part of the fourth ground of appeal

– Arguments of the parties

106 By the second part of the fourth ground of appeal, the appellants argue, in essence, that the refusal of the General Court to examine the witnesses against them infringed their right to a fair hearing. The General Court did not grant even one of the requests for measures of inquiry submitted by the appellants. Therefore, by summarily rejecting those requests in paragraphs 135, 200, 214, 236, 240, 245, 270, 283 and 305 of the judgment under appeal, the General Court infringed the appellants' right to a fair hearing and Article 6(3)(d) of the ECHR.

107 The Commission takes the view that it follows from the settled case-law of the Court of Justice that the power of the General Court to assess the relevance of a request for measures of inquiry to the subject matter of the dispute and the need to examine the witnesses is compatible with the fundamental right to a fair hearing and, in particular, Article 6(3)(d) of the ECHR.

– Findings of the Court

108 First of all, it should be borne in mind that the General Court is the sole judge of any need to supplement the information available to it in respect of the cases before it. Whether or not the evidence before it is sufficient is a matter to be appraised by it alone and is not subject to review by the Court of Justice on appeal, except where that evidence has been distorted or the substantive inaccuracy of the findings of the General Court is apparent from the documents in the case (see judgment of 12 June 2014, *Deltafina* v *Commission* , C-578/11 P, EU:C:2014:1742, paragraph 67 and the case-law cited).

109 Next, according to settled case-law, even where a request for the examination of witnesses, made in the application, states precisely about what facts and for what reasons the witness or witnesses should be examined, it falls to the General Court to assess the relevance of the request to the subject matter of the dispute and the need to examine the witnesses named (see judgment of 19 December 2013, *Siemens and Others* v *Commission* , C-239/11 P, C-489/11 P and C-498/11 P, not published, EU:C:2013:866, paragraph 323 and the case-law cited).

110 Finally, the General Court's discretion in that regard is compatible with the fundamental right to a fair hearing and, in particular, Article 6(3)(d) of the ECHR. It is apparent from the Court's case-law that that provision does not confer on the accused an absolute right to obtain the attendance of witnesses before a court and that it is in principle for the court to determine whether it is necessary or appropriate to call a witness. Article 6(3) of the ECHR does not require that every witness be called but is aimed at full equality of arms, ensuring that the procedure in issue, considered in its entirety, gave the accused an adequate and proper opportunity to challenge the suspicions concerning him (see, to that effect, judgment of 19 December 2013, *Siemens and Others* v *Commission* , C-239/11 P, C-489/11 P and C-498/11 P, not published, EU:C:2013:866, paragraphs 324 and 325 and the case-law cited).

111 It follows that the second part of the fourth ground of appeal and the fourth ground of appeal in its entirety must be rejected as unfounded.

The fifth ground of appeal

Arguments of the parties

112 The fifth ground of appeal, comprising two parts which must be considered together, alleges an infringement of the obligation to state reasons and of Article 101 TFEU, in connection with the legal classification of a single and continuous infringement and the appellants' liability in that regard.

113 By the first part of that ground of appeal, the appellants maintain that the neither in paragraphs 118 to 128 of the judgment under appeal nor in any other passage of that judgment did the General Court provide an adequate statement of reasons for its findings concerning the existence of complementarity between the practices found, which constitutes a requirement for the classification of an infringement as a single infringement.

114 By the second part of that ground of appeal, the appellants argue, in essence, that the General Court, in paragraph 180 et seq. of the judgment under appeal, misinterpreted the case-law of the Court of Justice concerning the legal classification of a single and continuous infringement, in particular because a single and continuous infringement can in principle be held to exist only between competitors and, in any event, because the General Court could not conclude, on the basis of the facts and evidence in the file, that the appellants participated in such an infringement.

115 The Commission contends that the General Court analysed various actions within the group of undertakings concerned in a number of paragraphs of the judgment under appeal and that it referred to the relevant paragraphs of the decision at issue. It follows, in particular, from the case-law of the Court of Justice that complementarity of practices is not a requirement for establishing the existence a single infringement and the alleged lack of analysis in that regard therefore does not constitute a failure to state reasons.

116 As regards the second part of the fifth ground of appeal, the Commission argues that an infringement of Article 101 TFEU also occurs where the conduct of an undertaking, as coordinated with the conduct of other undertakings, aims to restrict competition in the relevant market, without its being necessary for that undertaking itself to be active in such a market. The Commission adds that the participants have, in the present case, endorsed the uniform economic objective through their participation in the cartel meetings. In order to attribute to the appellants the unlawful conduct carried out by other undertakings, it is sufficient that the appellants were aware of that conduct or could reasonably have foreseen it. The General Court, on several occasions, examined the cartel meetings concerned and established that the relevant information had been communicated between the manufacturers of the three product subgroups, which is sufficient to establish the existence of 'awareness or the presumption of awareness of the unlawful conduct'.

Findings of the Court

117 According to settled case-law, an infringement of Article 101(1) TFEU can result not only from an isolated act, but also from a series of acts or from continuous conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that provision. Accordingly, if the different actions form part of an 'overall plan' because their identical object distorts competition within the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (see, to that effect, judgment of 24 June 2015, *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce* , C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 156 and the case-law cited).

