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SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN TUOMIOISTUIN
EUROPEISKA UNIONENS DOMSTOL

JUDGMENT OF THE COURT (Eighth Chamber)

14 September 2017 *

(Appeal — Agreements, decisions and concerted practices — Global market for cathode ray tubes for television sets and computer monitors — Agreements and concerted practices relating to prices, markets sharing, customer allocation and production limitation — Rights of the defence — Sending of the statement of objections only to the parent companies of a joint venture and not to the joint venture itself — Fine — 2006 Guidelines on the method of setting fines — Point 13 — Determining the value of sales relating to an infringement — Intragroup sales of the relevant product outside the European Economic Area (EEA) — Account to be taken of the sales within the EEA of final products in which the relevant product has been installed — Equal treatment)

In Joined Cases C-588/15 P and C-622/15 P,

TWO APPEALS pursuant to Article 56 of the Statute of the Court of Justice of the European Union, brought, respectively, on 12 and 19 November 2015,

LG Electronics Inc., established in Seoul (South Korea), represented by G. Van Gerven and T. Franchoo, advocaten,

Koninklijke Philips Electronics NV, established in Eindhoven (Netherlands), represented by E. Pijnacker Hordijk, J.K. de Pree and S. Molin, advocaten,

appellants,

the other party to the proceedings being:

European Commission, represented by A. Biolan, V. Bottka and I. Zaloguin, acting as Agents,

defendant at first instance,

THE COURT (Eighth Chamber),

* Language of the case: English.

composed of M. Vilaras (Rapporteur), President of the Chamber, J. Malenovský and M. Safjan, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2017,

gives the following

Judgment

1 By its appeal in Case C-588/15 P, LG Electronics Inc. ('LGE') asks the Court of Justice to set aside the judgment of the General Court of the European Union of 9 September 2015, *LG Electronics* v *Commission* (T-91/13, not published, EU:T:2015:609) ('the first judgment under appeal'), by which the General Court dismissed its action seeking the annulment of Commission Decision C(2012) 8839 final of 5 December 2012 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case COMP/39.437 — TV and Computer Monitor Tubes) ('the contested decision') in so far as it related to LGE and, as a subsidiary plea, a reduction of the amount of the fine imposed on it by that decision.

2 By its appeal in Case C-622/15 P, Koninklijke Philips Electronics NV ('Philips') asks the Court of Justice to set aside the General Court's judgment of 9 September 2015, *Philips* v *Commission* (T-92/13, not published, EU:T:2015:605) ('the second judgment under appeal'), by which the General Court dismissed its action seeking the annulment of the contested decision in so far as it related to Philips and, as a subsidiary plea, a reduction of the amount of the fine imposed on it by that decision.

Background to the proceedings

3 It is apparent from paragraph 9 of the first judgment under appeal and from paragraph 10 of the second judgment under appeal (together, 'the judgments under appeal') that, by the contested decision, the European Commission found that the main global producers of cathode ray tubes ('CRTs') had infringed Article 101 TFEU and Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) ('the EEA Agreement') by participating in two separate infringements, each constituting a single and continuous infringement. Those infringements concerned, on the one hand, the market for colour cathode tubes for computer monitors (colour display tubes; 'CDTs') and, on the other hand, the market for colour cathode tubes for television sets (colour picture tubes; 'CPTs').

4 As the General Court noted in paragraph 2 of both the first judgment under appeal and the second judgment under appeal, a CRT is an evacuated glass envelope containing an electron gun and a fluorescent screen, usually with internal or external means to accelerate and deflect the electrons. When electrons from the electron gun strike the fluorescent screen, light is emitted, creating an image on the screen. CDTs and CPTs were the only two types of CRT existing at the time of the facts to which the contested decision relates.

5 It is apparent from paragraph 1 of the first judgment under appeal that LGE is a supplier of consumer electronics products, mobile communications equipment and electrical household appliances. LGE and its wholly owned subsidiary LG Electronics Wales Ltd (United Kingdom) manufactured and sold CRTs until 1 July 2001.

6 In addition, it is apparent from paragraph 1 of the second judgment under appeal that Philips is the ultimate holding company of the Philips group, which specialises in electronic products and, in particular, in healthcare, lighting and consumer electronics. Until 1 July 2001 that group produced, inter alia, CRTs.

7 In paragraph 3 of the judgments under appeal, the General Court stated that from 1 July 2001 LGE and Philips had merged their worldwide CRT activities in a joint venture, the LPD group, headed by LG Philips Displays Holding BV. LGE and Philips transferred their entire CRT businesses to the joint venture.

8 It is apparent from paragraph 15 of the first judgment under appeal and from paragraph 16 of the second judgment under appeal that, in the contested decision, the Commission took the view, first, that LGE and its subsidiaries and, second, the subsidiaries of Philips had participated in cartels relating to CDTs and CPTs until the transfer of the CRT business to the LPD group on 1 July 2001. Consequently, on 30 June 2001 LGE and Philips were both found liable for an infringement relating to CDTs dating back to 24 October 1996 in the case of LGE and to 29 June 1997 in the case of Philips, as well as for an infringement relating to CPTs dating back to 3 December 1997 in the case of LGE and to 29 January 1997 in the case of Philips. Furthermore, the Commission formed the view that the appellants should also be held, as parent companies, to be jointly and severally liable for the participation of the LPD group in the cartels relating to CDTs and CPTs from 1 July 2001 until 30 January 2006.

9 The Commission held accordingly, in points (c) and (d) respectively of Article 1(1) of the contested decision, that Philips had participated in the cartel relating to CDTs from 28 January 1997 until 30 January 2006 and that LGE had participated in the same cartel from 24 October 1996 until 30 January 2006. The Commission also held, in points (f) and (g) respectively of Article 1(2) of the contested decision, that Philips had participated in the cartel relating to CPTs from 21 September 1999 until 30 January 2006 and that LGE had participated in the same cartel from 3 December 1997 until 30 January 2006.

