Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

26 January 2017*

(Appeal — 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 23(2) — Ceiling of 10% of turnover — 2006 Guidelines on the method of setting fines — Obligation to state reasons — Principle of equal treatment — Exercise of unlimited jurisdiction)

In Case C-637/13 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 27 November 2013,

Laufen Austria AG, established in Wilhelmsburg (Austria), represented by E. Navarro Varona, abogada,

appellant,

the other party to the proceedings being:

European Commission, represented by F. Castilla Contreras, F. Castillo de la Torre and F. Jimeno Fernández, acting as Agents, with an address for service in Luxembourg,

defendant 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,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* * Language of the case: Spanish.

Judgment

1 By its appeal Laufen Austria AG ('Laufen Austria' or 'the appellant') asks the Court of Justice to set aside the judgment of the General Court of the European Union of 16 September 2013, *Laufen Austria* v *Commission* (T-411/10, 'the judgment under appeal', EU:T:2013:443), by which the General Court dismissed its action for 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') in so far as the decision related to it or, in the alternative, for reduction of the fine imposed on it in that decision.

Legal context

Regulation (EC) No 1/2003

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) provides, in Article 23(2):

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

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

…

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

…'

The 2006 Guidelines

3 The Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the 2006 Guidelines') state, in point 2, that, so far as concerns the setting of fines, 'the Commission must have regard both to the gravity and to the duration of the infringement' and that 'the fine imposed may not exceed the limits specified in Article 23(2), second and third subparagraphs, of Regulation No 1/2003'.

4 Point 13 of the 2006 Guidelines states:

'In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly … relates in the relevant geographic area within the [European Economic Area (EEA)]. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement.'

5 Point 20 of the 2006 Guidelines provides:

'The assessment of gravity will be made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case.'

6 Point 21 of the 2006 Guidelines states:

‘As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30% of the value of sales.’

7 In accordance with point 22 of the 2006 Guidelines:

‘In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.’

8 Point 23 of the 2006 Guidelines states:

‘Horizontal price-fixing, market-sharing and output-limitation agreements …, which are usually secret, are, by their very nature, among the most harmful restrictions of competition. As a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale.’

9 Point 25 of the 2006 Guidelines is worded as follows:

‘In addition, irrespective of the duration of the undertaking’s participation in the infringement, the Commission will include in the basic amount a sum of between 15% and 25% of the value of sales as defined in Section A above in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements. The Commission may also apply such an additional amount in the case of other infringements. For the purpose of deciding the proportion of the value of sales to be considered in a given case, the Commission will have regard to a number of factors, in particular those referred [to] in point 22.’

10 Point 29 of those guidelines states:

‘The basic amount may be reduced where the Commission finds that mitigating circumstances exist, such as:

— where the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened: this will not apply to secret agreements or practices (in particular, cartels);

— where the undertaking provides evidence that the infringement has been committed as a result of negligence;

— where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market: the mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount;

— where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so;

— where the anticompetitive conduct of the undertaking has been authorised or encouraged by public authorities or by legislation. …’

Background to the dispute and the decision at issue

11 The background to the dispute was set out in paragraphs 1 to 27 of the judgment under appeal and may be summarised as follows.

12 At the time of the events constituting the infringement, Laufen Austria manufactured ceramic sanitary ware under its own brands and marketed those products as well as products manufactured by its competitors. Its sales were concentrated in Austria and, to a lesser extent, Germany. On 29 October 1999, Roca Sanitario SA, the parent company of a group of companies active in the bathroom fittings and fixtures sector ('the Roca group'), acquired the group whose ultimate parent was the Swiss company Keramik Holding AG, which held all the share capital of Laufen Austria.

13 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, 'the 2002 Leniency Notice') or, in the alternative, for a reduction of any fines that might be imposed on them.

14 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 Roca SARL ('Roca') and Laufen Austria. It then, on 26 March 2007, adopted a statement of objections. The statement of objections was notified, inter alia, to the appellant.

15 On 17 January 2006, Roca applied, on its own behalf and on behalf of the group to which Laufen Austria belongs, in so far as Roca had taken over the activities of that group in France, for immunity from fines under the 2002 Leniency Notice or, in the alternative, for a reduction of any fine that might be imposed on it.

