Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

8 May 2013 *

(Appeals — Competition — Agreements, decisions and concerted practices — Butadiene rubber and emulsion styrene butadiene rubber market manufactured by emulsion polymerisation — Attributability of unlawful conduct of subsidiaries to their parent companies — Presumption of the actual exercise of a decisive influence — Obligation to state reasons — Gravity of the infringement — Multiplier for deterrence — Actual impact on the market — Aggravating circumstances — Repeated infringements)

In Case C-508/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 24 September 2011,

Eni SpA, established in Rome (Italy), represented by G.M. Roberti and I. Perego, avvocati,

appellant,

the other party to the proceedings being:

European Commission, represented by V. Di Bucci, G. Conte and M.L. Malferrari, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Berger (Rapporteur), A. Borg Barthet, E. Levits and J.-J. Kasel, Judges,

Advocate General: Y. Bot,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 9 January 2013,

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

gives the following

* Language of the case: Italian.

Judgment

1 By its appeal, Eni SpA ('Eni') asks the Court to set aside the judgment of the General Court of the European Union in Case T-39/07 *Eni* v *Commission* [2011] ECR II-4457 ('the judgment under appeal'), by which that Court dismissed in part its action seeking annulment of Commission Decision C(2006) 5700 final of 29 November 2006 relating to a proceeding under Articles 81 EC and 53 of the EEA Agreement (Case COMP/F/38.638 – butadiene rubber and emulsion styrene-butadiene rubber) ('the contested decision'), or, in the alternative, to annul or reduce the fine imposed on it.

2 The European Commission has cross-appealed, seeking the setting aside of the judgment under appeal in so far as it annulled the contested decision as regards the finding of aggravating circumstances, namely repeated infringements, and consequently reduced the amount of the fine.

Background to the dispute and the contested decision

3 On 7 June 2005, the Commission instituted a proceeding under Article 81 EC and Article 53 of the European Economic Area Agreement ('the EEA Agreement'), concerning the market in butadiene rubber (BR) and emulsion styrene-butadiene rubber (ESBR), synthetic rubbers essentially used in the production of tyres. It sent an initial Statement of Objections, inter alia, to Eni, Polimeri Europa SpA (now Versalis SpA; 'Versalis'), its 100%-owned subsidiary, and Syndial SpA (formerly EniChem SpA; 'Syndial'), another undertaking in the Eni group.

4 On 6 April 2006, the Commission adopted a second Statement of Objections. After having held a hearing on 22 June 2006, the Commission decided to close the proceeding, particularly as regards Syndial.

5 The administrative procedure led, on 29 November 2006, to the adoption of the contested decision. Under Article 1 of that decision, Eni, Versalis and the other addressees of the contested decision, namely Bayer AG, The Dow Chemical Company, Dow Deutschland Inc., Dow Deutschland Anlagengesellschaft mbH, Dow Europe, Shell Petroleum NV, Shell Nederland BV, Shell Nederland Chemie BV, Unipetrol a.s., Kaučuk a.s. and Trade-Stomil sp. z o.o., had infringed Article 81 EC and Article 53 of the EEA Agreement by participating, for the periods indicated, in a single and continuous infringement by which they agreed on price targets, shared customers by non-aggression agreements and exchanged sensitive information on prices, competitors and customers in the BR and ESBR sectors, so far as Eni is concerned, from 20 May 1996 to 28 November 2002.

6 During that period, according to recital 26 et seq. to the contested decision, the business in the relevant products within the Eni group was initially carried out by EniChem Elastomeri srl ('EniChem Elastomeri'), an undertaking indirectly controlled by Eni through its subsidiary EniChem SpA. On 1 November 1997, EniChem Elastomeri was merged into EniChem SpA, of which Eni controlled 99.97%. On 1 January 2002, EniChem SpA transferred its strategic chemical business (including its BR and ESBR business) to Versalis. Eni has had direct and full control of Versalis since 21 October 2002.

7 With regard to the fine imposed by the Commission in its contested decision, it was fixed according to the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; 'the Guidelines').

8 Thus, the Commission took the view that the infringement at issue could be described as 'very serious' and first set the starting amount for calculating the fine, applying differential treatment to each of the undertakings concerned on the basis of their sales of BR and ESBR for 2001. With regard to the companies owned by Eni, referred to in recital 36 to the contested decision ('EniChem'), the sales figures of BR and ESBR amounted to EUR 164 902 million in 2001. That amount of sales resulted in

EniChem being placed in the first category of undertakings selling BR and ESBR and involved in the infringement in question. On that basis, the Commission set the starting amount for the fine at EUR 55 million for Eni.

9 Next, the Commission applied multipliers for deterrence, scaled according to the worldwide turnover achieved by the undertakings concerned during 2005. Taking the view that no multiplier for deterrence should be applied in respect of Trade-Stomil sp. z o.o. (turnover EUR 38 million) or Kaučuk a.s. (turnover EUR 2.718 billion), it applied multipliers of 1.5 in respect of Bayer AG (turnover EUR 27.383 billion), 1.75 in relation to The Dow Chemical Company, Dow Deutschland Inc., Dow Deutschland Anlagengesellschaft mbH and Dow Europe (EUR 37.221 billion), 2 in relation to Eni and Versalis (EUR 73.738 billion) and 3 in relation to Shell Petroleum NV, Shell Nederland BV and Shell Nederland Chemie BV (EUR 246.549 billion).

10 In addition, as regards Eni and Versalis, that amount was increased by 65% on the ground that those undertakings had been participating in the infringement in question for six years and six months.

11 Finally, taking the view that Eni has already been the addressee of two earlier decisions finding infringements of European Union competition law, namely Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article [81 EC] (IV/31.149 – Polypropylene) (OJ 1986 L 230, p. 1; 'the Polypropylene decision') and Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article [81 EC] (IV/31.865 – PVC) (OJ 1994 L 239, p. 14; 'the PVC II decision'), the Commission increased the basic amount of the fine applied to Eni by 50% for repeated infringements.

12 Consequently, in Article 2(c) of the contested decision, the Commission imposed a fine of EUR 272.25 million on Eni and its subsidiary Versalis, jointly and severally.

The action before the General Court and the judgment under appeal

13 By application lodged at the Registry of the General Court on 16 February 2007, Eni brought an action seeking the annulment of the contested decision and, in the alternative, the annulment or reduction of the fine imposed on it. It raised two pleas in law in support of its claim.

14 By its first plea, Eni complained of the fact that the Commission held it liable for the infringement. That first plea was divided into four parts. In the first part, Eni maintained that the Commission applied an incorrect criterion when assessing the liability of a parent company. In the second part, Eni submitted that the Commission wrongly found that it was strictly liable. In the third part, Eni stated that it had provided, during the administrative procedure, evidence which should have led the Commission to consider that it had not exercised any influence over the commercial policies of Syndial and Versalis. In the fourth part, Eni stated that the Commission had infringed the principle of limited liability of capital companies and the general principles governing liability.

15 By its second plea, Eni maintained that the Commission incorrectly set the amount of the fine. That plea consisted of three parts. In the first part, Eni contested the application of a multiplier for deterrence. In the second part, it considered that the Commission had committed an error by finding the aggravating circumstance of repeated infringement. In the third part, it claimed that the Commission should have taken into account the exclusion of Syndial when calculating the fine.

16 In its judgment, the General Court recalled, in essence, with regard to the first part of the first plea in law, that 'there is a rebuttable presumption that a parent company which has a 100% shareholding in its subsidiary exercises a decisive influence over the conduct of its subsidiary' and that 'the imputation

of the infringement to the parent company is a power that is left to the Commission's discretion', which is not bound by the Commission's previous practice in taking decisions in that regard (paragraphs 63 and 64 of the judgment under appeal).