10 As regards the infringement relating to CDTs, the Commission, in points (c) to (e) respectively of Article 2(1) of the contested decision, imposed fines of EUR 73 185 000 on Philips, of EUR 116 536 000 on LGE, and of EUR 69 048 000 on those two companies jointly and severally. As regards the infringement relating to CPTs, the Commission imposed, in points (c) to (e) respectively of Article 2(2) of the contested decision, fines of EUR 240 171 000 on Philips, of EUR 179 061 000 on LGE and of EUR 322 892 000 on those two companies jointly and severally.

Procedure before the General Court and the judgments under appeal

11 By applications lodged at the Registry of the General Court on 14 and 15 February 2013 respectively, LGE and Philips each brought an action seeking the annulment of the contested decision in so far as that decision concerned each of them or, as a subsidiary plea, a reduction of the amount of the fines imposed on them by that decision.

12 In support of its claims seeking annulment of the contested decision, LGE raised seven pleas in law before the General Court, including:

– the first plea in law, alleging infringement of LGE's rights of defence, in that the LPD group had been excluded from the procedure;

– the fifth plea in law, which is subdivided into two parts, alleging infringement of Article 101 TFEU, of Article 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1), of the principle of personal liability and the rights of defence, as well as a manifest error of assessment, in that, by including, in the sales taken into account for the calculation of the amount of the fine, sales of CRTs incorporated within the same group in a finished product, a television set or a computer monitor and then sold to customers in the European Economic Area ('the EEA') ('direct EEA sales through transformed products'), the Commission took account of direct EEA sales through transformed products made by Philips for the purposes of calculating the fine to be imposed on LGE; and

– the sixth plea in law, which is subdivided into three parts, alleging infringement of Article 296 TFEU, manifest error of assessment and infringement of the principles of equal treatment and sound administration, in that the Commission failed to establish the existence of an economic unit including Samsung SDI Co. ('Samsung'), another participant in the cartel referred to by the contested decision, and Samsung Electronics Co. Ltd ('SEC'), and, consequently, for the purposes of calculating the fine imposed on Samsung, it did not take into consideration as direct EEA sales through transformed products the sales by SEC within the EEA of television sets and computers incorporating CRTs manufactured by Samsung.

13 In paragraphs 67 to 91 of the first judgment under appeal, the General Court examined and rejected the first plea in law as being ineffective and, in any event, unfounded. The two branches of the fifth plea in law were examined, respectively, in paragraphs 166 to 171 and 172 to 181 of the same judgment and were also rejected. Lastly, the three branches of the sixth plea in law were examined, respectively, in paragraphs 183 to 188, 189 to 190 and 191 to 193 of the first judgment under appeal and were all rejected.

14 Since the General Court also rejected all of the other pleas in law raised by LGE in support of its claims seeking the annulment of the contested decision and a reduction of the amount of the fine imposed upon it, the General Court dismissed LGE's action in its entirety.

15 Philips raised before the General Court eight pleas in law in support of its claims seeking annulment of the contested decision, including:

– the second plea in law, subdivided into two parts, alleging infringement of Article 101 TFEU, of Article 53 of the EEA Agreement and of Article 27(1) of Regulation No 1/2003, infringement of the rights of defence, including the right to be heard, and of the principle of sound administration, in that the Commission did not impute liability to the LPD group for the infringements that it was alleged to have committed;

– the fifth plea in law, which is subdivided into three parts, alleging infringement of Article 101 TFEU, of Article 53 of the EEA Agreement and of Article 23 of Regulation No 1/2003, infringement of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2) ('the Guidelines on the method of setting fines') and of the principle of equal treatment, in that the Commission included sales made outside the EEA in the turnover relevant for the purpose of calculating the basic amount of the fines; and

– the eighth plea in law, which is subdivided into four branches, alleging, inter alia, infringement of the requirement to state reasons, of the principle of equal treatment and of the principle of sound administration, as well as a manifest error of assessment, in that the Commission had failed to establish the existence of a single economic unit, comprising namely Samsung and SEC, and, consequently, had failed to take into consideration the sales by SEC throughout the EEA of television sets and computers incorporating CRTs manufactured by Samsung for the purposes of calculating the fine imposed on Samsung.

16 The General Court examined the first part of the second plea in paragraphs 74 to 89 of the second judgment under appeal and rejected it. The second part of the second plea was examined in paragraphs 90 to 99 of the same judgment and was also rejected.

17 The three branches of the fifth plea in law were examined, respectively, in paragraphs 144 and 145, 146 to 180 and 181 to 188 of the second judgment under appeal and were all rejected.

18 Lastly, the General Court considered the four parts of the eighth plea in, respectively, paragraphs 224 to 226, 227 to 234, 235 to 238 and 239 to 252 of the second judgment under appeal and rejected all of them.

19 As it had also rejected all the other pleas in law raised by Philips in support of its claims seeking annulment of the contested decision and seeking a reduction of the amount of the fine imposed upon it, the General Court dismissed Philips's action in its entirety.

Procedure before the Court of Justice and forms of order sought

20 By decision of the President of the Court of 7 February 2017, Cases C-588/15 P and C-622/15 P were joined for the purposes of the oral procedure and the judgment.

21 LGE claims that the Court should:

– set aside the first judgment under appeal;

– annul, in whole or in part, Article 1(1)(d) and (2)(g) and Article 2(1)(d) and (e) and (2)(d) and (e) of the contested decision;

– reduce the fines imposed on it by Article 2(1)(d) and (e) and (2)(d) and (e) of the contested decision; and

– order the Commission to pay the costs of both the appeal and the proceedings at first instance.

