JUDGMENT OF THE COURT (Seventh Chamber)

14 November 2019 (*)

(Appeal — Competition — Agreements, decisions and concerted practices — European market for underground and submarine power cables — Market allocation in connection with projects — Proof of the infringement — Presumption of innocence — Distortion of the evidence — Public distancing — Subjective perception of other cartel participants — Infringement committed by several undertakings constituting a single economic entity — Gravity of the infringement committed by one of these undertakings — Determination — 'Fringe player' or 'moderate player' in the cartel — Determination — Principle of equal treatment)

In Case C-599/18 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 21 September 2018,

Silec Cable SAS, established in Montereau-Fault-Yonne (France),

General Cable Corp., established in Highland Heights, Kentucky (United States), represented by I. Sinan, Barrister, and C. Renner, Rechtsanwältin,

appellants,

the other party to the proceedings being:

European Commission, represented by H. van Vliet, S. Baches Opi and F. Castilla Contreras, acting as Agents,

defendant at first instance,

THE COURT (Seventh Chamber),

composed of P.G. Xuereb (Rapporteur), President of the Chamber, T. von Danwitz and A. Kumin, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

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

gives the following

Judgment

1 By their appeal, Silec Cable SAS (‘Silec’) and General Cable Corp. seek to have set aside the judgment of the General Court of the European Union of 12 July 2018, *Silec Cable and General Cable* v *Commission* (T-438/14, not published, EU:T:2018:447) (‘the judgment under appeal’), by which the General Court dismissed their action for the annulment of Commission Decision C(2014) 2139 final of 2 April 2014 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.39610 — Power cables) (‘the contested decision’) in so far as it concerns them and, in the alternative, a reduction in the amount of the fines imposed on them in that decision.

Legal context

Regulation (EC) No 1/2003

2 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1) provides as follows, in Article 23(2) and (3) thereof:

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

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

…

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.’

The 2006 Guidelines

3 Point 29 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 2006 Guidelines’) provides as follows:

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

…

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

…’

Background to the dispute and the contested decision

4 The background to the dispute, as set out in paragraphs 1 to 20 of the judgment under appeal, may, for the purposes of the present proceedings, be summarised as follows.

5 From 20 May 1998 to 11 May 2005, Sagem SA was active on the underground power cable market, through its separate business unit, Sagem Communications. On 11 May 2005, Sagem merged with Snecma Group to form Safran SA. As of that date, those activities were entrusted to Safran Communications SA, a subsidiary of Safran. On 30 November 2005, those activities were transferred to a newly created subsidiary of Safran, namely Silec. On 22 December 2005, Safran sold Silec to General Cable.

6 In Article 1 of the contested decision, the European Commission found that the appellants and 24 other companies, including Nexans France SAS, Brugg Kabel AG and LS Cable & System Ltd ('LS Cable') had participated in a cartel ('the cartel'), constituting a single and continuous infringement of Article 101 TFEU and of Article 53 of the EEA Agreement in the (extra) high voltage underground and/or submarine power cables sector ('the infringement at issue').

7 Silec was held liable on the basis of its direct participation in the infringement at issue from 30 November 2005 to 16 November 2006. The Commission also held Safran and General Cable 'jointly and severally liable' as parent companies of Silec.

8 Having regard to the role played by the various participants in the cartel in its implementation, the Commission classified them into three groups, namely, first, the undertakings which formed the core group of the cartel, secondly, the undertakings which were not part of the core group but which nevertheless could not be regarded as fringe players in the cartel and, thirdly, the fringe players in the cartel. According to the Commission, the entity constituted by Sagem, Safran and Silec belonged to the second of those three groups.

9 For the purpose of calculating the fines, the Commission applied the methodology set out in the 2006 Guidelines.

10 First, the Commission calculated the basic amount of the fines, which amounted, so far as the appellants were concerned, to EUR 2 080 000.

11 Second, as regards adjustments to the basic amounts of the fines, the Commission decided to reduce that amount by 5% so far as the undertakings whose involvement in the cartel had been moderate were concerned, those undertakings including the entity constituted by Sagem, Safran and Silec. The reduction was 10% in the case of the fringe players in the cartel.

12 Under Article 2(i) and (j) of the contested decision, the Commission imposed a fine on Silec of EUR 123 500, for whose payment it was held jointly and severally liable with Safran (in respect of the period from 30 November 2005 to 21 December 2005), and a fine of EUR 1 852 500, for whose payment it was held jointly and severally liable with General Cable (in respect of the period from 22 December 2005 to 16 November 2006).

The procedure before the General Court and the judgment under appeal

13 By application lodged at the Registry of the General Court on 13 June 2014, the appellants brought the action referred to in paragraph 1 above.