17 With regard to that previous practice in taking decisions, the Commission 'provided an adequate explanation of the reasons why it had decided to impute to Eni the conduct of its subsidiaries' (paragraph 65 of the judgment under appeal). Given that the Commission's practice, as it emerged from the present case, was 'based on a correct interpretation of Article 81(1) EC', the principle of legal certainty 'cannot therefore stand in the way of any reorientation of the Commission's decision-making practice' (paragraph 66 of the judgment under appeal). In consequence, the General Court rejected the first part of the first plea in law.

18 With regard to the second part of the first plea in law, alleging an incorrect application of 'strict liability', the General Court noted, in particular, that the fact that the Commission 'rejected the arguments presented by Eni to rebut the presumption stemming from the 100% control of its subsidiaries is not tantamount to rendering that presumption irrebuttable' (paragraph 78 of the judgment under appeal) and that 'it also follows that the lack of reasoning alleged by Eni in that regard is unfounded' (paragraph 79 of the judgment under appeal).

19 As regards the third part of the first plea in law, the General Court held, inter alia, that 'attribution to the parent company of the unlawful conduct of a subsidiary does not require proof that the parent company influences its subsidiary's policy in the specific area in which the infringement occurred ... In particular, the fact that Eni is merely a technical and financial coordinator, and that it provides its subsidiaries with the necessary financial assistance, is not sufficient to rule out the possibility that it exercises a decisive influence over the conduct of those subsidiaries by coordinating, inter alia, financial investments within the group' (paragraph 97 of the judgment under appeal).

20 With regard to the allegation that the chemical activities are of relative importance in the group's industrial policy, the General Court found that 'that cannot prove that Eni allowed its subsidiaries complete independence in defining their conduct on the market' (paragraph 98 of the judgment under appeal). Moreover, the General Court noted that, according to the Commission, reporting lines led directly to the CEO of EniChem SpA (now Syndial) and the CEO of Versalis and the CEOs of EniChem SpA and Versalis were responsible to their boards of directors. Those boards of directors were directly or indirectly appointed by Eni (paragraph 99 of the judgment under appeal).

21 Furthermore, the General Court held that the fact that Eni held 100% of the capital of the undertakings active in the production of BR and ESBR only indirectly 'does not, in itself, show that Eni and the undertakings at issue did not form a single economic entity' (paragraph 102 of the judgment under appeal). Eni failed to establish that there was an infringement of the principle of sound administration by the Commission (paragraph 103 of the judgment under appeal).

22 With regard to the fourth part of the first plea in law, the General Court held that 'the Commission did not raise an irrebuttable presumption in this case' (paragraph 114 of the judgment under appeal). As regards the arguments put forward by Eni concerning the rules applicable to business successions, the General Court found that they were irrelevant, since 'the Commission's finding, in the present case, that Eni is liable is not the result of such a situation' (paragraph 117 of the judgment under appeal).

23 The General Court therefore rejected all the parts of the first plea in law and, in paragraph 118 of the judgment under appeal, the first plea in its entirety.

24 As regards the first part of the second plea in law, the General Court held in particular that 'agreements or concerted practices aimed in particular, as in this case, at setting target prices or the allocation of market shares may entail, solely on the basis of their very nature, the characterisation as "very serious", without the Commission being required to demonstrate an actual impact of the infringement on the market' (paragraph 140 of the judgment under appeal).

25 Furthermore, in paragraph 143 of the judgment under appeal, the General Court noted that 'as regards … the size of the market in question, in the EEA, for the year 2001 (namely EUR 550 million), or … the market share of the undertakings concerned', it was necessary to 'take into account other relevant aspects of the case in question', namely the fact that the infringement at issue was 'intrinsically very serious and that it [covered] the whole of the EEA'.

26 Moreover, the General Court considered, in paragraph 143 of the judgment under appeal, that 'under Section 1. A of the Guidelines, the amount of the fine which may be set for a very serious infringement is over EUR 20 million'. Given that the sales of all the undertakings held directly or indirectly by Eni 'for the products at issue, in 2001, were more than EUR 164 million [and that] the amount of the fine imposed on it does not exceed the cap of 10% of its turnover during the preceding business year laid down by Article 23(2) of [Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1)]' setting the starting amount of the fine at EUR 55 million did not seem disproportionate.

27 Finally, the General Court also rejected Eni's argument that the undertakings concerned held only a small part of the whole BR and ESBR market, that argument being 'based on a market including those two products as well as natural rubber, which was not referred to by the contested decision' (paragraph 144 of the judgment under appeal).

28 With regard to the second part of the second plea in law, the General Court first recalled, in paragraph 164 of the judgment under appeal, that the Commission had taken the view that EniChem had already been the addressee of Commission decisions concerning cartel activities, namely the Polypropylene and PVC II decisions.

29 In the view of the General Court, it follows from the contested decision that the Commission took account, in this case, of the concept of 'undertaking' within the meaning of Article 81 EC for the purpose of applying the aggravating circumstance of repeated infringements. None the less, the General Court pointed out that the Commission, when it 'seeks to invoke the concept of 'undertaking' ... must adduce detailed and specific evidence to support its assertion' (paragraph 166 of the judgment under appeal).

30 The Commission 'refers, in a general way, in recital 487 to the contested decision, to "EniChem", that term being defined in recital 36 to the contested decision as "any company owned by Eni SpA"', which the General Court considered 'relatively imprecise'. Furthermore, in the view of the General Court, 'the company which was the subject of the Polypropylene decision, namely [Anic SpA], is not one of the legal persons mentioned' in recitals 26 to 35 to the contested decision, which is 'essentially intended to describe the development of the companies owned by Eni during the infringement, which postdates the adoption of the Polypropylene and PVC II decisions' (paragraph 167 of the judgment under appeal).

31 The Commission refers to the Polypropylene and PVC II decisions, 'stating that "Eni" was involved in those decisions'. However, 'Eni' is not defined in the contested decision. In particular, 'it is apparent from recitals 26 to 36 to the contested decision that, whenever the Commission refers to Eni as the parent company of the other companies, it uses the term "Eni SpA"' (paragraph 168 of the judgment under appeal).

32 The General Court stated that, 'even if, by the use of the term "Eni" …, the Commission is referring to the companies which form part of the "undertaking" …, consisting of the legal persons controlled by Eni, it must be pointed out that the Commission did not adduce any detailed and specific evidence in that regard in the contested decision' (paragraph 169 of the judgment under appeal). Nevertheless, given that, in the present case, the development of the structure and control of the companies concerned is particularly complex, 'in that context, it was for the Commission to be particularly precise and to adduce all the detailed evidence necessary for it to be considered that the companies addressed by the contested decision and those addressed by the Polypropylene and PVC II decisions formed the same "undertaking" within the meaning of Article 81 EC' (paragraph 170 of the judgment under appeal). Considering that the Commission had not fulfilled that obligation to state reasons, the General Court decided that the second part of the second plea in law had to be upheld.

33 Finally, with regard to the third part of the second plea in law concerning the application of the maximum amount laid down in Article 23(2) of Regulation No 1/2003, the General Court held that 'the maximum amount of 10% of turnover within the meaning of that provision must be calculated on the basis of the total turnover of all the companies constituting the single economic entity acting as an undertaking for the purposes of Article 81 EC' (paragraph 177 of the judgment under appeal). Accordingly, Eni's arguments seeking to show that the amount of the fine for the payment of which it was held jointly and severally liable should have been limited to 10% of Syndial's turnover were ineffective (paragraph 178 of the judgment under appeal).

