Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 29 April 2014 [1]

**Case C-580/12 P**

**Guardian Industries Corp.**
**Guardian Europe Sàrl**
**v**

**European Commission**

(Appeals — Agreements, decisions and concerted practices — Market for flat glass — Calculation of the fine — Inclusion of an undertaking's internal sales — Reasonable time — Admissibility of documents produced out of time)

1. In this appeal, Guardian Industries Corp. and Guardian Europe Sàrl (jointly referred to as 'Guardian' or 'the appellants') seek to have set aside the judgment in *Guardian Industries and Guardian Europe* v *Commission*, [2] by which the General Court of the European Union dismissed their action for the annulment of the decision of the European Commission of 28 November 2007 imposing a fine on them of EUR 148 million for their involvement in a cartel on the market for flat glass during the period between April 2004 and February 2005. [3]

2. In its calculation of that fine, which is at the heart of the central issue in this appeal, the Commission took no account of 'captive sales', that is to say sales made internally within vertically integrated undertakings. Guardian, which sold only to independent third parties, submits that, in accordance with the principle of non-discrimination, it should be allowed a reduction in its fine equal to the proportion of internal sales to the total size of the market. The other important question raised in this case concerns observance of the reasonable time requirement in proceedings before the General Court, in particular because no less than three years and five months elapsed between the conclusion of the written procedure and the decision to open the oral procedure, without any procedural step being taken and for no apparent reason.

1 — Original language: French.

2 — Case T-82/08, EU:T:2012:494 ('the judgment under appeal').

3 — Decision C(2007) 5791 final relating to a proceedings under Article 81 of the EC Treaty [now Article 101 TFEU] and Article 53 of the EEA Agreement (Case COMP/39.165 — Flat Glass), a summary of which was published in the Official Journal (OJ 2008 C 127, p. 9) ('the contested decision'). I shall use the old numbering of the Treaty in this Opinion, since the contested decision was adopted under the EC Treaty.

## I – **The background to the dispute**

3. The background to the dispute and to the contested decision is set out in the following terms in paragraphs 1 to 10 of the judgment under appeal:

‘1 The applicants, Guardian Industries Corp. and Guardian Europe Sàrl, are part of the Guardian Group, which is active in the production of flat glass and automotive glass. Guardian Industries is the ultimate parent company of the Guardian Group and indirectly owns 100% of the capital in Guardian Europe.

2 On 22 and 23 February and 15 March 2005, the Commission of the European Communities carried out unannounced inspections at the premises of, inter alia, Guardian Flachglas GmbH, Guardian Europe and Guardian Luxguard I SA.

3 On 2 March 2005, Asahi Glass Co. Ltd and all its subsidiaries, including Glaverbel SA/NV, which then became AGC Flat Glass Europe SA/NV (“Glaverbel”), submitted an application for immunity from fines or, in the alternative, a reduction of fines, pursuant to the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

4 On 3 January 2006, the Commission initiated proceedings pursuant to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [81 EC] and [82 EC] (OJ 2003 L 1, p. 1) and informed the parties to that effect on 6 March 2006.

5 On 10 February 2006, the Commission sent requests for information to a number of companies, including the applicants. Guardian Europe replied to that request on 10 March 2006.

6 On 9 March 2007, the Commission adopted a statement of objections, which was notified on 13 and 14 March 2007 to a number of companies, including the applicants.

7 On 28 November 2007, the Commission adopted [the contested decision] which was notified to the applicants on 3 December 2007.

8 The contested decision was also notified to Asahi Glass, Glaverbel, Pilkington Deutschland AG, Pilkington Group Ltd, Pilkington Holding GmbH (taken together, “Pilkington”), Compagnie de Saint-Gobain SA and Saint-Gobain Glass France SA (taken together, “Saint-Gobain”).

9 In the contested decision, the Commission stated that the companies to which that decision was addressed had participated in a single and continuous infringement of Article 81(1) EC, which covered the territory of the European Economic Area (EEA) and consisted in the fixing of price increases, minimum prices, target prices, price freezing and other commercial conditions in respect of sales to independent customers of four categories of flat glass products used in the building industry, namely float glass, low-e glass, laminated glass and unprocessed mirrors, as well as in the exchange of commercially sensitive information.

10 The applicants were found guilty of the infringement for the period from 20 April 2004 to 22 February 2005 and a fine of EUR 148 million was imposed on them jointly and severally.’

4. By application dated 12 February 2008, Guardian challenged the contested decision before the General Court.

## II – **The contested decision**

5. In support of its head of claim seeking partial annulment of the contested decision, Guardian put forward a single plea in law, alleging errors of fact concerning the duration of its participation in the cartel and the geographic scope of the cartel. Its head of claim seeking a reduction in the amount of the fine was supported by three pleas in law. The first was that the necessary consequences should ensue from the claim for partial annulment. By the second, Guardian alleged infringement of the principle of non-discrimination and of the duty to state reasons. The third plea alleged an error of assessment as regards Guardian's role in the cartel. The General Court dismissed the action in its entirety.

6. As a preliminary matter, the General Court gave the following ruling on the admissibility of a letter which the Commission had produced on 10 February 2012:

'19 At the hearing, the applicants disputed the admissibility of the Commission's letter of 10 February 2012 on the ground that it contained figures which had never previously been communicated to them.

20 The Commission takes the view that that letter, which constitutes a supplement to its reply of 23 January 2012 to the questions which the Court had put to it, is admissible.

21 It must be pointed out that that letter reached the Court outside of the period allowed to the Commission, but that it was, however, communicated to the applicants on 10 February 2012. That letter contains observations on a document submitted by the applicants on 8 February 2012 as well as a supplement to the Commission's reply to a written question put by the Court and requiring a reply before the hearing relating to the method for calculating the amount of the fine proposed by the applicants if the captive sales were excluded. In that letter the Commission thus stated, first, that the figures in table 1 of the statement of objections did not relate only to internal sales, but also to sales of certain categories of glass which were not ultimately included in the contested decision and, secondly, stated the ratio between the total sales of the members of the cartel and their internal sales.

22 In view of the content of that letter and of the fact that it was sent to the applicants, which were therefore able to put forward their observations regarding it at the hearing, it must be held that the document in question is admissible and that the plea of inadmissibility raised by the applicants must be rejected.'

7. The head of claim seeking annulment of the contested decision was rejected for the reasons set out in paragraphs 28 to 93 of the judgment under appeal.

8. As regards the claim for a reduction in the amount of the fine, paragraphs 98 to 107 of the judgment under appeal are drafted as follows:

'98 The applicants take the view that the Commission infringed, first, the principle of non-discrimination by excluding the value of captive sales, that is to say, sales internal to the groups, from the calculation of the fines of the three other members of the cartel and, secondly, its obligation to state the reasons for those calculations.

99 The applicants thus submit that, in the absence of reasoning regarding the calculation of the fines of the three other members of the cartel, and in view of the confidentiality of the data used, it is impossible for them to determine the respective nature and value of the captive sales excluded for each participant in the cartel. They submit that it is therefore for the Court to offset the exclusion of those sales by a reduction in the fine imposed on them that is proportionate to the total amount of the exclusions from the flat glass market. That course of

action would, they submit, be compatible with 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 ...") inasmuch as it would make it possible to reflect correctly the undertaking's relative importance in the relevant market and has already been adopted by the Court.

100 The applicants state that the Commission excluded one billion euros in captive sales from the total market size of EUR 2.7 billion. That figure, in their submission, is the result of the deduction of the total amount of flat glass sales used in the contested decision, namely EUR 1.7 billion (recital 41 of the contested decision), from the total amount used in the statement of objections, namely EUR 2.7 billion (recital 41 of the contested decision), and represents 37% of the total size of a market the value of which is EUR 2.7 billion.

101 The Commission disputes the applicants' arguments.

102 According to consistent case-law, the scope of the obligation to state reasons depends on the nature of the act in question and the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the Community judicature to review the legality of the measure and the persons concerned to ascertain the reasons for the measure, so that they can defend their rights and ascertain whether or not the decision is well founded.

103 It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question …

104 In the present case, the Commission found that the anti-competitive agreements related to sales of flat glass to independent customers (recital 377 of the contested decision) and it therefore used those sales in order to calculate the basic amount of the fines (recital 41, table 1, and recital 470 of the contested decision). The Commission therefore excluded from the calculation of the fine the sales of flat glass which was to be processed by a division of the undertaking or by a company in the same group. As the existence of anti-competitive conduct was established only in respect of sales to independent customers, the Commission cannot be criticised on the ground that it excluded the internal sales of vertically integrated members of the cartel from the calculation of the fine. Nor can the Commission be criticised on the ground that it did not state the reasons for the exclusion of those sales from the calculation of the fine.

105 In addition, as the Commission states, it has not been established that the vertically integrated members of the cartel which supplied the products concerned to divisions of the same undertaking or to companies which are part of the same group of undertakings drew an indirect advantage from the price increase agreed on or that the price increase in the upstream market resulted in an anti-competitive advantage in the downstream market for processed flat glass.

106 Lastly, as regards the argument that the Commission infringed the principle of non-discrimination by excluding the captive sales from the calculation of the fine, it must be borne in mind that, according to settled case-law, the principle of equal treatment or non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified … In the present case, inasmuch as the Commission took the view that the anti-competitive arrangements related only to the price of flat glass invoiced to independent customers, the exclusion of internal sales from the calculation of the fine in the case of

vertically integrated members of the cartel meant only that it treated objectively different situations differently. Consequently, it cannot be argued that the Commission infringed the principle of non-discrimination.

107 The present plea must therefore be rejected in its entirety.'

## III – **The appeal**

9. Guardian and the Commission participated in the written procedure before the Court and attended the hearing, which was held on 12 December 2013.

10. Before considering the three pleas in law put forward by Guardian, it is necessary to address the procedural issue which arose in this case after the first exchange of pleadings. In substance, Guardian has argued in connection with its first plea in law that, in its statement of defence, the Commission produced to the Court, for the first time, evidence of the cartel's effect on internal sales. That evidence consists in a statement which Saint Gobain made during the administrative procedure and which the Commission mentioned in paragraph 37 of its reply. According to Guardian, the statement suggests that intra-group prices were aligned with those fixed by the cartel and it thus undermines the position which the Commission had previously expressed, and which the General Court accepted, that there was no evidence of any such alignment.

11. Guardian's request to be allowed to reply on that point was refused, whereupon it applied to the Court for leave to amend its appeal in light of what it regarded as a new fact. That application was also refused.

