JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

23 May 2019 (*) (1)

(Competition — Agreements, decisions and concerted practices — Market for lead-acid car battery recycling — Decision finding an infringement of Article 101 TFEU — Coordination of purchase prices — Fines — Point 26 of the 2006 Leniency Notice — Point 37 of the Guidelines on the method of setting fines — Unlimited jurisdiction)

In Case T-222/17,

Recylex SA, established in Paris (France),

Fonderie et Manufacture de Métaux SA, established in Brussels (Belgium),

Harz-Metall GmbH, established in Goslar (Germany),

represented by M. Wellinger, S. Reinart and K. Bongs, lawyers,

applicants,

v

European Commission, represented by I. Rogalski, J. Szczodrowski and F. van Schaik, acting as Agents,

defendant,

APPLICATION pursuant to Article 263 TFEU for a reduction of the amount of the fine imposed on the applicants in Commission Decision C(2017) 900 final of 8 February 2017 relating to a proceeding under Article 101 TFEU (Case AT.40018 — Car battery recycling),

THE GENERAL COURT (Eighth Chamber),

composed of A.M. Collins (Rapporteur), President, M. Kancheva and R. Barents, Judges,

Registrar: N. Schall, Administrator,

having regard to the written part of the procedure and further to the hearing on 15 November 2018,

gives the following

Judgment

Background to the dispute

1 Recylex SA, Fonderie et Manufacture de Métaux SA and Harz-Metall GmbH (together ‘the applicants’ or ‘Recylex’), are companies established, respectively, in France, in Belgium and in Germany, which are active in the production of recycled lead and other products (polypropylene, zinc and special metals).

2 By Decision C(2017) 900 final of 8 February 2017 relating to a proceeding under Article 101 TFEU (Case AT.40018 — Car battery recycling) (‘the contested decision’), the European Commission found an infringement of Article 101 TFEU in the sector of the purchase of scrap lead-acid car batteries used for the production of recycled lead. Four undertakings or groups of undertakings participated in this

infringement, namely, first, Campine NV and Campine Recycling NV (together ‘Campine’); second, Eco-Bat Technologies Ltd, Berzelius Metall GmbH and Société de traitement chimique des métaux SAS (together ‘Eco-Bat’); third, Johnson Controls, Inc., Johnson Controls Tolling GmbH & Co. KG and Johnson Controls Recycling GmbH (together ‘JCI’); and, fourth, Recylex. The infringement was said to have taken place in the period from 23 September 2009 to 26 September 2012 (recitals 1 and 2 and Article 1(1) of the contested decision).

3 According to the Commission, the infringement is a single and continuous infringement consisting of agreements or concerted practices covering the territories of Belgium, Germany, France and the Netherlands. It consisted in the four undertakings or groups of undertakings referred to in paragraph 2 above coordinating their pricing behaviour with regard to the purchase of scrap lead-acid car batteries used for the production of recycled lead (recitals 1 and 2 and Article 1(1) of the contested decision).

The administrative procedure which led to the contested decision

4 The administrative procedure was initiated following an application for immunity, within the meaning of the Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17, ‘the 2006 Leniency Notice’), lodged on 22 June 2012 by JCI. On 13 September 2012, the Commission granted JCI conditional immunity under point 18 of that notice (recital 29 of the contested decision).

5 From 26 to 28 September 2012, the Commission carried out unannounced inspections under Article 20(4) 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) at the premises of, amongst others, the undertakings referred to in paragraph 2 above (recital 30 of the contested decision).

6 On 27 September 2012 and 23 October 2012 respectively, Eco-Bat and Recylex applied under the 2006 Leniency Notice for immunity or, failing that, for a reduction of the amount of the fine. On 4 December 2012, Campine submitted an application for a reduction of the amount of the fine under the same notice (recital 31 of the contested decision).

7 In the course of its investigation, the Commission sent requests for information pursuant to Article 18(2) of Regulation No 1/2003 to the undertakings referred to in paragraph 2 above and to various other undertakings (recital 32 of the contested decision).

8 On 24 June 2015, the Commission initiated the administrative procedure against the four undertakings or groups of undertakings referred to in paragraph 2 above, as well as against Métal Blanc and its sister company in the Netherlands, Van Peperzeel BV, and sent a statement of objections to each of them (recital 33 of the contested decision).

9 A CD-ROM containing the accessible parts of the Commission’s file was annexed to the statement of objections. The addressees of the statement of objections made use of their rights of access to the parts of the Commission’s file that were accessible only at the Commission’s premises (recital 34 of the contested decision).

10 By letter of 24 June 2015, the Commission informed Eco-Bat and Recylex of its provisional conclusion that the evidence which they had submitted to it represented significant added value within the meaning of points 24 and 25 of the 2006 Leniency Notice and, accordingly, of its intention to reduce the amount of the fine to be imposed on them. By letter of the same date, the Commission also informed Campine of its provisional conclusion that Campine did not meet the conditions for a reduction of the amount of the fine under the 2006 Leniency Notice (recital 33 of the contested decision).

11 The addressees of the statement of objections set out in writing to the Commission, within the prescribed period, their views on the objections raised against them. They also exercised their right to make oral submissions, at the hearing held on 17 and 18 November 2015 (recital 35 of the contested decision).

12 By letter of 13 December 2016, the Commission informed Campine, Eco-Bat, JCI and Recylex that it intended to apply a specific increase to the fines to be imposed on them, under point 37 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’). Recylex submitted observations on that letter on 23 December 2016.

13 On 8 February 2017, the Commission adopted the contested decision, in which, in particular, it alleged that Recylex had participated in the infringement referred to in paragraph 3 above from 23 September 2009 until 26 September 2012, and imposed on it, jointly and severally, a fine of EUR 26 739 000.

14 On 6 April 2017, the Commission adopted Decision C(2017) 2223 final, correcting the contested decision (‘the correcting decision’). The adoption of the correcting decision was justified by the fact that the Commission, first, had omitted to indicate in the contested decision the value of purchases taken into account in determining the basic amount of the fines to be imposed and, second, had made certain material errors in the calculation of the basic amount of the fine to be imposed on JCI (recitals 2 and 3 of the correcting decision). That omission and those material errors had not, however, had any impact on the amount of the fines imposed in the contested decision (recitals 2 and 3 of the correcting decision).

The contested decision

Relevant sector

15 The products concerned by the infringement are scrap lead-acid car batteries used for the production of recycled lead (recital 3 of the contested decision).

16 There are four groups of operators in the lead recycling industry: first, scrap collectors; second, scrap dealers or traders; third, recycling companies; and, fourth, battery manufacturers (recital 13 of the contested decision).

17 Scrap collectors gather scrap batteries from various collection points and sell them either to scrap dealers or traders or directly to recycling companies (recital 13 of the contested decision).

18 Scrap dealers or traders act as intermediaries between scrap collectors and recycling companies. They generally act primarily on behalf of one recycling company (recital 13 of the contested decision).

19 Recycling companies perform the treatment and recovery of scrap batteries, which they either acquire directly from their own collection points or purchase from scrap collectors or from scrap dealers or traders (recital 13 of the contested decision).

20 Recycling companies are often active at several levels of the supply chain. Thus, Eco-Bat and JCI operate both as recycling companies and as scrap battery collectors. JCI is, in addition, a battery manufacturer, while Eco-Bat is also active in the wholesale and retail trade in new lead-acid batteries and other types of batteries. Campine, on the other hand, operates only as a recycling company. Recycling companies therefore interact with each other as suppliers, as customers and as competitors. Campine, Eco-Bat and Recylex supply recycled lead to JCI, but also compete with it for the purchase of lead scrap from scrap collectors or from scrap dealers or traders (recital 18 of the contested decision).

21 During the period of the infringement, the main third-party suppliers of scrap batteries for Campine, Eco-Bat, JCI and Recylex were scrap collectors or scrap dealers or traders established in Belgium, Germany, France and the Netherlands (recital 16 of the contested decision).

22 Battery manufacturers acquire recycled lead from recycling companies (recital 13 of the contested decision).

23 Some battery manufacturers have their own scrap battery collection networks or are vertically integrated with scrap battery collectors, in which case they outsource the recycling of scrap batteries to recycling companies under tolling agreements (recital 13 of the contested decision). Thus, during the

period of the infringement, Campine, Eco-Bat and Recylex had each concluded such agreements with JCI.