34 In consequence, the General Court, having upheld the second part of the second plea in law, annulled Article 2(c) of the contested decision in so far as it sets the amount of the fine imposed on Eni at EUR 272.25 million and set that amount at EUR 181.5 million. The General Court dismissed the remainder of the action.

Forms of order sought by the parties

35 By its appeal, Eni claims that the Court should:

— set aside in whole or in part the judgment under appeal in so far as it dismissed the action brought by Eni in Case T-39/07 and, consequently:

  — set aside in whole or in part the contested decision; and/or

  — annul, or at least reduce, the fine imposed on Eni by the contested decision;

— in the alternative, set aside in whole or in part the judgment under appeal in so far as it dismissed the action brought by Eni in Case T-39/07 and refer the case back to the General Court for an adjudication on the merits in the light of the guidance with which the Court will provide it;

— order the Commission to pay the costs at both first and the present instance;

— dismiss the Commission's cross-appeal in so far as it is in part inadmissible and in any event unfounded, and order the Commission to pay the costs.

36 The Commission contends that the Court should:

— dismiss the appeal;

— set aside that part of the judgment under appeal in which the General Court has annulled in part the decision as regards the imputation of an aggravating circumstance, namely repeated infringements, and consequently reduced the amount of the fine;

— order the appellant to pay the costs.

The main appeal and the cross-appeal

The main appeal

37 Eni raises two grounds of appeal in support of its appeal. The first ground of appeal alleges, in essence, that the General Court ought to have annulled the contested decision in so far as it imputes the liability for the infringement committed by Syndial and/or Versalis to Eni. The second ground is based on alleged errors in law committed when the amount of the fine was being determined.

The first ground of appeal, alleging infringement of Article 101 TFEU, Articles 41, 47 to 49 and 52 of the Charter and Articles 6 and 7 of the ECHR, of general principles of law and a failure to state reasons

38 The first ground of appeal raised by Eni alleges infringement of Article 101 TFEU, of the Charter of Fundamental Rights of the European Union ('the Charter') and Articles 6 and 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), infringement of the principles of the presumption of innocence, of lawfulness, that penalties should be applied only to the offender, of personal liability, infringement of the principle of proportionality, the rights of the defence and the right to a fair hearing, and a failure to state reasons in breach of Article 296 TFEU.

39 That first ground of appeal is divided, in essence, into four parts. The first part alleges errors in law committed by the General Court as regards the conditions for the imputability of the infringement and the rules of evidence. The second and third parts allege that the assessment made by the General Court was incorrect as regards the possibility of rebutting the presumption of liability, with the consequence that the liability imputed to Eni was strict and the presumption of liability was irrebuttable. The fourth part alleges an infringement of the principle of limitation of the liability of companies with share capital, common principles of responsibility and principles concerning business successions.

– Admissibility of certain complaints

40 As regards the complaints relating to an alleged infringement of Article 47 of the Charter and Article 6 of the ECHR, which cannot be attributed with certainty to a particular part of the first ground of appeal, the Commission submits, firstly, that they were not raised at first instance and are therefore inadmissible. The same is true of Eni's complaint that the presumption of liability arising from 100% control would lead to an unjustified difference in treatment as between the general situation of non-absolute control by the parent company and situations in which the parent company holds 100% of the capital in its subsidiary.

41 In that regard, it must be found that those complaints, as the Commission has pointed out, were in fact not raised before the General Court. None the less, that fact is not sufficient of itself to render those complaints inadmissible inasmuch as they do not seek to introduce a new ground of appeal to justify the action brought before the General Court, but to question whether the judgment under appeal is well founded. In the present case, the complaints set out in the preceding paragraph can in fact be interpreted in the latter manner.

42 Consequently, Eni's complaints relating to an alleged infringement of Article 47 of the Charter and Article 6 of the ECHR and an alleged unjustified difference in treatment based solely on the level of participation by a parent company in its subsidiary are admissible.

– The first part of the first ground of appeal alleging errors in law committed by the General Court as regards the conditions for imputability of the infringement and the rules of evidence

i) Arguments of the parties

43 Eni submits that, contrary to the requirements of the Court of Justice in its judgment in Case C-90/09 P *General Química and Others* v *Commission* [2011] ECR I-1, paragraph 78, the General Court failed to take a specific position on the arguments which Eni put forward concerning an alleged obligation of the Commission to prove the actual exercise of a decisive influence by Eni on its subsidiary, Versalis.

44 In that regard, it is alleged that the General Court merely faithfully followed the judgment in Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, which vitiated the judgment under appeal with a failure to state reasons. Furthermore, a presumption of the actual exercise of a decisive influence by an undertaking on its wholly-owned subsidiary is unfounded and, in particular, contradicts the principles of lawfulness, that penalties should be applied only to the offender, of personal liability and of legal certainty.

45 In essence, the Commission submits, that it is entitled, in accordance with well-established case-law, to presume actual control by the parent company on the sole basis that it holds 100% of the capital in its subsidiary.

ii) Findings of the Court

46 Firstly, it is established case-law that the conduct of a subsidiary may be imputed, for the purposes of the application of Article 101 TFEU, to the parent company particularly where, although having separate legal personality, that subsidiary does not autonomously determine its conduct on the market but mostly applies the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links which unite those two legal entities. In such a situation, since the parent company and its subsidiary form part of a single economic unit and thus form a single undertaking for the purpose of Article 101 TFEU, the Commission may address a decision imposing fines to the parent company without being required to establish its individual involvement in the infringement (see, inter alia, order of 13 December 2012 in Case C-654/11 P *Transcatab* v *Commission*, paragraph 29 and the case-law cited).

47 It also follows from settled case-law that, in the particular case in which a parent company holds all or almost all of the capital in a subsidiary which has committed an infringement of the European Union competition rules, there is a rebuttable presumption that that parent company exercises an actual decisive influence over its subsidiary. In such a situation, it is sufficient for the Commission to prove that all or almost all of the capital in the subsidiary is held by the parent company in order to take the view that that presumption is fulfilled (see, inter alia, Case C-289/11 P *Legris Industries* v *Commission* [2012] ECR, paragraph 46 and the case-law cited).

48 In addition, in the specific case where a holding company holds 100% of the capital of an interposed company which, in turn, holds the entire capital of a subsidiary of its group which has committed an infringement of European Union competition law, there is also a rebuttable presumption that that holding company exercises a decisive influence over the conduct of the interposed company and also indirectly, via that company, over the conduct of that subsidiary (*General Química and Others* v *Commission*, paragraph 88).

49 In the present case, for the entire duration of the infringement in question, Eni held, directly or indirectly, at least 99.97% of the capital in the companies which were directly active within its group in the BR and ESBR sectors, namely EniChem Elastomeri, EniChem SpA and Versalis, which Eni does not dispute. In consequence, the presumption, referred to in paragraphs 47 and 48 of the present judgment and following from established case-law, is applicable to Eni.

50 As regards Eni's argument that that presumption of the exercise of an actual decisive influence runs counter to the principles of lawfulness, that penalties should be applied only to the offender, of personal liability and of legal certainty, it is sufficient to recall that that presumption seeks precisely to find a balance between the importance, on the one hand, of the objective of penalising conduct contrary to the competition rules, in particular Article 101 TFEU, and to prevent its repetition and, on the other, the requirements of certain general principles of European Union law, such as, in particular, the principles of the presumption of innocence, that penalties should be applied only to the offender, legal certainty and the rights of the defence, including the principle of equality of arms. It is particularly for that reason that it is rebuttable (see, to that effect, inter alia, Case C-521/09 P *Elf Aquitaine* v *Commission* [2011] ECR I-8947, paragraph 59). Since Eni's argument is unfounded, the judgment under appeal is not vitiated by any error in that regard.