12. In my view, it need only be observed that this was not a new fact, since, clearly, Guardian knew of, or could have apprised itself of, Saint-Gobain's document containing the statement in question during the administrative procedure.

13. By its first plea in law in this appeal, Guardian alleges that the General Court breached the principle of equal treatment by upholding the exclusion of captive sales from the contested decision in so far as concerns the calculation of the fines imposed on Asahi/Glaverbel, Pilkington and Saint-Gobain. By its second plea in law, Guardian maintains that, by ruling the letter which the Commission sent it on 10 February 2012 ('the letter of 10 February 2012') admissible, the General Court breached its Rules of Procedure and the principles of the rights of the defence and of equality of arms. Lastly, by its third plea in law, Guardian argues that the duration of the procedure before the General Court was unreasonable and thus infringed its right to a fair trial within a reasonable period of time. I shall address the first two pleas in law together.

### A – *The first and second pleas in law*

14. The first plea in law alleges breach of the principle of equal treatment. It is directed against paragraphs 104 to 106 of the judgment under appeal.

1. Arguments of the parties

15. Guardian submits, in substance, that, in accordance with settled case-law, the principle of equal treatment requires that, in the calculation of the fine, internal sales be treated as comparable to sales to independent third parties.[4] Guardian nevertheless emphasises that it does not dispute the lawfulness of the exclusion of internal sales, in so far as the vertically integrated undertakings are concerned, but rather the lawfulness of the failure to reduce by an equivalent proportion the fine which was imposed on it.

16. The Commission replies that, in paragraph 105 of the judgment under appeal, the General Court simply made a finding of fact in stating — without being contradicted on the point by Guardian[5] — that it was not known whether, and if so to what extent, the vertically integrated producers of flat glass had derived an anti-competitive advantage in the downstream market. Moreover, Guardian has in no way demonstrated, either in the proceedings at first instance or in the present appeal proceedings (which would, in any event, be too late), the existence of any such advantage.

2. Assessment

a) Paragraphs 104 and 105 of the judgment under appeal

17. I am not at all convinced by the Commission's reading of paragraph 105 of the judgment under appeal, the wording of which is as follows: 'In addition, as the Commission states, it has not been established that the vertically integrated members of the cartel which supplied the products concerned to divisions of the same undertaking or to companies which are part of the same group of undertakings drew an indirect advantage from the price increase agreed on or that the price increase in the upstream market resulted in an anti-competitive advantage in the downstream market for processed flat glass.'

18. That assertion, introduced by the words 'in addition', is made without any indication of the party by which 'it [had] not been established' that the vertically integrated members of the cartel had drawn an indirect advantage from the cartel.

19. It is, therefore, incorrectly that the Commission infers from paragraph 105 of the judgment under appeal that it was for Guardian to prove any such indirect advantage.

20. I would add that, in paragraph 104 of the judgment under appeal, the General Court also used the passive in making its observation that 'the existence of anti-competitive conduct was established only in respect of sales to independent customers', an assertion which, according to Guardian, is contradicted by recital 377 of the contested decision, which states that 'the cartel arrangements related to prices applicable to independent customers', without, however, expressly excluding internal sales.

4 — Case T-304/94 *Europa Carton* v *Commission* EU:T:1998:89, paragraph 117; Case C-248/98 P *KNP BT* v *Commission* EU:C:2000:625, paragraph 62, judgment on appeal against the judgment in Case T-309/94 *KNP BT* v *Commission* EU:T:1998:91; Case T-16/99 *Lögstör Rör* v *Commission* EU:T:2002:72, paragraph 360;and Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission* EU:T:2005:220, paragraph 260.

5 — According to the Commission, in paragraph 33 of their appeal, the appellants do not take issue with the General Court's findings of *fact*, but merely assert that the General Court applied an incorrect *legal* rule in reaching its decision that those findings were relevant.

b) The rule is to include captive sales in the turnover figure used as a basis for the calculation of the fine

21. In my opinion, whilst, according to the case-law of the Court, an infringement of Article 81(1) EC cannot extend to relationships within an economic unit comprised of a group of companies,[6] the case-law of the Court[7] does require captive or internal sales to be treated in the same way as external sales, so that any discrimination between vertically integrated undertakings and undertakings that are not vertically integrated may be avoided.

22. Observance of that rule is called for both by the 1998 Guidelines[8] and the 2006 Guidelines.

23. With regard to the concept of the 'value of sales', the 2006 Guidelines explain, in paragraphs 5 and 6 of the introduction, that '[i]n order to achieve [the] objectives [mentioned], it is appropriate for the Commission to refer to *the value of the sales of goods or services to which the infringement relates* as a basis for setting the fine' and that '[t]he combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an *appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement. Reference to these factors provides a good indication of the order of magnitude of the fine and should not be regarded as the basis for an automatic and arithmetical calculation method*' (emphasis added).

24. Next, in the part entitled 'Method for the setting of fines', under '1. Basic amount of the fine' and 'A. Calculation of the value of sales', the 2006 Guidelines explain, in paragraph 13, that, '[i]n determining the basic amount of the fine to be imposed, the Commission takes *the value of each undertaking's sales of goods or services to which the infringement directly or indirectly* [9] *relates* in the relevant geographic area within the EEA. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement (hereafter "value of sales")' (emphasis added).[10]

25. The General Court's observation, in paragraph 104 of the judgment under appeal, that the Commission had found that the anti-competitive agreements in question related to sales of flat glass to independent customers overlooks the fact that the inclusion of internal sales in the calculation of the fine is unrelated to the question whether the cartel expressly related to independent customers or, more generally, extended also to prices for internal sales within the groups participating in the cartel.

6 — See, in particular, Case C-73/95 P *Viho* v *Commission* EU:C:1996:405, paragraphs 16 and 17.

7 — *KNP BT* v *Commission*, EU:C:2000:625, paragraph 62.

8 — Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3) ('the 1998 Guidelines').

9 — A footnote to the 2006 Guidelines reads 'Such will be the case for instance for horizontal price fixing arrangements on a given product, where the price of that product then serves as a basis for the price of lower or higher quality products'.

10 — See, for example, de Broca, H., 'The Commission revises its Guidelines for setting fines in antitrust cases', which appeared in the official publication by the Commission's Directorate-General for Competition *Competition Policy Newsletter*, Number 3, Autumn 2006, p. 1, which explains that 'by using a clearer reference to each undertaking's "value of sales", the 2006 Guidelines intend to reflect, even approximately and imperfectly, the economic importance of the infringement as a whole as well as the relative weight of each undertaking participating in the infringement. The 1998 Guidelines, based on a lump sum system, have often been critici[s]ed on that particular aspect, even though this criticism was largely misplaced. In fact, a number of tools corrected the obvious drawbacks of a pure lump sum system. For instance, the Commission fixed starting amounts below the 20 million euros threshold mentioned in the 1998 Guidelines for very serious infringements taking place on small markets; it also differentiated between undertakings on the basis of their respective size in the market concerned (the so-called "groupings") ... If anything, the 1998 Guidelines rather reflected the insufficient level of fines imposed on "large" infringements or on large players, something which the 2006 Guidelines will probably correct.'

i) The case-law

26. It is important to recall, first of all, that, even before the 1998 Guidelines, the Commission used as a basis the total turnover achieved from the product concerned during the last year of the cartel. [11]

27. Then, after the 1998 Guidelines had come into effect, the Court confirmed that it was permissible for the Commission to proceed in that manner, holding [12] that 'although the [1998] Guidelines do not provide that the fines are to be calculated according to the overall turnover of the undertakings concerned or their turnover on the relevant product market, they do not preclude such turnover from being taken into account in determining the amount of the fine in order to comply with the general principles of [EU] law and where circumstances demand it'.

28. In the cases which I shall now consider, I note that it was, in each case, the vertically-integrated cartel member that took issue, in proceedings before the General Court or the Court of Justice, with the Commission's practice of including its captive sales in the turnover figure used as a basis for the calculation of the fine.

29. Indeed, the judgments in *Europa Carton* v *Commission*, EU:T:1998:89, *KNP BT* v *Commission*, EU:C:2000:625, *KNP BT* v *Commission*, EU:T:1998:91 (all three of which concerned the 'Cartonboard' cartel), *Lögstör Rör* v *Commission*, EU:T:2002:72 (the 'Pre-Insulated Pipe' cartel) and *Tokai Carbon and Others* v *Commission*, EU:T:2005:220 (the 'Speciality Graphite' cartel) all have the following characteristics in common: (i) the applicant was vertically integrated, (ii) captive sales were taken into account by the Commission, and (iii) the applicant submitted that they ought not to have been.

30. What was the response of the General Court or the Court of Justice in each of those cases?

31. In *Europa Carton* v *Commission*, EU:T:1998:89, the General Court held that no provision stated that internal supplies within one company could not be taken into account in order to determine the amount of the fine. The approach adopted in that case was to consider the benefit derived from the cartel. However, the applicant had not applied to its own internal sales the price fixed by the cartel (paragraphs 123 and 128).

32. In paragraph 62 of its judgment in *KNP BT* v *Commission*, EU:C:2000:625, the Court of Justice [13] referred to paragraph 128 of the judgment of the General Court and agreed that '[t]o ignore the value of the applicant's internal cartonboard deliveries would inevitably give an unjustified advantage to vertically integrated companies. In such a case the benefit derived from the cartel might not be taken into account and the undertaking in question would avoid the imposition of a fine proportionate to its importance on the product market to which the infringement relates.'

33. In *KNP BT* v *Commission*, EU:T:1998:91, the General Court observed that 'the applicant [had] not adduced any evidence to show' that the Commission should not have taken captive sales into account (paragraph 112).

11 — See, for example, the following commentary: Castillo de la Torre, F., 'The 2006 Guidelines on Fines: Reflections on the Commission's Practice', in *World Competition: Law and Economics Review*, volume 33, number 3, September 2010, p. 359 (footnote 37): 'In the press release relating to the Cement cartel (IP/94/1108), the Commission stated: "calculation [of fines] is normally based on the Community turnover in the product concerned". In Cartonboard, the Commission explained the method used: "fines of a basic level of 9 or 7.5% of the turnover of each undertaking addressed by the decision on the Community cartonboard market in 1990 were imposed on the undertakings regarded as the 'ringleaders' of the cartel and on the other undertakings respectively" (Case T-348/94, *Enso Española* v *Commission* [1998] ECR II-1875, para. 247). See also, the calculation of the fine in Steel Beams, in Case T-151/94, *British Steel* v *Commission* [1999] ECR II-629, paras 598–605.'

