Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

9 June 2016*

(Appeal — Article 81 EC — Agreements, decisions and concerted practices — Spanish market for penetration bitumen — Market sharing and price coordination — Notice on immunity from fines and reduction of fines in cartel cases (2002) — Final paragraph of point 23(b) — Partial immunity from fines — Evidence of facts previously unknown to the Commission)

In Case C-617/13 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 27 November 2013,

Repsol Lubricantes y Especialidades SA, formerly Repsol Lubricantes YPF y Especialidades SA, established in Madrid (Spain),

Repsol Petróleo SA, established in Madrid,

Repsol SA, established in Madrid,

represented by L. Ortiz Blanco, J. Buendía Sierra, M. Muñoz de Juan, A. Givaja Sanz and A. Lamadrid de Pablo, abogados,

appellants,

the other party to the proceedings being:

European Commission, represented by C. Urraca Caviedes and F. Castillo de la Torre, acting as Agents,

defendant at first instance,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Fourth Chamber, acting as President of the Fifth Chamber, K. Lenaerts, President of the Court, acting as a Judge of the Fifth Chamber, D. Šváby (Rapporteur), A. Rosas and C. Vajda, Judges,

Advocate General: N. Jääskinen,

Registrar: M. Ferreira, principal administrator,

having regard to the written procedure and further to the hearing on 15 April 2015,

* Language of the case: Spanish.

after hearing the Advocate General at the sitting on 16 July 2015,

gives the following

Judgment

1 By their appeal, Repsol Lubricantes y Especialidades SA, formerly Repsol Lubricantes YPF y Especialidades SA ('RPA/Rylesa'), Repsol Petróleo SA ('Repsol Petróleo') and Repsol SA ('Repsol'), ask the Court to set aside the judgment of the General Court of the European Union of 16 September 2013 in *Repsol Lubricantes y Especialidades and Others* v *Commission* (T-496/07, 'the judgment under appeal', EU:T:2013:4464), which dismissed their action for annulment of Commission Decision C(2007) 4441 final of 3 October 2007 relating to a proceeding under Article [81 EC] (Case COMP/38.710 — Bitumen (Spain)) ('the decision at issue'), and, in the alternative, the reduction of the amount of the fine imposed on them.

Legal context

Regulation No 1/2003

2 Under the title 'Fines', Article 23 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [81 and 82 EC] (OJ 2003 L 1, p. 1) provides, in paragraph 3, that 'in fixing the amount of the fine, regard shall be had both to the gravity and the duration of the infringement'.

3 Article 31 of that regulation provides:

'The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.'

The 1998 Guidelines

4 Under paragraph 1 of the Commission notice entitled 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article [65(5) CS]' (OJ 1998 C 9, p. 3; 'the 1998 Guidelines') 'the basic amount will be determined according to the gravity and duration of the infringement, which are the only criteria referred to in Article 15(2) of [Council] Regulation No 17' of 6 February 1962: first regulation implementing Articles [81 and 82 EC] (OJ, English Special Edition 1959-1962, p. 87).

5 As regards the gravity of the infringement, Section 1.A of the 1998 Guidelines provides that in assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market. Under that provision, infringements are put into one of three categories: minor infringements, serious infringements and very serious infringements.

6 According to the 1998 Guidelines, very serious infringements comprise, in particular, horizontal restrictions such as 'price cartels' and market-sharing quotas. For those infringements, the basic amount of the likely fine is 'above [EUR] 20 million'.

2002 Leniency Notice

7 The Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3, 'the 2002 Leniency Notice') sets out the conditions under which undertakings cooperating with the Commission during an investigation it is carrying out into a cartel may be exempted from fines, or may be granted reductions in any fine which would otherwise have been imposed on them.

8 Point 7 of that notice states:

'Cooperation by one or more undertakings may justify a reduction of a fine by the Commission. Any reduction of a fine must reflect an undertaking's actual contribution, in terms of quality and timing, to the Commission's establishment of the infringement. Reductions are to be limited to those undertakings that provide the Commission with evidence that adds significant value to that already in the Commission's possession.'

9 Under Section B of that notice, headed 'Reduction of a fine', points 21 and 23 thereof provide:

'21. In order to qualify, an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence.