22 Philips claims that the Court should:

– set aside the second judgment under appeal;

– annul, in whole or in part, Article 1(1)(c) and (2)(f) and Article 2(1)(c) and (e) and (2)(c) and (e) of the contested decision;

– reduce the fines imposed on it in Article 2(1)(c) and (e) and (2)(c) and (e) of the contested decision; and

– order the Commission to pay the costs of both the appeal and the proceedings at first instance.

23 The Commission contends that the Court should:

– dismiss the appeals; and

– order the appellants to pay the costs.

The appeals

24 In support of its appeal, LGE raises four grounds alleging, first, infringement of its rights of defence; second, an error of law on the part of the General Court, to the extent that the latter wrongly took into consideration, as direct EEA sales through transformed products effected independently by LGE and by Philips, sales that in fact related to the LPD group's independent businesses; third, an error in law by the General Court, in that the latter took into consideration Philips's direct EEA sales through transformed products, despite this being a separate business from LGE; and, fourth, an infringement of the principle of equal treatment.

25 Philips raises three grounds in support of its appeal. The first alleges an error in law as regards the taking into consideration of direct EEA sales through transformed products when calculating the basic amount of the fine imposed upon it. This corresponds to LGE's second and third grounds of appeal. Philips's second ground alleges, in essence, an infringement of the rights of defence and corresponds to LGE's first ground of appeal. Lastly, Philips's third ground of appeal alleges an error in law and an infringement of the requirement to state reasons, in that the General Court approved the Commission's decision not to take into consideration SEC's direct EEA sales through transformed products effected with Samsung as an intermediary for the purposes of calculating the basic amount of the fine imposed on Samsung, as well as a failure to adjudicate. This ground of appeal corresponds, in essence, to LGE's fourth ground of appeal.

LGE's first ground of appeal and Philips's second ground of appeal, alleging an infringement of their rights of defence

Arguments of the parties

26 LGE and Philips claim that the General Court erred in law by finding that the Commission had not infringed their rights of defence and had not committed a procedural error by deciding not to send the statement of objections to the LPD group.

27 In the first place, LGE contests the rejection, in paragraph 83 of the first judgment under appeal, of the first plea in law in the proceedings at first instance on the ground that it was ineffective. LGE maintains that the grounds stated in paragraphs 73 to 82 of that judgment relate to a separate issue, which had not been raised before the General Court, namely whether the Commission had erred in holding LGE liable for the infringement. LGE takes the view that a finding that the Commission was entitled to impute liability to LGE does not make its plea in relation to an infringement of the rights of the defence ineffective.

28 LGE complains that the General Court found that the Commission has an absolute discretionary power to decide whether the statement of objections had to be sent to the parent company or to the subsidiary, although, in certain circumstances, such as those in this instance, the exercise of that discretion is restricted by respect for the rights of defence. LGE argues that it is apparent from the judgment of 22 January 2013, *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29, paragraph 39), that, if a subsidiary submits exculpatory evidence from its records or from interviewing staff, that evidence will automatically benefit the parent company. Consequently, according to LGE, the ability of a parent company to exercise its rights of defence depends on its subsidiary being involved in the procedure.

29 LGE submits, relying on the judgment of 25 October 2011, *Solvay* v *Commission* (C-109/10 P, EU:C:2011:686, paragraph 62), that it cannot be ruled out that, if the Commission had sent the statement of objections to the LPD group, the latter could have produced evidence that could have been of use for LGE's defence.

30 LGE argues that the practice of contacting both the subsidiary and the parent company is also apparent from the Commission's Manual of procedures for the application of Articles 101 and 102 TFEU. The fact that the Commission sent questionnaires to the LPD group is irrelevant, because, as a source of exculpatory evidence, it is LGE's submission that the questionnaires are not the same as a statement of objections. A defendant should know the objections if it is to be able fully to exercise its rights of defence.

31 In the second place, LGE criticises the grounds of the first judgment under appeal that led the General Court to reject, in the alternative, the first plea in law as unfounded.

32 According to LGE, the fact that it was able to submit observations on the evidence adduced by the Commission and the fact that the Commission obtained information from the LPD group are not sufficient to ensure respect for its rights of defence. Further, LGE criticises the finding of the General Court, set out in paragraph 86 of the first judgment under appeal, that LGE was under an obligation to ensure the proper maintenance in its books and records of information to enable it to retrieve details of the activity of the joint venture. LGE maintains that such a duty is relevant only in cases where the parent company assigns a subsidiary to a third party and it can thus be contractually assured of continued access to the documents. In the present instance, however, LGE explains that it no longer had control over its subsidiary following the latter's insolvency, the liquidator being under no obligation to grant it continued access to the documents.

33 Philips, for its part, does not dispute the ability of the Commission to attribute liability for the infringement to a parent company that exercised decisive influence over the conduct of a subsidiary. However, Philips claims that its liability is 'purely derivative' of that of its subsidiary and, without the LPD group being held directly liable, its liability as a parent company 'exceeds' the liability of the

subsidiary in question. In the judgment of 17 September 2015, *Total* v *Commission* (C-597/13 P, EU:C:2015:613, paragraphs 35 and 38), the Court of Justice found, however, that, in a situation where the liability of a parent company is purely derivative of that of its subsidiary and in which no other factor individually reflects the conduct for which the parent company is held liable, the liability of that parent company cannot exceed that of its subsidiary.

34 In the same way as LGE, Philips states that its subsidiary was no longer part of the same undertaking during the administrative proceedings, since it had been under the control of a liquidator since 30 January 2006. Philips states that, because its subsidiary was not involved in the administrative proceedings and did not receive, in particular, the statement of objections, the latter had no opportunity or obligation to defend itself against the Commission's allegations. In addition, having regard to the insolvency of its subsidiary, Philips asserts that it was impossible for it to ensure access to those documents so as to have the necessary evidence to enable it to defend itself. Further, only the liquidator of the LPD group was supposedly in possession of the documents relating to the group's business and had access to the relevant employees.