14 In support of their claims for annulment of the contested decision the appellants raised five pleas in law before the General Court, based, first, on an error of law in that the Commission allegedly failed to discharge its burden of proof with regard to Silec's participation in the cartel after its acquisition by General Cable, second, on an error of law and a breach of the

principles relating to the burden of proof and the presumption of innocence in that the Commission asserted that Silec was under a positive obligation to distance itself publicly from the cartel, third, on a manifest error of assessment and an infringement of the principle of equal treatment in that the Commission found that Silec had participated directly in the cartel from 30 November 2005, fourth, on a manifest error of assessment and an infringement of the principle of equal treatment in that the Commission allegedly treated Silec differently and inconsistently by comparison with the way it treated other addressees of the contested decision and, fifth, on a manifest error in the assessment of the gravity of the infringement at issue and an infringement of the principles of equal treatment and proportionality in that the Commission did not class Silec as a fringe player in the cartel.

15 By the judgment under appeal, the General Court dismissed that action.

16 To that end, the General Court held, in the first place, that the Commission was fully entitled to have found Silec liable for participating in the cartel in respect of the period from 30 November 2005 to 21 December 2005. In the second place, after recalling the requirements in the case-law in relation to the taking of evidence, the General Court held that, in the light of the evidence upon which the Commission had relied in order to adopt the contested decision, first, the appellants' arguments that Silec's conduct underwent a significant change after its acquisition by General Cable could not succeed and, secondly, the Commission had established to the requisite legal standard that Silec had continued to participate in the cartel from 22 December 2005 to 16 November 2006. In the third place, the General Court found that the Commission had not committed any error in the interpretation and application of the concept of public distancing from the cartel, given that that institution did not rely solely on the lack of public distancing in the present case. In the fourth place, the General Court found that the Commission had not infringed the principle of equal treatment concerning the duration of Silec's participation in the cartel, given that LS Cable's situation, to which the appellants had referred, was not comparable to Silec's situation. In the last place, the General Court held that the Commission had not committed any error in not treating Silec as a fringe player in the cartel.

Forms of order sought by the parties before the Court of Justice

17 By their appeal, the appellants claim that the Court should:

– set aside the judgment under appeal;

– annul Article 1 of the contested decision in so far as it pertains to the appellants;

– in the alternative, amend Article 2 of the contested decision and reduce the amount of the fine imposed on the appellants in accordance with the arguments put forward in their appeal;

– in the further alternative, refer the case back to the General Court, and

– order the Commission to pay the full costs of the proceedings.

18 The Commission contends that the Court should:

– dismiss the appeal, and

– order the appellants to pay the costs.

The appeal

19 In support of their appeal, the appellants put forward two grounds, each divided into three parts and alleging, as to the first, infringement of the rules relating to evidence, distortion of the evidence, breach of the obligation of professional secrecy and a failure to state sufficient reasons so far as concerns Silec's participation in the cartel, and, as to the second, an error of law, failure to comply with the principle of equal treatment and a failure to state sufficient reasons with regard to the General Court's refusal to consider Silec a fringe player in the cartel.

The first ground of appeal

Arguments of the parties

20 By the first part of its first ground of appeal, directed at paragraph 153 of the judgment under appeal, the appellants claim that the General Court infringed the rules relating to evidence by holding that Silec's open and public distancing was required to demonstrate that that undertaking had not participated in the cartel. According to the appellants, the case-law however shows that such distancing is necessary only in the context of an undertaking's participation in anti-competitive meetings and Silec did not participate in any anti-competitive meeting for the entire duration of the cartel.

21 In the appellants' submission, the General Court's assertion, in paragraph 153 of the judgment under appeal, that the Commission did not rely solely on Silec's lack of public distancing to conclude that it participated in the cartel but also on other evidence is manifestly incorrect. When examining the probative value of each of those other items of evidence, the General Court systematically held that a given email or exchange did not constitute distancing on Silec's part. In doing so, it applied circular reasoning, which is tantamount to reversing the burden of proof and denying Silec the presumption of innocence or, at the very least, the benefit of the doubt which should apply in its favour with regard to all the evidence adduced by the Commission.

22 By the second part of the first ground of appeal, directed at paragraphs 87 to 146 of the judgment under appeal, the appellants argue, first, that the General Court infringed the rules relating to evidence in confirming the merits of the Commission's analysis concerning Silec's direct participation in the cartel solely on the basis of the subjective perception of the other participants. They submit that, with the exception of an email sent by one of Silec's employees on 16 November 2006, the Commission relied exclusively on emails exchanged by other participants in the cartel. None of those latter emails proves that Silec had participated in the cartel and there is no other factual evidence which corroborates the subjective perception of the other cartel participants that Silec participated in it.

23 In addition, in holding, in paragraph 164 of the judgment under appeal, that the Commission did not reverse the burden of proof in the case under consideration since the apportionment of that burden is likely to vary inasmuch as the evidence on which a party relies may be of such a kind as to require the other party to provide an explanation, failing which it is permissible to conclude that the burden of proof has been discharged, the General Court misinterpreted the relevant case-law. The Commission was required to demonstrate Silec's presence at a specific meeting in order for the burden of proof to be transferrable to Silec. It is common ground that Silec did not participate in any meeting for the entire duration of its alleged participation in the cartel.