…

23. The Commission will determine in any final decision adopted at the end of the administrative procedure:
(a) whether the evidence provided by an undertaking represented significant added value with respect to the evidence in the Commission's possession at that same time;

…

In addition, if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these elements into account when setting any fine to be imposed on the undertaking which provided this evidence.'

Background to the dispute and the decision at issue

10 The background to the dispute was set out in paragraphs 1 to 91 of the judgment under appeal and may be summarised as follows.

11 The product concerned by the infringement is penetration bitumen, namely a type of bitumen which has not been processed and is used for the construction and maintenance of roads.

12 The Spanish bitumen market comprises, first, three producers, namely the Repsol, CEPSA-PROAS and BP groups, and, second, importers, including the Nynäs and Petróleos de Portugal (Petrogal) groups.

13 During the period corresponding to the years 1991 to 2002, 99.99% of RPA/Rylesa was held by Repsol Petróleo, itself a 99.97% subsidiary of Repsol YPF SA ('Repsol YPF'), now Repsol, the parent company of the Repsol group.

14 RPA/Rylesa produces and markets bitumen products. One of Repsol Petróleo's activities is the production of penetration bitumen and its sale to RPA/Rylesa in order for it to be marketed.

15 Two other companies of the Repsol group, Petróleos del Norte SA and Asfalnor SA carry out, in Spain, an activity related to penetration bitumen.

16 From their sales of penetration bitumen to third parties, RPA/Rylesa and Petróleos del Norte generated, in Spain, turnover of EUR 97 500 000 during the 2001 fiscal year, that is, 34.04% of the relevant market. The total consolidated turnover of the Repsol group was EUR 51 355 000 000 for 2006, which corresponds to the fiscal year prior to the adoption of the decision at issue.

17 Following an application for immunity submitted on 20 June 2002 by BP pursuant to the 2002 Leniency Notice, investigations were carried out on 1 and 2 October 2002 at the premises of the Repsol, CEPSA-PROAS, BP, Nynäs and Petrogal groups.

18 On 6 February 2004, the Commission sent the companies concerned a first round of requests for information pursuant to Article 11(3) of Regulation No 17.

19 By faxes of, respectively, 31 March and 5 April 2004, the appellants and PROAS submitted an application to the Commission pursuant to its 2002 Leniency Notice, together with a corporate statement.

20 After having sent four other requests for information to the undertakings concerned, the Commission formally initiated proceedings and, between 24 and 28 August 2006, notified a statement of objections to the companies concerned in the BP, Repsol, CEPSA-PROAS, Nynäs and Petrogal groups.

21 On 3 October 2007, the Commission adopted the decision at issue by which it found that the 13 companies to which it was addressed had participated in a complex of market-sharing agreements and price coordination of penetration bitumen in Spain (excluding the Canary Islands).

22 The Commission considered that each of the two restrictions of competition established, namely the horizontal market-sharing agreements and the price coordination, was by its nature among the most serious types of infringements of Article 81 EC, which, according to the case-law, are capable of warranting the classification of 'very serious' infringements.

23 The Commission set the 'starting amount' of the fines to be imposed at EUR 40 000 000 by taking into account the seriousness of the infringement, the estimated value of the relevant market, namely EUR 286 400 000 for 2001, the last full year of the infringement, and the fact that the infringement was limited to sales of bitumen in one Member State.

24 The Commission then placed the companies to which the decision at issue was addressed in different categories, defined by reference to their relative importance on the relevant market, for the purposes of applying differential treatment, in order to take account of their effective economic capacity to cause significant damage to competition.

25 The Repsol group and PROAS, whose shares of the relevant market amounted, respectively, to 34.04% and 31.67% in 2001, were placed in the first category, the BP group, with a market share of 15.19%, in the second category, and the Nynäs and Petrogal groups, whose market shares varied between 4.54% and 5.24%, in the third category. On that basis, the basic amounts of the fines to be imposed were adjusted as follows:

— category one, for the Repsol group and PROAS: EUR 40 000 000;

— category two, for the BP group: EUR 18 000 000; and

— category three, for the Nynäs and Petrogal groups: EUR 5 500 000.

26 In order to determine the amount of the fines at a level to ensure a sufficiently dissuasive effect, the Commission took the view that it was appropriate to apply a multiplier of 1.2 to the basic amount of the fine to be imposed on the Repsol group.