24 Other battery manufacturers have their own recycling facilities (recital 13 of the contested decision).

25 The price of scrap lead-acid batteries is the main cost component in the recycling of lead. Primary lead is traded on the London Metal Exchange (LME) (United Kingdom). The LME lead prices are the basis for determining both primary lead and recycled lead prices (recital 24 of the contested decision). Scrap battery prices generally follow the LME prices and may be expressed as a percentage of those prices (recital 25 of the contested decision).

Description of the infringement

26 The Commission described the infringement at issue in recitals 40 to 182 of the contested decision.

27 In the first place, the Commission set out the basic principles of the cartel and how it was organised (recitals 40 to 58 of the contested decision).

28 First of all, the Commission stated that the objective of the cartel was to coordinate prices (target prices, maximum prices or fixed-amount price reductions) for the purchase of scrap lead-acid car batteries and to restrict competition for their purchase. According to the Commission, by achieving a reduction of the purchase prices of such scrap or preventing an increase in those prices, the participants in the cartel sought to increase their profit margin (recital 40 of the contested decision).

29 The Commission stated that the participants in the cartel coordinated their behaviour through contacts relating to prices, future market conduct and negotiations with suppliers (recital 41 of the contested decision).

30 Thus, according to the Commission, as regards prices, the participants in the cartel agreed among themselves to maintain at a certain level the prices offered to third-party scrap battery suppliers or to reduce those prices by a certain amount, sometimes in phased reductions over a set period of time. In addition to exchanging information and agreeing prices offered to specific suppliers, the participants agreed maximum price levels and target prices, expected price evolutions and purchasing intentions regarding Belgium, Germany, France and the Netherlands. They also tried to ensure that purchase prices did not fall below a certain level, which would have encouraged the suppliers to sell their scrap to third-party companies (recital 42 of the contested decision).

31 As regards future market conduct, besides exchanging information on current or future prices offered to suppliers, the participants in the cartel had also occasionally exchanged information on expected volumes of purchases, on current levels of stocks and levels of activity (recital 43 of the contested decision).

32 As regards negotiations on prices with suppliers, the participants in the cartel informed each other about the prices offered to their respective third-party scrap collectors or scrap dealers, who were in direct competition with them for the purchase of scrap batteries (recital 44 of the contested decision).

33 Next, the Commission identified the individuals who had participated in the cartel, stating, in each case, the name of the company to which they belonged, the position of responsibility held there, primarily within senior management, and the period of their employment within the company concerned during the period of the infringement (recitals 45 to 48 of the contested decision). Thus, in the case of Recylex, it provided the names of Mr R. (Chairman and Chief Executive Officer at Recylex SA), Mr F. (Chairman and Commercial Director at Recylex Commercial SAS, commercial agent of Recylex SA for the purchase of batteries to be recycled in France, the company having operated only as a holding company since 1 January 2011, and Counsellor to the Chief Executive Officer at Recylex SA) and Mr P. (Purchaser and Commercial Manager at Recylex SA). It also provided the names of Mr M. and Mr O. (Managing Director and Commercial Manager, respectively, at Fonderie et Manufacture de Métaux) and of Mr B. (Manager at Harz-Metall).

34 Last, the Commission described the way in which the cartel was organised (recitals 49 to 58 of the contested decision).

35 In that regard, the Commission noted that JCI, Eco-Bat and Recylex had confirmed that, during the period from at least 23 September 2009 to 26 September 2012, a series of meetings and contacts had taken place between the participants in the cartel. They had kept each other informed, directly or indirectly, of what they had discussed with others. The Commission stated that the majority of the anticompetitive contacts took place on a bilateral basis, mainly through telephone calls, emails or text messages. Contacts also took place in person, either through bilateral meetings or, less frequently, through multilateral meetings. Some of the contacts took place at international trade events or events held by national trade associations. During those various contacts, the individuals involved typically exchanged information on the prices they were offering for the purchase of scrap batteries and on the prices they were intending to offer in the near future in Belgium, Germany, France and the Netherlands. They then agreed on target prices or maximum prices to pay to their suppliers, or on fixed-amount price reductions (recitals 49 and 50 of the contested decision).

36 The Commission also explained the pattern of bilateral contacts which generally took place, stating in particular that the frequency and intensity of those contacts was driven by fluctuations in LME lead prices (recitals 53 and 54 of the contested decision).

37 The Commission further stated that the participants in the cartel monitored the effective implementation of the agreed prices (recital 55 of the contested decision). It also noted that they were aware of the unlawful nature of the contacts and that they tried to limit any written communication. Some of the individuals involved used coded language in their communications, referring to weather conditions (recital 56 of the contested decision).

38 Last, the Commission provided a table setting out the date of each anticompetitive contact, the nature of those contacts (meeting, email, telephone call, text message, telephone conference or unspecified contact) and the undertakings and their representatives who had taken part in them. Recylex was found to have been involved in 39 contacts (recital 58 of the contested decision).

39 In the second place, the Commission set out the chronology of events, describing the various anticompetitive contacts that had taken place between the participants in the cartel and certain other relevant events related to those contacts (recitals 59 to 182 of the contested decision).

The Commission's legal assessment of the infringement

40 In recitals 183 to 243 of the contested decision, the Commission set out its legal assessment of the conduct of the undertakings concerned.

41 In the first place, the Commission described the nature of the infringement at issue (recitals 185 to 230 of the contested decision).

42 In that regard, first, the Commission set out a series of considerations in order to establish, by reference to the facts described in the 'chronology of events', that the alleged conduct of the undertakings concerned had all the characteristics of an agreement or of a concerted practice for the purposes of Article 101(1) TFEU (recitals 185 to 196 of the contested decision).

43 Second, the Commission stated that each of the aspects of the alleged conduct of the undertakings concerned had the object of restricting competition and, therefore, constituted an infringement of Article 101(1) TFEU. The Commission considered that it could nevertheless be concluded that the various individual infringements of Article 101(1) TFEU together constituted a single and continuous infringement for which each of those undertakings could be held liable, since, first of all, their conduct was part of an overall plan pursuing a common anticompetitive objective, second, they all intended to contribute to that overall plan and, last, they were aware of the unlawful conduct planned or put into effect by each of the others in pursuit of the same objectives or could reasonably have foreseen it and were prepared to take the risk (recitals 197 to 230 of the contested decision).

44 In the second place, the Commission considered that the alleged conduct of the cartel participants constituted a restriction of competition by object for the purposes of Article 101(1) TFEU (recitals 231 to 238 of the contested decision).

45 In the third place, the Commission found that that conduct was capable of affecting trade between Member States, after having indicated, in essence, that the relevant market was characterised by a substantial volume of trade between Member States, that that conduct covered at least Belgium, Germany, France and the Netherlands and that it concerned both imports and exports (recitals 239 to 241 of the contested decision).

46 In the fourth place, the Commission noted that there were no indications in the present case that the conditions of Article 101(3) TFEU could be fulfilled and that, moreover, none of the participants in the cartel had claimed that they were fulfilled (recitals 242 and 243 of the contested decision).

Duration of participation in the infringement

47 In recitals 244 to 264 of the contested decision, the Commission examined the question of the duration of the relevant undertakings' participation in the infringement.

48 In the first place, the Commission took 23 September 2009 as the commencement date of the infringement, that being the date of the meeting in Windhagen (Germany) in which all the undertakings concerned had participated. With regard to the end date of the infringement, the Commission took 26 September 2012 for Campine, Eco-Bat and Recylex, that being the date of the commencement of its inspections, and 22 June 2012 for JCI, the date on which JCI had lodged its application for immunity (recitals 244 and 245 of the contested decision).

49 In the second place, the Commission considered whether there was evidence of facts sufficiently close in time for it to be reasonable to conclude that the infringement had continued without interruption between two specific dates (recitals 246 to 264 of the contested decision). As regards Recylex specifically, the Commission found that Recylex had participated in the infringement without interruption from 23 September 2009 until 26 September 2012, that is a period of three years and four days (recitals 261 to 264 of the contested decision).

Liability for the infringement

50 In recitals 265 to 287 of the contested decision, the Commission examined the issue of the attribution of liability for the infringement.