24 Second, as regards the examination made by the General Court of a document dated 10 July 2006, found on the premises of Nexans France and presented by the Commission as a note

from a supposed meeting between Silec and another undertaking, the Commission decided, following an application for confidential treatment of that document submitted by the appellants, to delete any reference to that document from the non-confidential version of the contested decision. The publication of details concerning that document in the judgment under appeal thus infringed the appellants' fundamental right to the protection of their confidential information, enshrined in Article 339 TFEU, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and Article 7 of the Charter of Fundamental Rights of the European Union.

25 In any event, the appellants submit, the General Court was incorrect to hold, by grossly distorting the contents of that document and relying on contradictory reasoning, that it constituted evidence of Silec's participation in the cartel.

26 By the third part of the first ground of appeal, directed at paragraphs 87 and 88 and 123 to 142 of the judgment under appeal, the appellants claim that the General Court misapplied the rules relating to evidence, failed to comply with its obligation to state sufficient reasons by relying on contradictory reasoning and distorted the evidence in holding that the emails of 21 and 22 December 2005 and 16 November 2006 constituted evidence of Silec's participation in the cartel.

27 As regards the emails of 21 and 22 December 2005 exchanged between a Nexans France employee and Mr V., one of Silec's employees, the appellants argue, first, that that exchange took place prior to the acquisition of Silec by General Cable, and it therefore predates the period under investigation so far as Silec is concerned. In relying on those emails, the General Court thus infringed the very principles governing the taking of evidence, given that it is for the Commission to prove the individual participation of the undertaking concerned in the cartel. Secondly, the use of those emails is in contradiction with the General Court's finding, in paragraph 203 of the judgment under appeal, that General Cable is not liable for events predating its acquisition of Silec. Thirdly, the General Court incorrectly reversed the burden of proof in holding that those emails demonstrated the direct participation of Silec in the cartel simply on the ground that Silec had not informed the coordinator of the European members of the cartel in the same email exchange that it no longer had interest in the cartel. The appellants submit that the onus is not on them to prove that they publicly distanced themselves from the cartel. Fourthly, in finding that the emails of 21 and 22 December 2005 constituted evidence of Silec's participation in the cartel, the General Court distorted the content of those documents.

28 As regards the emails exchanged between one of Brugg Kabel's employees and Mr V. on 16 November 2006, the appellants argue that the General Court distorted their content in holding that it constituted sufficient evidence proving Silec's participation in the cartel. First, the content of that exchange was very vague. Secondly, Mr V. replied in an evasive and unresponsive manner and the Commission provided no evidence demonstrating that that email was acted upon. Thirdly, in view of the fact that that email constituted the only direct contact between Silec and the members of the cartel, approximately eleven months after the acquisition of the former by General Cable, the General Court could not infer from Brugg Kabel's email that it 'was part of a continuum' and that it followed on from earlier contacts between the latter and Silec. Fourthly, the General Court's assertion that it is apparent from Brugg Kabel's email that Mr V. already had knowledge of its subject is highly speculative. Fifthly, the email exchange at issue did not take place on Silec's initiative. Sixthly, Mr V.'s reply could be considered perfectly neutral. At the very least, that reply is as neutral as a reply by LS Cable which was regarded as such by the Commission and the General Court.

29 In addition, the General Court would have been able to rely on those emails to hold that Silec had participated in the cartel only in the absence of another plausible explanation concerning that evidence. However, the General Court itself observed that a certain distrust had taken hold between Silec and the other members of the cartel and that there was evidence showing that complaints were made about Silec in relation to its disloyal attitude on numerous occasions. In that context, a neutral document such as Mr V.'s email of 16 November 2006 cannot be regarded as an incriminating item of evidence, and any doubt in this connection must operate in the appellants' favour. Finally, contrary to the General Court's findings in paragraph 140 of the judgment under appeal, it is of no relevance that that email does not indicate that Silec has left the cartel. In this connection, the appellants point out that it is for the Commission positively to prove their participation in the cartel and not for the appellants to prove that they did not participate in it.

30 According to Silec, there is therefore insufficient evidence to prove that it participated in the cartel.

31 The Commission raises an objection of inadmissibility with regard to the first ground of appeal, on the ground that it seeks to obtain a re-examination of the evidence taken into account by the General Court without demonstrating a distortion of that evidence or any other error in law. The Commission claims, in the alternative, that that ground of appeal is unfounded.