35 According to Philips, the Commission should have taken account of the fact that it no longer had control over its subsidiary and no longer had access to the documentation of the LPD group. Philips states that, if the Commission had included the LPD group in the administrative proceedings, the latter would have been able to defend itself and Philips would thus also have been better placed to ensure its own defence. The Commission's decision to exclude the LPD group from the administrative proceedings therefore allegedly deprived Philips of the full effectiveness of its rights of defence.

36 The Commission claims, principally, that the first of LGE's grounds of appeal and the second of Philips's grounds of appeal are both inadmissible, because by those grounds the appellants are in fact contesting the assessment of the facts made by the General Court, as set out in paragraphs 83 to 91 of the first judgment under appeal and in paragraphs 86, 97 and 98 of the second judgment under appeal. In any event, the Commission maintains that the appellants' grounds set out above are unfounded.

37 According to the Commission, since it was the appellants themselves which claimed that their liability for the infringement at issue was 'derivative', the General Court cannot be criticised for responding to that argument. The Commission submits that the case-law referred to by the appellants is irrelevant. In particular, the circumstances in the instant cases are very different from those in the case that gave rise to the judgment of 25 October 2011, *Solvay* v *Commission* (C-109/10 P, EU:C:2011:686).

38 The Commission argues that the judgment of 22 January 2013, *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29) was correctly interpreted by the General Court. In this regard, it submits that, in accordance with the case-law of the Court

of Justice (judgment of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 159 and the case-law cited), in order to impute, to an entity forming part of an undertaking, liability for an infringement committed by that undertaking, the Commission is not obliged either to hold liable the other entities of that same undertaking or to contact those other entities.

39 As regards the Antitrust Manual of Procedures, the Commission notes that it does not constitute a decision, that it contains no binding instructions for the Commission's staff and that the procedures set out in it are capable of being adapted to fit the circumstances of each case. Consequently, the Commission claims that a potential procedural divergence in a particular case from the content of that document is insufficient to demonstrate that there is an error in law.

Findings of the Court

40 It is apparent from the judgments under appeal that the LPD group, a subsidiary common to both of the appellants with LG Philips Displays Holding at the top of its corporate chain, participated in the CDT and CPT cartels from 1 July 2001 until 30 January 2006. On 30 January 2006, LG Philips Displays Holding was declared insolvent. Also according to the judgments under appeal, the Commission sent neither a statement of objections nor the contested decisions to the LPD group and, accordingly, did not impute liability to it for its conduct, on the ground that that group was subject to insolvency proceedings.

41 By their first and second grounds of appeal respectively, LGE and Philips submit that, in order to respect their rights of defence, the Commission was bound, in the circumstances of these cases, to send a copy of the statement of objections also to the LPD group, their common subsidiary, inasmuch as it was also implicated in the CDT and CPT cartels.

42 In this regard, it must be noted, first of all, that, by those two grounds, the appellants are alleging that the General Court erred in law and are not contesting its assessment of the facts. Consequently, contrary to what is argued by the Commission, those two grounds of appeal are not capable of being rejected at the outset as inadmissible.

43 According to the Court's settled case-law, observance of the rights of the defence in a proceeding before the Commission, the aim of which is to impose a fine on an undertaking for infringement of competition rules, requires that the undertaking concerned must have been afforded the opportunity to make known its views on the truth and relevance of the facts and circumstances alleged as well as on the documents used by the Commission to support its claim that there has been an infringement. Those rights are referred to in Article 41(2)(a) and (b) of the Charter of Fundamental Rights of the European Union (judgment of 25 October 2011, *Solvay* v *Commission*, C-110/10 P, EU:C:2011:687, paragraph 48 and the case-law cited).

44 Accordingly, Article 27(1) of Regulation No 1/2003 provides that, prior to taking a decision establishing an infringement of the rules of competition and imposing a fine, the Commission is required to give those who are the subject of the proceedings the opportunity to have their point of view heard as regards the grounds that the Commission has advanced and is to base its decisions solely on the objections in respect of which the relevant parties have been able to set out their observations.

45 It follows, as the Advocate General found in point 57 of his Opinion, that the statement of objections is designed to ensure the exercise of the rights of the defence, individually, by each natural or legal person concerned by the administrative proceedings in relation to the competition rules.

46 By contrast, if the Commission has no intention of establishing that an infringement was committed by a company, the rights of defence do not require a statement of objections to be sent to that company. The sending of a statement of objections to a given company seeks to ensure that the rights of defence of that company are respected, rather than those of a third party, even though that latter party may well be affected by the same administrative proceedings.

47 In the present instance, the Commission chose to pursue solely the appellants, the parent companies of the LPD group, and not to pursue the LPD group itself, which was their common subsidiary.

48 The case-law relied on by the appellants cannot lead to any different conclusion.

49 First, no parallel can be drawn between the circumstances in the instant cases and those in the case that gave rise to the judgment of 25 October 2011, *Solvay* v *Commission* (C-109/10 P, EU:C:2011:686).

50 As the Advocate General noted in point 66 of his Opinion, that case-law relates to access to exculpatory evidence found in the Commission's case file. In the instant cases, however, the appellants have not contested the fact that they had access to the whole of the Commission's case file, including the documents which the Commission obtained from the LPD group following its requests for information and inspections at that group's premises.

51 Second, the findings made by the Court in paragraph 39 of the judgment of 22 January 2013, *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29) cannot lead to any different conclusion. That judgment relates to a case in which the Commission had pursued both a parent company and its subsidiary for an infringement of the competition rules and the two companies concerned had contested the Commission's decision.