51 With regard, in particular, to the applicants, the Commission noted that they had participated directly in the infringement through Mr R., Mr F. and Mr P. in the case of Recylex SA, Mr M. and Mr O. in the case of Fonderie et Manufacture de Métaux, and Mr B. in the case of Harz-Metall. It added that, throughout the infringement period, 100% of the shares in the latter two companies were held by Recylex SA. Accordingly, it held those three companies jointly and severally liable for the infringement (recitals 284 to 287 of the contested decision).

Calculation of the amount of the fines

52 In recitals 288 to 420 of the contested decision, the Commission examined the matter of the fines to be imposed on the addressees of that decision, after having found that they should be required to bring the infringement to an immediate end, if they had not already done so, and to refrain from any further restrictive practice having the same or a similar object or effect. Moreover, the Commission rejected Recylex's claims that it should have been granted partial immunity pursuant to the third paragraph of point 26 of the 2006 Leniency Notice, since it had been the first to submit compelling evidence concerning the part of the infringement relating to France (recital 333 of the contested decision).

53 As regards the calculation of the amount of the fines, the Commission applied, in the contested decision, the methodology set out in the Guidelines and the 2006 Leniency Notice.

– *Basis for setting the basic amount of the fines*

54 In determining the basic amount of the fines, the Commission took into account the value of the purchases of scrap lead-acid car batteries made by each of the undertakings concerned, in the course of the full business year 2011, from scrap collectors, scrap dealers or traders established in Belgium, in Germany, in France and in the Netherlands, including purchases made directly from collection points where used batteries were deposited (recitals 297 to 319 of the contested decision). Moreover, the Commission rejected Recylex's claim that the Commission should take into account the average price of lead on the LME during the infringement period, that is from 2009 to 2012, which was lower than that in 2011 (recitals 316 to 318 of the contested decision).

– *Basic amount of the fines*

55 The Commission noted that, in accordance with the Guidelines, the basic amount of the fine consisted of an amount of up to 30% of an undertaking's relevant value of purchases, depending on the degree of gravity of the infringement, multiplied by the number of years of the undertaking's participation in the infringement, and an additional amount of between 15 and 25% of the value of an undertaking's relevant value of purchases, irrespective of duration (recital 320 of the contested decision).

56 In order to determine the percentage of the value of purchases by reference to the degree of gravity of the infringement, the Commission examined and took into consideration the nature of the infringement (recitals 321 to 334 of the contested decision). In that regard, it set the percentage at 15% for all the undertakings concerned, stating that the infringement consisted in a horizontal price-fixing agreement which was, by its very nature, among the most harmful restrictions of competition.

57 Since the duration of Campine's, Eco-Bat's and Recylex's participation in the infringement was 1 100 days, the Commission set the multiplier to be applied to those undertakings for the duration of the infringement at 3.01 (recital 344 of the contested decision). It used a multiplier of 2.74 for JCI, which had participated in the infringement for 1 004 days (recital 344 of the contested decision).

58 Moreover, the Commission rejected Recylex's claim that it should have been granted partial immunity pursuant to the third paragraph of point 26 of the 2006 Leniency Notice, since it had been the first to submit compelling evidence concerning the date of commencement of the infringement (recital 340 of the contested decision).

59 In order to deter undertakings from participating in agreements or concerted practices prohibited as incompatible with the internal market, the Commission, on the basis of the provisions of point 25 of the Guidelines and in the light of its assessment of the nature of the infringement (see paragraph 56 above), included in the basic amount of the fines an additional amount of 15% of the value of their purchases (recitals 345 to 347 of the contested decision).

60 At the end of that first stage, the Commission set the basic amount of the fine to be imposed on Recylex at EUR 37 124 000 (recital 348 of the contested decision).

– *Adjustments to the basic amount of the fines*

61 The Commission did not find that there were any aggravating circumstances in the case of the addressees of the contested decision (recitals 349 and 350 of the contested decision).

62 Nor, moreover, did the Commission consider it necessary to impose an increase in the basic amount of the fine on any of the addressees of the contested decision under point 30 of the Guidelines, according to which, in order to ensure that fines have a sufficient deterrent effect, the Commission may increase the fine to be imposed on undertakings with a particularly large turnover beyond the sales of goods or services to which the infringement relates (recitals 360 and 361 of the contested decision).

63 Furthermore, the Commission did not grant Recylex any reduction of the basic amount on account of mitigating circumstances (recitals 351, 353, 354, 356, 357 and 359 of the contested decision).

64 Next, having rejected the argument that a symbolic fine would suffice because of Recylex's precarious financial resources and difficult economic situation, the Commission did not grant Recylex a reduction of the amount of the fine under point 36 of the Guidelines (recital 362 of the contested decision).

65 Last, on the basis of point 37 of the Guidelines, the Commission decided to increase by 10% the amount of the fine to be imposed on each of the addressees of the contested decision in order to take into account the particularities of the case and to achieve deterrence (recitals 363 to 380 of the contested decision). In essence, it justified that increase on the basis that, in the present case, what was at issue was a purchase cartel and the value of purchases in itself was unlikely to be an appropriate proxy for reflecting the economic importance of the infringement. It explained, in that regard, that, in the case of a cartel whose objective it is to reduce purchase prices or to prevent their increase, the more successful it is, the lower the amount of the value of purchases and thus the amount of the fine.

– *Application of the 10% of turnover limit*

66 The Commission applied the 10% of turnover limit, pursuant to Article 23(2) of Regulation No 1/2003. The amount of the fine imposed on Recylex after that limit was applied was EUR 38 199 130 (recitals 381 to 383 of the contested decision).

– *Application of the 2006 Leniency Notice and the final amount of the fines*

67 In recitals 384 to 411 of the contested decision, the Commission decided on the application of the 2006 Leniency Notice.

68 As regards Recylex, the Commission first of all informed it, on 13 December 2013, that it was not entitled to full immunity from fines (recitals 394 and 395 of the contested decision). Next, on 24 June 2015, the Commission informed Recylex that it was the second undertaking to submit evidence that represented significant added value, as a result of which it was entitled to a reduction of between 20 and 30% of the amount of the fine that would otherwise have been imposed on it under points 24 and 25 of the 2006 Leniency Notice (recitals 396 and 397 of the contested decision).

69 Moreover, the Commission rejected Recylex's argument that it was entitled to a reduction of the amount of the fine of between 30 and 50% as it was the first to have submitted evidence of significant added value, namely information concerning collusive arrangements in France, the duration of the cartel and its commencement date (the Windhagen meeting), the meetings on 21 June and 8 October 2010 and the use of a coded language referring to weather conditions. The Commission noted, in that regard, that it had already obtained numerous documents and information from Eco-Bat in the first month after the inspections. Although Recylex was the first undertaking to provide evidence concerning the meetings on 21 June and 8 October 2010, that did not justify a reduction of the amount of the fine of between 30 and 50% (recitals 400 to 402 of the contested decision).

70 In the light of those various points, the Commission considered that Recylex should be granted a reduction of 30% of the fine (recital 403 of the contested decision).

71 Finally, the Commission examined the merits of the application submitted by Recylex on grounds of its inability to pay, based on point 35 of the Guidelines (recitals 412 to 418 of the contested decision). It refused that application for the reasons set out in Annex I to the contested decision.

72 The final amounts of the fines imposed were EUR 8 158 000 for Campine, EUR 32 712 000 for Eco-Bat, EUR 0 for JCI and EUR 26 739 000 for Recylex (recital 420 and Article 2 of the contested decision).

Procedure and forms of order sought

73 The applicants brought the present action by application lodged at the Court Registry on 18 April 2017.

74 On a proposal from the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral part of the procedure and, by way of measures of organisation of procedure pursuant to Article 89 of its Rules of Procedure, put questions to the parties in writing. The parties answered those questions within the periods prescribed.

75 The parties presented oral argument and replied to the oral questions put by the Court at the hearing on 15 November 2018.

76 The applicants claim that the Court should:

– reduce the amounts of the fines imposed on them;

– grant them payment terms;

– order the Commission to pay the costs.

77 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

Law

78 In support of their claims for a reduction of the fines imposed on them, the applicants rely on five pleas in law, the first, second and fourth pleas alleging errors in the application of point 26 of the 2006 Leniency Notice, the third plea alleging an error in the application of point 37 of the Guidelines, and the fifth plea expressly requesting the Court to exercise its unlimited jurisdiction in view of the allegedly inappropriate nature of the amount of the fine. The sixth plea in law is invoked by the applicants in support of their request that the Court grant them payment terms.