Findings of the Court

32 It must be observed in respect of the third part of the first ground of appeal, which it is appropriate to examine first, that, inasmuch as the appellants take issue with the General Court for misapplying the rules relating to evidence, that part raises a question of law and is therefore admissible (judgment of 12 January 2017, *Timab Industries and CFPR* v *Commission*, C-411/15 P, EU:C:2017:11, paragraph 58 and the case-law cited). That part of the first ground of appeal is also admissible in so far as the appellants claim that the General Court failed to comply with its obligation to state sufficient reasons.

33 However, no error of law committed by the General Court can be identified from the arguments raised by the appellants in this connection.

34 It must first be observed that, in the contested decision, Silec was found to have directly participated in the cartel from 30 November 2005 to 16 November 2006. Contrary to what is claimed by the appellants, the emails exchanged on 21 and 22 December 2005 therefore do not predate the period under investigation so far as Silec is concerned.

35 Secondly, inasmuch as the appellants take issue with the General Court for allowing the Commission to use evidence against General Cable which pre-dated the latter's acquisition of Silec, on one hand, the documents at issue were used by the Commission as evidence of the direct participation not of General Cable in the cartel, but of Silec, and, on the other hand, the liability of General Cable was upheld purely in its capacity as the parent company of Silec and exclusively from the point at which it acquired that latter company onwards.

36 Thirdly, given that, as is apparent from the preceding paragraph, the General Court was legitimately able to rely on the emails exchanged on 21 and 22 December 2005 to prove Silec's participation in the cartel, it was also able, without contradicting itself, to hold in paragraph 203 of the judgment under appeal that General Cable was not liable for events pre-dating its acquisition of Silec. Accordingly, the General Court cannot be accused either of a failure to state sufficient reasons in the judgment under appeal in that regard.

37 Fourthly, the claim that the General Court reversed the burden of proof in holding in paragraph 87 of the judgment under appeal that, in the emails exchanged on 21 and 22 December 2005, neither Silec nor General Cable had informed Mr J., the coordinator of the European members of the cartel, that Silec 'no longer had interest in the cartel' is unfounded. That finding by the General Court is included in the part of the judgment under appeal constituted by paragraphs 69 to 90 thereof, entitled 'The alleged change in Silec's conduct after its acquisition by General Cable on 22 December 2005', in which the General Court responds to the appellants' claim at first instance that Silec's conduct underwent a significant change after that acquisition. Contrary to what the appellants argue, that finding does not show that the General Court held that Silec had continued to participate in the cartel after its acquisition by General Cable solely on the ground that it had not indicated in the email exchange dated 21 and 22 December 2005 that it no longer had interest in the cartel.

38 Concerning the appellants' arguments criticising the assessment by the General Court of the emails of December 2005 and November 2006, it is important to recall that the Court of Justice in an appeal has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the evidence adduced before the General Court has been distorted, that appraisal does not therefore constitute a point of law which is subject to review by the Court of Justice (judgment of 12 January 2017, *Timab Industries and CFPR* v *Commission*, C-411/15 P, EU:C:2017:11, paragraph 153 and the case-law cited).

39 In addition, according to settled case-law of the Court of Justice, there is such distortion where, without recourse to new evidence, the assessment of the existing evidence is manifestly incorrect. However, such distortion must be obvious from the documents in the case, without it being necessary to undertake a fresh assessment of the facts and the evidence. Moreover, where an appellant alleges distortion of the evidence by the General Court, he must indicate precisely the evidence alleged to have been distorted by that Court and show the errors of appraisal which, in his view, led to that distortion (judgment of 26 January 2017, *Masco and Others* v *Commission*, C-614/13 P, EU:C:2017:63, paragraph 36 and the case-law cited).

40 In this respect, so far as concerns, in the first place, the emails dated 21 and 22 December 2005, the appellants merely claim that they been distorted but have in no way explained or substantiated that claim.

41 So far as concerns, in the second place, the email sent by Mr K., one of Brugg Kabel's employees, to Mr V. on 16 November 2006 and the reply of the latter of the same date, it is apparent from paragraph 123 of the judgment under appeal that Mr K.'s email contained a subject entitled 'Quote' and the text 'Dear [Mr V.], Please note that we need to receive instruction by today' and 'If we do not receive anything we will quote as our convenience'. It is also apparent that Mr V. responded to that email as follows: 'Dear [Mr K.], According to our phone conversation, I have noticed your agreement to receive instructions on Monday, November 20'.

42 In paragraph 131 of the judgment under appeal, the General Court concluded that that response was evidence that Silec continued to participate voluntarily in the cartel.

43 It must be held that the arguments relied upon by the appellants contain no information such as to show that, in reaching that conclusion, the General Court distorted the content of those two emails of 16 November 2006.

44 It is apparent from that evidence that Mr K. wrote to Mr V., an employee of Silec and therefore of one of Brugg Kabel's competitors, in order to obtain 'instructions' in relation to a quote and that, following a telephone conversation between those two persons, Mr V. replied to Mr K. giving notice of such instructions for Monday, 20 November 2006. Contrary to what is claimed by the appellants, the content of those emails is therefore clear and not at all neutral from the perspective of the application of the rules of EU law on competition. In particular, and as the General Court correctly noted in paragraph 129 of the judgment under appeal, Mr V. had no legitimate business reason to put Mr J., coordinator of the European members of the cartel, in copy in his email.