16 Following a hearing held from 12 to 14 November 2007, the sending, on 9 July 2009, of a letter of facts to certain companies, including the appellant, and further requests for information that were addressed to, amongst others, the appellant, the Commission, on 23 June 2010, adopted the decision at issue, by which it found there to have 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, 'the EEA Agreement') 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 the territory of Belgium, Germany, France, Italy, the Netherlands and Austria. According to the decision at issue, the products covered by the cartel were bathroom fittings and fixtures belonging to the following three product sub-groups: taps and fittings, shower enclosures and accessories, and ceramic sanitary ware (ceramics) ('the three product sub-groups').

17 The Commission pointed to, amongst other things, the existence of national industry associations whose members' activities covered all three product sub-groups, which it termed 'umbrella associations', national industry associations with members active in at least two of those three product sub-groups, which it termed 'cross-product associations', as well as product-specific associations with members active in only one of the three product sub-groups. Lastly, it identified a central group of undertakings which participated in the cartel in various Member States and in umbrella associations and cross-product associations.

18 As regards the Roca group's participation in the infringement found, the Commission considered that the group had been aware that the infringement covered the three product sub-groups. However, so far as the geographic scope of the cartel was concerned, the Commission concluded that the Roca group could not be considered to have been aware of the cartel's overall scope but was to be regarded as having been aware only of the collusive conduct in France and Austria.

19 The Commission thus found, in Article 1(3) of the decision at issue, that Laufen Austria, Roca Sanitario and Roca France had infringed Article 101(1) TFEU and Article 53 of the EEA Agreement by participating in a continuing agreement or concerted practice in the bathroom fittings and fixtures sector in France and Austria.

20 For the purpose of setting the fines imposed on each undertaking the Commission took as a basis the 2006 Guidelines.

21 The Commission first determined the basic amount of the fine. To this end it explained that this amount was based, for each undertaking, on its sales by Member State, multiplied by the number of years of participation in the infringement found in the Member State in question for the relevant product group, so that account was taken of the fact that certain undertakings were active only in certain Member States or that their activities concerned only one of the three product sub-groups.

22 After giving that explanation, the Commission set at 15% of the value of sales the multiplier linked to the gravity of the infringement found, as provided for in points 20 to 23 of the 2006 Guidelines ('the multiplier for the "gravity of the infringement"'). In that regard, it took account of four criteria for assessing the infringement: combined market shares and the nature, geographic scope and implementation of the infringement.

23 In addition, the Commission, under point 24 of the 2006 Guidelines, set the multiplier to be applied — to take account of the duration of the infringement found — to the basic amount determined for Laufen Austria, at 10, which reflected 10 years' participation in the infringement, in Austria, in respect of ceramics.

24 Finally, in order to ensure that the decision at issue had a deterrent effect, the Commission, on the basis of point 25 of the 2006 Guidelines and taking account of the four criteria referred to in paragraph 22 of the present judgment, increased the basic amount of the fine by applying to the value of sales an additional multiplier ('the multiplier for the "additional amount"') at a rate of 15%.

25 This resulted, in the case of the Roca group, in basic amounts of the fine of EUR 3 000 000 for the collusive conduct relating to taps and fittings on the French market and EUR 35 700 000 for the collusive conduct relating to ceramics, of which EUR 3 700 000 concerned the French market and EUR 32 000 000 concerned the Austrian market.

26 Secondly, the Commission considered whether there were any aggravating or mitigating circumstances capable of justifying an adjustment to the basic amount of the fine. It did not find that any aggravating or mitigating circumstances applied in the appellant's case.

27 Thirdly, the Commission applied the ceiling of 10% of turnover ('the 10% ceiling') in accordance with Article 23(2) of Regulation No 1/2003. Once the 10% ceiling had been applied, the Roca group's fine amounted to EUR 38 700 000.

28 Fourthly, the Commission took the view that the Roca group, to which the appellant belonged, was not entitled to any reduction of fines under the 2002 Leniency Notice. In its view, the evidence put forward by the group could not be considered to represent significant added value for the purposes of point 21 of that notice. Nor did the Commission consider the group to have shown a genuine spirit of cooperation during the administrative procedure.

29 In view of the foregoing, the Commission found, in Article 1(3) of the decision at issue, that the appellant had infringed Article 101 TFEU and Article 53 of the EEA Agreement by participating, from 12 October 1994 to 9 November 2004, in a continuing agreement or concerted practice in the bathroom fittings and fixtures sector in France and Austria.