27 After increasing the basic amount of the fines according to the length of the infringement, namely a period of 11 years and 7 months (from 1 March 1991 to 1 October 2002) as regards the Repsol group, the Commission found that the amount of the fine to be imposed on it had to be increased by 30% on the basis of aggravating circumstances, since that group had been amongst the significant 'driving forces' of the cartel at issue.

28 The Commission also decided that, pursuant to the 2002 Leniency Notice, the Repsol group was entitled to a reduction of 40% of the amount of the fine which should have normally been imposed on it.

29 On the basis of those factors, RPA/Rylesa, Repsol Petróleo and Repsol YPF were fined jointly and severally EUR 80 496 000.

Procedure before the General Court and the judgment under appeal

30 By application lodged at the General Court Registry on 18 December 2007, the appellants applied for annulment of the decision at issue, and, in the alternative, for a reduction of the amount of the fine imposed on them.

31 In support of their action, they raised eight pleas in law of which only the fourth to the sixth and the eighth pleas are relevant to the present appeal.

32 The fourth and fifth pleas in law, which the General Court examined together, alleged, first, an error of fact and law vitiating the examination of the evidence adduced by the appellants in their responses to the statement of objections, in support of the demonstration of the commercial autonomy of RPA/Rylesa in relation to Repsol Petróleo and Repsol YPF, and, second, that the additional evidence relating to the relationships of those three companies were not able to support the presumption of the actual exercise of decisive influence of those two latter companies over the first.

33 The sixth plea alleged that the amount of the fine imposed was set in infringement of the principles of proportionality and equal treatment.

34 By their eighth plea, the appellants challenged, in essence, the Commission's application of the 2002 Leniency Notice and, in particular, of the final paragraph of point 23(b) thereof.

35 The General Court rejected each of those pleas and dismissed the action in its entirety.

36 The General Court also dismissed the Commission's counterclaim seeking that the amount of the fine imposed on the appellants be increased.

Forms of order sought

37 By their appeal, the appellants claim that the Court of Justice should:

— set aside the judgment under appeal and annul the decision at issue;

— reduce the amount of the fine imposed;

— establish the excessive and unjustified duration of the judicial proceedings before the General Court; and

— order the Commission to pay the costs.

38 The Commission contends that the Court of Justice should:

— dismiss the appeal; and

— order the appellants to pay all the costs.

The appeal

39 The appellants put forward four grounds in support of their appeal.

The first ground of appeal, alleging an error of law in the assessment of RPA/Rylesa's commercial autonomy or, in the alternative, a failure to provide reasons for that assessment

Arguments of the parties

40 In support of their first ground of appeal, directed against paragraphs 179 to 207 of the judgment under appeal, the appellants claim that the judgment under appeal is vitiated by a double error of law in the assessment of the evidence adduced in support of their arguments designed to demonstrate the commercial autonomy of RPA/Rylesa in relation to Repsol Petróleo and Repsol YPF.

41 They complain that the General Court considered, in particular in paragraphs 202 and 203 of the judgment under appeal, that proof that control of a parent company over its subsidiaries, in which it has a 100%, or almost 100%, holding, was not exercised in practice is insufficient to reverse the presumption of the actual exercise of decisive influence of that parent company over those subsidiaries.

42 The appellants submit, in the alternative, that the General Court failed in its duty to state reasons arising from Article 36 and the first paragraph of Article 53 of the Statute of the Court of Justice of the European Union, by pursuing an excessively individualised assessment of each piece of evidence produced by the appellants, without carrying out an overall assessment of that evidence, except that contained in laconic wording in paragraph 207 of the judgment under appeal.

43 The Commission contends that the first ground of appeal is unfounded.

Findings of the Court

44 With regard to the main part of that ground of appeal, suffice it to state that it is based on a misreading of the judgment under appeal.

45 It is not apparent from any of the points raised by the appellants that the General Court held that the proof that control of a parent company over its subsidiaries, in which it has a 100%, or almost 100%, holding, was not exercised in practice is insufficient to reverse the presumption of the actual exercise of decisive influence of that parent company over those subsidiaries.

46 It follows from the judgment under appeal and, in particular, paragraphs 207 and 211 thereof, solely that the General Court held that the evidence provided by the appellants was not such as to demonstrate the autonomy of RPA/Rylesa's conduct in relation to Repsol Petróleo and to Repsol YPF and, therefore, did not allow the presumption of the latters' actual exercise of decisive influence over the former to be reversed.