12 — See Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* EU:C:2005:408, paragraph 209 and the case-law cited, and paragraph 258. See also, inter alia, Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik* v *Commission* EU:T:2008:415, paragraphs 176 and 177, Case T-155/06 *Tomra Systems and Others* v *Commission* EU:T:2010:370, paragraph 317, and Case T-362/06 *Ballast Nedam Infra* v *Commission* EU:T:2012:492, paragraph 122.

13 — See also the Opinion of Advocate General Mischo in this case, (EU:C:2000:258), which was followed by the Court of Justice.

34. Finally, in its judgments in *Lögstör Rör* v *Commission*, EU:T:2002:72 (paragraph 360) and in *Tokai Carbon and Others* v *Commission*, EU:T:2005:220 (paragraph 260), the General Court referred to the judgments in *KNP BT* v *Commission*, EU:C:2000:625, and *Europa Carton* v *Commission*, EU:T:1998:89.

ii) The Commission's guidelines

35. As the Court of Justice pointed out in its judgment in *KME Germany and Others* v *Commission*,[14] on that occasion in connection with the 2006 Guidelines, '[i]n the interests of transparency the Commission adopted the Guidelines, in which it indicates the basis on which it will take account of one or other aspect of the infringement and what this will imply as regards the amount of the fine'. Moreover, the General Court has also held[15] that, 'while the method of calculating the amount of fines contained in the Guidelines is, admittedly, not the only permissible method, it is capable of ensuring *a coherent decision-making practice* in relation to the imposition of fines, which in turn *guarantees equality of treatment* for undertakings which are penalised for infringements of the rules of competition law' (my emphasis).

36. The fact that the question whether or not internal sales must be included in the turnover figure on which the calculation of the fine is based (and the question of possible discrimination between undertakings, according to whether or not they are vertically integrated) has arisen in the present case is certainly linked to the Commission's varying application of its 2006 Guidelines, more particularly, of the notion of 'value of sales' in its fining policy[16] (which oscillates between excluding and including internal sales within that concept and thus runs the risk of being uncertain).

37. The Commission's approach varies inasmuch as, by contrast with the cases which I shall mention below, it insists that there are many cases other than the present case in which it did not take internal sales into account in its calculation of the fines.[17] However, leaving aside the fact that those decisions did not explain clearly that internal sales were not included in the value of the sales made by the vertically integrated producers,[18] they were adopted after the contested decision. In other words, the Commission's practice was always to include internal sales in the turnover figure which it used as a basis for calculating the fine until it adopted the contested decision, in which, without giving any reason (or even mentioning the fact[19]), it radically altered its approach.

38. The case-law,[20] however, demands a single interpretation of the Guidelines, except when, in individual cases, the Commission sets out all the reasons for its departure from that interpretation. Furthermore, before the 'innovation' in its approach in the contested decision, the Commission's practice was wholly consistent with both the case-law and the Guidelines.

14 — Case C-389/10 P EU:C:2011:816, paragraph 126.

15 — Case T-38/02 *Groupe Danone* v *Commission* EU:T:2005:367, paragraph 523.

16 — See in this context, for example, the commentary in 'The 2006 Guidelines on Fines: Reflections on the Commission's Practice', cited above, according to which the 'Car glass' decision 'does not deviate from the 2006 Guidelines, but rather applies the concept of sales indirectly or directly related to the infringement to the case at hand'. Indeed, 'much depends on whether the concept of sales "relating" to the infringement is narrowly or broadly construed' (Kerse, C.S., and Khan, N., *EU Antitrust Procedure*, Sixth Edition, Sweet & Maxwell, London, 2012, p. 417). Furthermore, in so far as the 2006 Guidelines and the concept of 'value of sales' are concerned, '[t]he adoption of this new calculation method has somewhat reduced the margin of discretion of the Commission which, in every case, has to take a reasoned position on the sales included in the calculation of the fines. The identification of the goods and services to which the infringement indirectly or directly relates when setting the fine is expected to be a bone of contention in many cases. In several decisions already adopted under the [2006] Fining Guidelines, the determination of the value of the undertaking's sales of goods or services related to the infringement was highly debated … [It follows from the Commission's practice] that, in order to determine the basic amount of the fine in cartel cases, the Commission need not provide proof of each occasion on which individual sales were affected by the cartel activities' (Van Bael & Bellis (ed.), *Competition Law of the European Community*, Fifth Edition, Kluwer Law International, 2010, p. 1100).

17 — It cites Decisions C(2009) 7601 final of 7 October 2009 in Case COMP/39.129, Power Transformers, and Decision C(2011) 7436 final of 19 October 2011 in Case COMP/39.605, CRT Glass.

18 — In light of the case-law cited below (in points 62 to 64 of this Opinion), that omission is, in itself, censurable.

19 — See also, in this connection, point 70 of this Opinion.

20 — See the case-law cited below (points 62 to 64 of this Opinion).

39. In its 'International Removal Services' decision,[21] the Commission emphasised 'firstly that use of the expression "goods or services to which the infringement ... relates ...", instead of the expression "goods or services affected", indicates that this point of the guidelines ... does not refer to sales of goods or services where there is direct proof of their being affected by the infringement. In any case, such an interpretation of that point would mean that the Commission, in order to be able to determine the basic amount of the fine in cartel cases, would need to prove on each occasion which individual sales had been affected by the cartel, whereas, according to the case-law, the practical effects of an agreement are not to be taken into account for the purpose of applying Article 81 [EC] where it transpires that the object of the agreement is to prevent, restrict or distort the interplay of competition within the common market'.

40. The decision goes on to state that '[s]econdly, the Commission takes the view that the term "relates" in point 13 of the guidelines ... does not refer to the term "sales" but rather to the term "goods or services" found in the same point. In other words, this point must be taken to mean that, once the Commission has established which are the goods or services to which the infringement directly or indirectly relates, the value of sales of *all* such goods or services is taken into consideration in calculating the basic amount of the fine.'

41. In legal theory, the 2006 Guidelines are interpreted in the same way. As D. Geradin points out,[22] '[i]n practice, this means that the Commission does not need to prove how the infringement relates to each individual sale, once it is established that it relates to the whole category of goods or services. This is because the phrase "*to which the infringement ... relates*" refers to goods/services and not to sales.'

42. In the International Removal Services cartel, the infringing practices agreed upon by the cartel members were not applied to all the contracts which they concluded on the relevant market.

43. In the action brought against that decision,[23] the General Court dismissed the argument that only the value of sales derived from removals that had actually been affected by the infringing practices, and not the total turnover achieved by Team Relocations on the Belgian market for international removals, could be taken into consideration in determining the value of the relevant sales made by Team Relocations, for the purposes of point 13 of the 2006 Guidelines.

44. Thus, 'point 13 of the 2006 Guidelines refers to: "sales … to which the infringement directly or indirectly relates" and not to "sales affected by the infringement". The wording of [point] 13 therefore covers sales in the relevant market. That is very clear, moreover, from the German-language version of point 6 of the 2006 Guidelines, which is concerned with the "Umsatz auf den vom Verstoß betroffenen Märkten" (sales in the markets concerned by the infringement). A fortiori, point 13 of the 2006 Guidelines does not relate solely to the cases for which the Commission has documentary evidence of the infringement' (paragraph 63 of the judgment).

45. According to paragraph 64 of the same judgment '[t]hat interpretation is reinforced by the objective of the [EU] rules on competition. The interpretation put forward by Team Relocations would mean that, in order to determine the basic amount of the fines to be imposed in cartel cases, the Commission would be obliged in each case to ascertain the individual sales which were affected by the cartel. An obligation of that kind has never been imposed by the Courts of the European Union and there is no indication that the Commission intended to assume such an obligation in the 2006 Guidelines.'

21 — Commission Decision C(2008) 926 final of 11 March 2008 (Case COMP/38.543 — International Removal Services), recitals 532 and 533.

22 — *The EU Competition Law Fining System: A Reassessment*, (TILEC Discussion Paper, 2011-052) Tilburg: TILEC.

23 — Joined Cases T-204/08 and T-212/08 *Team Relocations and Others* v *Commission* EU:T:2011:286, paragraphs 60 to 68.

46. In addition, 'it is inevitable, in cartel cases, which by their very nature are secret, that some of the documents showing each of the manifestations of anti-competitive practices will not be discovered. ...' (paragraph 65).

47. Lastly, according to paragraph 66 of the judgment, 'it is settled case-law that the proportion of the turnover accounted for by the goods in respect of which the infringement was committed gives a proper indication of the scale of the infringement on the relevant market'. [24] In particular, the turnover in the products which were the subject of a restrictive practice constitutes an objective criterion giving a proper measure of the harm which that practice does to normal competition. [25] That principle was reproduced in the 2006 Guidelines.'

48. That ruling was upheld by the Court of Justice in a judgment,[26] paragraph 76 of which clearly states that the concept of the 'value of sales' does not apply 'only to turnover achieved by the sales in respect of which it is established that they were actually affected by that cartel'.[27] Such a limitation would, according to the Court (paragraph 77) 'in addition, have the effect of artificially minimising the economic significance of the infringement committed by a particular undertaking since the mere fact that a limited amount of direct evidence of sales actually affected by the cartel had been found would lead to the imposition of a fine which bore no actual relation to the scope of application of the cartel in question. Such a reward for being secretive would also adversely affect the objective of the effective investigation and sanctioning of infringements of Article 81 EC and, therefore, cannot be permitted.' Thus, (according to paragraph 78), 'the General Court ... correctly held, in paragraph 62 of the judgment under appeal, that "it does not follow from [point 13 of the 2006 Guidelines] that only the value of sales for removals actually affected by the infringement may be taken into account in order to determine the relevant value of sales". In that regard, it could therefore rely, without erring in law, in paragraph 64 of that judgment on the objective of the EU rules on competition, in paragraph 65 of that judgment on the need to take into account the secret character of cartels, which in the present case would make it "impossible to find evidence in relation to each of the removals affected" and, in paragraph 66 of that judgment on the case-law resulting from *Musique Diffusion française and Others* v *Commission*'.[28]

49. In paragraph 28 of its judgment in Case C-564/08 P *SGL Carbon* v *Commission* EU:C:2009:703, concerning Decision 2004/420/EC,[29] the Court noted '[i]t is also clear ... from the contested decision that the various turnover figures and market share percentages, including captive consumption, were supplied to the Commission by the undertakings concerned'.