30 Under Article 2(4) of the decision at issue, the Commission imposed a fine of EUR 32 000 000 on the appellant, for EUR 17 700 000 of which it was jointly and severally liable with Roca Sanitario.

Proceedings before the General Court and the judgment under appeal

31 By application lodged at the Registry of the General Court on 8 September 2010, Laufen Austria brought an action for annulment of the decision at issue in so far as the decision concerned it or, in the alternative, for reduction of the fine imposed on it.

32 In support of its claim for the partial annulment of the decision at issue, Laufen Austria put forward six pleas in law. The first plea in law concerned the imputation of liability for the anticompetitive conduct alleged against Roca Sanitario. The second plea concerned the application of the 10% ceiling. The third plea related to the Commission's assessment of the gravity of the infringement committed by Laufen Austria. The fourth plea alleged infringement of the principles of proportionality and equal treatment in so far as the context of the financial crisis had not been taken into account as a mitigating circumstance. The fifth plea concerned the failure to take into consideration, as a mitigating circumstance, the pressure exerted by the wholesalers. The sixth plea alleged errors in the application of the 2002 Leniency Notice and the 2006 Guidelines.

33 In the context of the claim, put forward in the alternative, for a reduction of the fine, Laufen Austria argued that its involvement in the infringement found was less extensive than that of the other participants and relied on the lesser gravity of its participation in the infringement committed and the level of its cooperation with the Commission.

34 By the judgment under appeal, the General Court rejected, as in part inadmissible, in part ineffective and in part unfounded, the six pleas in law raised by Laufen Austria. Under its unlimited jurisdiction, it held that none of the matters on which Laufen Austria had relied, nor any ground of public policy, justified its exercising that jurisdiction to reduce the fine to be imposed on Laufen Austria.

35 Consequently, the General Court dismissed Laufen Austria's action in its entirety.

Forms of order sought by the parties

36 Laufen Austria claims that the Court should:

— set aside in part the judgment under appeal;

— reduce the fine imposed on it; and

— order the Commission to pay the costs.

37 The Commission contends that the Court should:

— dismiss the appeal; and

— order Laufen Austria to pay the costs.

The appeal

38 The appellant puts forward two grounds in support of its appeal. The first ground of appeal alleges that the General Court failed in its obligation to state reasons and infringed the principle that penalties must be specific to the offender as well as the principles of personal responsibility, proportionality and equal treatment in its application of the ceiling laid down by Regulation No 1/2003. The second ground of appeal alleges that the General Court, in dismissing the claim for reduction of the basic amount of the fine imposed on Laufen Austria, infringed the principle that penalties must be specific to the offender, the principles of personal responsibility, proportionality, equal treatment and the protection of legitimate expectations and the obligation to state reasons.

The first ground of appeal

Arguments of the parties

39 By its first ground of appeal, Laufen Austria maintains, in essence, that the General Court failed in its obligation to state reasons and infringed the principle that penalties must be specific to the offender and the principles of personal responsibility, proportionality and equal treatment when, in paragraphs 148 to 154 of the judgment under appeal, it took into account the total turnover of Roca Sanitario in calculating the 10% ceiling provided for in Article 23(2) of Regulation No 1/2003, including for the period in which Laufen Austria was held solely liable for the infringement in question.

40 Laufen Austria argues in this regard that it did not form an economic unit with Roca Sanitario during the period of the infringement prior to the acquisition by Roca Sanitario of Keramik Holding. It submits that it follows from the case-law of the Court of Justice that the ceiling must be calculated solely on the basis of the turnover of the undertakings liable for the infringement.

41 Consequently, for the purpose of calculating the fine relating to that period, the General Court ought to have applied the 10% ceiling solely to the individual turnover of Laufen Austria.

42 Laufen Austria further submits that the General Court failed in its obligation to state reasons and infringed the principle of equal treatment in failing to take account of either previous Commission decisions or judgments of the General Court, in which the fine imposed on a subsidiary in circumstances comparable to those of the present case was calculated by reference to the subsidiary's own resources.