52 The findings outlined above are also sufficient to respond to Philips's argument, set out in paragraph 33 of the present judgment and based on the judgment of 17 September 2015, *Total* v *Commission* (C-597/13 P, EU:C:2015:613), in so far as the latter also concerns a case in which both the parent company and the

subsidiary had been pursued for their participation in an infringement of the competition rules.

53 In such circumstances, the additional arguments of the appellants, which seek to contest the validity of the grounds put forward by the General Court in the judgments under appeal justifying that rejection and demonstrating the allegedly insufficient nature of those grounds, must be held to be ineffective, since, as the Advocate General has, in essence, set out in point 70 of his Opinion, those arguments, even on the assumption that they are well founded, are insufficient to lead to the setting aside of the judgments under appeal.

54 Consequently, LGE's first ground of appeal and Philips's second ground of appeal must be rejected.

LGE's second and third grounds of appeal and Philips's first ground of appeal, alleging an error in law committed by the General Court regarding the taking into consideration by the Commission of direct EEA sales through transformed products for the purposes of calculating the amount of the fine

Arguments of the parties

55 In their second and first grounds of appeal respectively, LGE and Philips submit that it is as a result of an error in law that the General Court found that direct EEA sales through transformed products made independently by LGE and Philips could be imputed to the LPD group on the sole ground that that group belonged to the same economic unit as its parent companies.

56 The appellants criticise the General Court for having ignored the findings made in the judgment of 26 September 2013, *EI du Pont de Nemours* v *Commission* (C-172/12 P, not published, EU:C:2013:601, paragraph 47). The appellants conclude from that case-law that the finding that a joint venture and its controlling shareholders form a single undertaking has the sole purpose of attributing joint and several liability to those shareholders for the joint venture's infringing conduct. Consequently, it is their submission that LGE, Philips and the LPD group should each have been treated as a separate undertaking for purposes other than parent company liability. They maintain that such an approach is, moreover, in accordance with the judgment of 9 July 2015, *InnoLux* v *Commission* (C-231/14 P, EU:C:2015:451, paragraphs 56 and 57). The appellants submit that an analysis on the basis of that case-law should have led the General Court to conclude that LGE, Philips and the LPD group did not constitute a vertically integrated undertaking, and that sales between them were consequently not capable of being found to have been carried out within the same group.

57 In this respect, Philips submits that, as a joint venture fulfilling, in the long term, all the functions of an independent economic entity, the LPD group must be found to be an independent economic entity on the market and, consequently, an undertaking distinct from its parent companies. If such a joint venture were held to

be part of the same undertaking as its two parent companies, Article 101 TFEU would not apply to the agreements between that common undertaking and its parent companies, something which would be contrary to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('the EC Merger Regulation') (OJ 2004 L 24, p. 1) and the Commission Notice on restrictions directly related and necessary to concentrations (OJ 2005 C 56, p. 24).

58 Philips concludes from the foregoing that the General Court erred in law when it confirmed the classification of sales of cartelised CRTs by the LPD group to Philips or LGE as 'intragroup sales'. When calculating the amount of the fine, however, the Commission took into consideration, as regards CRT sales within the EEA through transformed products, only first sales within the EEA of transformed products, corresponding to CRTs that had been integrated within the same group, into a final product.

59 For its part, LGE criticises the General Court for having failed to take into consideration the fact that direct EEA sales through transformed products were not sales of cartelised CRTs, but were sales of transformed products, namely sales of television sets and computer monitors. Thus, it is LGE's submission that the General Court erred when, in paragraph 167 of the first judgment under appeal, it referred to 'CRTs sold by the LPD group to each of its parent companies'. LGE submits that direct EEA sales through transformed products are downstream sales of transformed products, made by LGE and Philips, and could not be attributed to the LPD group. LGE takes the view that, although it may be held liable for the infringement committed by the LPD group, the group itself must be treated as a separate undertaking.

60 By its third ground of appeal, LGE claims that the General Court erred in law and infringed the principle that the penalty must be specific to the offender and the offence when it confirmed, in paragraph 171 of the first judgment under appeal, the Commission's decision to hold LGE jointly and severally liable in respect of the LPD group's direct EEA sales through transformed products, even when those sales had been made by Philips as intermediary. In this context LGE submits that, even if it were admitted that sales between the LPD group and Philips constitute intragroup sales, it is those sales alone between the LPD group and Philips that are intragroup sales. Even assuming that the LPD group and Philips are vertically integrated, LGE maintains that it is not part of such a vertically integrated undertaking. Consequently, it is LGE's submission that the General Court should have annulled the contested decision, at the very least because the decision held that LGE was liable for the fine, but also because the fine had been calculated on the basis of the LPD group's direct EEA sales through transformed products made with Philips as intermediary.

61 In this respect, LGE repeats the arguments which it put forward in support of its second ground of appeal and adds that, in its submission, the General Court infringed the principle that the penalty must be specific to the offender and the

offence, as recognised by the Court of Justice in its judgment of 10 April 2014, *Commission and Others* v *Siemens Österreich and Others* (C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 91). LGE claims that direct EEA sales through transformed products were taken into account in order to reflect the overall gravity of the infringement. However, LGE submits that it is not liable for the gravity reflected by such sales made by Philips. Thus, LGE claims that it has had a fine imposed upon it that does not correctly reflect the gravity of the infringement imputed to it. In that context, LGE provides detailed figures on the volume of the LPD group's direct EEA sales through transformed products made with LGE and Philips as intermediary respectively in order to demonstrate that the volume of sales with Philips as intermediary was 26 times greater.