50. It stated, in paragraph 29 of the judgment that, '[h]aving regard to all of those matters, the Commission explained, in recitals 291 to 295 of the contested decision, that captive sales had been included in the calculations. In recital 292 of the contested decision, it explained that it was essential to include the value of captive sales in determining turnover and market share, because to ignore that

24 — Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* EU:C:1983:158, paragraph 121.

25 — Case T-151/94 *British Steel* v *Commission* EU:T:1999:52, paragraph 643, and Case T-50/03 *Saint-Gobain Gyproc Belgium* v *Commission* EU:T:2008:252, paragraph 84. The General Court also dismissed the 'alternative argument' put forward by Team Relocations that the relevant value of sales should not include the turnover on moves of private individuals, that is, those not by paid for by a third party, since the infringing practices had not been applied to such removals.

26 — Case C-444/11 P *Team Relocations and Others* v *Commission* EU:C:2013:464.

27 — The full wording of paragraph 76 is as follows: 'It follows that point 13 of the 2006 Guidelines pursues the objective of adopting as the starting point for the calculation of the fine imposed on an undertaking an amount which reflects the economic significance of the infringement and the size of the undertaking's contribution to it. Consequently, while the concept of the value of sales referred to in point 13 of those guidelines admittedly cannot extend to encompassing sales made by the undertaking in question which do not fall within the scope of the alleged cartel, it would however be contrary to the goal pursued by that provision if that concept were understood as applying only to turnover achieved by the sales in respect of which it is established that they were actually affected by that cartel.'

28 — See also paragraphs 85 to 87 of the judgment of the Court of Justice.

29 — Commission Decision of 3 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case C.38.359 - Electrical and mechanical carbon and graphite products) (OJ 2004 L 125, p. 45).

particular value would inevitably give an unjustified advantage to vertically integrated companies. If the figure were not taken into account, the true benefit derived by the vertically integrated company from the cartel would not be taken into account and the undertaking in question would avoid the imposition of a fine proportionate to its importance on the product market to which the infringement relates.'

51. Paragraph 30 of the judgment recalls 'in this connection that the importance of including captive sales in the determination of turnover and market share in a context such as the present case was recognised by the Court in its judgment in [*KNP BT* v *Commission*, EU:C:2000:625, paragraph 62], from which it is clear that the exclusion of the value of internal deliveries would inevitably give an unjustified advantage to vertically integrated companies as regards the assessment of the benefit derived from the cartel from such companies'.

52. It follows that, without proving that all sales had benefited from the cartel, the Commission nevertheless included internal sales.

53. Another example of this practice on the part of the Commission is to be found in the Liquid Crystal Displays ('LCD') decision of 8 December 2010,[30] in which it was recalled that the inclusion of captive sales in the calculation of 'the sales affected' was, according to the 2006 Guidelines, necessary to ensure that 'no discrimination [was] made between vertically integrated companies and non-vertically integrated companies'.[31] Indeed, the Commission took the view that the vertically integrated members of the cartel should not be treated more favourably than the other members of the cartel.

54. In the action brought against that decision, the General Court[32] dismissed, inter alia, the first plea in law by which it was alleged that the Commission had been wrong to include the applicant's sales in its calculation of the fine. According to the General Court, it did not follow from point 13 of the 2006 Guidelines that only the value of sales derived from transactions that had actually been affected by the infringement could be taken into account in order to determine the value of sales relevant to the setting of the fine[33] (paragraph 65). The wording of point 13 in fact covered sales in the relevant market, that is to say, the market affected by the infringement. *A fortiori*, point 13 did not relate solely to cases in which the Commission had documentary evidence of the infringement (paragraph 66).

55. The General Court went on to observe that 'that interpretation is confirmed by the objective of the EU rules on competition. The interpretation put forward by the applicants would mean that, in order to determine the basic amount of the fines to be imposed in cartel cases, the Commission would be obliged in each case to ascertain the individual sales which were affected by the cartel. An obligation of that kind has never been imposed by the Courts of the European Union and there is no indication

30 — Commission Decision C(2010) 8761 final in Case COMP/39.309; recital 382: 'Though both Direct EEA Sales and Direct EEA Sales Through Transformed Products lead to the inclusion of — respectively — sales to related companies and intra-group sales for some of the parties, focusing on the first EEA sale of the product concerned by the infringement — whether transformed or not — to a company that is not part of the supplier undertaking ensures that no discrimination is made between vertically integrated companies and non-vertically integrated companies'; recital 383: 'As concerns Direct EEA Sales Through Transformed Products, the consumer harm inflicted by the cartel arrangements is clearly represented by the value of panels delivered within the transformed products to the final consumer in the EEA'; and, lastly, recital 394: 'in general, as explained in recital 238 with reference to the Cartonboard case, it can be reasonably assumed that an implemented cartel had effects on direct sales through transformed products'. That recital (238) reads: 'As confirmed by the General Court in [*Europa Carton* v *Commission*], even if the higher price resulting from a cartel is not always or not in its entirety passed on to intra-group customers, the competitive advantage deriving from this positive discrimination does foreseeably influence competition on the market … Intra-group sales of LCD panels — in as far as they ended up into transformed products sold in the EEA — are therefore to be taken into account, just like intra-cartel sales in the EEA.'

31 — It should be noted in this connection that, in Commission Decision C(2008) 3043 of 25 June 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (COMP/39.180 — Aluminium fluoride) (which gave rise to the judgment in Case T-406/08 *ICF* v *Commission* EU:T:2013:322, and then to Case C-467/13 P, currently pending), the Commission took the view that the question whether captive sales had been taken into account in calculating the value of sales and the final amount of the fine was irrelevant.

32 — Case T-128/11 *LG Display and LG Display Taiwan* v *Commission* EU:T:2014:88, paragraph 60 et seq. See also Case T-91/11 *InnoLux* v *Commission* EU:T:2014:92.

33 — See, to that effect, Case T-211/08 *Putters International* v *Commission* EU:T:2011:289, paragraph 58.

that the Commission intended to assume such an obligation in the 2006 Guidelines' (paragraph 67). 'Where a product covered by a cartel is sold in the internal market, competition within that market is distorted and the Commission must take that into account in calculating the fine it imposes on the undertaking which has profited from the sale. In that regard, Article 81 EC is intended to protect not only the interests of competitors or of consumers but also the structure of the market and, in so doing, competition as such'[34] (paragraph 70). Thus, 'it is irrelevant whether LGE and Philips in fact paid them the increased prices resulting from the cartel or whether they carried any such price increase over into the price of the final products incorporating the cartelised LCD panels which they sold to European consumers (paragraph 71)'.

56. It was merely as a subsidiary point that the General Court observed that it was also clear 'from the case-file that there had certainly been discussion within the cartel of sales of cartelised LCD panels to customers connected with the cartel members' (paragraphs 73 to 89). Furthermore, the Court held that it was not the question whether the sales at issue had been made at prices influenced by the cartel which was decisive, but the fact that those sales had been made on a market affected by the existence of the cartel in which the applicants were involved (paragraph 97).

57. In the decision relating to the 'Bathroom fittings and fixtures' cartel,[35] the argument had been raised that certain special products had not been covered by the cartel and should be excluded from the value of sales. The Commission rejected that argument: even if the special price list had never, either directly or indirectly, been the subject of discussions about prices during meetings of the cartel members, the sales associated with that list were affected by the infringement because those 'special' prices were most likely fixed by reference to 'standard' prices[36].

58. In the action brought against that decision (Joined Cases T-373/10, T-374/10, T-382/10 and T-402/10[37]), the General Court dismissed as unfounded the fifth plea in law, by which it was alleged that sales that had not been affected by the cartel had been included in the calculation of the fine. The General Court held that 'it was in accordance with point 13 of the 2006 Guidelines that the Commission took into account sales of products to wholesalers in general, since those sales were all affected, directly or indirectly, by the infringement in question. The applicants' argument that the Commission does not enjoy a broad discretion as regards the turnover to be taken into consideration must be dismissed, since the Commission made no error of assessment in that regard'.

59. It is also interesting to note the General Court's findings in the 'Industrial tubes' cartel, in Case T-127/04,[38] a judgment that the Court of Justice upheld in Case C-272/09 P.[39] The General Court examined whether the Commission had been wrong, when assessing the size of the market affected, to take into account the price of copper. The applicants argued in that regard, first, that the price of copper was outside the control of industrial tube manufacturers, since it was fixed by the LME[40] and, secondly, that it was the buyers of industrial tubes themselves who decided at what price the metal was bought. The applicants further emphasised that fluctuations in the metal price had no impact on their

34 — Case C-8/08 *T-Mobile Netherlands and Others* EU:C:2009:343, paragraph 38, and C-501/06 P, Joined Cases C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others* v *Commission and Others* EU:C:2009:610, paragraph 63.

35 — Commission Decision C(2010) 4185 final of 23 June 2010 relating to a proceeding under Article [81 EC] and Article 53 of the EEA Agreement (Case COMP/39.092 — Bathroom fittings and fixtures).

36 — See also, on this issue, Kerse, C.S., and Khan, N., pp. 412 to 419.

37 — *Villeroy & Boch Austria and Others* v *Commission*, EU:T:2013:455, paragraph 335 et seq. For example, paragraph 342: 'it must be observed that they have failed to establish that the linking of wholesale sale prices to the said lists of gross prices did not influence the fixing of the other price lists. As the Commission observed in its written submissions, without the applicants putting forward any contrary argument or counter-evidence, the lists of gross prices applied to wholesale sales which were the subject of coordination were likely to serve as a guide to manufacturers of bathroom fittings and fixtures when selling to wholesalers products of theirs not destined for the three-stage distribution cycle'. See also Joined Cases T-379/10 and T-381/10 *Keramag Keramische Werke and Others* v *Commission* EU:T:2013:457, Case T-368/10 *Rubinetteria Cisal* v *Commission* EU:T:2013:460 ('Bathroom fittings and fixtures') and Case T-146/09 *Parker ITR and Others* v *Commission* EU:T:2013:258 ('Marine hoses').

38 — *KME Germany and Others* v *Commission* EU:T:2009:142, paragraphs 89 to 91.

39 — *KME Germany and Others* v *Commission* EU:C:2011:810.