First plea in law, alleging an error in the application of the third paragraph of point 26 of the 2006 Leniency Notice as regards the duration of the infringement

79 By the first plea, Recylex claims that the Commission did not apply the third paragraph of point 26 of the 2006 Leniency Notice correctly. Recylex asserts that since it provided, on 23 October 2012, compelling evidence used by the Commission to establish additional facts extending the duration of the infringement by one and half years, those facts should not have been taken into account when determining the basic amount of the fine. In addition, the evidence on which the Commission relied in order to substantiate its ability to prove the continued existence of the infringement between 23 September 2009 and 4 April 2011 did not have sufficient probative value. Recylex claims that it should thus have qualified for the partial immunity provided for in the third paragraph of point 26 of the 2006 Leniency Notice in respect of the period from 23 September 2009 to 4 April 2011.

80 The applicants submit that the case-law concerning the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3, ‘the 2002 Leniency Notice’) does not apply to the 2006 Leniency Notice. They submit that the key question in the context of the application of the 2006 Leniency Notice is whether the Commission would have been able, on the basis of evidence already in its possession prior to the applicants’ submissions, to establish to the requisite legal standard that the multilateral cartel had started on 23 September 2009, the date of the Windhagen meeting.

81 Recylex adds that, in order to establish that the Commission had been aware of that meeting before Recylex’s oral statement, the Commission relied only on the handwritten notes obtained during the inspection carried out at Campine’s premises on 27 September 2012 (‘the handwritten notes’). However, those notes did not reveal the identity of the participants, the location of the meeting or the existence of anticompetitive practices. Furthermore, Campine had disputed the anticompetitive nature of the remarks contained in the handwritten notes and had explained that they could equally reflect estimates based on information available on the market.

82 The Commission contests those arguments.

83 It should be borne in mind that the third paragraph of point 26 of the 2006 Leniency Notice provides that, if the applicant for a reduction of the amount of a fine imposed on it is the first to submit

compelling evidence in the sense of point 25 of that notice which the Commission uses to establish additional facts increasing the gravity or the duration of the infringement, the Commission will not take such additional facts into account when setting any fine to be imposed on the undertaking which provided this evidence.

84 The purpose of that rule is to encourage undertakings to cooperate fully with the Commission, even if they have not been granted conditional immunity pursuant to point 8 of the 2006 Leniency Notice. In the absence of the rule laid down in the third paragraph of point 26 of that notice, such undertakings would fear that, by submitting evidence which might affect the duration or the gravity of the infringement and of which the Commission had no prior knowledge, they might run the risk of the fines which might be imposed on them being increased (judgment of 29 February 2016, *Deutsche Bahn and Others* v *Commission*, T-267/12, not published, EU:T:2016:110, paragraph 376).

85 The phrase ‘first to submit compelling evidence’ allows a restrictive interpretation of the third paragraph of point 26 of the 2006 Leniency Notice, limiting it to cases where a company that is party to a cartel provides new information to the Commission, relating to the gravity or duration of the infringement, and excluding from it cases where a company has done no more than provide material which reinforces the evidence of the existence of the infringement (see judgment of 29 February 2016, *Deutsche Bahn and Others* v *Commission*, T-267/12, not published, EU:T:2016:110, paragraph 377 and the case-law cited).

86 The wording of the provision in question does not change the logic of partial immunity as interpreted by the case-law in the light of the wording of the last subparagraph of point 23(b) of the 2002 Leniency Notice. According to that case-law, the test for the application of that provision is based on the provision by one of the undertakings participating in a cartel of evidence concerning a new fact which increases the gravity or the duration of the infringement. This excludes cases in which the undertaking has merely provided information which strengthens the evidence of the existence of the infringement (see, to that effect, judgment of 23 April 2015, *LG Display and LG Display Taiwan* v *Commission*, C-227/14 P, EU:C:2015:258, paragraph 79 and the case-law cited).

87 For the purposes of the application of the third paragraph of point 26 of the 2006 Leniency Notice, it must be held that the Commission’s possession of evidence amounts to knowledge of its content, regardless of whether that evidence was actually examined and analysed by its services (see, to that effect and by analogy, judgment of 9 June 2016, *Repsol Lubricantes y Especialidades and Others* v *Commission*, C-617/13 P, EU:C:2016:416, paragraph 72).

88 In addition, where the information provided by an undertaking concerns facts which were not previously unknown to the Commission, the application for partial immunity under the third paragraph of point 26 of the 2006 Leniency Notice with respect to those facts must be refused, and there is no need to compare the evidential value of the information provided with that of the information previously provided by other parties (see, to that effect and by analogy, judgment of 23 April 2015, *LG Display and LG Display Taiwan* v *Commission*, C-227/14 P, EU:C:2015:258, paragraph 81).

89 The provision in question does not require the information already in the Commission’s possession to be compelling evidence within the meaning of point 25 of the 2006 Leniency Notice, namely evidence that does not need to be corroborated by other evidence. As provided in the third paragraph of point 26 of that notice, that requirement applies to evidence submitted to the Commission with the aim of obtaining partial immunity, but not to evidence already held by the Commission. Consequently, the assessment of the evidential value of the evidence submitted by an applicant for partial immunity is required only in circumstances in which that applicant has provided information concerning a new fact which increases the gravity or the duration of the infringement (see, to that effect, judgment of 29 February 2016, *Deutsche Bahn and Others* v *Commission*, T-267/12, not published, EU:T:2016:110, paragraphs 386 and 387).

90 The Court must examine in the light of those considerations whether the grounds on which the Commission refused to grant Recylex partial immunity for the period from 23 September 2009 to

4 April 2011 were well founded.

91 As to whether the Commission was already aware, before Recylex's application for leniency of 23 October 2012, of the fact that an anticompetitive meeting had taken place on 23 September 2009, it is clear from the handwritten notes, read in the light of the general information on the cartel provided by JCI in the non-confidential version of its leniency application of 28 June 2012, that multilateral discussions on purchase prices had taken place during that meeting.

92 In its leniency application, JCI provided the Commission with a variety of general information about the cartel. Thus, first of all, JCI provided details of the purpose of the cartel, namely to coordinate purchase prices for scrap lead-acid batteries. Next, JCI declared that the cartel had lasted for at least two years; indeed, some contacts may have taken place before 2008. Last, JCI provided the names and addresses of the undertakings participating in the cartel and those of their representatives.

93 The handwritten notes were taken by a representative of Campine, Mr G., during a discussion which he had had with another representative of the same undertaking, Mr C., a few days after the Windhagen meeting. The notes mention the date of 24 September 2009 and, although they do not state where the meeting was held, they contain information that established that this was a record of anticompetitive discussions that took place in a multilateral meeting. Prices and margins in relation to various markets are included in them. The use of the expression '520 ex-works Recylex' suggests that the price paid by the parties for the purchase of scrap batteries was discussed, as the Commission found in recital 69 of the contested decision. Similarly, the next line indicates a price trend on the German market. Reference is made to a discussion within Recylex and to contacts between JCI and Recylex from which it can be inferred that they related to prices, given the context of these notes. Eco-Bat and its representatives are also mentioned.

94 It should be noted that, first, the handwritten notes mention several first names; second, there is significant overlap between the individuals named in those notes and those mentioned in the information provided by JCI; and, third, the notes are headed '"Reach" vergadering' ('Reach' meeting). These aspects reinforce the Commission's view that the notes were a record of an anticompetitive meeting rather than a negotiation concerning the renewal of a tolling agreement between JCI and Campine and did not contain mere thoughts and speculation about the market. It must be added that it is not essential, in order to determine the commencement date of a cartel, to have information about where the first anticompetitive meeting took place.

95 Consequently, it must be held that, in the light of the information provided by JCI on 28 June 2012, it was possible to establish from the content and meaning of the handwritten notes that the various undertakings referred to and their representatives had participated, on 23 September 2009, in an anticompetitive meeting.

96 It follows from the foregoing that the Commission was already aware of the fact that an anticompetitive meeting had taken place on 23 September 2009 before it received the information provided by Recylex. The latter merely strengthened the Commission's ability to prove that fact. Therefore, that information cannot be regarded as evidence that serves to establish additional facts increasing the duration of the infringement, within the meaning of the third paragraph of point 26 of the 2006 Leniency Notice.