118 An undertaking which has participated in such a single and complex infringement of that kind by its own conduct, which fell within the definition of an 'agreement' or 'concerted practice' having an anticompetitive object within the meaning of Article 101(1) TFEU and was intended to help bring about the infringement as a whole, may thus be responsible also in respect of the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement. That is the position where it is shown that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participants and that it was aware of the offending conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to take the risk (see, to that effect, judgment of 24 June 2015, *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce* , C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 157 and the case-law cited).

119 An undertaking may thus have participated directly in all the forms of anticompetitive conduct comprising the single and continuous infringement, in which case the Commission is entitled to attribute liability to it in relation to that conduct as a whole and, therefore, in relation to the infringement as a whole. Equally, the undertaking may have participated directly in only some of the forms of anticompetitive conduct comprising the single and continuous infringement, but have been aware of all the other unlawful conduct planned or put into effect by the other participants in the cartel in pursuit of the same objectives, or could reasonably have foreseen that conduct and have been prepared to take the risk. In such cases, the Commission is also entitled to attribute liability to that undertaking in relation to all the forms of anticompetitive conduct comprising such an infringement and, accordingly, in relation to the infringement as a whole (see judgment of 24 June 2015, *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce* , C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 158 and the case-law cited).

120 On the other hand, if an undertaking has directly taken part in one or more of the forms of anticompetitive conduct comprising a single and continuous infringement, but it has not been shown that that undertaking intended, through its own conduct, to contribute to all the common objectives pursued by the other participants in the cartel and that it was aware of all the other offending conduct planned or put into effect by those other participants in pursuit of the same objectives or that it could reasonably have foreseen all that conduct and was prepared to take the risk, the Commission is entitled to attribute to that undertaking liability only for the conduct in which it had participated directly and for the conduct planned or put into effect by the other participants, in pursuit of the same objectives as those pursued by the undertaking itself, where it has been shown that the undertaking was aware of that conduct or was able reasonably to foresee it and prepared to take the risk (see judgment of 24 June 2015, *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce* , C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 159 and the case-law cited).

121 In that regard, the Court of Justice has already held that the General Court is not required, for the purpose of characterising various instances of conduct as a single and continuous infringement, to establish whether they present a link of complementarity, in the sense that each of them is intended to deal with one or more consequences of the normal pattern of competition, and through interaction, contribute to the attainment of the set of anticompetitive effects desired by those responsible, within the framework of an overall plan having a single objective. By contrast, the condition relating to a 'single objective' requires that it be ascertained whether there are any elements characterising the various instances of conduct forming part of the infringement which are capable of indicating that the instances of conduct in fact implemented by other participating undertakings do not have an identical object or identical anticompetitive effect and, consequently, do not form part of an 'overall plan' as a result of their identical object distorting the normal pattern of competition within the internal market (see, to that effect, judgment of 19 December 2013, *Siemens and Others* v *Commission* , C-239/11 P, C-489/11 P and C-498/11 P, not published, EU:C:2013:866, paragraphs 247 and 248).

122 Moreover, it cannot be inferred from the Court's case-law that Article 101(1) TFEU concerns only either (i) the undertakings operating on the market affected by the restrictions of competition or indeed on the markets upstream or downstream of that market or neighbouring markets or (ii) undertakings which restrict their freedom of action on a particular market under an agreement or as a result of a concerted practice. Indeed, it follows from well-established case-law of the Court that the text of Article 101(1) TFEU refers generally to all agreements and concerted practices which, in either horizontal or vertical relationships, distort competition on the internal market, irrespective of the market on which the parties operate, and that only the commercial conduct of one of the parties need be affected by the terms of the arrangements in question (see, to that effect, judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraphs 34 and 35 and the case-law cited).

123 In the present case, it should be stated, first, that the General Court recalled, in paragraphs 90 to 92 of the judgment under appeal, the case-law relating to the concept of 'single and continuous infringement'. Second, it recalled, in paragraphs 93 to 108 of that judgment, the case-law on the burden of proof. Third, it reviewed, in paragraphs 111 to 147 of that judgment, in the course of examining the appellants' plea in law concerning the classification of the infringement at issue as a single and continuous infringement, whether the unlawful practices and actions form part of an 'overall plan'.

124 In those circumstances, since the General Court examined whether the unlawful practices and conduct at issue form part of an 'overall plan' and because a competitive relationship between the participating undertakings is not a requirement for classifying anticompetitive conduct as a single and continuous infringement, the General Court cannot be criticised for not providing adequate reasoning for its examination of the classification of the practices and conduct at issue as a single and continuous infringement.

125 Thus, the General Court made no error in law in considering that the appellants are, on the one hand, liable on account of direct participation in the alleged infringement and, on the other hand, liable on account of indirect participation in it, inasmuch as they were aware of all the other unlawful conduct planned or put into effect by the other participants in the cartel at issue in pursuit of the same objectives or could reasonably have foreseen that conduct and were prepared to take the risk.