40 — The London Metal Exchange.

profit. However, according to the General Court, '[i]t must nevertheless be held that there is no valid reason to require that the turnover of a relevant market be calculated excluding certain production costs. As the Commission has rightly pointed out, there are in all industries costs inherent in the final product which the manufacturer cannot control but which nevertheless constitute an essential element of its business as a whole and which, therefore, cannot be excluded from its turnover when fixing the starting amount of the fine. [41] The fact that the price of copper constitutes an important part of the final price of industrial tubes or that the risk of fluctuations of copper prices is far higher than for other raw materials does not invalidate that conclusion.' I would add that, even though the fine was imposed in this case under the 1998 Guidelines, the approach taken by the General Court remains relevant in the light of the 2006 Guidelines, inasmuch as the fine was based on the total value of the relevant market.

60. Finally, in the 'Carglass' decision in Case COMP/39.125,[42] the Commission treated as relevant sales for the purposes of calculating the fine only sales by glass suppliers to motor car manufacturers in relation to which there was direct evidence of the cartel. That point was also raised by Team Relocations in *Team Relocations and Others* v *Commission*, EU:T:2011:286. However, the General Court noted that, in recital 663 of the 'Carglass' decision, the Commission had started from the principle that the fact that specific evidence was not available for each and every discussion that took place on the 'car accounts' did not limit the determination of the relevant value of sales to only those accounts for which such specific evidence was available, since cartel arrangements were by their very nature secret agreements and evidence would in most, if not all cases remain incomplete.[43] Although the Commission had then gone on to nuance that principle in recitals 664 to 667 of that decision, the General Court observed that it had done so only in relation to two exceptional periods at the beginning and end of the infringement, because it assumed that during those periods the carglass suppliers had rigged their bids only within selected large accounts. Therefore, the approach followed by the Commission in that decision was not contrary to that applied in the 'International removal services' decision.

61. Could the Commission nonetheless have had good reason to depart from its guidelines in the present case?

62. It should be recalled that the Court of Justice has previously held,[44] 'in a judgment concerning internal measures adopted by the administration, that although those measures may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving the reasons that are compatible with the principle of equal treatment. Such measures therefore constitute a general act and the officials and other staff concerned may invoke their illegality in support of an action against the individual measures taken on the basis of the measures.'

63. The Court has added that '[t]hat case-law applies *a fortiori* to rules of conduct designed to produce external effects, as is the case of the Guidelines, which are aimed at traders'. Furthermore, '[i]n adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its

41 — The General Court referred here to its judgment in Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* EU:T:2000:77, paragraphs 5030 and 5031.

42 — Commission Decision C(2008) 6815 final of 12 November 2008, a summary of which is published in the Official Journal (OJ 2009 C 173, p. 13).

43 — Recital 663: 'the fact that specific evidence is not available for each and every discussion that took place on the respective car accounts within the overall arrangements does not limit the determination of the relevant value of sales to only those accounts for which such specific evidence is available'.

44 — See *Dansk Rørindustri and Others* v *Commission*, EU:C:2005:408, paragraph 209 and the case-law cited. See also Case T-132/07 *Fuji Electric* v *Commission* EU:T:2011:344, paragraph 235, and, with regard to the 2006 Guidelines, Case T-83/08 *Denki Kagaku Kogyo and Denka Chemicals* v *Commission* EU:T:2012:48, paragraph 107.

discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot therefore be precluded that, on certain conditions and depending on their content, such rules of conduct, which are of general application, may produce legal effects'. [45]

64. Moreover, as the General Court has already confirmed, [46] '[a]lthough the Commission has discretion when determining the amount of each fine, and is not required to apply a precise mathematical formula, [47] it may not depart from the rules which it has imposed on itself. [48] Since the Guidelines are an instrument intended to define, while complying with higher-ranking law, the criteria which the Commission proposes to apply in the exercise of its discretion when determining fines, the Commission must in fact take account of the Guidelines when determining fines, in particular the elements which are mandatory under the Guidelines.' [49]

65. In the present case, the Commission not only departed, without giving reasons, from its own guidelines and from its own interpretation of those guidelines but also, by comparison with the case in *Europa Carton* v *Commission*, EU:T:1998:89, for example, it completely reversed its line of argument!

66. Indeed, in that case, the Commission never alleged or assumed that the general price increases agreed upon by the cartel members were actually applied to captive sales within their own corporate structures. On the contrary, the Commission stated before the General Court that 'the applicant [had] sold folding cartons manufactured from the products covered by the Decision. It therefore benefited from an unlawful competitive advantage; it [could not] seriously argue that intra-group transactions were invoiced by it at the excessive prices applied by the cartel. It therefore benefited in one form or another from the sale of products which had been the subject of the collusive arrangements. Consequently, it would be wrong to take no account of "internal" turnover. To accept the applicant's point of view would grant an unjustified advantage to integrated producers.' Moreover, it would be 'incorrect to state that there was no turnover from the cartonboard products in question; they were used in order to produce folding cartons which were then sold on the market' (paragraphs 117 and 118 of the judgment).

67. For its part, the General Court held that '[t]he applicant's folding carton factories, which is to say, the applicant itself, therefore benefited from the cartel by using cartonboard from its own production as a raw material. *Unlike competing converters, the applicant did not have to bear the cost increases caused by the concerted price increases*' (paragraph 127 of the judgment; my emphasis).

68. In my opinion, that approach corresponds to the economic reality underlying the Court's judgment in *KNP BT* v Commission, EU:C:2000:625 (paragraph 62), inasmuch as vertically integrated companies may derive downstream advantages from cartel prices applied upstream.

69. In conclusion, the Commission has completely reversed the process. Whereas, in principle, it should have included internal or captive sales in the turnover figure used as a basis for calculating the fine, except if it were able to prove the existence of exceptional or special circumstances militating against doing so, it excluded them on the ground that it had not been established, or that it itself (or, possibly, Guardian) had not proved that such internal sales had contributed to the competitive advantage generated by the cartel.

45 — Ibid., paragraphs 210 and 211 respectively.

46 — Case T-26/02 *Daiichi Pharmaceutical* v *Commission* EU:T:2006:75, paragraph 49.

47 — See, for example, Case T-150/89 *Martinelli* v *Commission* EU:T:1995:70, paragraph 59.

48 — See, by analogy, Case T-7/89 *Hercules Chemicals* v *Commission* EU:T:1991:75, paragraph 53, confirmed on appeal in Case C-51/92 P *Hercules Chemicals* v *Commission* EU:C:1999:357.

49 — See Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* EU:T:2004:221, paragraph 537.

70. In other words, despite the case-law of the Court of Justice and the General Court, as well as the Commission's decision-making practice as described above (and even though the aim of the 2006 Guidelines was to refocus the analysis on the relevant market), the Commission excluded internal sales without providing the least statement of reasons for doing so. [50]

71. It follows that the General Court erred in law by upholding the contested decision in so far as it excluded internal sales from turnover, without giving any reasons.

c) Since some of the cartel members were vertically integrated, could the exclusion of their captive sales have resulted in discrimination against members that were not vertically integrated?

72. There is nothing to prevent the Commission from applying a reduction coefficient to a fine if it considers that justified in order to observe the principle of proportionality.

73. In so doing, however, the Commission may not breach other general principles, namely, in this case, the principle of equal treatment, in accordance with which comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified. [51] However, in so far as the Commission maintains in the present case that it treated all the members of the cartel in the same way (by excluding captive sales), it is forgetting that only one of the four cartel members, Guardian, was not vertically integrated.

74. The Commission's reduction of a fine, by excluding captive sales from the turnover figure used as a basis for calculating the fine, thus has the effect of '[giving] an unjustified advantage to vertically integrated companies'. [52] Those companies are thus able to 'avoid the imposition of a fine proportionate to [their] importance on the product market to which the infringement relates'. [53] In effect, vertically integrated companies thus receive a fine which, in relative terms, does not reflect their ability to distort competition and thus benefit from their infringement.

75. This manner of proceeding thus leads to discrimination against undertakings that are not vertically integrated, in this case, Guardian.

76. It is worth remarking that the documents submitted to the Court show that Guardian received the heaviest penalty despite being the smallest of the four producers in the EEA area. Its share of European flat glass production capacity is only 13%, well below that of Saint-Gobain (25%), Pilkington (24%) and Glaverbel (20%). [54] Worldwide turnover achieved by the Guardian group stood at EUR 3.878 billion in 2004, while that of Saint-Gobain was eight times greater (EUR 32.02 billion), that of Asahi/Glaverbel was almost four times greater and that of Pilkington was similar to Guardian's until Pilkington's acquisition by Nippon Sheet Glass. [55]

50 — Oddly, during the administrative procedure, the question of how captive/internal sales should be dealt with was not raised, either in the statement of objections or at the hearing, as if the assumption at that time was that internal sales were to be included. I would also observe that, of the 541 recitals of the contested decision, not one of them gives any justification for the exclusion of internal sales, which appeared as a given in the calculation when the fine was determined. It may also be noted that: (i) according to Guardian, the Commission decided at the very last minute to change its opinion about captive sales, and (ii) according to a legal article published by an Agent of the Commission ('The 2006 Guidelines on Fines: Reflections on the Commission's Practice', cited above, p. 369 and footnote 56): 'There is no consolidated practice as regards "captive sales", and it would appear that the Commission will assess the specific circumstances of the case in order to decide whether to take them into account or not … [The captive sales] were *finally* excluded in Flat Glass' (my emphasis).

51 — See, for example, Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission and Others* EU:C:2010:512, paragraphs 54 and 55 and the case-law cited.

52 — See *KNP BT* v *Commission*, EU:C:2000:625, point 62.

53 — Ibid.

54 — See 'Pilkington and the Flat Glass Industry 2006', p. 5, cited in footnote 36 of the contested decision.

55 — In the statement of objections, it is indicated that Guardian's market share stood at between 10% and 20% (15.7% being the actual share, taking as a basis an overall market size of EUR 1.7 billion). That share, however, rose to nearly 25% in the contested decision, as a result of the exclusion of the internal sales of the three other cartel members.

77. I would also note that the exclusion of the internal sales resulted in a reduction of the overall size of the relevant market from EUR 2.7 billion to EUR 1.7 billion, which in turn very significantly altered, in terms of the value of sales, the relative weight of each of the undertakings involved in the cartel, that being the relevant criterion laid down in the 2006 Guidelines.