97 Accordingly, having regard to the case-law cited in paragraphs 88 and 89 above, Recylex's arguments concerning the probative value, on the one hand, of the evidence already held by the Commission and, on the other, of the evidence it supplied to the Commission are ineffective.

98 As regards the applicants' argument calling into question the Commission's ability to prove that the infringement continued between 23 September 2009 and 4 April 2011, it should be noted that the Commission did not claim to have used the various emails referred to for the purpose of determining the date on which the cartel commenced. It relied on those documents only as indicia of the continued operation of the cartel by its various participants. It should be noted that, since it has been established that the Commission had been aware of the anticompetitive meeting that had taken place on 23 September 2009, the information provided by Recylex about contacts between that date and 4 April

2011 was not capable of increasing the duration of the infringement. Accordingly, the third paragraph of point 26 of the 2006 Leniency Notice was not applicable.

99 It follows from the foregoing that the Commission did not make an error in its application of the third paragraph of point 26 of the 2006 Leniency Notice when it refused to grant partial immunity to Recylex for the period from 23 September 2009 to 4 April 2011.

Second plea in law, alleging an error in the application of the third paragraph of point 26 of the 2006 Leniency Notice as regards the infringement in relation to France

100 By the second plea, Recylex claims that the Commission did not apply the third paragraph of point 26 of the 2006 Leniency Notice correctly. It asserts that it was the first to submit to the Commission, on 23 October 2012, compelling evidence concerning the part of the infringement relating to France and that, therefore, it should have been granted partial immunity in relation thereto.

101 Recylex submits that the statements by JCI and Eco-Bat to which the Commission refers in the contested decision are not sufficient to establish an infringement in France. In its statement of 22 June 2012, JCI simply mentioned briefly various countries which may have been affected by the infringement, including France. The fact that that statement lacks probative value is confirmed by the fact that four of the Member States mentioned, namely the Czech Republic, Luxembourg, Poland and Slovenia, were not included within the geographical scope of the infringement. Moreover, JCI's statements of 5 to 16 July 2012 relating to transactions between JCI and Métal Blanc did not concern any collusive activity. As regards the information provided by Eco-Bat, Recylex claims that this concerned only the Netherlands market and could not therefore constitute compelling evidence of the infringement in relation to France.

102 Last, it is maintained that the Commission clearly did not have sufficient evidence to prove the infringement in relation to France, since, in the contested decision, its findings in relation to France are based on the information submitted by Recylex.

103 The Commission contests those arguments.

104 The arguments raised in the context of this plea must be examined in the light of the principles set out in paragraphs 82 to 89 above.

105 First of all, it must be stated that, before the applicants sent the evidence in question to the Commission, the Commission was already in possession of various statements made by JCI. The first, dated 22 June 2012, indicated that the coordination in question concerned the French market in particular. That assertion was then reiterated by JCI in the non-confidential version of its oral statement of 28 June 2012.

106 The Commission also had the handwritten notes (see paragraph 93 above), which refer, albeit briefly, to the French market. In view of the anticompetitive nature of the Windhagen meeting, which has been established in the context of the first plea, it could be inferred from the reference in those notes to the 'French market' that, in the course of that meeting, the participants had discussed their activities in France, and that the cartel covered the territory of that country. That explanation is supported particularly by the fact that it is evident from the first JCI statement that two of the six undertakings participating in the cartel were established in France. It follows that the Commission was already aware of the fact that the cartel covered France before Recylex's application for partial immunity of 23 October 2012. Accordingly, it is not necessary to examine Recylex's arguments concerning the probative value, on the one hand, of the JCI statements of 5 to 16 July 2012 and, on the other, of the information provided by Eco-Bat in its applications of 12 and 19 October 2012.

107 Last, contrary to what is claimed by Recylex, and as is apparent from the case-law, the fact that, in the contested decision, the Commission relied on some of the evidence provided by Recylex in order to establish the existence of the infringement in relation to France does not preclude the finding that, before the Commission obtained that evidence, it was already aware of the fact that the geographical scope of the cartel included France (see, to that effect, judgment of 29 February 2016, *Deutsche Bahn*

and Others v *Commission*, T-267/12, not published, EU:T:2016:110, paragraph 406). Similarly, it cannot be inferred from the fact that, in the contested decision, the Commission did not find an infringement in certain Member States mentioned in the oral statements of an applicant for immunity that, when the information was provided to the Commission by Recylex, the Commission was unaware that the infringement covered France. It should be added in that regard that the JCI statements indicated that the cartel concerned 'in particular' the French market.

108 It follows from the foregoing that the Commission did not make an error in its application of the third paragraph of point 26 of the 2006 Leniency Notice when it refused to grant partial immunity to Recylex in relation to the part of the infringement relating to France.

Third plea in law, alleging an error in the application of point 37 of the Guidelines concerning the specific increase of 10% in the calculation of the fine

109 By the third plea, Recylex submits that the Commission wrongly applied point 37 of the Guidelines to increase the fines imposed on the addressees of the contested decision by 10% on the basis of that provision.

110 In the first place, Recylex submits that, in so far as the Commission decided to depart from the general methodology set out in the Guidelines, it was required to provide sound reasoning capable of constituting an adequate statement of reasons. The Commission did not fulfil that obligation. It asserts both that it had no regard to the effects and that such effects are likely. Moreover, although it indicated, in recital 361 of the contested decision, that it '[was] not necessary to apply a multiplier for deterrence' for Recylex, it specifically relied on deterrence in order to justify the increase.

111 In the second place, Recylex states that the increase is based on the erroneous premiss that the cartel had effects on the level of scrap battery purchase prices. As shown in its response to the statement of objections, however, the cartel had not led to any reduction in purchase prices or prevented increases in the latter.

112 In the third place, Recylex argues that the increase will adversely affect its position in any private damages actions before national courts, in that the Commission effectively found that the cartel had anticompetitive effects, without satisfying the evidential standard required to make such a finding. Claimants before national courts could rely on that fact to argue that prices would have been 10% higher absent the cartel.

113 In the fourth place, Recylex maintains that the increase in the amount of the fine results in over-deterrence and, in so far as the gravity of the infringement has already been taken into account in the calculation of the amount of the fine, in a situation in which a cartel relating to purchase prices is penalised more severely than a cartel relating to sales prices, even though it is a practice that is less harmful to consumers.

114 In the fifth place, Recylex submits that the Commission also erred by failing to take into account Recylex's specific position when applying that increase. The Commission applied the same increase to all the undertakings to which the contested decision was addressed. However, Recylex's position was of a particular nature, both on account of its precarious financial situation and because its product range is much more limited than that of the other addressees. According to Recylex, the principle of equal treatment required the Commission to take those elements into consideration. The Commission should therefore have proceeded on the basis of point 37 of the Guidelines to reduce the amount of the fine imposed on Recylex and thus duly taken into account its specific position. Such a failure to take account of its specific position was also contrary to the principle of proportionality enshrined in Article 5(4) TEU and Article 49(3) of the Charter of Fundamental Rights of the European Union.

115 In sixth and last place, Recylex maintains that the Commission infringed its rights of defence by not giving it the opportunity to make its views known as regards the Commission's intention to increase the amount of the fine under point 37 of the Guidelines. The reasoning on which that increase is based extends the scope of the objections raised with respect to Recylex in the statement of objections, which

means that Recylex is entitled to a hearing or, at the very least, to the production by the Commission of a new statement of objections and the opportunity to respond to it.

116 The Commission contests those arguments.

Failure to state reasons

117 As a preliminary point, it must be recalled that the obligation to state reasons laid down in the second paragraph of Article 296 TFEU is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the measure at issue. The reasoning of a decision consists in a formal statement of the grounds on which that decision is based. If those grounds are vitiated by errors, the latter will vitiate the substantive legality of the decision, but not the statement of reasons in it, which may be adequate even though it sets out reasons which are incorrect (see judgment of 16 June 2016, *SKW Stahl-Metallurgie and SKW Stahl-Metallurgie Holding* v *Commission*, C-154/14 P, EU:T:2016:445, paragraph 39 and the case-law cited).

118 The requirement to state reasons must be assessed by reference to the circumstances of the case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. 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 296 TFEU 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 (see judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 150 and the case-law cited).