43 The Commission disputes the appellant's arguments.

Findings of the Court

44 As the Court of Justice has already stated, the wording of the second subparagraph of Article 23(2) of Regulation No 1/2003 is clear in so far as it imposes the requirement that, 'for each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year' (judgment of 4 September 2014, *YKK and Others* v *Commission*, C-408/12 P, EU:C:2014:2153, paragraph 58).

45 The concept of an 'undertaking participating in the infringement' for the purposes of that provision must necessarily be the same as for the application of Article 101 TFEU, since that concept cannot be capable of differing interpretations for the purposes of attribution of responsibility for the infringement and for the purposes of application of the 10% ceiling (judgment of 4 September 2014, *YKK and Others* v *Commission*, C-408/12 P, EU:C:2014:2153, paragraph 59).

46 Accordingly, where an undertaking regarded by the Commission as responsible for an infringement of Article 101 TFEU is acquired by another undertaking within which it retains, as a subsidiary, the status of a distinct economic entity, the Commission must take account of the specific turnover of each of those economic entities for the period prior to the acquisition in order to apply to them, where necessary, the 10% ceiling (judgment of 4 September 2014, *YKK and Others* v *Commission*, C-408/12 P, EU:C:2014:2153, paragraph 60).

47 In that regard, the objective sought by the establishment, in Article 23(2), of a ceiling of 10% of the turnover of each undertaking participating in an infringement is, inter alia, to ensure that the imposition of a fine higher in amount than that ceiling should not exceed the capacity of an undertaking to make payment at the time when it is identified as responsible for the infringement and a financial penalty is imposed on it by the Commission (judgment of 4 September 2014, *YKK and Others* v *Commission*, C-408/12 P, EU:C:2014:2153, paragraph 63).

48 That finding is confirmed by the second subparagraph of Article 23(2) of Regulation No 1/2003 which requires, as regards the 10% ceiling, that it should be calculated on the basis of the turnover in the business year preceding the Commission decision imposing a penalty for an infringement. Such a requirement is fully respected where that ceiling is determined solely on the basis of the turnover of the subsidiary, in respect of the fine which is imposed exclusively on it, in relation to the period prior to its acquisition by the parent company. It follows that, in such circumstances, the structural changes in the undertaking responsible as an economic entity are in fact taken into account in the calculation of the fine (judgment of 4 September 2014, *YKK and Others* v *Commission*, C-408/12 P, EU:C:2014:2153, paragraph 64).

49 Accordingly, inasmuch as a parent company cannot be held responsible for an infringement committed by its subsidiary prior to the acquisition of that subsidiary, the Commission must take account, for the purpose of calculating the 10% ceiling, of the subsidiary's own turnover in the business year preceding the year in which the decision penalising the infringement was adopted.

50 Consequently, the General Court made an error of law in holding, in paragraph 150 of the judgment under appeal, that, where a distinction is drawn between an initial period, in respect of which the subsidiary is held to be solely responsible for the infringement, and a second period, in respect of which the parent company is held jointly and severally liable with its subsidiary for the infringement, Article 23(2) of Regulation No 1/2003 does not require the Commission to determine whether the part of the fine, for whose payment the parent company is not held to be jointly and severally liable, is below the ceiling of 10% of the subsidiary's own turnover.

51 It follows from the foregoing that this ground of appeal must be declared well founded, there being no need to adjudicate on the other arguments put forward by the appellant in support of the first ground of appeal, in particular those concerning an infringement of the obligation to state reasons. Consequently, the judgment under appeal must be set aside in so far as it held that the Commission did not make an error in taking the Roca group's turnover into account for the purpose of applying the 10% ceiling in respect of the period for which Laufen Austria was held solely liable for the infringement.

The second ground of appeal

Arguments of the parties

52 By its second ground of appeal, Laufen Austria complains that the General Court infringed, in particular in paragraphs 164 to 193 and 259 to 261 of the judgment under appeal, the principle that the penalty should be specific to the offender, the principles of personal responsibility, proportionality, equal treatment and protection of legitimate expectations and the obligation to state reasons in that it

failed to act upon its finding that the participation in the infringement that was imputed to Laufen Austria was of lesser gravity than that of other members of the cartel and should, in particular, have (i) adjusted the multipliers for the 'gravity of the infringement' and the 'additional amount' and (ii) reduced the basic amount of the fine.