51 Next, with regard to the alleged failure to state reasons, the General Court explained in detail, in paragraphs 56 to 67 of the judgment under appeal, the reason for which it took the view, in accordance with established case-law, that the Commission, when holding Eni responsible for the infringement committed, inter alia, by Versalis, was entitled to rely on the presumption in question. Those explanations leave room for no doubt as to the considerations on which the General Court based the judgment under appeal on that point and they enable the Court of Justice to carry out its task of reviewing that judgment. The judgment under appeal is therefore not vitiated by a failure to state reasons in that context. Furthermore, contrary to Eni's apparent submission, it is irrelevant, in that regard, that the General Court relied on the judgment in *Akzo Nobel and Others* v *Commission* in giving reasons for its judgment.

52 Having regard to the foregoing, the first part of the first ground of appeal must be rejected as unfounded.

– The second and third parts of the first ground of appeal, alleging an incorrect assessment by the General Court as regards the possibility of rebutting the presumption of liability, resulting in Eni being held strictly liable and the presumption of liability being irrebuttable

i) Arguments of the parties

53 By the second and third parts of the first ground of appeal, which it is appropriate to examine together, Eni argues that the evidence which it submitted to the Commission during the administrative procedure ought to have been considered sufficient to overturn the presumption of liability. The General Court did not, in Eni's submission, undertake a full, impartial and specific examination of all the elements of the file. More particularly, the General Court did not take account of the fact that Eni had never operated directly in the sector in question, that there had never been any management overlap between the parent company and the subsidiaries, that Eni did not have information on the strategic and commercial plans or on their implementation as they had been defined by the operational undertakings and that Eni had not been involved in the decision-making processes to define strategic and commercial plans and, in particular, annual sales volumes and prices.

54 The General Court merely emphasised two aspects, namely the role played by Eni as technical and financial coordinator and the relative importance of the chemical sector within the group. Eni's argument that its subsidiary carried out a separate activity very far removed from the other activities

was rejected by the General Court on the basis of a simple reference to its case-law. The Court of Justice has, however, censured such an approach in paragraph 76 et seq. of *General Química and Others* v *Commission*.

55 Moreover, the General Court repeated the Commission's observations that, within the subsidiaries, hierarchical relations led to the managing directors of the subsidiaries, who were themselves responsible to their boards of directors that were appointed, indirectly, by Eni. However, the appointment of the board of directors is nothing other than a typical prerogative of a principal shareholder and is not in itself the exercise of a decisive influence over the conduct of the subsidiary. In paragraph 100 of the judgment under appeal, the General Court referred to the only examination made in that regard by the Commission and concluded that that examination did not appear to be manifestly incorrect, without taking a position on the arguments put forward by Eni. The reasons stated for the judgment under appeal are therefore manifestly insufficient.

56 Furthermore, in Eni's submission, the conclusion reached by the General Court in paragraph 102 of the judgment under appeal that the fact that Eni held only indirectly 100% of the capital of the undertakings active in the production of BR and ESBR did not, in itself, show that Eni and the undertakings at issue did not form a single economic entity is not sufficiently supported by reasoning and runs counter to the case-law of the General Court itself.

57 In addition, Eni alleges that its argument concerning the objectivity of the strict liability imputed to it is not based on an incorrect premiss, contrary to the findings of the General Court. The rebuttable nature of the presumption of an actual decisive influence ought to be real when it is applied. The Commission argues that, in essence, the exercise of an actual decisive influence follows from control. The General Court upholds that argument, rejecting a priori the relevance of the objective elements relied on by Eni. That approach is contrary to the rights of the defence, to the fundamental principles of law which are also cited in the Charter, the principle of the presumption of innocence and the principle of lawfulness, and it constitutes an infringement of the principle that penalties should be applied only to the offender and of personal liability.

58 Finally, in the light of Eni's observations, the General Court was wrong to take the view that the Commission had not infringed the principle of sound administration.

59 In the submission of the Commission, the complaints raised by Eni are inadmissible since in reality they seek a fresh evaluation of the facts. In any event, they are unfounded. The General Court took into consideration the facts put forward by Eni to rebut the presumption based on the 100% ownership of the subsidiaries and explained why those facts were irrelevant or unfounded. Eni ought to have demonstrated that its subsidiary was to be managed as a separate undertaking for legal or regulatory reasons, or even that the 100% ownership was merely temporary and transitory, in order thus to demonstrate that it and its subsidiary did not form a single undertaking which committed the infringement in question. In the Commission's view, the reasons given for the judgment concerning that question are correct, sufficient and convincing.

ii) Findings of the Court

60 First of all, it is appropriate to answer the Commission's arguments concerning the alleged inadmissibility of the second part of the first ground of appeal in so far as it seeks to challenge the assessment of the facts carried out by the General Court.

61 In that regard, it must be noted that Eni, in the appeal, emphasises certain facts, referred to in paragraph 53 of this judgment, in support of its assertion that it had rebutted the presumption of liability against it as a parent company holding 100% or almost 100% of the capital in its subsidiary.

62 However, as Eni confirmed at the hearing, it does not challenge, in that context, the assessment of those facts as such, but the legal assessment made of them by the General Court to reach the conclusion that those facts, even if their relevance had been demonstrated, did not allow the conclusion to be drawn that Eni and, in particular, Versalis, did not form a single undertaking for the purposes of Article 101 TFEU. Consequently, that complaint, in so far as it seeks review by the Court of Justice of that legal assessment, is admissible.

63 As regards whether this complaint is well founded, it is appropriate, firstly, to recall the case-law cited in paragraph 47 et seq. of this judgment, in accordance with which, where a subsidiary is wholly owned or almost wholly owned, the Commission may address a decision imposing fines to the parent company without having to establish its individual involvement in the infringement, the parent company and its subsidiary forming a single undertaking for the purposes of Article 101 TFEU (see, to that effect, the order in *Transcatab* v *Commission*, paragraph 29 and the case-law cited), and also where, as pointed out in paragraph 48 of this judgment, there is indirect control such as that in the present case.

64 With regard to the factors emphasised by Eni to rebut the presumption in question, clearly, if they had been in fact established before the General Court, they would be such as to demonstrate that Versalis enjoyed a certain autonomy as regards its chemical activities. However, that fact is not sufficient alone to establish that Eni, and, in particular, Versalis, did not form a single undertaking for the purpose of Article 101 TFEU. In addition, the fact that Eni was 'merely' a technical and financial coordinator or that it provided those undertakings with financial and investment assistance, as it has submitted, shows that it did not refrain from exercising a decisive influence over its subsidiaries. As the General Court rightly held in paragraph 97 of the judgment under appeal, 'in the context of a group of companies, a company that coordinates, inter alia, financial investments within the group is in a position to regroup shareholdings in various companies and has the function of ensuring that they are run as one, including by means of such budgetary control'.

65 That conclusion cannot be called into question by the fact that Eni had never operated directly in the chemical sector or that there had never been any management overlap between the parent company and the subsidiaries. The fact that the parent company did not participate directly in that infringement or encourage it to be committed is not such as to show that those two companies did not constitute a single economic unit (see, to that effect, *General Química and Others* v *Commission*, paragraph 103, and Case C-520/09 P *Arkema* v *Commission* [2011] ECR I-8901, paragraphs 48 to 50). In addition, Eni does not dispute that it was possible for it to coordinate investments within the group even in the absence of such an overlap or its direct participation in the operational management of its subsidiaries.