47 Furthermore, it should be recalled that, according to the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, assessments of a factual nature fall outside the jurisdiction of the Court of Justice in the context of an appeal (see, to that effect, judgment of 11 September 2014 in *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 113).

48 As regards the alternative part of the first ground of appeal, it should certainly be noted that, in paragraph 207 of the judgment under appeal, the General Court held, without giving prior reasoning, that, taken together, the points developed by the appellants in connection with their application for annulment did not make it possible to reverse the presumption of the actual exercise of decisive influence of Repsol Petróleo and Repsol YPF over RPA/Rylesa.

49 However, it is apparent from the judgment under appeal that, in rejecting, in paragraphs 207 and 211, the appellants' arguments seeking to establish RPA/Rylesa's commercial autonomy in relation to Repsol Petróleo and Repsol YPF, the General Court did not just conduct a decontextualised analysis of each piece of evidence adduced by the appellants.

50 Apart from the fact that, in paragraphs 164 to 206 of the judgment under appeal, the General Court carried out, in the context of its assessment of the facts which is not subject to appeal, a detailed analysis of each of the pieces of evidence adduced by the parties, which cannot be left out of account for the overall assessment thereof, it follows from paragraphs 208 to 210 of that judgment that the General Court also analysed and assessed some additional evidence, which the Commission had used as a basis in the decision at issue, and which the General Court considered supported the fact that the appellants in fact constituted a single economic entity.

51 In doing so, the General Court did not commit an error of law and, in particular, did not infringe its obligation to provide reasons for its decision in finding that the appellants had not demonstrated the autonomy of RPA/Rylesa's conduct in relation to Repsol Petróleo and Repsol YPF.

52 Accordingly, the first ground of appeal must be rejected as being unfounded.

The second ground of appeal, alleging an error of law in the interpretation of the 2002 Leniency Notice

Arguments of the parties

53 By their second ground of appeal, directed against paragraphs 339 to 349 of the judgment under appeal, the appellants claim that the General Court erred in law in the interpretation of the final paragraph of point 23(b) of the 2002 Leniency Notice by refusing to grant them partial immunity from the fine on the ground that they had incorrectly claimed that it was Repsol which had produced, in its statement under that notice, the information which enabled the Commission to be aware of the fact that the cartel had continued during the period from 1998 to 2002.

54 In the present case, the appellants, while accepting that the Commission had, prior to their statement under the 2002 Leniency Notice, the documents showing the actual duration of the alleged infringement, submit that it is their statement of the facts in that statement which enabled the Commission to find that the BP group had concealed the truth as to the real duration of the cartel in dispute and that that infringement had continued during that period.

55 In that regard, the appellants claim that the wording of the final paragraph of point 23(b) of the 2002 Leniency Notice and, in particular, the use, in the Spanish version, of the words 'hechos de los cuales la Comisión no tenga conocimiento previo', which correspond to the words 'facts previously unknown' and 'faits précédemment ignorés', in particular in the English and French language versions, must be understood as not covering mere physical possession of documents by the Commission, but also as requiring a 'cognitive element', that is, knowledge by the Commission of the infringement which would be shown by those documents.

56 Furthermore and in any event, the appellants are of the view that the ambiguity of that provision should have led the General Court to adopt the interpretation which was most favourable to them.

57 According to the Commission, the second ground of appeal must be categorised as being new, and, therefore, it is inadmissible since the action for annulment brought by the appellants did not contain any argument relating to the requirement for a 'cognitive element', for the purposes of using the provision relied upon. Alternatively, that ground of appeal is unfounded.

Findings of the Court

58 At the outset, it should be borne in mind that, under Article 170(1) of the Rules of Procedure of the Court of Justice, the subject matter of the proceedings before the General Court may not be changed in the appeal. In an appeal, the jurisdiction of the Court of Justice is in principle confined to a review of the findings of law on the pleas argued at first instance (see, to that effect, judgment of 22 May 2014 in *ASPLA* v *Commission*, C-35/12 P, EU:C:2014:348, paragraph 39 and the case-law cited).

59 A party cannot, consequently, put forward for the first time before the Court of Justice a plea in law which it has not raised before the General Court since that would allow that party to bring before the Court of Justice, whose jurisdiction in appeal proceedings is limited, a wider case than that heard by the General Court (judgment of 3 September 2015 in *Inuit Tapiriit Kanatami and Others* v *Commission*, C-398/13 P, EU:C:2015:535, paragraph 57 and the case-law cited).