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

120 When the Commission decides to depart from the general methodology set out in the Guidelines, by which it limited the discretion it may itself exercise in setting the amount of fines, and relies, as in the present case, on point 37 of the Guidelines, the requirements relating to the duty to state reasons must be complied with all the more rigorously. Those reasons must be all the more specific because point 37 of the Guidelines simply makes a vague reference to ‘the particularities of a given case’ and thus leaves the Commission a broad discretion where it decides, as in the present case, to make an exceptional adjustment to the fines imposed. In such a case, the Commission’s respect for the rights guaranteed by the EU legal order in administrative procedures, including the obligation to state reasons, is of even more fundamental importance (see judgment of 13 December 2016, *Printeos and Others* v *Commission*, T-95/15, EU:T:2016:722, paragraph 48 and the case-law cited).

121 Last, the statement of reasons for a measure must be logical and contain no internal inconsistency that would prevent a proper understanding of the reasons underlying the measure (see judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 151 and the case-law cited).

122 It is necessary, therefore, to determine whether the Commission provided sufficient reasons for its decision, such as to enable the parties to challenge it before the Courts of the European Union and to enable those courts to assess the substantive legality of that decision, and whether it explained sufficiently clearly, precisely and logically how it intended to use its discretion.

123 In that respect, contrary to Recylex’s contention, it must be held that, in Section 8.3.3.5 of the contested decision (see, in particular, recitals 363 to 365), the Commission set out clearly and to the requisite legal standard the reasons why it considered it necessary to apply an increase.

124 It indicated the following:

– the terms of points 5 and 6 of the Guidelines, which refer to the value of sales;

– the objective of the cartel at issue was to coordinate prices for the purchase of scrap lead-acid batteries;

– price-fixing of purchase prices and price-fixing of selling prices differ in that the objective of the former is not to increase the (purchase) price but, on the contrary, to reduce it or to prevent its increase;

– the mechanism of the general method for the setting of fines is such that the more successful a sales cartel is, the higher the value of sales and thus the amount of the fine;

– the inverse is true for purchase cartels: the more successful a purchase cartel is, the lower the amount of the value of purchases and thus the amount of the fine;

– the Commission drafted the Guidelines with sales cartels in mind, not taking this particularity of purchase cartels into account;

– it is thus inherent in the fact that the cartel at issue is a purchase cartel that the value of purchases in itself is unlikely to be an appropriate proxy for reflecting the economic importance of the infringement;

– normally, in an operating company, purchases are lower than sales in value terms, thus giving a systematic lower starting point for the calculation of the basic amount of the fine;

– therefore, following the general methodology of the Guidelines without any adjustment would also not achieve a sufficient deterrent effect (not only specific, but also general);

– in order to take this particularity into account and to achieve sufficient deterrence, it is appropriate for an increase of 10% to be applied for all undertakings concerned.

125 Recylex's arguments do not call into question the sufficiency of the Commission's statement of reasons, as noted in paragraph 124 above. First, its argument that the Commission should have analysed and taken into account the effect of the cartel relates to the substantive assessment of the justification put forward for applying a 10% increase to the fine imposed. Second, that statement of reasons is not vitiated by any inconsistency. The Commission was entitled, without thereby contradicting itself, to decide, in recital 361 of the contested decision, that it was not necessary to apply a multiplier for deterrence on the basis of point 30 of the Guidelines and, in recital 365 of the contested decision, that deterrence warranted a 10% increase in the amount of the fine. Although points 30 and 37 of the Guidelines both relate to the objective of deterrence, they do not take the same factors into consideration. The first applies where the turnover of an undertaking to which the Commission's decision is addressed is particularly large. The second applies where justified by the particularities of a given case or the need to achieve deterrence in a particular case. Point 37 is therefore broader in scope and covers particular situations going beyond those envisaged by point 30.

126 It must therefore be held that the Commission set out to the requisite legal standard the matters which it took into account in applying point 37 of the Guidelines.

Whether the reasons are well founded

127 As regards the substantive assessment of the justification put forward by the Commission for the 10% increase in the fine imposed on Recylex, it should be noted, first of all, that the lack of analysis of the effects of the cartel on prices does not mean that the Commission made an error of assessment. Indeed, it does not claim that the cartel had any effects on purchase prices. It merely considers that, while the value of purchases is the most appropriate value to take into account and, moreover, the only value available in the absence of the value of sales, it constitutes an imperfect basis for ensuring that the fine has a deterrent effect. That assessment of the deterrent effect of the fine, both with respect to the addressees of the contested decision but also to all undertakings likely to participate in a cartel relating to purchase prices, adequately justifies its decision to apply a 10% increase to the amount of the fine imposed on Recylex.

128 As regards the argument relating to the consequences of the Commission's decision to apply an increase on the basis of point 37 of the Guidelines for any damages actions before national courts, it must be stated that, as has already been indicated in paragraph 127 above, the Commission did not rely on the existence of effects of the cartel. It follows that the consequences referred to by the applicants are not likely to manifest themselves. Accordingly, that argument cannot be accepted.

129 As to the specific position of Recylex, this was taken into account both in the calculation of the basic amount, as the values of purchases differ for each undertaking, and in the calculation of the duration of its participation. Further, the Commission also assessed the merits of Recylex's application in relation to its specific position on the basis of point 35 of the Guidelines in recitals 412 to 418 of the contested decision and in Annex I to that decision. Recylex does not challenge that assessment. Consequently, its argument, based on the failure to take its specific position into account, must be rejected.

130 As regards Recylex's argument that the fine that was imposed on it should be reduced pursuant to point 37 of the Guidelines in view of the fact that its range of products is more limited than that of the other addressees of the contested decision, it must be observed, as did the Commission in recital 379 of the contested decision, that the Court of Justice has ruled that the difference in the proportion represented by the fine in relation to the total turnover of the undertakings concerned does not, as such, constitute a sufficient justification for departing from the method of calculation which the Commission imposed on itself. That would be tantamount to conferring an advantage on the least diversified undertakings on the basis of criteria that are irrelevant in the light of the gravity and the duration of the infringement. When the amount of the fine is determined, there cannot, by the application of different methods of calculation, be any discrimination between the undertakings which have participated in an agreement or a concerted practice contrary to Article 101(1) TFEU (see, to that effect, judgment of 7 September 2016, *Pilkington Group and Others* v *Commission*, C-101/15 P, EU:C:2016:631, paragraph 66 and the case-law cited).

131 Since the Commission duly took into account the specific position of Recylex in the contested decision, the related argument based on the principle of proportionality must also be rejected.

132 The arguments put forward by Recylex to establish that the Commission breached the principle of equal treatment by not applying point 37 of the Guidelines to reduce the amount of its fine are no more compelling. First, the alleged lack of sufficient differentiation on account of the fact that Recylex's fine reached the 10% limit is not relevant. Recylex has not demonstrated how the fact that that limit is reached puts it in a particular position that would justify a reduction of the fine imposed on it. Second, the Commission is not required, when determining the amount of the fine, to take into account the poor financial situation of an undertaking concerned, since recognition of such an obligation would be tantamount to giving an unjustified competitive advantage to undertakings least well adapted to the market conditions (see, to that effect, judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 327 and the case-law cited).

133 Third, the Court must also reject Recylex's argument concerning infringement of the right to be heard. It is settled case-law that, in order to fulfil its obligation to respect the right of undertakings to be heard, where it has indicated the factual and legal criteria on which it will base its calculation of the amount of the fines, the Commission is not required to specify the way in which it will use each of those criteria in order to determine the level of the fine (see judgment of 6 July 2017, *Toshiba* v *Commission*, C-180/16 P, EU:C:2017:520, paragraph 21 and the case-law cited). In the present case, contrary to what is claimed by Recylex, the factual and legal criteria on which the Commission based its calculation of the amount of the fines were all indicated in the statement of objections and the Commission was not required to specify the conclusions it drew, in particular, from the fact that the cartel related to purchase prices rather than selling prices.

134 Furthermore, Recylex was able to submit its observations on the increase in the amount of the fine following the letter of 13 December 2016 from the Commission informing Recylex of its intention to apply point 37 of the Guidelines (recital 366 of the contested decision). Recylex's observations were duly taken into account in the contested decision, as is apparent from recitals 370 to 380 thereof.