66 Nor can Eni's other arguments put forward in that context succeed, namely that it did not have information on the strategic and commercial plans or on their implementation and was not involved in the decision-making processes to define strategic and commercial plans or annual sales volumes and prices, in so far as they relate only to the operational activities in the chemical sector.

67 Next, with regard to Eni's argument that, in essence, it held only the typical prerogatives of a principal shareholder and that the fact of holding them does not in itself amount to the exercise of a decisive influence over the conduct of the subsidiary, it must be borne in mind that the presumption of decisive influence rests on the fact that it is precisely the prerogatives of a parent company which wholly or almost wholly owns its subsidiary which enables that parent company, except in exceptional circumstances, to exercise decisive influence over the conduct of its subsidiary (see, to that effect, *Elf Aquitaine* v *Commission*, paragraph 60), and that, accordingly, proof of the absence of such a decisive influence is to be adduced not by the Commission but by the parent company itself.

68 Nor does that interpretation of the scope of the presumption of actual decisive influence, applied by the Commission and confirmed by the General Court, transform that presumption into an irrebuttable presumption. The fact that it is difficult to prove the opposite in order to rebut a presumption does not imply, of itself, that it is in fact irrebuttable (see *Elf Aquitaine* v *Commission*, paragraph 70). More specifically, to rebut the presumption in question, Eni would have had to show that Versalis could act with complete autonomy not only at the operational level but also at the financial level, which it failed to do.

69 Accordingly, since Eni's argument that the General Court had made the presumption of actual decisive influence strict or irrebuttable in nature is unfounded, Eni cannot succeed in its complaints alleging that the General Court, by accepting that that presumption was of that nature, infringed the principles of presumption of innocence, that penalties should be applied only to the offender, of personal liability, of equal treatment and lawfulness for the purposes of Article 52 of the Charter and Articles 47 of the Charter and 6 and 7 of the ECHR.

70 The General Court therefore did not commit any error when, in the judgment under appeal, it confirmed the Commission's reasoning that neither Eni's arguments dealt with expressly in recitals 382 to 398 to the contested decision nor the other arguments raised by Eni before the General Court can suffice to rebut the presumption in question. Consequently, the complaints put forward in that regard must be rejected.

71 Secondly, with regard to an alleged infringement of the duty to state reasons by the Commission and, subsequently, the General Court, the case-law of the Court of Justice must be borne in mind, in accordance with which the duty to state reasons for an individual decision has the aim, in addition to enabling review by the Courts, of giving the person concerned sufficient indication of whether the decision is vitiated by a defect making it possible to challenge its validity (see, to that effect, *Elf Aquitaine* v *Commission*, paragraph 148 and the case-law cited).

72 In the present case, it is clear that the detailed reasons regarding Eni's liability for the infringement at issue, given by the Commission in recitals 382 to 398 to the contested decision, meet the requirements of the case-law cited in the preceding paragraph. Although the Commission did not address one by one all the pieces of evidence put forward by Eni before the General Court to rebut the presumption of actual decisive influence, it none the less gave a sufficient indication for it to be established whether the decision is vitiated by a defect making it possible to challenge its validity. Above all, in recital 388 to the contested decision, the Commission stated that Eni's prerogatives, as they appear in particular from the group's corporate governance rules, allowed Eni to control the essential aspects of the commercial policy of its subsidiaries.

73 The General Court did not therefore err in law in holding that the reasons stated for the contested decision were sufficient in that context.

74 As regards the reasons for the judgment under appeal, in accordance with settled case-law, the statement of the reasons on which a judgment is based must clearly and unequivocally disclose the reasoning of the General Court, so that the persons concerned can ascertain the reasons for the decision taken and the Court of Justice can exercise its power of review (see, inter alia, Case C-202/07 P *France Télécom* v *Commission* [2009] ECR I-2369, paragraph 29 and the case-law cited).

75 In the present case, there is nothing to show that the detailed reasons given in paragraphs 93 to 105 of the judgment under appeal, relating to the reasoning of the contested decision in that context, do not meet those conditions. Consequently, the argument that the reasons for the judgment under appeal are insufficient, in so far as it upholds the contested decision relating to the rebuttal of the presumption of actual decisive influence, is also unfounded.

76 Finally, in the light of those considerations, the General Court was also correct to hold, in paragraph 103 of the judgment under appeal, that the Commission did not infringe the principle of sound administration. Accordingly, Eni's argument relating thereto must also be rejected as unfounded.

77 Since none of the arguments raised by Eni in support of the second and third parts of the first ground of appeal has succeeded, those parts must be rejected as unfounded.

– The fourth part of the first ground of appeal, alleging infringement of the principle of the limited liability of capital companies, of general principles governing liability and principles governing the succession of undertakings

i) Arguments of the parties

78 In Eni's submission, it follows from the principle of the limited liability of capital companies, of general principles governing liability and principles governing the succession of undertakings that a move from the separate legal personality of the companies to a unitary conception of the group could be possible only as a complete exception, in cases where abuse of the principle of limited liability had been found and proven. Without justification, the General Court failed to undertake any specific analysis of those arguments or of two opinions annexed to the application, one relating to American company law and the other to American anti-trust law. The General Court merely, in fact, repeated the observation made in recital 396 to the contested decision that 'it is pointless to refer to other legal areas …'. The judgment under appeal is thus vitiated by unlawfulness on that point.

79 Moreover, the appellant submits that there is a lack of reasoning in the judgment under appeal as regards Eni's arguments concerning the case-law of the Court of Justice on succession of undertakings. Eni submits that the possibility of regarding an entity separate from the author of an infringement as liable is restricted to particular and exceptional cases since it derogates from the principle of personal liability. The General Court failed to examine the links uniting Syndial and Versalis at a legal and organisational level and whether those companies applied, essentially, the same commercial instructions, but merely recalled that the two subsidiaries were owned wholly, directly or indirectly, by Eni.

80 The Commission notes in that regard that, so far as European Union competition law is concerned, no lesson can be drawn from the principles generally applicable in company law. The rules laid down by US law concerning cartels are not binding on European Union law. The opinions on that law, annexed to the application at first instance and offered once again as annexes to the appeal, are therefore manifestly irrelevant for the purposes of the present case and, moreover, inadmissible in so far as they contain arguments which do not appear in the text of the application. Finally, the argument based on the case-law on the economic succession of undertakings is manifestly irrelevant, since the infringement at issue was not imputed to Eni on the basis of succession, as the General Court explained in paragraph 117 of the judgment under appeal. If anything, that case-law supports the Commission's position.

ii) Findings of the Court

81 Clearly the complaint is manifestly unfounded with regard to the references made by Eni to general principles of law, namely those of the limited liability of capital companies and the separate legal personality of companies, allegedly precluding Eni being held liable for the infringement committed by its subsidiaries, and to the two opinions annexed to the application in support of its argument.

82 In that regard, it is sufficient to refer to the established case-law that European Union competition law refers to the activities of undertakings (see, inter alia, Joined Cases 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 *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 59), that the concept of an undertaking must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (see, inter alia, Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 40) and that, when such an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement (*Akzo Nobel and Others* v *Commission*, paragraph 56 and the case-law cited).

83 In the light of that established case-law, the General Court was able validly to reject, in paragraph 113 et seq. of the judgment under appeal, the analogous complaints raised by Eni at first instance, without giving detailed reasons in that regard. Moreover, in so far as Eni in fact was attempting to challenge the validity of the presumption of actual decisive influence of a parent company over its wholly or almost wholly-owned subsidiary, the General Court did not err in referring to its findings relating to that question and holding that Eni's arguments on that subject were based on an incorrect premiss.

84 Secondly, the complaint alleging insufficient reasons for the judgment under appeal concerning the case-law of the Court of Justice on succession of undertakings is unfounded.