78. Finally, I fail to see in what way the vertically integrated groups are in an objectively different situation from undertakings that are not integrated, as is stated in paragraph 106 of the judgment under appeal, for the cartel related solely to the prices charged to independent customers. Indeed, what relevance could the difference between the structures of the undertakings have to the calculation of the fine? The only relevant factors are, in fact, those relating to the gravity and duration of the infringement (as is confirmed by the wording of Regulation No 1/2003 [56]) and the relative weight of the participants on the relevant market, so as to ensure that the penalty imposed is proportionate and deterrent.

79. At the hearing, the Commission complained that any obligation upon it always to take into account captive sales when calculating fines would entail a sharp increase in the amounts of the fines imposed on vertically integrated groups participating in cartels. Suffice it to remark in this connection that the effect of increasing fines for vertically integrated groups is a consequence of the choice made by the EU legislature to refer to turnover, rather than operating profit or net profit, in the calculation of fines. [57]

80. It follows from the foregoing that the General Court erred in law by failing to recognise the unequal treatment of the addressees of the contested decision. The judgment under appeal must therefore be set aside.

d) How might that discrimination be remedied?

81. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, the latter may, after quashing the decision of the General Court, 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. I am of the opinion that the state of the proceedings permits the Court to give final judgment.

82. Guardian is the only producer concerned by the contested decision that is not integrated and thus the only undertaking that did not benefit from the reduction of the fines resulting from the exclusion of captive sales from which the other addressees of the decision benefited.

83. Clearly, it is no longer possible to include the captive sales of the other addressees of the contested decision and thus increase their fines, since they have not appealed against the contested decision, which has now become final so far as they are concerned. [58]

56 — Article 23(3) merely provides that, '[i]n fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement', the amount of the fine obviously being subject to the limit of 10% of the total turnover of the undertaking participating in the infringement in the preceding business year (Article 23(2) of the regulation). (See, in this connection, my Opinion in Case C-408/12 P *YKK and Others* v *Commission* (currently pending), delivered on 12 February 2014.)

57 — Having said that, according to the 2006 Guidelines, the Commission may derogate from the rules laid down therein provided that it adequately states its reasons for doing so.

58 — It is worth noting that, if captive sales had been included in the value of sales taken into account, the total amount of the fines would have risen to approximately EUR 759.9 million, including a particularly large fine of approximately EUR 335.4 million for Saint-Gobain. The Commission's reply to the questions put to it by the General Court suggests that, on the date when the contested decision was adopted, an increase in the total amount of the fines imposed on the other participants would have been 'disproportionate', in particular given that the infringement was of limited duration. In this connection, it is interesting to note that another fine of EUR 896 million in connection with the 'Carglass' cartel was imposed on Saint-Gobain in 2008, in the Carglass case. By decision of 28 February 2013, the Commission reduced Saint-Gobain's fine to EUR 880 million and Pilkington's fine to EUR 357 million following an error in the calculation. See also Joined Cases T-56/09 and T-73/09 *Saint-Gobain Glass France and Others* v *Commission* EU:T:2014:160.

84. It remains to be decided whether the discrimination may be remedied by a reduction in the fine imposed on Guardian such as to reflect the overall reduction in the fines imposed on the other undertakings resulting from the exclusion of their captive sales.

85. At the hearing before the Court of Justice, the Commission objected to that possibility on the twofold grounds that the fines had not been calculated in the same way for all the participants and that Guardian's fine would no longer be sufficiently deterrent, given the gravity of its conduct.

86. I do not share the Commission's opinion. On the contrary, I would endorse the course of action adopted by the General Court in its judgment in *JFE Engineering* v *Commission*. [59]

87. Rather than increasing the fines imposed on the European manufacturers, it reduced the fines imposed on the Japanese manufacturers, even after concluding that the Commission had underestimated the European manufacturers' involvement in the infringement. The General Court rejected the solution (which would have been more logical in the circumstances) of increasing the fines for the group of participants unjustly favoured because the Commission had not mentioned the possibility of such an increase until the hearing and the parties concerned had not been given an opportunity to express their views on the matter. The same must apply, *a fortiori*, in the present case, in which it is no longer possible to alter the fines imposed on the cartel members other than Guardian.

88. Moreover, the fact that it is no longer possible to erase the circumstance giving rise to the unequal treatment does not mean that the rights of the victim cannot be protected.

89. In civil service cases, for example, where, following legal action, a test in an open competition is annulled, candidates who have been adversely affected must have their rights restored to them without its being necessary, however, to call into question all the results of the competition and thus infringe the legitimate expectations of candidates who have been successful in the competition. [60] In such a situation, the case-law in matters relating to the civil service requires the Court to seek a just solution, and the present case calls for a similar response.

e) Interim conclusion

90. Therefore, in order to redress the discrimination, I consider that it is for the Court to offset the exclusion of the captive sales by reducing the fine imposed on Guardian by an amount equivalent to the proportion of internal sales in the relevant market. That course of action is, moreover, consistent with the 2006 Guidelines, inasmuch as it would make it possible to reflect correctly the undertaking's relative importance on the relevant market and has already been adopted in the case-law of the General Court. [61]

91. However, before going any further, I must examine the second plea in law put forward by Guardian, which (indirectly) concerns the proper percentage to be applied on reducing its fine.

92. The second plea is directed against paragraphs 21 and 22 of the judgment under appeal, in which the General Court ruled a letter from the Commission dated 10 February 2012 admissible.

59 — EU:T:2004:221, paragraphs 566 to 579.

60 — See, for example, Case C-242/90 P *Commission* v *Albani and Others* EU:C:1993:284, paragraphs 13 to 17.

61 — *JFE Engineering* v *Commission*, EU:T:2004:221 (see point 86 et seq. of this Opinion).

93. Guardian points out that, in the action before the General Court, the Commission's statement of defence remained silent on the question of how the unequal treatment in the calculation of the fines might be redressed. By questions dated 19 December 2011 and 10 January 2012, the General Court called on the Commission to express its position on the point. In its reply of 23 January 2012, the Commission merely stated that a fine reduced by almost 40% would not be sufficiently deterrent.

94. On 16 January 2012, Guardian applied to the General Court for leave to produce certain documents in support of its argument for the reduction of its fine. By letter of 31 January 2012, the Commission opposed that application on the ground that the late production of evidence would infringe the rights of the defence.

95. On being granted leave by the General Court, Guardian lodged a new document on 8 February 2012, that is to say, within the time allowed it.

96. On 10 February 2012, the last working day before the hearing on 13 February 2012, the Commission sent the General Court a letter expressing its position on the possible reduction of the fine. According to Guardian, that letter contained new material which had not been included in the case-file.

97. Despite the fact that that letter was lodged out of time, in paragraph 22 of the judgment under appeal the General Court ruled it admissible, having regard to 'the content of the letter' and to 'the fact that it [had been] sent to the applicants, which were therefore able to put forward their observations regarding it at the hearing'.

98. According to the Commission, the second plea is unfounded, for there is nothing to prevent the General Court from accepting a late reply, in accordance with Article 11(2) of the instructions to the Registrar of the General Court.[62] Furthermore, given its unlimited jurisdiction, the General Court was at liberty to take into account facts and matters submitted out of time, provided that it observed the principle *audi alteram partem*. That principle was observed in the present case, since Guardian was able to reply to the content of the letter of 10 February 2012 at the hearing. The fact that it chose not to do so alters nothing.

99. The Commission adds that it made every effort to give Guardian a written reply to its letter of 8 February 2012 as quickly as possible, sending both Guardian and the General Court a letter on 10 February 2012, and that it could have merely submitted its observations at the hearing.

100. In my opinion, the General Court was not at liberty to accept the letter in question, assessing its admissibility as a document produced out of time by reference to the nature of its content. The reason is simple: its Rules of Procedure and the instructions to the Registrar (in particular, Article 11) define strictly the conditions under which evidence may be produced. Moreover, as regards the content of the letter, referred to in paragraph 22 of the judgment under appeal, the General Court gave no reasons to explain why the admission of evidence submitted the day before the hearing, in breach of the Rules of Procedure, was justified.

101. Indeed, although the Commission observes that the President of the General Court may, exceptionally, extend a time-limit, suffice it to observe that, in the present case, the Commission had already obtained one such extension[63] and had refrained from applying for another, which would have enabled it to justify the late submission of the evidence in question.[64] Under the second subparagraph of Article 11(3) of the instructions to the Registrar of the General Court, applications for extensions of

62 — See Joined Cases T-285/02 and T-395/02 *Vega Rodríguez* v *Commission* EU:T:2004:324, paragraph 24.

63 — In its letter of 6 January 2012, the General Court also noted that '[i]n principle, no further extension of this time-limit will be granted'.

64 — Under Article 11(3) of the instructions to the Registrar of the General Court, applications for extensions of time-limits must be duly reasoned and be submitted in good time.

time-limits must be duly reasoned and be submitted in good time before the expiry of the period prescribed and a time-limit may not be extended more than once save for exceptional reasons.[65] Therefore, the argument that a second extension of the time-limit might have been granted 'implicitly' cannot be accepted.

102. The Commission must have known that it could not add to the case-file (i) a document containing facts and figures in reply to an argument raised by Guardian at the start of the proceedings, four years earlier, (ii) at the last minute, the day before the hearing,[66] (iii) beyond the time-limit and thus out of time, (iv) without consulting the General Court as to whether it was permissible to take such a step, and thus without its authorisation, and (v) without justifying its delay in supplementing its reply of 23 January 2012. The argument that the Commission sent the letter to Guardian after sending it to the General Court changes none of that.

103. I therefore consider that the Commission's letter was inadmissible and that the General Court erred in law by admitting it. The Court of Justice ought therefore to remove it from the case-file and disregard its content.

104. As Guardian has pointed out, the Commission excluded one billion euros in captive sales from the total market size of EUR 2.7 billion. That amount represents the difference between the total amount of flat glass sales used in the contested decision, namely EUR 1.7 billion (recital 41 of the contested decision) and the total amount used in the statement of objections, namely EUR 2.7 billion,[67] and is thus equal to 37% of the total size of the market initially used.

105. Consequently, Guardian's fine should be reduced by 37% and set at EUR 93 240 000 instead of EUR 148 000 000.

B – *The third plea in law*

106. Guardian argues, in substance, that, in this case, the duration of the proceedings before the General Court amounts to an infringement of its fundamental right to a fair trial within a reasonable time, as referred to in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

107. After taking the view that this plea was inadmissible, at the hearing, the Commission withdrew its objections of inadmissibility in light of the judgments in the *Gascogne and Others* cases.[68] As to the merits, the Commission contests Guardian's argument. It disputes that the present case was urgent for Guardian, as well as the argument that the General Court's delay caused it harm, since its action was dismissed. The Commission submits that any reduction in the fine by the Court should, in this case, be merely symbolic or extremely limited.