135 In the light of the above, the third plea in law must be rejected as unfounded.

Fourth plea in law, alleging an error in the application of point 26 of the 2006 Leniency Notice as regards the cooperation of Eco-Bat

136 By its fourth plea in law, Recylex maintains that Eco-Bat did not fulfil its duty of cooperation for the purposes of point 12(a) and (c) of the 2006 Leniency Notice, as point 24 of that notice requires. In its view, given that, in order to be able to claim a reduction of the fine, the cumulative conditions of point 12(a) to (c) of that notice must be met, Eco-Bat did not qualify for a reduction of the fine. It should therefore be concluded that, rather than being the second undertaking to provide evidence that represented significant added value, Recylex was the first undertaking to provide such evidence. Accordingly, the Commission erred in its application of the first paragraph of point 26 of the 2006 Leniency Notice by granting it a reduction of 20 to 30% instead of 30 to 50%.

137 Recylex claims that Eco-Bat failed to fulfil its duty of cooperation in several respects. First, prior to Recylex's leniency application, Eco-Bat provided incomplete and misleading information about the territories concerned by the infringement. Eco-Bat asserted that the infringement was limited to Germany, the Netherlands and, occasionally, Belgium. Eco-Bat also replied evasively to the Commission's questions about the infringement in relation to France. Second, Eco-Bat did not disclose the full extent of the involvement of its representatives in the infringement, which shows that it did not carry out serious investigations in order to provide the Commission with a full description of its involvement. Third, Eco-Bat provided misleading information as to the role of one of its representatives. More generally, the responses given by Eco-Bat to the Commission's requests for information did not demonstrate genuine cooperation.

138 Consequently, in view of Eco-Bat's disqualification, Recylex takes the view that it was entitled to the maximum reduction of 50% in the first indent of the first paragraph of point 26 of the 2006 Leniency Notice. As regards the significant added value of the evidence which it provided, Recylex relies, in essence, on the same arguments as those put forward in support of the first and second pleas in law.

139 At the hearing, Recylex confirmed that it was not seeking, by this plea, to deprive Eco-Bat of the 50% reduction granted to it.

140 The Commission states that it is common ground between the parties that, on 27 September 2012, Eco-Bat had been the first undertaking to provide evidence that had significant added value. On 23 October 2012, Recylex was the second undertaking to provide such evidence. In view of the chronological order in which evidence having significant added value was lodged, Recylex cannot, on any view, be described as the first undertaking to provide evidence of significant added value, even if Eco-Bat were ineligible for any reduction because of a breach of the duty of cooperation in accordance with the requirements of point 12 of the 2006 Leniency Notice. Consequently, the Commission contends, Recylex's complaints concerning the breach by Eco-Bat of the duty of cooperation and its assertions regarding the significant added value of the evidence which it provided are irrelevant.

141 The first question that arises is whether, where two undertakings have provided evidence of significant added value, the undertaking which provided that evidence second could take the place of the first undertaking, if it transpired that the latter's cooperation did not meet the requirements of point 12 of the 2006 Leniency Notice.

142 As a preliminary point, it must be noted that, by the adoption of the 2006 Leniency Notice, the Commission created legitimate expectations, as indeed the Commission recognised in point 38 of that notice. In view of the legitimate expectation which undertakings intending to cooperate with the Commission are entitled to derive from that notice, the Commission is therefore obliged to adhere to it (see judgment of 29 February 2016, *Schenker* v *Commission*, T-265/12, EU:T:2016:111, paragraph 361 and the case-law cited).

143 Next, it should be recalled that, since the leniency procedure is an exception to the rule that an undertaking must be punished for any infringement of the rules of competition law, the relevant rules

must be interpreted strictly (see, to that effect and by analogy, judgment of 27 February 2014, *LG Display and LG Display Taiwan* v *Commission*, T-128/11, EU:T:2014:88, paragraph 167).

144 The first paragraph of point 26 of the 2006 Leniency Notice provides as follows:

‘The Commission will determine in any final decision adopted at the end of the administrative procedure the level of reduction an undertaking will benefit from, relative to the fine which would otherwise be imposed. For the:

– first undertaking to provide significant added value: a reduction of 30-50%,

– second undertaking to provide significant added value: a reduction of 20-30%,

– subsequent undertakings that provide significant added value: a reduction of up to 20%.’

145 Point 24 of the 2006 Leniency Notice provides that, in order to qualify for a reduction, an undertaking must meet the cumulative conditions set out in point 12(a) to (c) of that notice. Point 12 sets out the requirements in relation to the duty of cooperation. It provides, in essence, that the undertaking must, first, cooperate genuinely, fully, on a continuous basis and expeditiously throughout the administrative procedure, which requires the undertaking to provide accurate, not misleading, and complete information. Second, it must end its involvement in the alleged cartel and, third, it must not have destroyed, falsified or concealed evidence of the alleged cartel. In the present case, the applicants do not dispute that Eco-Bat met the second condition.

146 The last paragraph of point 30 of the 2006 Leniency Notice provides that, if the Commission finds that the undertaking does not meet the conditions set out in point 12, the undertaking will not benefit from any favourable treatment under that notice. Accordingly, as is, moreover, undisputed, the requirement of cooperation, within the meaning of point 12 of that notice, is of fundamental importance in determining whether an undertaking is entitled to full or partial immunity, or to any reduction of the amount of the fine. If it did not fulfil its duty to cooperate, it cannot benefit from leniency.

147 It must be noted, however, that it is not apparent from the 2006 Leniency Notice that any failure to fulfil the duty to cooperate will affect the order in which leniency applications are deemed to have arrived.

148 It must also be stated that, according to settled case-law, it is apparent from the very logic of the 2002 Leniency Notice, as well as from that of the 2006 Leniency Notice, that the effect sought is to create a climate of uncertainty within cartels by encouraging those participating in them to denounce the cartels to the Commission. That uncertainty results precisely from the fact that the cartel participants know that only one of them can benefit from immunity from fines by denouncing the other participants in the infringement, thereby exposing them to the risk that they face being fined. In the context of that system, and according to the same logic, the undertakings that are quickest to provide their cooperation are supposed to benefit from greater reductions of the fines that would otherwise be imposed on them than those granted to the undertakings that are less quick to cooperate (see judgments of 16 September 2013, *Wabco Europe and Others* v *Commission*, T-380/10, EU:T:2013:449, paragraph 147 and the case-law cited, and of 16 September 2013, *Repsol Lubricantes y Especialidades and Others* v *Commission*, T-496/07, not published, EU:T:2013:464, paragraph 334 and the case-law cited).

149 The chronological order and the speed of the cooperation provided by the members of the cartel therefore constitute fundamental elements of the system put in place by the 2006 Leniency Notice (judgment of 5 October 2011, *Transcatab* v *Commission*, T-39/06, EU:T:2011:562, paragraph 380; see also judgment of 16 September 2013, *Wabco Europe and Others* v *Commission*, T-380/10, EU:T:2013:449, paragraph 148 and the case-law cited).

150 It follows that neither the wording of the 2006 Leniency Notice nor its logic supports an interpretation whereby, where two undertakings have provided evidence that represents significant added value, the undertaking which provided that evidence second is to take the place of the first undertaking if it

transpires that the latter's cooperation did not meet the requirements of point 12 of the 2006 Leniency Notice.

151 The opposite conclusion could lead to a hypothetical situation in which two undertakings benefited from the reductions referred to in each of the indents of the first paragraph of point 26 of the 2006 Leniency Notice. That would be likely to weaken the incentive, for each undertaking involved in an anticompetitive cartel, to cooperate with the Commission as expeditiously as possible without, however, increasing the incentive to cooperate with it fully, because the incentive to cooperate genuinely is already fully protected by the threat of the Commission's application of points 24 and 30 of the 2006 Leniency Notice.

152 Last, it should also be noted that Recylex did not put forward either in its pleadings or in its reply to the question put in the context of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure any relevant arguments that might cast doubt on that conclusion.

153 Consequently, it must be held that the Commission did not err in declining to grant Recylex a reduction of 30 to 50% pursuant to the first indent of the first paragraph of point 26 of the 2006 Leniency Notice. Even if Eco-Bat had failed to fulfil its duty to cooperate fully with the Commission, the fact remains that Recylex was the second undertaking to provide evidence that had significant added value.