85 As the General Court held, in essence, in paragraph 117 of the judgment under appeal, Eni's liability in the present case does not arise out of a situation of succession of undertakings, given that, at the time of the infringement, Eni had total or almost total control of its subsidiaries, which has not been disputed. Accordingly, the Commission was entitled to assume, on the basis of the case-law referred to in paragraphs 47 and 48 of this judgment, that Eni, subject to evidence to the contrary, never ceased to form part, during the infringement, of the 'undertaking', within the meaning of Article 101 TFEU, which is the author of the infringement which forms the subject-matter of the contested decision. As the General Court rightly held in the judgment under appeal, no evidence to the contrary has been adduced. The General Court therefore provided reasons to the requisite legal standard for the judgment under appeal.

86 Consequently, the fourth part of the first ground of appeal must also be rejected as unfounded.

87 Since none of the four parts of the first ground of appeal has succeeded, that ground must be rejected in its entirety.

The second ground of appeal, alleging infringement of Article 23 of Regulation No 1/2003 and of the principle of proportionality and a failure to state reasons in breach of Article 296 TFEU

88 The second ground of appeal in support of Eni's appeal is divided, in essence, into two parts. The first part alleges errors of assessment by the General Court as regards the gravity of the infringement and the multiplier and the second part alleges a failure to take account of the effects of the exclusion of Syndial on the calculation of the fine.

– The first part of the second ground of appeal alleging errors of assessment by the General Court as regards the gravity of the infringement and the multiplier

i) Arguments of the parties

89 By the first part of the second ground of appeal, Eni submits that, in order to determine the basic amount of the fine on the basis of the seriousness of the infringement, the General Court took account only of its nature, defined only in the light of the unlawful object of the cartel, without taking into consideration a series of other relevant factors.

90 First of all, the General Court did not take account of the fact that the effects of the anticompetitive conduct found in the contested decision could be 'measured' within the meaning of point 1 A of the Guidelines and that it was in fact measured by the Commission in the first Statement of Objections. Consequently, according to Eni, the Commission was required to examine those effects.

91 Next, the General Court failed to explain, using its own reasoning, what criteria brought the starting point to EUR 55 million instead of the minimum EUR 20 million.

92 Finally, Eni complains that the General Court rejected its argument that it had not been aware of the anticompetitive nature of the conduct in question by finding, in paragraph 145 of the judgment under appeal, that EniChem SpA must have been aware of such conduct. In Eni's submission, the reasons given by the General Court are contradictory, given that the Commission had regarded Eni as liable only as a result of its role as parent company and not because it had been aware of the conduct in question.

93 With regard to the multiplier for deterrence, Eni argues that the General Court failed to take account of the fact that chemicals has never been part of the appellant's principal activity and had only relative importance in the industrial policy of the group. The General Court also failed correctly to assess the incorrect application of a multiplier of 2 by the Commission, which in turn failed correctly to assess the turnover of the addressees of the contested decision and also failed to give adequate reasons concerning that point.

94 The Commission notes, in particular, that it is established case-law that horizontal price agreements may of themselves be classified as 'very serious' infringements. The identification of particular effects would have constituted, at most, an additional piece of evidence to be taken into consideration in order to increase the starting point of the fine. The fact that the Commission took the view that it was able to make that assessment only after a fruitless attempt in the first Statement of Objections makes no difference.

95 The appellant's allegation that the cartel affected only a restricted part of the relevant market refers to matters of fact and is therefore inadmissible. As regards the amount of EUR 55 million as the starting point for calculation of the fine, the General Court exhaustively explained the reasons therefor in paragraph 143 of the judgment under appeal. The Commission, while regarding the subjective element as irrelevant, is of the opinion that Eni, which was at the head of the undertaking which participated in the cartel at issue, was also aware of the anticompetitive conduct in question.

ii) Findings of the Court

96 As regards, firstly, the relevance of the effects of the infringement in question, it must be borne in mind that, in accordance with settled case-law, the seriousness of infringements of European Union competition law is determined by reference to numerous factors, and that no binding or exhaustive list of criteria to be taken into account has been drawn up (see, inter alia, judgment of 19 December 2012 in Case C-445/11 P *Bavaria* v *Commission*, paragraph 59 and the case-law cited). With regard,

more specifically, to the actual impact of an infringement on the market, that is not a decisive factor for determining the level of fines (see Case C-272/09 P *KME Germany and Others* v *Commission* [2011] ECR I-12789, paragraph 34 and Case C-389/10 P *KME Germany and Others* v *Commission* [2011] ECR I-13125, paragraph 44).

97 Moreover, horizontal price or market sharing agreements may be classified as very serious infringements solely on account of their nature, without the Commission being required to demonstrate an actual impact of the infringement on the market (see, inter alia, order in *Transcatab* v *Commission*, paragraph 42). In that case, the actual impact of the infringement is only one among a number of factors which, if it can be measured, may allow the Commission to increase the starting amount of the fine beyond the minimum likely amount of EUR 20 million (Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraph 75).

98 Consequently, had the General Court taken account of the effects of the actual impact of the infringement at issue on the market, assuming that those effects could effectively be measured, it would have been superfluous for it to have done so. In addition, since the infringement in question was intrinsically very serious, taking its actual impact into account would merely have led to an increase in the fine. That complaint is therefore ineffective (see, to that effect, *Prym and Prym Consumer* v *Commission*, paragraph 75, and order in *Transcatab* v *Commission*, paragraphs 43 and 44).

99 Secondly, as regards the complaint alleging that the General Court failed to explain, using its own reasoning, what criteria brought the starting point to EUR 55 million instead of the minimum EUR 20 million, it is sufficient to state that, in paragraph 143 of the judgment under appeal, the General Court gave a detailed explanation of the factors which it took into account to assess the gravity of the infringement. That complaint is therefore manifestly unfounded. The mere fact that the General Court confirmed, in that regard, in the exercise of its unlimited jurisdiction, a number of factors from the assessment made by the Commission in the contested decision cannot call that conclusion into question (see, to that effect, Case C-89/11 P *E.ON Energie* v *Commission* [2012] ECR, paragraph 133).

100 Thirdly, with regard to the claim that Eni was not aware of the anticompetitive nature of the infringing conduct, it is sufficient to recall that liability for that infringement was imputed to that company because, as is apparent from the considerations in the present judgment concerning the first ground of appeal, it formed a single undertaking for the purposes of Article 101 TFEU with EniChem SpA, now Syndial. None the less, the unchallenged finding of the General Court in paragraph 145 of the judgment under appeal that EniChem SpA must have been aware of the infringement committed is sufficient to reject the argument at first instance alleging that the Commission had incorrectly determined the starting point of the fine without taking into consideration the subjective element as concerns Eni. That complaint is therefore manifestly unfounded, and it is not necessary to rule on whether awareness of the anticompetitive nature of the conduct in question is relevant or not to the determination of the amount of the fine.

101 Fourthly, the complaint alleging that the General Court did not take account of the supposedly relative importance of the chemical sector in the industrial policy of the group is ineffective. That fact alone, even had it been proven, is irrelevant to the determination of the starting point for the calculation of the fine. Nor is it capable of constituting a mitigating circumstance within the meaning of point 2 of the Guidelines.

102 As regards, fifthly, the complaint alleging an incorrect assessment by the General Court of the allegedly incorrect application of a multiplier of 2 by the Commission and insufficient reasons in the judgment under appeal in that regard, it is settled case-law that an appeal must indicate precisely the contested

elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (see, inter alia, *Arkema* v *Commission*, paragraph 59 and case-law cited).