62 The Commission responds by claiming that LGE's second and third grounds of appeal and Philips's first ground of appeal are based on the erroneous premiss that the existence of an economic unit that includes the LPD group and its parent companies would be relevant only for the purposes of imputing to those parent companies liability for the infringement committed by the LPD group. Through those arguments, however, the Commission maintains that the appellants are attempting to challenge facts established by the General Court without invoking any distortion of the evidence. Consequently, the Commission claims that those grounds of appeal are inadmissible.

63 In any event, the Commission claims that those grounds of appeal must be rejected as unfounded as they are based on a misreading of paragraph 47 of the judgment of 26 September 2013, *EI du Pont de Nemours* v *Commission* (C-172/12 P, not published, EU:C:2013:601). Furthermore, the Commission contends that the method of calculating the fine used in the contested decision complies with the guidance set out in the case-law of the Court of Justice on the subject.

64 As regards, in particular, LGE's third ground of appeal, the Commission notes that the imputation of liability for an infringement committed by a subsidiary to its parent company does not infringe the principle that the penalty must be specific to the offender and the offence, because the parent company and the subsidiary are part of the same economic unit and form a single undertaking. The assessment of the gravity of the infringement on the basis of the value of the sales relating directly or indirectly to the infringement takes into account all sales by the entirety of the relevant undertaking, which is in this instance composed of both the parent companies, namely LGE and Philips, and their subsidiary, namely the LPD group.

Findings of the Court

65 It is necessary to examine LGE's second and third grounds of appeal and Philips's first ground of appeal together, since, in essence, they deal with the same question relating to the taking into account, for the purposes of calculating the fine, of the LPD group's direct EEA sales through transformed products.

66 In this regard, it should first be noted that, as the appellants have pointed out in their replies, by those grounds of appeal, they are, in essence, criticising the General Court for having erred in law when analysing the lawfulness of the taking into account of the sales referred to above for the purposes of calculating the amount of the fine. Those grounds of appeal are not, therefore, seeking to challenge the validity of the factual assessments made by the General Court and, consequently, they are admissible.

67 Next, it is apparent from the case-law of the Court of Justice that, although Article 23(2) of Regulation No 1/2003 leaves the Commission a certain discretion in determining the amount of the fine, it nevertheless limits the exercise of that discretion by establishing objective criteria to which the Commission must adhere. Thus, first, the amount of the fine that may be imposed on an undertaking is subject to a quantifiable and absolute ceiling, such that the maximum amount of the fine that may be imposed on a given undertaking can be determined in advance. Second, the exercise of that discretion is also limited by rules of conduct which the Commission imposed on itself, in particular in the Guidelines on the method of setting fines (judgment of 9 July 2015, *InnoLux* v *Commission*, C-231/14 P, EU:C:2015:451, paragraph 48 and the case-law cited).

68 In the contested decision, the Commission applied those guidelines to calculate the fines. Point 13 of those guidelines states that 'in determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly ... relates in the relevant geographic area within the EEA'. Point 6 of those guidelines states that 'the combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement'.

69 Although the concept of the 'value of sales' referred to in point 13 of the Guidelines on the method of setting fines cannot extend to encompass sales made by the undertaking in question that in no way come within the scope of the alleged cartel, it would be contrary to the objective pursued by Article 23(2) of Regulation No 1/2003 if vertically integrated participants in a cartel could, solely because they incorporated the goods forming the subject matter of the infringement into products finished outside the EEA, expect to have excluded from the calculation of the fine the proportion of the value of their sales of those finished products within the EEA that are capable of being regarded as corresponding to the value of the goods forming the subject matter of the infringement (judgment of 9 July 2015, *InnoLux* v *Commission*, C-231/14 P, EU:C:2015:451, paragraph 55 and the case-law cited).

70 Vertically integrated undertakings may benefit from a horizontal price-fixing agreement concluded in breach of Article 101 TFEU not only when sales are made to independent third parties on the market for the goods that are the subject

of the infringement, but also on the downstream market for transformed goods into which those goods are incorporated, in two different ways. Either the price increases of the inputs which result from the infringement are passed on by those undertakings in the price of the transformed goods, or those undertakings do not pass those increases on, which thus effectively confers on them a cost advantage in relation to their competitors which obtain those same inputs on the market for the goods which are the subject of the infringement (judgment of 9 July 2015, *InnoLux* v *Commission*, C-231/14 P, EU:C:2015:451, paragraph 56 and the case-law cited).

71 In the judgments under appeal, the General Court confirmed the Commission's conclusion that the appellants had jointly exercised a decisive influence over the conduct of the LPD group. It follows from that conclusion, which is not contested by the appellants in their appeals, that during the period mentioned above the appellants and their common subsidiary group were part of the same undertaking and, consequently, formed an economic unit.

72 Given that the LPD group intervened in the product market affected by the infringement, while LGE and Philips were active in the market for the transformed goods in which those products were incorporated, it should be noted that, contrary to what Philips argues, the LPD group and its parent companies did form a vertically integrated undertaking within the meaning of the judgment of 9 July 2015, *InnoLux* v *Commission* (C-231/14 P, EU:C:2015:451, paragraphs 56 and 57).

73 In those circumstances, the General Court did not err in law when it found, in paragraph 170 of the first judgment under appeal and in paragraph 164 of the second judgment under appeal, that the Commission was entitled to include direct EEA sales through transformed products by the economic unit formed by the LPD group and its parent companies when calculating the basic amount of the fine imposed on the appellants.

74 That finding cannot be brought into question by the appellants' arguments based on the judgment of 26 September 2013, *EI du Pont de Nemours* v *Commission* (C-172/12 P, not published, EU:C:2013:601, paragraph 47), according to which, where two parent companies each have a 50% shareholding in the joint venture which committed an infringement of the rules of competition law, it is only for the purposes of establishing liability for participation in an infringement of that law and only in so far as the Commission has demonstrated, on the basis of factual evidence, that both parent companies did in fact exercise decisive influence over the joint venture, that those three entities can be considered to constitute a single economic unit and therefore form a single undertaking.