65 — Moreover, under Article 11(2) of the instructions (on which the Commission seeks to rely), 'documents received at the Registry after the period prescribed for their lodgement has expired *may be accepted only with the authorisation of the President*' (my emphasis).

66 — I agree with Guardian that the principle of the equality of arms and the principle *audi alteram partem* require the hearing to be restricted, in principle, to information in the case-file which has been the subject of written debate. The mere fact that a party may make submissions at the hearing in relation to documents submitted out of time does not mean that the rights of the defence have been observed (see Case T-321/05 *AstraZeneca* v *Commission* EU:T:2010:266, paragraph 27).

67 — See paragraph 100 of the judgement under appeal.

68 — Case C-40/12 P *Gascogne Sack Deutschland* v *Commission* EU:C:2013:768; Case C-50/12 P *Kendrion* v *Commission* EU:C:2013:771, and Case C-58/12 P *Groupe Gascogne* v *Commission* EU:C:2013:770 ('*Gascogne and Others*').

## 1. Analysis

### a) Introduction

108. First of all, it is necessary to bear in mind the second paragraph of Article 47 of the Charter, which provides that '[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law'. As the Court of Justice has held on several occasions, 'that article relates to the principle of effective judicial protection'.[69] On that basis, such a right, which was affirmed as a general principle of EU law before the Charter entered into force, is applicable in the context of proceedings brought against a Commission decision.[70]

109. Indeed, as the European Court of Human Rights has pointed out, 'Article 6[(1) ECHR] requires that cases be heard "within a reasonable time"; in so providing, the Convention underlines the importance of *rendering justice without delays which might jeopardise its effectiveness and credibility*' (emphasis added).[71]

110. In my opinion, the appropriate mechanism for remedying a breach by the General Court of the reasonable time principle in a case such as the present, would, for reasons of economy of procedure and also to ensure an immediate and effective remedy, be to reduce the fine rather than to leave it to the parties to bring an action for damages before the General Court which, necessarily, will have been found to have failed to observe that principle by being unable to deliver its judgment within a reasonable time.

111. Indeed, it would be paradoxical if the only way to obtain redress for excessively lengthy legal proceedings were to bring another legal action, which would necessarily entail additional costs (both for the parties and for the company) and further delay.

112. Moreover, Advocate General Léger observed in point 67 of his Opinion in *Baustahlgewebe* v *Commission*:[72] '[a]gain without prejudging the issue whether the time taken by the [General Court] to give judgment was unreasonable or its own share of the responsibility in the present case, it is not feasible to entrust a judicial body with the task of determining whether its own conduct is wrongful or unlawful. This would unquestionably be contrary to the principle of an impartial tribunal laid down in Article 6(1) of the Convention. I think it would be difficult to avoid such a conflict by referring the case back to a differently constituted court from that which gave the original judgment because, if we adopt the approach taken by the Strasbourg Court, a change in the constitution of a court may not be enough to remove entirely the impression of partiality which would arise from a judgment concerning the court which it itself delivers. ...'

113. That was also the view taken by Advocate General Kokott in her Opinion in *Solvay* v *Commission*.[73]

69 — See, inter alia, Case C-385/07 P *Der Grüne Punkt — Duales System Deutschland* v *Commission* EU:C:2009:456, paragraph 179 and the case-law cited ('*Der Grüne Punkt*'). The Court has found on several occasions that the right to a fair trial, which derives from, inter alia, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), constitutes a fundamental right that the European Union observes as a general principle under Article 6(2) EU (see, inter alia, Case C-289/11 P *Legris Industries* v *Commission* EU:C:2012:270, paragraph 36).

70 — See, inter alia, *Der Grüne Punkt*, EU:C:2009:456, paragraph 178 and the case-law cited. See, for example, European Court of Human Rights, *Erkner and Hofauer v. Austria*, 23 April 1987, § 66, Series A no. 117.

71 — See European Court of Human Rights, *H. v. France*, 24 October 1989, § 58, Series A no. 162-A.

72 — ? Case C-185/95 P, EU:C:1998:37.

73 — Case C-109/10 P, EU:C:2011:256, points 325 to 332, and Case C-110/10 P, EU:C:2011:257, points 166 to 173.

114. It was also the approach taken by the Court of Justice in *Baustahlgewebe* v *Commission*.[74] According to Advocate General Kokott, with that approach 'competition law is effectively implemented through the establishment of the infringement and the imposition of an obligation to bring it to an end on the undertaking concerned ... The fine originally set by the Commission or the General Court has a deterrent effect on the other operators on the market. [The approach] does not call in question the appropriateness of the measure itself [and] simply involves a form of offsetting against the original fine of the amount considered to represent appropriate compensation for the excessive length of the proceedings' (point 332).

115. Advocate General Kokott also said that '[i]n the interests of procedural economy and the need to provide the undertaking concerned with an immediate and effective remedy, the Court of Justice should, where possible (in other words, in cases involving fines) continue to adopt the approach which it outlined in *Baustahlgewebe*' (point 331).

116. Furthermore, in some national legal systems, a finding by the court that there has been an unreasonable delay[75] in criminal proceedings will have a direct effect on the sentence.

117. Nevertheless, in a recent judgment (*Groupe Gascogne* v *Commission*, EU:C:2013:770) delivered by the Grand Chamber, the Court of Justice clearly ruled in favour of a different solution. Ruling out the possibility of seeking, in the context of appeal proceedings, a sanction for infringement of the reasonable time principle (paragraph 84), it held, referring to Article 47 of the Charter (without mentioning Article 6(1) ECHR) that a breach of that principle by a Court of the European Union may be redressed only by an action for damages brought before the General Court (paragraph 83), which has jurisdiction to hear actions against the European Union in non-contractual liability.

118. Admittedly, the Court had already given a similar ruling in *Der Grüne Punkt*, EU:C:2009:456, but in that case, although the Commission had established an abuse of a dominant position, it had not imposed a fine, which was not the case in *Gascogne and Others*.

119. I believe that it should be considered that, with its judgment in *Groupe Gascogne* v *Commission*, EU:C:2013:770, the Court clearly abandoned the approach of reducing the fine in order to redress a breach of the reasonable time principle and it is on that basis that I must set out my reasoning in the present case, drawing on certain other points in the judgment in *Groupe Gascogne* v *Commission*, EU:C:2013:770, which too will guide my arguments.

120. In the first place, the Court has held that, where the excessive length of proceedings has no effect on the outcome of the dispute, failure to adjudicate within a reasonable time cannot lead to the setting aside of a judgment in the context of an appeal. Given that the companies concerned had provided no evidence to show that the General Court's failure to adjudicate within a reasonable time could have affected the outcome of the dispute which was before it, the Court of Justice dismissed the companies' claims for the General Court's judgments to be set aside.

121. In the second place, as I have explained, the Court of Justice has indicated that the General Court alone has jurisdiction to adjudicate on a breach of the reasonable time principle. The rule is now unambiguous: 'a claim for compensation for the damage caused by the failure by the General Court to adjudicate within a reasonable time may not be made directly to the Court of Justice in the context of an appeal, but must be brought before the General Court itself' (paragraph 84 of the judgment in *Groupe Gascogne* v *Commission*, EU:C:2013:770). The Court went on to give details of the criteria for assessing whether the General Court has observed the reasonable time principle (in paragraphs 85

74 — EU:C:1998:608.

75 — As regards what may be considered to be a 'reasonable' period (in relation to Article 6 ECHR and the case-law of the European Court of Human Rights), see, in particular, the Opinion of Advocate General Widdershoven of the Raad van State (Netherlands) of 23 October 2013, available at the following address: http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2013:1586.

to 97 of the judgment) and concluded (in paragraph 88) that '[i]t will *also* be for the General Court to assess both the actual existence of the harm alleged and the causal connection between that harm and the excessive length of the legal proceedings in dispute by examining the evidence submitted for that purpose' (my emphasis). The use of the adverb 'also' should mean that the assessment of the criteria set out in the preceding paragraphs falls within the jurisdiction of the same court as that referred to at the beginning and end of the Court's reasoning, that is to say, the General Court. That reading of the judgment in *Groupe Gascogne* v *Commission*, EU:C:2013:770, should lead me to consider the third plea in law put forward by Guardian as inadmissible. However, another reading of the judgment is possible, for in the judgment, perhaps in somewhat paradoxical fashion, the Court of Justice itself ruled on the question whether there had been a breach of that principle and held it to be a sufficiently serious breach of EU law. In reaching that conclusion, it took the view that neither the complexity of the dispute nor the conduct of the parties or the supervening procedural matters could justify the length of the proceedings before the General Court.

122. Taken as a whole, the Court's reasoning in relation to the breach of the reasonable time principle in its judgment in *Groupe Gascogne* v *Commission*, EU:C:2013:770, thus seems to suggest that, of the three conditions that must be satisfied in order for the non-contractual liability of the European Union to be established, namely: the existence of a rule of EU law intended to protect individuals (such as the reasonable time principle), a sufficiently serious breach of that rule, and the existence of a causal nexus between the breach and damage, the General Court must examine only the last of these, which will include the assessment of the damage.

123. If the Court excludes the first reading of the judgment in *Groupe Gascogne* v *Commission*, EU:C:2013:770, in accordance with which the third plea in law would be inadmissible, and transposes to the present case the method which it adopted in *Groupe Gascogne* v *Commission*, it ought then to give a ruling on the question whether there has been a breach of the reasonable time principle.

b) The case under consideration

124. In my examination of this question in the present case, I shall take as a basis the judgments in *Baustahlgewebe* v *Commission*, EU:C:1998:608, and *Gascogne and Others*, in which the Court found that there had been a breach of the reasonable time principle.

125. In paragraph 29 of its judgment in *Baustahlgewebe* v *Commission*, EU:C:1998:608, the Court mentioned the criteria by which the total duration of proceedings, and in particular any unexplained periods of inactivity, should be assessed, namely the 'importance' of the case for the applicant, the complexity of the case and any conduct on the applicant's part that may have contributed to the delay.

126. In that case, the total duration of the proceedings before the General Court was five years and six months. The Court of Justice took note of the unexplained — and in its view unjustified — length of two periods of inactivity, that is to say, the 2 years and 8 months which elapsed between the close of the written procedure and the opening of the oral procedure and the 22 months which elapsed between the close of the oral procedure and delivery of the judgment (paragraphs 45 and 46).