126 Consequently, the fifth ground of appeal is unfounded.

The sixth ground of appeal

Arguments of the parties

127 By their sixth ground of appeal, comprising three parts which must be considered together, the appellants claim that the General Court infringed Article 101 TFEU by holding that it is necessary to categorise the discussions which took place in the course of the various meetings as deliberate restrictions on competition and by assuming that the appellants had an obligation to distance themselves from the discussions of non-competing undertakings.

128 By the first part of that ground of appeal, the appellants argue that a concerted practice can, in principle, be held to exist only between undertakings which compete against each other. However, by holding, in paragraph 212 of the judgment under appeal, that an exchange of sensitive information could, in itself, be anticompetitive, the General Court relied on an incorrect criterion and failed to take account of the economic framework of the discussions concerned. Accordingly, it infringed Article 101 TFEU.

129 By the second part of the sixth ground of appeal, the appellants argue that the General Court also infringed Article 101 TFEU by holding, in paragraphs 251 and 252 of the judgment under appeal, that, in order to escape liability for the infringement at issue, it was incumbent on the appellants to distance themselves from all discussions taking place within the IFS in which they participated. However, there exists no presumption regarding the anticompetitive nature of concerted action between non-competing undertakings. According to the appellants, it is therefore not possible to draw any conclusions as to whether they support an unlawful initiative from their presence at discussions concerning subjects relating to the markets on which they are not active.

130 By the third part of the sixth ground of appeal, the appellants argue that the General Court infringed Article 101 TFEU by holding, in paragraphs 235, 239 and 298 of the judgment under appeal, that an 'attempt to reach an agreement', without evidence of the existence of such an agreement, is sufficient to establish the existence of a concerted practice. According to the appellants, an 'attempt to reach an agreement' by non-competing undertakings is not sufficient to establish an infringement of Article 101 TFEU.

131 The Commission contends that the existence of a competitive relationship was established for the cartel meetings at which the appellants were not the only ceramics manufacturers. According to the Commission, the pressure allegedly exerted by wholesalers did not deprive the appellants of their autonomy. Moreover, the appellants not only had the opportunity to respond to it individually, but also opted for a joint collusive practice and attempted to agree to a timetable for the introduction of price increases. The Commission indicates that, contrary to the arguments of the appellants, the exchange of information already infringes Article 101 TFEU where it underpins another anticompetitive arrangement.

132 The Commission argues that the discussion on prices was not exclusively concerned with third markets. Similarly, the obligation to distance themselves from the discussions taking place within the IFS arises from the nature of the infringement as single and continuous. In particular, the appellants incurred liability for the unlawful conduct of the other participants in the cartel since they were aware or should have been aware of that conduct.

133 The Commission recalls that it follows from the Court's case-law that it is sufficient that an undertaking discloses information to its competitors in preparation for an anticompetitive agreement to prove the existence of a concerted practice within the meaning of Article 101(1) TFEU. That institution asks the Court to reject the sixth ground of appeal in its entirety.

Findings of the Court

134 First of all, it is clear from settled case-law that the exchange of sensitive information infringes Article 101(1) TFEU, in particular where it underpins another anticompetitive arrangement (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 281).

135 Next, the exchange of commercial information between competitors in preparation for an anticompetitive agreement suffices to prove the existence of a concerted practice within the meaning of Article 101(1) TFEU. In that regard, it is not necessary to show that those competitors formally undertook to adopt a particular course of conduct or that the competitors colluded over their future conduct on the market (see, to that effect, judgment of 5 December 2013, *Solvay* v *Commission* , C-455/11 P, not published, EU:C:2013:796, paragraph 40).

136 Finally, 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 (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, paragraphs 143 and 144).

137 Since, as is clear from paragraph 124 of the present judgment, a competitive relationship between the participating undertakings is not a requirement for classifying anticompetitive conduct, such as that at issue, as a single and continuous infringement, the appellants are mistaken in their view that the case-law recalled in paragraphs 134 to 136 of the present judgment is not applicable in the context of a single and continuous infringement.

138 If the appellants' line of argument were upheld, it would deprive the concept of 'single and continuous infringement' of part of its meaning, since such an interpretation would exonerate undertakings participating in a single and continuous infringement of any indirect liability based on the conduct of non-competing undertakings which, nevertheless, contribute by their conduct to achieving the overall plan specific to the single and continuous infringement.

139 Accordingly, the General Court was correct to hold that the appellants may be held liable both for their direct participation in the cartel at issue and for their indirect participation in that cartel, given that they were aware of all the other unlawful conduct planned or put into effect by the other participants in that cartel in pursuit of the same objectives or could reasonably have foreseen that conduct and were prepared to take the risk.

140 It follows from all the foregoing considerations that the sixth ground of appeal is unfounded.

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

Costs

142 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where an appeal is unfounded, the Court is to make a decision as to costs.

143 In accordance with Article 138(1) of those rules, which applies to appeal proceedings pursuant to Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs against the appellants and they have been unsuccessful, they must be ordered to pay the costs.

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

1. Dismisses the appeal;

2. Orders Duravit AG, Duravit SA and Duravit BeLux SPRL/BVBA to pay the costs.

[Signatures]