75 It cannot but be held that the appellants have misread and taken out of context paragraph 47 of the judgment of 26 September 2013, *EI du Pont de Nemours* v *Commission* (C-172/12 P, not published, EU:C:2013:601), in which the Court of Justice affirmed that it is solely for the purposes of establishing liability for

participation in the infringement of competition law that the Commission may conclude, from the effective exercise by two parent companies of a decisive influence over a joint venture, that there exists a single and common unit.

76 The Court made this affirmation in order to respond to a different argument from that in the instant cases, as summarised in paragraph 36 of that judgment, according to which the circumstance that two companies independent of one another both exercise a decisive influence over a joint venture does not imply that they constitute, within the meaning of competition law, a single undertaking. When read in its original context, it appears that that affirmation merely sought to highlight the fact that the establishment of the existence of a joint venture, such as the Commission may be led to make in this context, is valid only as regards competition law and the relevant market for the infringement.

77 LGE's argument that direct EEA sales through transformed products should not have been taken into consideration, since they do not constitute sales of cartelised CRTs, but are merely sales of television sets and computer monitors, also cannot succeed. Because the LPD group and its parent companies, namely LGE and Philips, constituted an economic unit and therefore had to be regarded as forming part of the same undertaking on the relevant markets for the infringement, the amount of the fine has to be calculated, in accordance with point 13 of the Guidelines on the method of setting fines, on the basis of the value of the sales of cartelised products made by that undertaking on those markets. As the General Court established in paragraph 135 of the first judgment under appeal and in paragraph 148 of the second judgment under appeal, the CRTs provided by the LPD group to its two parent companies were installed in the television sets and the computer monitors in question. In addition, it follows from paragraph 137 of the first judgment under appeal and from paragraph 157 of the second judgment under appeal that those sales were taken into account only up to the proportion of their value that was capable of corresponding to the value of the cartelised CRTs installed in the television sets and computer monitors.

78 It is also necessary to reject Philips's argument, summarised in paragraph 57 of the present judgment, which states, in essence, that establishing that a joint venture is part of the same undertaking as its parent companies would result in a failure to apply Article 101 TFEU to the agreements between that joint venture and its parent companies, something which would be contrary to Regulation No 139/2004. It must be noted, in this regard, that it follows from Article 2(4) of that regulation that, to the extent that the creation of a joint venture constituting a concentration within the meaning of Article 3 of that regulation has as its subject or effect the coordination of the competitive conduct of undertakings that remain independent, such coordination is to be appraised in accordance with the criteria of Article 101(1) and (3) TFEU, with a view to establishing whether or not the concentration is compatible with the internal market.

79 The fact that a joint venture and its parent companies are considered to form part of the same undertaking for the purposes of establishing an infringement on a

certain market does not prevent the two parent companies from being independent, within the meaning of Article 2(4) of Regulation No 139/2004, on all other markets.

80 It follows from the foregoing considerations that LGE's third ground of appeal, in which it alleges that the General Court erred in law when it approved the Commission also taking into account the value of Philips's direct EEA sales through transformed products for the purposes of calculating the fine imposed upon LGE, cannot succeed.

81 Consequently, LGE's second and third grounds of appeal and Philips's first ground of appeal must be rejected.

LGE's fourth ground of appeal and Philips's third ground of appeal, alleging an error in law, an infringement of the principle of equal treatment and a failure to adjudicate

Arguments of the parties

82 By their fourth and third grounds of appeal respectively, LGE and Philips criticise the General Court, in essence, for having rejected, after an incomplete and insufficiently reasoned analysis, LGE's sixth plea in law and the first three parts of Philips's eighth plea in law and for having therefore found, contrary to the arguments of the two appellants, that the Commission was not obliged to take the view that sales between SEC and Samsung were intragroup sales and to include them as an amount in the calculation of the fine imposed on Samsung as direct EEA sales through transformed products made with SEC as intermediary.

83 In particular, LGE and Philips criticise the General Court for having limited itself to examining, when seeking to dismiss the possibility that SEC and Samsung could constitute a single undertaking, whether SEC was able to exercise a decisive influence over Samsung, without examining whether the existence of a single undertaking could not be inferred from the fact that both companies were under the ultimate control of the same natural persons, which was apparent from the evidence on which they relied before the General Court. In this regard, they stress that they are not requesting a new assessment of that evidence by the Court of Justice, but that they are criticising the General Court because of an incomplete and insufficiently reasoned examination of that evidence.

84 The appellants maintain that this error by the Commission led it to apply two different methodologies to the fines imposed on the appellants, on the one hand, and on Samsung, on the other hand, taking into account direct EEA sales through transformed products in the case of the former, but failing to do so in the case of the latter. The appellants claim that the General Court failed to reprimand this discriminatory treatment and thus erred in law and infringed the principle of equal treatment.

85 Philips adds that, contrary to what was established in paragraph 233 of the second judgment under appeal, the case-law that states that, where an undertaking, by its conduct, has infringed Article 101 TFEU, it cannot escape being penalised altogether on the ground that another trader has not been fined when that trader's circumstances are not even the subject of proceedings before the EU Courts, is not applicable in the instant case, since Samsung has not evaded all sanction, but has simply been treated more favourably.

86 The Commission submits principally that LGE's fourth ground of appeal and Philips's third ground of appeal are inadmissible and ineffective since, first, those grounds seek a new assessment of the facts by the Court of Justice and, second, they are based on an alleged unlawful act committed in favour of another, which cannot, in any event, benefit the appellants.