45 Furthermore, the General Court was able, without distorting that evidence, to infer from the wording and informal tone of Mr K.'s email of 16 November 2006 that that exchange was part of a continuum, that the lack of detail on the quote concerned in that email suggested that Mr V. knew what it was about and that that email followed on from contacts between Silec and Brugg Kabel concerning that quote.

46 Accordingly, neither the fact that that exchange of emails was not initiated by Silec nor the fact that the Commission was unable to prove that Mr V.'s email had been acted upon are of any importance in this respect. Indeed, it must be recalled, in that context, that the Commission held that Silec's participation in the cartel ended on 16 November 2006, the date on which that email was sent.

47 As regards the appellants' argument in relation to another item of evidence, concerning LS Cable, it is sufficient to note that the appellants have not established that the wording of that document and its interpretation by the General Court prove that the assessment by that court of the email exchange which took place on 16 November 2006 was manifestly incorrect. In any event, the General Court noted in paragraphs 178 to 182 of the judgment under appeal, which are not contested by the appellants, that that other evidence was not comparable to the emails exchanged between Mr K. and Mr V. on 16 November 2006.

48 Lastly, the fact that, as the General Court noted in paragraph 85 of the judgment under appeal, first, a certain distrust had taken hold between Silec and the other European members of the cartel after Silec's acquisition by General Cable and, secondly, evidence showed that complaints were made about Silec in relation to its disloyal attitude on numerous occasions, cannot have the consequence that Mr V.'s email of 16 November 2006 should be regarded as a neutral document from the point of view of EU competition law, as the appellants claim. Consequently, the General Court, in allowing the Commission to rely on that document in order to prove that Silec had continued to participate in the cartel until 16 November 2006, did not reverse the burden of proof.

49 The appellants' arguments calling into question the assessment of the emails dated December 2005 and November 2006 must therefore be rejected as inadmissible.

50 It follows from the foregoing considerations that the third part of the first ground of appeal must be rejected as in part inadmissible and in part unfounded.

51 It must be observed that the first part of the first ground of appeal, alleging that the General Court breached the rules relating to evidence by incorrectly holding that Silec's open and public distancing from the cartel was necessary to demonstrate that it had not participated in

the cartel, concerns a question of law which may be raised on appeal and therefore that part of the ground of appeal is admissible.

52 As regards the substance, as the General Court observed in paragraphs 150 to 152 of the judgment under appeal, it is apparent from the Court of Justice's case-law that two situations must be distinguished so far as public distancing from a cartel is concerned. First, a public distancing is necessary in order that an undertaking which participated in collusive meetings can prove that its participation was without any anti-competitive intention. Secondly, with regard to participation in a cartel which operated over several years rather than in individual anti-competitive meetings, the absence of public distancing forms only one factor amongst others to take into consideration with a view to establishing whether an undertaking has actually continued to participate in a cartel or has, on the contrary, ceased to do so (see, to that effect, judgment of 17 September 2015, *Total Marketing Services* v *Commission*, C-634/13 P, EU:C:2015:614, paragraphs 20 to 23).

53 So far as the case at hand is concerned, in paragraph 153 of the judgment under appeal the General Court observed that, in the contested decision, the Commission had not relied solely on Silec's lack of public distancing after its acquisition by General Cable to decide that Silec had not ceased its participation in the cartel before 16 November 2006, but that, on the contrary, it had demonstrated Silec's direct and continued participation in the cartel until 16 November 2006 and had invoked Silec's lack of public distancing only in combination with other evidence.

54 It follows that, implicitly but indisputably, the General Court held that, to prove Silec's participation in the cartel, the Commission could not make do merely with Silec's lack of public distancing but had to rely to that effect on other evidence. It is also apparent from paragraph 154 of the judgment under appeal that, according to the General Court, the emails exchanged on 21 and 22 December 2005 and 16 November 2006, respectively, were included, inter alia, among that other evidence.

55 Since it is common ground that Silec did not participate in any of the meetings which took place in connection with the cartel in the period covering the infringement at issue, it must be noted first of all that the General Court's approach is consistent with the Court of Justice's case-law referred to in paragraph 52 above.