127. In *Gascogne and Others*, the total duration of the proceedings before the General Court was five years and nine months and the Court of Justice found that that duration '[could not] be justified by any of the particular circumstances of the ... case' (paragraph 91).

128. According to the Court, 'whether it be the complexity of the dispute, the conduct of the parties or supervening procedural matters' (paragraph 92), nothing could justify the lapse of 3 years and 10 months between the conclusion of the written procedure and the opening of the oral procedure.

129. Applying those same criteria to the present case, and on the basis of the following findings, I can only arrive at the same conclusion.

130. First and foremost, out of a total duration of four years and seven months, more than three years and five months [76] elapsed between the closing of the written procedure and the General Court's decision to open the oral procedure, without any procedural step being taken and for no apparent reason. [77] The length of that period cannot be explained by the circumstances of the case, whether it be the complexity of the dispute, Guardian's conduct or supervening procedural matters.

i) The complexity of the dispute

131. The present case cannot be regarded as complex. Guardian's arguments rested on notes which related to only a few contacts between members of a cartel which lasted for just over a year and a month. [78] All those documents were drafted in English, the language of the case. [79]

132. In *Baustahlgewebe* v *Commission*, EU:C:1998:608, although the Court noted that the procedure 'called for a detailed examination of relatively voluminous documents and points of fact and law of some complexity', that was not enough to persuade the Court that the case was sufficiently complex to justify the length of the proceedings.

133. In *Gascogne and Others*, the Commission's decision was addressed to 25 addressees (and almost as many companies were implicated), 15 of which brought actions for annulment before the General Court. In the present case there were no more than nine addressees of the contested decision (and four companies were implicated, namely Guardian, Asahi/Glaverbel, Pilkington and Saint-Gobain), of which Guardian alone brought an action before the General Court. [80]

134. The case in *Baustahlgewebe* v *Commission* concerned a decision addressed to 14 manufacturers (of which 11 had brought actions in three different languages), which gave rise to two complete rounds of exchanges of pleadings. [81] Nevertheless, in that case the General Court organised a hearing nine months sooner than in the present case!

135. In addition, the pleas which Guardian put forward did not present any special degree of difficulty. In support of its head of claim seeking partial annulment of the contested decision, Guardian put forward a single plea in law, alleging errors of fact concerning the duration of its participation in the cartel and the geographic scope of the cartel. Its head of claim seeking a reduction in the fine rested

76 — The replacement of the President of the Chamber, Mr Moavero Milanesi, by Judge Kanninen, which took effect on 25 November 2011, does not constitute a relevant circumstance, given, first, that it occurred more than three years and four months after the close of the written procedure and, secondly, as Advocate General Kokott observed in *Solvay* v *Commission* (EU:C:2011:256, point 343), '[i]t goes without saying that issues relating to the internal organisation of the General Court, for example those connected with the regular partial replacement of judges or with judges being prevented from attending, must not operate to the detriment of the persons concerned'. See, to the same effect, the Opinion in *Solvay* v *Commission* (EU:C:2011:257, point 184).

77 — Guardian maintains, in substance, that the delay of three years and five months between the close of the written procedure and the decision to open the oral procedure is difficult to reconcile with the absence of any particular effort on the General Court's part to examine the facts and evidence, manifested by the absence of any written questions relating to the facts in issue. I would add that that delay also appears to be at odds with the way in which the General Court addressed the question of the captive sales, which was the subject of the first plea in law raised by Guardian, in that it failed to analyse, or even to mention, the case-law of the Court of Justice on that issue (*KNP BT* v *Commission*, EU:C:2000:625) from which it departed in the judgment under appeal — despite the fact that Guardian had referred to it.

78 — According to Guardian, its arguments rested on notes relating to 'three contacts with competitors and two statements by undertakings, and two or three meetings'.

79 — In the present case, the General Court had to examine only a limited number of annexes, mainly containing notes relating to three contacts between competitors (17 pages in total), along with brief extracts of two statements by undertakings. All those documents were drafted in the language of the case (namely, English, a language almost everyone understands, by contrast with Slovak or Maltese, to give just a few examples).

80 — Consequently, it was not necessary for the General Court to consider issues of 'connexity' likely to arise in parallel proceedings, which can also have an effect on the length of the proceedings (see, for example Case T-214/06 *ICI* v *Commission* EU:T:2012:275, paragraph 314).

81 — EU:C:1998:608, paragraphs 35 and 47.

on only three pleas. The first was that the necessary consequences should ensue from the claim for partial annulment. By the second, Guardian alleged infringement of the principle of non-discrimination and of the duty to state reasons. The third plea alleged an error of assessment as regards Guardian's role in the cartel.

ii) Procedural matters

136. As in *Gascogne and Others*, the procedure in the present case was not interrupted or delayed by the adoption of any measures of organisation of procedure by the General Court.

iii) The importance of the case to Guardian and Guardian's conduct in the procedure

137. The case was of considerable importance to Guardian. The amount of its fine, EUR 148 million (by comparison with EUR 9.9 million in the case in *Groupe Gascogne* v *Commission*, EU:C:2013:770), represented 4% of its total turnover. Moreover, Guardian in no way obstructed or delayed the course of justice. Its application originating the proceedings ran to only 49 pages and Guardian waived its right to a second round of exchanges of written pleadings (which is rare in competition law cases). [82]

138. Furthermore, on three occasions, Guardian took the initiative to remind the General Court that it had not yet set a date for the hearing, on each of those occasions emphasising the considerable period of time that had elapsed since the close of the written procedure, [83] and wrote to the Court saying that, curiously, the oral procedure remained open four months after the hearing without the Court's having put any request to the parties.

139. Lastly, the General Court sent the parties no written questions, which might have lengthened the delay in opening the oral procedure, and merely raised a question on the facts at the hearing. Moreover, it appears that the General Court took no steps to accelerate the procedure during the period of apparent inactivity that lasted three years and five months. I conclude from the foregoing that the procedure before the General Court in this case infringed the second paragraph of Article 47 of the Charter in that the Court failed to have regard to the requirement that it adjudicate within a reasonable time, which constitutes a sufficiently serious breach of a rule of law that is intended to confer rights on individuals. [84]

140. As is clear from the judgment in *Groupe Gascogne* v *Commission*, EU:C:2013:770, if Guardian considers that the financial difficulties to which it refers in its appeal have a causal nexus with the General Court's failure to observe the reasonable time principle, [85] it may argue that point in an action brought before the General Court pursuant to Articles 235 EC and the second paragraph of Article 288 EC (now Article 268 TFEU and the second paragraph of Article 340 TFEU). [86]

82 — See the Opinion of Advocate General Kokott in *Solvay* v *Commission* EU:C:2011:256, point 340. See, to the same effect, the Opinion in *Solvay* v *Commission*, EU:C:2011:257, point 181.

83 — To this same end, Guardian even made a formal application to the President of the General Court for the case to be given priority.

84 — Case C-352/98 P *Bergaderm and Goupil* v *Commission* EU:C:2000:361, paragraph 42.

85 — Guardian refers to damage resulting (a) from its loss of revenue attributable to the provisional payment of EUR 111 million of the fine and (b) the cost of constituting a bank guarantee as to the remainder of the fine (EUR 30 000 per month). It asks the Court to make a substantial reduction of the fine in order to compensate the breach of the reasonable time principle, which Guardian estimates at 25% of the fine before any reduction ordered as a result of the first plea in law.

86 — See the Opinion in Case C-58/12 P *Groupe Gascogne* v *Commission* EU:C:2013:360, point 148. I share Advocate General Sharpston's view, expressed in point 149 of that Opinion, that 'the event giving rise' to the non-contractual liability of the Union for the purposes of Article 46 of the Statute must be the finding by the Court of Justice that there was undue delay before the General Court and that it follows that the five-year limitation period within which a claim in damages must be brought begins to run from the date of the judgment of the Court of Justice.

141. In this connection, it is clear from the case-law of the Court of Justice that 'it will also be for the General Court to assess both the actual existence of the harm alleged and the causal connection between that harm and the excessive length of the legal proceedings in dispute by examining the evidence submitted for that purpose' (paragraph 88 of the judgment).

142. In that regard, 'in an action for damages based on a breach by the General Court of the second paragraph of Article 47 of the Charter, in so far as it failed to have regard to the requirement that the case be dealt with within a reasonable time, the General Court must, in accordance with the second paragraph of Article 340 TFEU, take into consideration the general principles applicable in the legal systems of the Member States for actions based on similar breaches. In that context, the General Court must, in particular, ascertain whether it is possible to identify, in addition to any material loss, any other type of harm sustained by the party affected by the excessive period, which should, where appropriate, be suitably compensated' (paragraph 89 of the judgment).

143. Finally, '[i]t is therefore for the General Court, which has jurisdiction under Article 256(1) TFEU, to determine such claims for damages, sitting in a different composition from that which heard the dispute giving rise to the procedure whose duration is criticised and applying the criteria set out in paragraphs 85 to 89 [of the judgment in *Groupe Gascogne* v *Commission*]' (paragraph 90).

## IV – **Costs**

144. Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Article 138(3) of the same Rules of Procedure, which is applicable to appeal proceedings by virtue of Article 184(1) of those rules, provides that, where each party succeeds on some and fails on other heads, the parties are to bear their own costs.

145. In this appeal, since the Commission has been unsuccessful, it must be ordered to pay Guardian's costs. On the other hand, since Guardian and the Commission were unsuccessful in part of their claims in the proceedings at first instance, it is appropriate to decide that each of them shall bear its own costs relating to those proceedings.

## V – **Conclusion**

146. In the light of the foregoing considerations, I propose that the Court should rule as follows:

— declare that, in its judgment in Case T-82/08 *Guardian Industries and Guardian Europe* v *Commission* EU:T:2012:494, the General Court of the European Union erred in law in ruling the European Commission's letter of 10 February 2012 admissible even though it was produced out of time, declare that letter inadmissible and remove it from the case-file;

— annul that judgment in so far as, by upholding the Commission's decision to exclude the captive sales from its calculation of the fines imposed on the other addressees of the decision, and thus discriminating against the applicants, the General Court erred in law;

— consequently reduce by 37% the fine imposed on the applicants and set the fine at EUR 93 240 000 instead of EUR 148 000 000;

— declare that the General Court failed to adjudicate within a reasonable time;

— decide that each party is to bear its own costs relating to the proceedings at first instance and that the Commission is to pay all the costs of these proceedings.