154 It follows that the remaining arguments are ineffective and that the fourth plea in law must be rejected as unfounded.

Fifth plea in law, alleging that the amount of the fine was inappropriate

155 By its fifth plea, Recylex requests the Court, in the exercise of its unlimited jurisdiction, to reduce the amount of the fine imposed on it. Recylex submits that, considering the matters put forward in connection with the first four pleas, notably the arguments raised in the context of the third plea, set out in paragraph 114 above, and the additional factors set out in paragraphs 156 and 157 below, the Court ought to reduce the fine by such an amount as it considers appropriate to ensure fair, proportionate and individualised treatment.

156 In support of this plea, Recylex relies on the following additional factors. First, the significant size of the fine compared to the size of the Recylex group; second, the lack of meaningful assets which the group could give as security for a loan; third, the fact that no third party would have any interest in acquiring part or all of the group; fourth, significant indebtedness as a result of the judgments of the Cour d'appel de Douai (Court of Appeal of Douai, France) of 31 January 2017; and, fifth, the risk of jeopardising the group's recovery process if the funding for a lead furnace project in Germany remains suspended as a result of the imposition of the fine.

157 Recylex adds that the LME lead price was higher in 2011 than in 2009, which led to a difference of more than 10% between the value of purchases in 2011 and their average value over the period from 2009 to 2012. Therefore, according to Recylex, the Commission should have given at least some weight to the value of purchases reached in 2009.

158 The Commission contests those arguments. First, it notes that Recylex did not call into question the contested decision in so far as it refused Recylex's request for a reduction of the fine on the grounds of any inability to pay. Second, it contends that the fifth plea must be rejected as being uncorroborated and, in so far as Recylex refers generally to all the other pleas, as manifestly unfounded for the same reasons as those relied on in the defence in the context of the other pleas.

159 It is necessary to assess whether the arguments raised by Recylex in the context of the first four pleas, the factors set out in paragraph 156 above and the arguments concerning the use of the value of purchases reached in 2009, either separately or taken together, justify a reduction in the amount of the fine in the exercise of the Court's unlimited jurisdiction.

160 In that regard, first of all, it must be borne in mind that the Court is bound to examine all complaints based on issues of fact and law which seek to show that the amount of the fine is not commensurate

with the gravity or the duration of the infringement (judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 200; see also judgment of 26 September 2018, *Infineon Technologies* v *Commission*, C-99/17 P, EU:C:2018:773, paragraph 195 and the case-law cited), or does not adequately reflect the degree of cooperation provided by the applicants.

161 It must, however, be pointed out that the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, and that proceedings before the Courts of the European Union are *inter partes*. With the exception of pleas involving matters of public policy which the Courts are required to raise of their own motion, such as the failure to state reasons for a contested decision, it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas (judgment of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 64).

162 Next, it must be noted that, when the Court exercises its unlimited jurisdiction, it is not bound by the Guidelines but is itself under a duty to verify whether the fine is proportionate in relation to the gravity of the unlawful conduct (see, to that effect, judgment of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraphs 69 and 77). However, although neither the Guidelines nor the 2006 Leniency Notice prejudge the assessment of the fine by the EU judicature when it exercises its unlimited jurisdiction in this respect, there is nothing to prevent the Court from drawing on those guidelines or that notice if it considers it appropriate to do so (see, to that effect, judgment of 16 September 2013, *Dornbracht* v *Commission*, T-386/10, EU:T:2013:450, paragraph 246 and the case-law cited).

163 In the present case, it must be noted that, in so far as the arguments relied on by Recylex in connection with the fifth plea restate those raised in connection with the first four pleas, they must be rejected for the same reasons. Furthermore, examination of those pleas does not reveal any reason to consider the amount of the fine imposed on Recylex to be inappropriate. Admittedly Recylex provided useful information about the conduct of the cartel, the anticompetitive contacts that took place, the way in which the cartel was organised and the anticompetitive activities on the French market. However, the degree of cooperation provided by Recylex was fully recognised by the grant of the maximum reduction in the second indent of the first paragraph of point 26 of the 2006 Leniency Notice.

164 It must, moreover, be noted that Recylex confirmed at the hearing that it had raised all the factors set out in paragraph 156 above in the context of its request for a reduction of the amount of the fine on the grounds of an inability to pay. At the hearing, it also explained, notably with regard to the fifth factor mentioned in paragraph 156 above, that its financial situation had changed since its first request for a reduction of the fine, and that it had lodged a second request for a reduction of the fine on the grounds of its inability to pay, which, at the time of the hearing, was pending.

165 In that regard, it must be observed, first, that, to take account of the economic situation of an undertaking concerned, and in particular of its financial capacity, would be tantamount to conferring unfair competitive advantages on the undertakings least well adapted to market conditions (see, to that effect, judgment of 7 September 2016, *Pilkington Group and Others* v *Commission*, C-101/15 P, EU:C:2016:631, paragraph 67 and the case-law cited). Second, according to point 35 of the Guidelines, a reduction of the fine on account of an undertaking's inability to pay could be granted only in exceptional circumstances, on the basis of objective evidence that the imposition of the fine would irretrievably jeopardise the economic viability of the undertaking concerned and would cause its assets to lose all their value.

166 There are no such exceptional circumstances in this case. First, Recylex confirmed in the application that, having agreed a payment plan with the Commission, the group's viability was not jeopardised by the fine. Second, it does not challenge the refusal of its request for a reduction of the fine on the grounds of an inability to pay. Accordingly, the fact that the fine causes financial difficulties does not justify a reduction on the ground that it is not commensurate with the gravity or the duration of the infringement. Last, the argument that the Commission admitted, in Annex I to the contested decision,

that the amount of the fine was significant compared to the size of the Recylex group cannot be accepted, as that would be tantamount to conferring an advantage on the applicant on the basis of a criterion that is irrelevant in the light of the gravity and the duration of the infringement.

167 Nor, finally, does the lower value of purchases in 2009, compared to purchases in 2011, constitute any justification for reducing the amount of the fine. According to the case-law and point 13 of the Guidelines, in order to determine the basic amount of the fine to be imposed, the Commission normally takes the value of the undertaking's sales (in the present case, the value of purchases) during the last full business year of its participation in the infringement. This factor makes it possible to assess the size and economic power of each undertaking and the scale of the infringement committed by each of them, those factors being relevant to an assessment of the gravity of the infringement committed by each undertaking (see, to that effect, judgment of 2 February 2012, *Denki Kagaku Kogyo and Denka Chemicals* v *Commission*, T-83/08, not published, EU:T:2012:48, paragraphs 134 and 135 and the case-law cited). In the present case, it is common ground that Recylex participated in the infringement for only part of 2009 and 2012 and that the last full year of its participation was 2011. In particular, in 2009, Recylex participated in the infringement only in the last three months of that year. Although it states that the LME lead price was lower in 2009 than in 2011, it does not explain how the value of sales in 2009 would reflect, in a more appropriate and proportionate manner, its true size, its economic power or the scale of the infringement it committed.

168 It must be held that, in the light of the Court's unlimited jurisdiction in relation to fines for the infringement of competition rules, there is nothing in the complaints, arguments and matters of law and of fact put forward by Recylex from which it might be concluded that the fine imposed on it by the contested decision is not commensurate with the gravity and duration of the infringement or with the degree of cooperation which it provided in the context of the leniency programme.

169 Consequently, the fifth plea in law must be rejected.

Sixth plea in law, concerning the grant of payment terms

170 By their sixth plea, the applicants submit that it would be appropriate for the Court to exercise its unlimited jurisdiction in order to grant them payment terms for any part of the fine still due.

171 However, as in the case of the Court's finding in paragraph 168 above with regard to the fifth plea, and since there is nothing in the complaints, arguments and matters of law and of fact put forward by Recylex from which it might be concluded that it should be granted such terms, the sixth plea must in any event by rejected.

172 It follows from all of the above and from the circumstances of the case that the action must be dismissed in its entirety.

Costs

173 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Recylex has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Dismisses the action;

2. **Orders Recylex SA, Fonderie et Manufacture de Métaux SA and Harz-Metall GmbH to pay the costs.**

Collins Kancheva Barents

Delivered in open court in Luxembourg on 23 May 2019.

E. Coulon A.M. Collins

Registrar President

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Costs

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* Language of the case: English.

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1 This judgment is published in extract form.