53 Laufen Austria submits, in the first place, that paragraphs 164 to 193 of the judgment under appeal are vitiated by an error of law in that they take no account, in the determination of the amount of the fine, of the fact that its participation in the infringement was of lesser gravity than that of the other undertakings penalised. Laufen Austria argues in this respect that the judgment under appeal drew no distinction — other than with regard to the geographic extent of the involvement of the participants in the infringement — between the gravity of its conduct and the gravity of the conduct of the undertakings making up the 'hard core' of participating undertakings, in order to reflect the nature of their respective actions. In accordance with the principle of non-discrimination, the General Court should have reduced the basic amount of the fine imposed on Laufen Austria, applying lower multipliers for the 'gravity of the infringement' and for the 'additional amount' than those applied to those core undertakings and should have acted upon the findings it made in paragraphs 187, 259 and 260 of the judgment under appeal.

54 In the second place, Laufen Austria maintains that the grounds stated in paragraphs 186 and 260 of the judgment under appeal conflict with the case-law precedents in the matter of the gradation of fines and unduly favour the principle of proportionality of the fine to the detriment of the principle of equal treatment.

55 In the third place, Laufen Austria submits that the lesser gravity of its participation in the infringement found should have been taken into account as a mitigating circumstance for the purposes of the third indent of point 29 of the 2006 Guidelines. However, in paragraphs 189 to 191 of the judgment under appeal, the General Court, on the basis of an over-restrictive and incorrect interpretation of that provision, did not allow any reduction of the fine on this account.

56 In the fourth place, the General Court infringed the principle of the protection of legitimate expectations and failed in its obligation to state reasons in stating, in paragraph 183 of the judgment under appeal, that the Commission had not departed from the method of setting the fine provided for by the 2006 Guidelines.

57 The Commission disputes the applicant's arguments. Furthermore, whilst it considers that the General Court was correct in rejecting Laufen Austria's arguments concerning infringement of the principles of equal treatment and proportionality, it submits, in essence, that the premiss accepted by the General Court — that the multipliers for the 'gravity of the infringement' and for the 'additional amount' applied to Laufen Austria, which participated only in the Austrian aspect of the infringement, should have been different from those used for other cartel members which had participated in the infringement in six Member States and in relation to three product sub-groups — was incorrect. The Commission therefore requests the Court of Justice to replace the relevant grounds of the judgment under appeal.

Findings of the Court

58 It must first of all be recalled that the General Court alone has jurisdiction to examine how in each particular case the Commission assessed the gravity of unlawful conduct. In an appeal, the purpose of review by the Court of Justice is, first, to examine to what extent the General Court took into consideration, in a legally correct manner, all the essential factors to assess the gravity of particular conduct in the light of Article 101 TFEU and Article 23 of Regulation No 1/2003 and, second, to consider whether the General Court responded to a sufficient legal standard to all the arguments raised in support of the claim for cancellation or reduction of the fine (see, inter alia, judgments of

17 December 1998, *Baustahlgewebe* v *Commission*, C-185/95 P, EU:C:1998:608, paragraph 128; of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 244; and of 5 December 2013, *Solvay Solexis* v *Commission*, C-449/11 P, not published, EU:C:2013:802, paragraph 74).

59 In so far as Laufen Austria, by its second ground of appeal, complains that the General Court failed — both in carrying out its review of the legality of the decision at issue (in paragraphs 164 to 193 of the judgment under appeal) and in exercising its unlimited jurisdiction as regards the setting of the fine (in paragraphs 258 to 261 of that judgment) — to take account of the fact that its participation in the infringement was of lesser gravity than that of the undertakings making up the 'hard core' of the cartel, it should be noted that it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the General Court exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of EU law (judgments of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 245, and of 11 July 2013, *Gosselin Group* v *Commission*, C-429/11 P, not published, EU:C:2013:463, paragraph 87).

60 It should also be recalled that, in setting the amount of fines, regard must be had to the duration of the infringement and to all the factors capable of affecting the assessment of the gravity of that infringement (judgments of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 240, and of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 98).

61 The factors capable of affecting the assessment of the gravity of the infringements include the conduct of each of the undertakings, the role played by each of them in the establishment of the cartel, the profit which they were able to derive from the cartel, their size, the value of the goods concerned and the threat that infringements of that type pose to the objectives of the European Union (judgments of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 242, and of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 100).