56 Next, the appellants' argument that the conclusion reached by the General Court in paragraph 153 of the judgment under appeal is manifestly incorrect on the ground that, with regard to each of the other items of evidence taken into account by the Commission in that connection, that court examined whether they showed Silec's public distancing from the cartel, is unfounded. The appellants in this respect merely mention findings made by the General Court in paragraphs 95, 105 and 113 of the judgment under appeal concerning some of those other items of evidence. It is not apparent from those findings, having regard to the context of the judgment under appeal in which they were made, that the General Court held that Silec's public distancing was necessary in order to demonstrate that the latter had not participated in the cartel. In particular, as regards the General Court's finding, in paragraph 95 of the judgment under appeal and concerning an email dated 17 January 2006, that the appellants had not proved that Silec clearly and obviously opposed the implementation of the cartel at that date, the fact that that passage is introduced by the word 'furthermore' shows that it is merely a ground of the judgment under appeal stated for the sake of completeness.

57 Lastly, nor are the appellants well founded in arguing that the General Court incorrectly applied the rules relating to the burden of proof and taking of evidence by making Silec bear

the burden of proof that it had not participated in the cartel on the ground that the other participants had a subjective perception to the contrary of that situation, even though the Commission had not established the date at which its alleged participation in the cartel began and ended or, more specifically, proven its presence at a particular meeting during that period. First, according to the case-law of the Court of Justice, the apportionment of the burden of proof is likely to vary inasmuch as the evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged (see, to that effect, judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 79). In that context, in a case such as that which gave rise to the judgment under appeal, the possibility for the General Court to make an undertaking participate in the taking of evidence cannot be rendered conditional on the fact that it must have been previously proven that that undertaking took part in a collusive meeting in connection with the cartel. Secondly, as is apparent from paragraphs 153 and 154 of the judgment under appeal, the General Court did not in any event rely upon that case-law of the Court of Justice, which it in fact reiterates in paragraph 164 of that judgment for the sake of completeness, as a basis for its decision that the Commission had proven Silec's participation in the cartel.

58 Accordingly, the appellants' claim that the General Court, in applying circular reasoning, reversed the burden of proof and refused Silec the presumption of innocence or the benefit of the doubt, is unfounded.

59 The first part of the first ground of appeal must therefore be dismissed as unfounded.

60 So far as the second part of the first ground of appeal is concerned, inasmuch as the appellants claim that the General Court failed to have regard to the rules on the burden of proof and taking of evidence in endorsing, solely on the basis of the perception of the other participants in the cartel, the Commission's decision that Silec had participated in the cartel, that part raises a question of law and is therefore admissible. However, that claim must be rejected as unfounded, given that, first, in order to prove Silec's participation in the cartel, the General Court did not rely exclusively on evidence from the other participants which, according to the appellants, reflected the subjective perception of those participants. It is apparent from paragraph 154 of the judgment under appeal that the General Court also based its decision on Mr V.'s emails dated 22 December 2005 and 16 November 2006, which the appellants moreover do not dispute. Secondly and in any event, the appellants are incorrect in claiming that the documents drawn up by the other participants in the cartel merely reflect the subjective perception of those participants. In that connection, inter alia, the General Court noted in paragraph 99 of the judgment under appeal, with which the appellants do not take issue, that it was apparent from one of those documents, namely the minutes of the meeting of 17 February 2006, that Silec and another company were simply 'excused'.

61 So far as concerns the appellants' argument that by publishing details of the document of 10 July 2006 in the judgment under appeal the General Court infringed their fundamental right to the protection of their confidential information, such an infringement, even if it were established, would at the most be capable of giving rise to the non-contractual liability of the European Union within the meaning of the second paragraph of Article 340 TFEU. In an appeal directed against a judgment dismissing an application for annulment, such an argument can, however, succeed only if the appellants are able to prove that the infringement which they allege, namely the disclosure of purportedly confidential information in the judgment under appeal, had an effect on the outcome of the case before

the General Court. As it is, the appellants have not explained, let alone proven, any such effect caused by that alleged infringement.

62 So far as concerns the document of 10 July 2006, referred to in paragraph 114 et seq. of the judgment under appeal, namely a document found on Nexans France's premises and presented by the Commission as a note from a meeting between Silec and another undertaking, the appellants claim that the General Court distorted that document by inferring therefrom that it proved Silec's participation in the cartel. That argument is based on a misreading of the judgment under appeal. According to paragraphs 120 and 121 of that judgment, the General Court held that a plausible interpretation of that document was that a Nexans France employee had written an information note on the market summarising that undertaking's connections in a certain number of countries in reference to Silec, and that therefore there was reason to doubt the Commission's interpretation that that document was a note from a meeting in which Silec had participated and that that doubt had to operate to the appellants' advantage. In paragraph 122 of the judgment under appeal, the General Court nevertheless held that the reference in the document of 10 July 2006 to 'SIL' suggested at the very least that, in the mind of a Nexans France employee, Silec was still a member of the cartel to be taken into consideration for the allocation of a market.

63 Such an interpretation of that document does not constitute a distortion by the General Court of its content. The General Court could, without contradicting itself, find, on the one hand, that that document could not be considered evidence of Silec's participation in a meeting in connection with the cartel and, on the other hand, that it was nevertheless apparent from information included in that document by its author that the latter took the view that Silec was at that point part of that cartel.