87 As a subsidiary plea, the Commission notes that in the contested decision it held that only sales between entities where one had a decisive influence over the other constituted intragroup sales. The Commission argues that, since the appellants did not argue that Samsung had a decisive influence over SEC or vice versa, they cannot criticise the Commission for having infringed the principle of equal treatment. The Commission adds that it may decide to impute the liability of one or a number of subsidiaries to their parent company and that neither Regulation No 1/2003 nor the case-law determines who is the legal or natural person within an undertaking whom it must hold liable for the infringement and sanction by imposing a fine.

Findings of the Court

88 It should be noted as a preliminary point that, since, by their fourth and third grounds of appeal respectively, LGE and Philips criticise the General Court for having erred in law, infringed the principle of equal treatment and failed to adjudicate, those grounds cannot be rejected from the outset as being inadmissible, contrary to what is claimed by the Commission.

89 Next, it should be noted that those grounds are based on the premiss that, if the appellants had succeeded in establishing before the General Court that Samsung and SEC were part of the same economic unit and that, as a result, the Commission had committed an unlawful act, the General Court would have had to reduce the amount of the fines that had been imposed on them for their participation in the infringements at issue in order to mitigate the unequal treatment resulting from the Commission's failure to take into account direct EEA sales through transformed products by Samsung through SEC as intermediary when setting the amount of the fine imposed on Samsung for its participation in the same infringements as those in which LGE and Philips participated.

90 It should be noted that that premiss is erroneous.

91 The principle of equal treatment, relied on by the appellants, must be reconciled with the principle of legality, according to which a person may not rely, to his benefit, on an unlawful act committed in favour of a third party (judgment of 16 June 2016, *Evonik Degussa and AlzChem* v *Commission*, C-155/14 P, EU:C:2016:446, paragraph 58).

92 Therefore, in so far as they are invoking for their own benefit unlawful acts allegedly committed by the Commission when determining the amount of the fine imposed on Samsung, the appellants could not, in any event, rely on the principle of equal treatment in order to challenge before the General Court the amount of the fines imposed on them by the Commission.

93 Admittedly, according to the settled case-law of the Court of Justice, when the amount of the fine is determined, there cannot, by the application of different methods of calculation, be any discrimination between the undertakings which have participated in the same infringement of Article 101 TFEU (judgment of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363, paragraph 62 and the case-law cited).

94 However, in the present cases, as follows from paragraphs 135 and 159 of the first judgment under appeal and from paragraphs 148 and 187 of the second judgment under appeal, the Commission applied the same methodology to all the undertakings by taking into account, as regards each of them, the ‘first real sale’ and by distinguishing three categories on the basis of that criterion, namely ‘direct EEA sales’, corresponding to CRTs sold directly to customers within the EEA by one of the addressees of the contested decision, direct EEA sales through transformed products and ‘indirect sales’, corresponding to CRTs sold by one of the addressees of the contested decision to customers outside the EEA, which would incorporate the CRTs into the final goods, television sets or computer monitors and then sell them within the EEA. Only direct EEA sales and direct EEA sales through transformed products were taken into account to calculate the amount of the fine. In those circumstances, the fact that the category of direct EEA sales through transformed products was applied only in the case of some of those which participated in the cartel, namely to those whom the Commission was able to prove belonged to a vertically integrated undertaking, does not amount to discrimination, since the Commission assessed the applicability of that category to each of the participants on the basis of the same objective criteria.

95 The instant cases can therefore be distinguished from the case that gave rise to the judgment of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission* (C-580/12 P, EU:C:2014:2363). By that judgment the Court reduced the amount of the fine imposed on a participant in an infringement in order to take into account the fact that, by erroneously applying the method that it had chosen to determine the amount of the fine, the Commission had imposed on another participant in the same cartel a fine that reduced the relative weight in the infringement of that other participant (judgment of 12 November 2014, *Guardian*

Industries and Guardian Europe v *Commission*, C-580/12 P, EU:C:2014:2363, paragraphs 70 to 80).

96 By contrast, by the pleas in law raised before the General Court, the appellants criticised the Commission, not for having applied to them a different legal criterion to determine the amount of the fine, but for having erroneously taken the view that, in the markets concerned by the infringement at issue, Samsung, along with its own subsidiaries, constituted an independent undertaking, and for having failed to identify a broader economic unit that, first, included not only Samsung and its subsidiaries, but also SEC, and, second, constituted the economic unit that had participated in the infringement at issue.

97 It follows from the foregoing considerations that the General Court cannot be criticised for erring in law or for infringing the principle of equal treatment on the ground that it did not reduce the amount of the fines imposed on the appellants in order to compensate for the favourable treatment allegedly received by Samsung.

98 As for Philips's argument that, in essence, the General Court omitted to examine some of the claims that Philips had submitted to it, namely claims in which it argued that, by failing to take into account intragroup sales made by Samsung in order to calculate the amount of the fine, the Commission infringed the principle of equal treatment in such a way that, in order to restore equality of treatment, the General Court should also have excluded Philips's direct EEA sales through transformed products, that argument is ineffective, since it is apparent from the foregoing considerations that those allegations were based on an erroneous premiss and were, consequently, in any event bound to fail.

99 It is therefore appropriate to reject LGE's fourth ground of appeal and Philips's third ground of appeal and, consequently, to dismiss the appeals in their entirety.

Costs

100 In accordance with Article 184(2) of its Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those rules, which applies to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

101 Since the Commission has applied for costs to be awarded against the appellants, and since the latter have been unsuccessful, the appellants must be ordered to pay the costs.

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

1. Dismisses the appeals;

2. Orders LG Electronics Inc. and Koninklijke Philips Electronics NV to pay the costs.

Vilaras Malenovský Safjan

Delivered in open court in Luxembourg on 14 September 2017.

A. Calot Escobar M. Vilaras

Registrar President of the Eighth Chamber