103 It is clear that Eni, in that context, does not indicate precisely the legal arguments specifically advanced in support of its application to have the judgment under appeal set aside. It merely asserts, in paragraph 72 of its appeal, that the Commission had not 'correctly' assessed the 'relevant' calculation factors, including the turnover, and that the General Court did not 'correctly' assess that allegedly incorrect application. Similarly, Eni has not explained how the reasons given for the judgment under appeal were incorrect in that regard. In those circumstances, the Court of Justice is not in a position to exercise its judicial review without running the risk of ruling *ultra petita* (see, by analogy, *Arkema* v *Commission*, paragraph 61 and the case-law cited). Accordingly, those complaints are inadmissible.

104 Finally, with regard to the complaint alleging an infringement of the principle of proportionality, it must be held that Eni does not put forward a separate argument from that in support of the other complaints raised in respect of the first part of the second ground of appeal. Furthermore, Eni has, in essence, raised the same arguments before the General Court in order to have it reduce, in the exercise of its unlimited jurisdiction, the fine imposed on Eni and that the General Court, after having examined those arguments, concluded that they did not justify such a reduction (see order of 2 February 2012 in Case C-404/11 P *Elf Aquitaine* v *Commission*, paragraph 89), irrespective of the fact that it reduced the fine for other reasons.

105 In those circumstances, it is not for the Court of Justice to substitute, on grounds of equity, its assessment for that of the General Court, ruling in the exercise of its unlimited jurisdiction, on the amount of the fines imposed on undertakings as a result of infringements by them of the rules of European Union law (see order in *Elf Aquitaine* v *Commission*, paragraph 90 and the case-law cited). In consequence, that complaint cannot succeed either.

106 Since none of the complaints in the first part of the second ground of appeal is well founded, that part must be rejected.

– The second part of the first ground of appeal, alleging a failure to take account of the effects on the calculation of the fine of the exclusion of Syndial

i) Arguments of the parties

107 In Eni's submission, the failure to include Syndial as an addressee of the contested decision had serious consequences for the application of the maximum amount of 10% laid down in Article 23(2) of Regulation No 1/2003. Eni reiterates its argument based on case-law that liability, in the case of a succession of undertakings, requires of necessity that the company which is the author of the infringement ceased to exist at the economic and/or legal level, which is not the situation in the present case.

108 The Commission responds that the General Court, which dealt with the arguments relating thereto in paragraphs 177 to 179 of the judgment under appeal, did not commit any error. During the entire period of the cartel, Eni exercised control over the company which participated directly in the cartel, so that the fact that no fine was imposed on Syndial makes no difference to its liability. Furthermore, the ceiling of 10% provided for in Article 23(2) of Regulation No 1/2003 refers to the group, as the General Court explained in paragraphs 177 to 179 of the judgment under appeal.

ii) Findings of the Court

109 First of all, the General Court, which had already rejected, in paragraphs 177 to 179 of the judgment under appeal, Eni's argument that the failure to include Syndial as addressee of the contested decision had 'serious consequences' for the application of the maximum amount of 10% provided for in Article 23(2) of Regulation No 1/2003, recalled, in that regard, its case-law in accordance with which that ceiling must be calculated on the basis of the total turnover of all the companies constituting the single economic entity acting as an undertaking for the purposes of Article 101 TFEU. The Court of Justice has already confirmed that that case-law is not vitiated by any error of law (see order of 3 May 2012 in Case C-240/11 P *World Wide Tobacco España* v *Commission*, paragraphs 45 and 46).

110 Consequently, the complaint raised by Eni is ineffective, given that, even if Syndial had been an addressee of the contested decision, the amount of the fine for payment of which Eni would be jointly and severally liable did not have to be limited to 10% of the turnover of Syndial.

111 Next, having regard to the case-law cited in paragraph 109 of the present judgment, the argument that liability, in the case of a succession of undertakings, requires that the company which is the author of the infringement ceased to exist at the economic and/or legal level, which is not the situation in the present case, is also irrelevant. What matters, in that context, is the fact, which Eni does not dispute, that Syndial was directly involved in the infringement in question, at least until the transfer of its chemical business to Versalis, and that Syndial, when it was directly involved in the infringement, was controlled by Eni.

112 Finally, Eni has not asserted that Syndial, after the transfer of its chemical business to Versalis, had ceased, before adoption of the contested decision, to be part of the group controlled by Eni. Accordingly, Eni has never ceased, during the infringement in question and until adoption of the contested decision, to be the ultimate holding company of the undertaking which committed the infringement in question, such that Eni's argument concerning the succession of undertakings are irrelevant in that context.

113 It follows that the second part of the second ground of appeal must also be rejected and, accordingly, the second ground of appeal in its entirety.

114 Since none of the grounds of appeal in the present appeal have been successful, it must be dismissed in its entirety.

The cross-appeal

Arguments of the parties

115 In support of its cross-appeal, the Commission puts forward a single ground of appeal, alleging infringement of Article 296 TFEU, read in conjunction with Article 101 TFEU, procedural defects harming the interests of the Commission and infringement of the principle of *audi alteram partem*. The judgment under appeal was incorrect to hold that the evidence supplied in the contested decision was insufficient to establish the imputation of an aggravating circumstance, namely repeated infringements by Eni and Versalis.

116 The Commission recalls, firstly, that, in paragraph 430 of the second Statement of Objections, it had stated its intention to take into consideration, as an aggravating circumstance, earlier infringements already found and had expressly referred to the participation of Eni in the infringements covered by the Polypropylene and PVC II decisions. Eni did not take a position in that regard during the procedure before the Commission. For the first time in its application at first instance, Eni submitted, firstly, that the author of the earlier infringements and the person now involved in the infringement are

not identical, since the sectors in question involved different products and markets and had already been transferred before the adoption of the Polypropylene and PVC II decisions and, secondly, that the undertaking in the group involved in the earlier competition cases was EniChem SpA.

117 However, Eni has never asserted that the companies penalised in the Polypropylene and PVC II decisions were not under the control of the 'Eni group'. The Commission is of the view that, had it so wished, it could have imposed the fine of the same parent company in those decisions, namely Eni, which wholly controlled the companies which were the addressees of those decisions, EniChem SpA and Anic SpA. The General Court, in Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, confirmed that the Commission was entitled to consider in the contested decision that the same undertaking had already been censured for the same type of infringement.

118 The General Court did not put written questions to the parties on the subject of the repeated infringements or ask for clarification of the facts at the hearing. It was therefore totally unexpected for the judgment under appeal to annul in part the contested decision on the basis of an alleged lack of reasons. Accordingly, the judgment under appeal is vitiated by an infringement of Article 296 TFEU, read in conjunction with Article 101 TFEU. The General Court determined, wrongly, the object and the scope of the duty to state reasons. In addition, in the Commission's submission, the General Court's approach leads to a serious infringement of the principle of *audi alteram partem* and, consequently, a procedural defect which harms the interests of the Commission.

119 The Commission points out that the reasons for an act must be assessed in relation to its context. The Court of Justice has thus held, in its judgment in Case C-42/01 *Portugal* v *Commission* [2004] ECR I-6079, paragraph 66 and the case-law cited, that where the measure was adopted in a context with which the persons concerned were familiar, summary reasons are sufficient. In addition, according to the Commission, the General Court should have given the Commission the opportunity of clarifying and specifying its reasons, as it did in the case which gave rise to its judgment of 13 December 2012 in Case T-103/08 *Versalis and Eni* v *Commission*.