64 In any event, even if such a distortion of the contents of the document referred to in paragraph 62 above were proven, that distortion alone could not lead to the judgment under appeal being set aside, given that the General Court's decision that the Commission had proven Silec's participation in the cartel is also based on other evidence with which the appellants in the present appeal have not taken issue or with which they have unsuccessfully taken issue.

65 Accordingly, the second part of the first ground of appeal must be rejected, as must therefore that ground of appeal in its entirety.

The second ground of appeal

Arguments of the parties

66 By the first part of this ground of appeal, directed, like the other two parts of this ground, at paragraphs 201 to 205 of the judgment under appeal, the appellants claim that the General Court misapplied the principle of personal responsibility, thereby discriminating against the appellants. They submit that the General Court incorrectly refused to grant Silec the reduction in the fine granted by the Commission to the fringe players in the cartel on the sole ground that, in the General Court's view, the past conduct of the entity composed of Safran, Sagem and Sagem Communications was to be attributed to it.

67 In their reply, the appellants argue that by refusing to take account of the degree of their individual participation in the cartel, the Commission went against its own practice, including as implemented in the contested decision itself. Furthermore, it is neither relevant nor appropriate to refuse Silec the status of a fringe player on the ground that there was no significant change in its conduct after its acquisition by General Cable.

68 By the second part of the second ground of appeal, the appellants claim that the General Court's reasoning in relation to possible discrimination against them as regards the determination of the gravity of the infringement committed by Silec is contradictory. They submit that, although in paragraph 203 of the judgment under appeal the General Court held that General Cable is not liable for events prior to its acquisition of Silec and that the appellants 'are not being held liable for the gravity and extent of the infringement committed before 22 December 2005', it was only by basing its decision on the previous participation in the cartel not of Silec itself, but of the entity composed of Safran, Sagem and Sagem Communications that the General Court held that Silec could not be classified as a fringe player.

69 By the third part of the second ground of appeal, the appellants claim that the General Court's decision on the absence of such discrimination is also flawed since that court did not compare the right factual situations. Had the General Court examined the actions of Silec itself instead of the gravity and extent of the infringement committed by the entity composed of Safran, Sagem and Sagem Communications, it would have found that Silec participated neither in the creation of the cartel nor in meetings but that it had merely adopted conduct which should have led the Commission to classify it as a fringe player in that cartel.

70 The appellants also submit that the General Court erred in law when it accepted the relevance of the short duration of LS Cable's participation in the cartel, as opposed to the alleged long duration of the participation of the entity composed of Safran, Sagem and Sagem Communications, in order to award LS Cable a reduction in the fine on account of its being classified a fringe player, contrary to the provision made in point 29 of the 2006 Guidelines.

71 The Commission contends that the appellants' line of argument based on its practice, put forward in the reply, is inadmissible and that, as to the remainder, the second ground of appeal is unfounded.

Findings of the Court

72 By the three parts of this ground of appeal, which it is appropriate to examine together, the appellants claim, in essence, that the General Court erred in law in refusing to grant Silec the status of a fringe player in the cartel, resulting in discrimination against Silec.

73 So far as concerns, first, the appellants' argument that the General Court erred in law in attributing the past conduct of the entity composed of Safran, Sagem and Sagem Communications to Silec, it should be noted that in paragraph 201 of the judgment under appeal that court considered Silec to have participated in the cartel 'as the successor' of the businesses owned by the 'economic entity "Sagem/Safran"', that the economic entity referred to by the Commission as 'Sagem/Safran/Silec' constituted the undertaking which, according to the Commission, had participated in the cartel from 12 November 2001 to 16 November 2006 and that, therefore, the Commission was justified in assessing the gravity of the infringement committed by that undertaking.

74 In that regard, it is true that the concept of an 'undertaking', within the meaning of EU competition law, designates an economic entity even if in law that economic entity consists of several natural or legal persons (judgment of 18 July 2013, *Schindler Holding and Others* v *Commission*, C-501/11 P, EU:C:2013:522, paragraph 103 and the case-law cited). Such a definition does not, however, entail that, in order to set the penalties to be imposed on one of the companies involved in an infringement, the Commission may take account of the conduct of the economic entity constituted by those companies as a whole where, as in the

present case, the liability of the company in question was upheld only so far as concerns its own participation in the cartel.

75 However, in paragraph 201 of the judgment under appeal, the General Court responded to the appellants' argument that, for the purposes of assessing the gravity of the infringement which Silec had committed, only Silec's conduct after its acquisition by General Cable on 22 December 2005 should have been taken into account by the Commission. Since Silec's liability for its participation in the cartel was upheld in respect of the period from 30 November 2005 until 16 November 2006, it is clear that its conduct in the period from 30 November 2005 to 21 December 2005 had to be taken into account in order to determine whether it could be considered a fringe player in the cartel.