62 In the present case, as is clear from paragraph 179 of the judgment under appeal, it is undisputed that Laufen Austria participated in an infringement consisting in implementing the coordination of future price increases and that, because of its participation in the meetings of the umbrella organisation Arbeitskreis Sanitärindustrie, it was aware that the material scope of that infringement covered the three product sub-groups and that that infringement covered the whole of Austria.

63 The General Court thus concluded that the Commission was, in accordance with points 21 to 23 and 25 of the 2006 Guidelines, fully entitled to consider that multipliers of 15% for the 'gravity of the infringement' and for the 'additional amount' were appropriate.

64 In that regard, without challenging the reality of the infringement described in the judgment under appeal, Laufen Austria complains that the General Court failed to take into account the fact that it did not belong to the 'hard core' of the cartel because, amongst other things, it had not played a part in creating and maintaining the cartel.

65 Even if that fact were established, it would not, in any event, show that the General Court should have held that multipliers for the 'gravity of the infringement' and for the 'additional amount' at a rate of 15% are not appropriate or are too high, since such a rate was warranted by reason of the very nature of the infringement at issue, namely the implementation of coordinated price increases. Such an infringement is among the most harmful restrictions of competition for the purposes of points 23 and 25 of the 2006 Guidelines and 15% is the lowest rate on the scale of penalties prescribed for such

infringements under those guidelines (see, to that effect, judgments of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraphs 124 and 125, and of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 125).

66 Accordingly, the General Court was fully entitled to hold, in paragraphs 179 and 258 of the judgment under appeal, that the Commission had not infringed the principle of proportionality in having set the multipliers for the 'gravity of the infringement' and for the 'additional amount' at 15%, even though the geographic scope of Laufen Austria's participation in the infringement at issue was limited to Austria.

67 In so far as Laufen Austria complains that the General Court — although it found that its participation in the infringement was of lesser gravity than that of other cartel participants — used those multipliers with regard to Laufen Austria and thereby infringed the principle of equal treatment, it must be found that, as the Commission has in essence submitted, there is an error of law in the grounds set out in paragraphs 186 and 187 and 259 and 260 of the judgment under appeal which state (i) that an infringement covering the territories of six Member States and three product sub-groups must be regarded as more serious than an infringement such as that at issue, which was committed only on the territory of a single Member State, and (ii) that the undertakings that participated in the first-mentioned infringement should, for that reason alone, be subject to a fine calculated on the basis of higher multipliers for the 'gravity of the infringement' and for the 'additional amount' than those applied to Laufen Austria.

68 As regards the determination of the multipliers for the 'gravity of the infringement' and for the 'additional amount', it is apparent from points 22 and 25 of the 2006 Guidelines that account must be taken of a number of factors, in particular those set out in point 22 of those guidelines. Although, in order to assess the gravity of an infringement and subsequently set the fine to be imposed, account may be taken, inter alia, of the geographic extent of an infringement, the fact that the geographic scope of one infringement is more extensive than that of another does not, on its own, necessarily mean that the first infringement, considered as a whole, and in particular in the light of its nature, must be classified as more serious than the second and as therefore justifying the setting of higher multipliers for the 'gravity of the infringement' and for the 'additional amount' than those used in the calculation of the fine for the second infringement (see, to that effect, judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 178).

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

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

71 It follows from the case-law of the Court of Justice, however, that the taking into account, by virtue of the principle of equal treatment, of differences between the undertakings that have participated in a single cartel (in particular with regard to the geographic scope of their respective involvement) for the purpose of assessing the gravity of an infringement need not necessarily occur when the multipliers for the 'gravity of the infringement' and for the 'additional amount' are set but may occur at another stage in the setting of the fine, such as when the basic amount of the fine is adjusted in the light of

mitigating and aggravating circumstances under points 28 and 29 of the 2006 Guidelines (see, to that effect, judgments of 11 July 2013, *Gosselin Group* v *Commission*, C-429/11 P, not published, EU:C:2013:463, paragraphs 96 to 100, and of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraphs 104 and 105).

72 As the Commission has observed, such differences may also be reflected by means of the value of sales that is used in calculating the basic amount of the fine inasmuch as that value reflects, for each participating undertaking, the scale of its involvement in the infringement in question, in accordance with point 13 of the 2006 Guidelines, under which it is possible to take as a starting point for the calculation of the fines an amount which reflects the economic significance of the infringement and the size of the undertaking's contribution to it (see, to that effect, judgment of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 76).