120 Finally, in the view of the Commission, recitals 366 to 373 to the contested decision clearly establish the continuity between the addressee undertaking of the PVC II decision and that involved in the infringement at issue in the present case. Consequently, the Commission seeks to have the judgment under appeal set aside as regards the section where the General Court annulled in part the contested decision in respect of the finding of repeated infringements both with respect to the Polypropylene decision and the PVC II decision and, in any event, in so far as the annulment of that decision by the General Court refers to the finding of repeated infringements as regards the PVC II decision.

121 In Eni's submission, the Commission, in its cross-appeal, bases its arguments on an incorrect reading of the contested decision and the judgment under appeal and on a misleading statement of the objections which Eni raised during the administrative procedure and at first instance.

122 Eni submits that European Union law does not require the addressee of a Statement of Objections to dispute its different factual or legal elements during the administrative procedure and refers, in that regard, to Case T-234/07 *Koniklijke Grolsch* v *Commission* [2011] ECR II-6169, paragraph 37. The General Court was correct to find that the Commission had not been able to impute the repeated infringements to Eni by attributing to it liability *ex post* for the infringements imputed at the time to EniChem SpA and Anic SpA, because of the control of the capital of those two companies, which theory the General Court regarded, moreover, as not having been demonstrated.

123 Eni submits that, in the Polypropylene and PVC II decisions, the Commission in no way involved the parent company, Eni, despite the fact that a problem of liability for the infringements found came to the Commission's attention. It could not rely retroactively on the presumption of control by the

parent company of 100% of the capital in its subsidiaries without, in particular, breaching the principles of legal certainty and legitimate expectations and causing an unjustified reduction in the rights of the defence of Eni.

124 In addition, Eni had already denied during the administrative procedure that it could be liable on the basis of the sole consideration of its position at the head of the group and by way of a presumption. It is of the opinion that the Commission ought to have shown that it had actually exercised a decisive influence over its subsidiaries in the PVC and polypropylene sector and that they did not operate autonomously in the market.

125 With regard to the complaint alleging infringement of the principle of *audi alteram partem* and of other procedural rules, Eni argues that the Commission does not identify those rules in it pleading and that that complaint, inasmuch as it is entirely vague, is inadmissible. According to Eni, an infringement of the principle of *audi alteram partem* cannot be validly claimed except in the case of pleas raised of its own motion by the General Court. The plea accepted by the General Court was raised in Eni's application. Furthermore, the 'putting into order' of the reasons for the contested decision was possible only if it had related to the reasons for a specific point of fact or law. In the present case, such reasons are lacking.

Findings of the Court

126 It must be recalled, first of all, that the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review (see Joined Cases C-628/10 P and C-14/11 P *Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others* [2012] ECR, paragraph 72 and the case-law cited).

127 Thus, in the context of individual decisions, in accordance with the Court's settled case-law, the purpose of the obligation to state reasons for an individual decision is both to enable the Court to review the legality of the decision and to provide the person concerned with sufficient information to make it possible to ascertain whether the decision is vitiated by a defect which may permit its legality to be contested (*Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others*, paragraph 73 and the case-law cited).

128 The statement of reasons must, therefore, in principle be notified to the person concerned at the same time as the decision adversely affecting him. A failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the European Union courts (*Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others*, paragraph 74 and the case-law cited).

129 It follows therefrom that the Commission, when imposing a fine on a company for an infringement of the European Union competition rules and when applying, in calculating the fine, a multiplier to take account of the fact that that company had already been involved in an infringement of the competition rules, is required to provide, with the decision imposing the fine, a statement of reasons enabling the European Union Courts and that company to understand in what capacity and to what extent it was involved in the earlier infringement. In particular, if the Commission considers that that company was part of the addressee undertaking of the decision relating to the earlier infringement, it is for the Commission to give sufficient proper reasons for that assertion.

130 In the present case, it must be borne in mind that, in recital 430 to the second Statement of Objections, the Commission indicated that it would take into account previous findings of similar infringements, referring in that regard to the Polypropylene and PVC II decisions and indicating that 'Eni' had been 'involved' in those decisions. In essence, the same succinct finding appears in recital 487 to the contested decision, where the Commission notes, furthermore, that 'EniChem' had already been an addressee of those decisions. Finally, recital 488 to the contested decision can be understood as meaning that, according to the Commission, the same undertaking within the meaning of Article 101 TFEU is the author of the infringements forming the subject-matter of the Polypropylene and PVC II decisions and of the infringement found by the contested decision.

131 Since the Polypropylene decision was addressed, inter alia, to Anic SpA and the PVC II decision, inter alia, to 'EniChem SpA', it is clear that the statements made in the contested decision and referred to in the preceding paragraph do not at all enable it to be understood in what capacity and to what extent Eni, which is not among the addressees of the Polypropylene decision or the PVC II decision, was involved in those decisions.

132 Although the Commission submits that recitals 366 to 373 to the contested decision contain an exact description of all the events involving 'EniChem', those explanations concern only the changes which occurred within the Eni group between 20 May 1996 and 28 November 2002, as the General Court rightly noted in paragraph 167 of the judgment under appeal. However, those recitals do not contain any statement concerning the companies forming the addressee undertakings of the Polypropylene and PVC II decisions, do not mention whether those companies are identical to those referred to in the contested decision, which Eni disputes, and do not deal either with any changes in that context which took place between the date of adoption of the Polypropylene decision, namely 23 April 1986, and the PVC II decision, namely 27 July 1994, and the start of the infringement found by the contested decision, namely 20 May 1996.

133 Accordingly, in that regard, insufficient reasons are stated for the contested decision.

134 Next, with regard to the alleged infringement of the principle of *audi alteram partem* giving rise to an infringement of the Commission's rights of defence, it is sufficient to recall that Eni, as it rightly points out, raised the complaint of a lack of reasoning in its application at first instance. Consequently, since the Commission had the opportunity to state its position in full on that complaint in its defence and at the hearing at first instance, it is not possible to find that there has been any infringement of the principle of *audi alteram partem* harming the Commission's rights of defence.

135 In addition, as is apparent from the case-law cited in paragraph 128 of the present judgment, the Commission is required to give sufficient reasons at the same time as the contested decision is adopted. Therefore it does not appear that more extensive information that the Commission, in the absence of any alleged infringement of the principle of *audi alteram partem*, could have given to the General Court would have been likely to affect in any way the result of the judgment under appeal.

136 With regard to the argument that Eni, during the procedure before the Commission, had not yet raised the point that the addressees of the Polypropylene and PVC II decisions, on the one hand, and of the contested decision, on the other, were not identical, it suffices to recall that, as Eni has rightly pointed out, there is no provision of European Union law requiring the addressee of a Statement of Objections to dispute its various factual or legal elements during the administrative procedure.

137 In those circumstances, the General Court did not err in law by holding that the Commission, in the contested decision, did not provide sufficient detailed and precise evidence in the contested decision to support a finding that the same 'undertaking' within the meaning of Article 101 TFEU had repeated an infringement and by annulling, consequently, Article 2(c) of the contested decision, in so far as it sets the fine imposed on Eni at EUR 272.25 million.

138 Accordingly, since the single ground of appeal put forward by the Commission in support of its cross-appeal is unfounded, it must be dismissed.

Costs

139 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court of Justice is to make a decision as to the costs. Under Article 138(1) of those Rules, applicable to the procedure on appeal pursuant to 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.

140 As regards the main appeal, since the Commission applied for costs against Eni and since Eni was unsuccessful, it must be ordered to pay the costs.

141 As regards the cross-appeal, since Eni applied for costs against the Commission and since the Commission's single ground of appeal was unsuccessful, it must be ordered to pay the costs.

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

1. Dismisses the main appeal and the cross-appeal;

2. Orders Eni SpA to pay the costs of the main appeal;

3. Orders the European Commission to pay the costs of the cross-appeal.

[Signatures]