76 Furthermore, in paragraph 202 of the judgment under appeal, the General Court held that Mr V.'s email of 21 December 2005 containing a 'declaration of interest' by Silec was in line with the involvement of the undertaking referred to by the Commission as 'Sagem/Safran/Silec' in the cartel and that such involvement contributed to making that undertaking a 'moderate player' in the cartel rather than a 'fringe player'. It follows that it is also in the light of the conduct of Silec itself, and not only by attributing to it the past conduct of the entity composed of Safran, Sagem and Sagem Communications, that the General Court held that Silec could not be classified as a 'fringe player' in the cartel.

77 In any event, in paragraph 204 of the judgment under appeal, by relying inter alia on the email exchanges which took place on 21 and 22 December 2005 and on 16 November 2006, the Court noted, for the sake of completeness, that the appellants had not provided any evidence in support of their claim that Silec's conduct had radically changed as of 22 December 2005. In paragraph 205 of that judgment, the General Court inferred from that finding that, 'consequently, even if it was relevant to assess the gravity of an infringement by relying on the degree of individual participation of each legal person by taking into account changes in its control, the fact remains that the evidence outlined in paragraph 204 above [does] not show that Silec's participation was more limited after its acquisition by General Cable'. It must be added in that regard that, in paragraph 90 of the judgment under appeal, which is not challenged by the appellants, the General Court rejected, following a detailed examination, the appellants' arguments that Silec's conduct underwent a significant change after its acquisition by General Cable.

78 The grounds set out in paragraphs 204 and 205 of the judgment under appeal, which have not been challenged by the appellants, are sufficient to support the General Court's decision that Silec could not be considered a fringe player in the cartel.

79 Accordingly, the appellants' argument that the Commission went against its own practice in failing to take account of Silec's individual participation in the cartel cannot succeed either, without it being necessary to ascertain whether that argument could still legitimately be submitted before the Court of Justice by the appellants in their reply.

80 So far as concerns, secondly, the appellants' argument that, had the General Court taken account of Silec's individual conduct, it would have found that the latter participated neither in the creation of the cartel nor in meetings but behaved in a manner inconsistent with the cartel, it must be held that, as follows from the Court of Justice's case-law cited in paragraph 38 above, that argument must be rejected as inadmissible given that by it the appellants are seeking a re-examination of the evidence submitted before the General Court, without claiming a distortion of that evidence.

81 So far as concerns, thirdly, the appellants' claim that the General Court relied on contradictory reasoning in this connection, it must be observed that the General Court, in

paragraph 203 of the judgment under appeal, held that the appellants '[were] not being held liable for the gravity and extent of the infringement committed before 22 December 2005. The [appellants were], however, being held liable for the infringement committed by the undertaking after that date.' It must be stated that that reading of the contested decision is incorrect, since Silec's liability was upheld by the Commission in respect of the period from 30 November 2005 to 16 November 2006 and thus also in respect of a brief period prior to 22 December 2005.

82 The fact remains, however, as is apparent from paragraphs 74 to 76 above and contrary to what the appellants maintain, that it is not solely by relying on the past participation of the entity composed of Safran, Sagem and Sagem Communications in the cartel that the General Court held that Silec could not be classified as a fringe player in the cartel. That incorrect reading of the contested decision therefore does not affect that decision by the General Court, which is still justified on the basis of the other evidence accepted by that court, referred to in those paragraphs of the present judgment.

83 Lastly, so far as concerns the appellants' argument alleging the infringement of point 29 of the 2006 Guidelines, that argument is based on a misreading of the judgment under appeal. That judgment does not show that the General Court held that LS Cable was to be regarded as a fringe player in the cartel on the grounds of the limited duration of its participation in that cartel. In any event, and as the General Court correctly observed in paragraph 188 of the judgment under appeal, an undertaking on which a fine has been imposed for its participation in a cartel, in breach of the competition rules, cannot request the annulment or reduction of that fine on the ground that another participant in the same cartel was not penalised in respect of a part, or all, of its participation in that cartel (judgment of 9 March 2017, *Samsung SDI and Samsung SDI (Malaysia)* v *Commission*, C-615/15 P, not published, EU:C:2017:190, paragraph 38 and the case-law cited).

84 The second ground of appeal raised by the appellants must therefore be rejected.

85 It follows from all of the foregoing considerations that the appeal must be dismissed in its entirety.

Costs

86 Under Article 138(1) of the Rules of Procedure, which applies to appeal proceedings 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.

87 Since the appellants have been unsuccessful, they must be ordered to pay the costs, as applied for by the Commission.

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

1. **Dismisses the appeal;**

2. **Orders Silec Cable SAS and General Cable Corp. to pay the costs.**

Xuereb von Danwitz Kumin

Delivered in open court in Luxembourg on 14 November 2019.

A. Calot Escobar	P.G. Xuereb
Registrar	President of the Seventh Chamber

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* Language of the case: English.