73 Consequently, since it is not disputed that the basic amount of the fines imposed on Laufen Austria was determined by reference to the value of the sales made by it in Austria, the General Court could, in paragraphs 186 and 187 and 259 and 260 of the judgment under appeal, set the multipliers for the 'gravity of the infringement' and for the 'additional amount' at 15% of that value without infringing the principle of equal treatment.

74 Although it follows from the previous paragraphs that the reasoning of the General Court in paragraphs 186 and 187 and 259 and 260 of the judgment under appeal is vitiated by errors of law, it must be recalled that, if the grounds of a decision of the General Court contain an infringement of EU law but its operative part is shown to be well founded on other legal grounds, such an infringement is not one that should cause that decision to be set aside, and a substitution of grounds must be made (see, to that effect, judgments of 9 June 1992, *Lestelle* v *Commission*, C-30/91 P, EU:C:1992:252, paragraph 28, and of 9 September 2008, *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 187 and the case-law cited).

75 As is apparent from the grounds set out in paragraphs 68 to 73 of the present judgment, which must be substituted for those relied on by the General Court, that is the case here.

76 The second ground of appeal must therefore be rejected in so far as it complains that the General Court made errors of law and, in particular, infringed the principles of proportionality and equal treatment in that, since the General Court failed to apply to Laufen Austria multipliers for the 'gravity of the infringement' and for the 'additional amount' that were lower than those applied to undertakings whose conduct in the infringement was the most serious, account was not taken in the judgment under appeal of the lesser gravity of Laufen Austria's participation in the infringement.

77 As regards the claim that the General Court failed in its obligation to state reasons and infringed the principle of the protection of legitimate expectations in holding, in paragraph 183 of the judgment under appeal, that the Commission had not departed from the method laid down by the 2006 Guidelines for calculating the amount of the fine, it must be noted that the General Court described that method in general terms, in paragraphs 169 and 170 of the judgment under appeal, and, in paragraphs 172 to 174 of the judgment, described how the Commission had applied the method in the present case.

78 Such a claim therefore cannot succeed.

79 As regards, finally, the complaint that the General Court failed to take into account, as a mitigating circumstance within the meaning of the third indent of point 29 of the 2006 Guidelines, the lesser gravity of Laufen Austria's participation in the infringement as compared with that of other participants, it is not disputed that Laufen Austria merely put forward an assertion about the limited nature of its participation in the infringement found.

80 Under point 29 of the 2006 Guidelines, the appellant should, in order to be granted a reduction in the amount of the fine on account of mitigating circumstances, have established that it had actually avoided applying the offending agreements in question by adopting competitive conduct on the market, a matter which the appellant failed to prove, as the General Court found in paragraph 191 of the judgment under appeal.

81 In any event such an assessment of the evidence cannot — unless the clear sense of the evidence has been distorted, which has not been claimed in this case — be challenged in an appeal (see, to that effect, judgments of 13 January 2011, *Media-Saturn-Holding* v *OHIM*, C-92/10 P, not published, EU:C:2011:15, paragraph 27; of 10 July 2014, *Greece* v *Commission*, C-391/13 P, not published, EU:C:2014:2061, paragraphs 28 and 29; and of 20 January 2016, *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, paragraph 40).

82 Accordingly, the complaint concerning the examination by the General Court of mitigating circumstances within the meaning of the third indent of point 29 of the 2006 Guidelines must be rejected.

83 It follows from all the foregoing considerations that the second ground of appeal must be rejected.

Referral of the case back to the General Court

84 According to the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the latter may, where the decision of the General Court has been set aside, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

85 In the present case, since the Court does not have before it the turnover achieved by Laufen Austria in the year preceding the decision at issue, the state of the proceedings does not permit judgment to be given. The present case should therefore be referred back to the General Court.

Costs

86 Since the case has been referred back to the General Court, the costs relating to the present appeal proceedings must be reserved.

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

1. **Sets aside the judgment of the General Court of the European Union of 16 September 2013, *Laufen Austria* v *Commission* (T-411/10, EU:T:2013:443);**

2. **Refers the case back to the General Court of the European Union for it to give judgment on the claim made by Laufen Austria AG for reduction of the fine imposed;**

3. **Reserves the costs.**

[Signatures]