60 However, and as the Advocate General pointed out in points 17 and 18 of his Opinion, it must be held that the appellants had raised, in essence, the arguments at issue in their action for annulment brought before the General Court.

61 Contrary to what the Commission argues, the second ground of appeal must therefore be declared admissible.

62 By that ground of appeal, the appellants criticise the General Court for having committed an error of law in paragraphs 339 to 349 of the judgment under appeal in that it validated the interpretation and application by the Commission of the concept of 'facts previously unknown' under the final paragraph of point 23(b) of the 2002 Leniency Notice. That provision, they claim, does not refer to mere physical possession of documents, but requires a separate criterion which the appellants describe as a 'cognitive criterion' to be taken into account.

63 In that regard, it should, in the first place, be recalled that, according to settled case-law of the Court of Justice, the General Court has exclusive jurisdiction to find and assess the facts and, in principle, to examine the evidence it accepts in support of those facts. Provided that that 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 before it. Save where the clear sense of the evidence has been distorted, that assessment does not therefore constitute a point of law which is subject as such to review by the Court of Justice (judgment of 20 January 2016 in *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, paragraph 40).

64 Consequently, the findings of fact made by the General Court, which are challenged in the context of the second ground of appeal, and in particular, that in paragraph 341 of the judgment under appeal, namely that the Commission already had in its possession — before even receiving, on 31 March 2004, the appellants' statement attached to Repsol's application under the 2002 Leniency Notice — the relevant information in contemporaneous documents collected during investigations on 1 and 2 October 2002, cannot be called into question. The same is true with regard to the rejection by the General Court, in particular in paragraph 345 of the judgment under appeal, of the argument relating to the alleged added value of the facts related by Repsol as regards the period from 1998 to 2002.

65 In the second place, as regards the error of law alleged by the appellants, it should be noted that, under the final paragraph of point 23(b) of the 2002 Leniency Notice, 'if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these elements into account when setting any fine to be imposed on the undertaking which provided this evidence'.

66 It follows from the very wording of that provision that the partial immunity provided for therein requires two conditions to be satisfied: first, the undertaking in question is the first to prove facts previously unknown to the Commission; and, second, those facts, which have a direct bearing on the gravity or the duration of the suspected cartel, enable the Commission to make new findings concerning the infringement (judgment 23 April 2015 in *LG Display and LG Display Taiwan* v *Commission*, C-227/14 P, EU:C:2015:258, paragraph 78).

67 The Court has held that the wording 'facts … unknown to the Commission', is unambiguous and allows the adoption of a restrictive interpretation of the final paragraph of point 23(b) of the 2002 Leniency Notice, by limiting that provision to cases in which a company party to a cartel provides the Commission with new information relating to the gravity or the duration of the infringement (see, to that effect, judgment 23 April 2015 in *LG Display and LG Display Taiwan* v *Commission*, C-227/14 P, EU:C:2015:258, paragraph 79 and the case-law cited).

68 The Court has also held that the meaning to be given to those words must be able to guarantee the objectives of the final paragraph of point 23(b) of that notice and, in particular, the effectiveness of the leniency programme (see, to that effect, judgment 23 April 2015 in *LG Display and LG Display Taiwan* v *Commission*, C-227/14 P, EU:C:2015:258, paragraph 84 and the case-law cited). In that regard, as noted by the Advocate General in point 22 of his Opinion, the objective of leniency programmes is to obtain the termination of the infringement by those committing it, in order to end it quickly and completely.

69 It is thus necessary to ensure the effectiveness of that provision, which — where the undertaking which was the first to submit to the Commission, in order to obtain total immunity from a fine under the 2002 Leniency Notice, evidence enabling the Commission to find an infringement of Article 101 TFEU, but has chosen not to disclose information which demonstrates that the duration of the infringement at issue was longer than disclosed by that evidence — seeks to provide an incentive, by means of partial immunity from a fine, to any other undertaking having participated in that infringement to be the first to disclose such information (see, to that effect, judgment 23 April 2015 in *LG Display and LG Display Taiwan* v *Commission*, C-227/14 P, EU:C:2015:258, paragraph 85).

70 In view of the foregoing, the 'cognitive' criterion referred to by the appellants cannot be accepted. The final paragraph of point 23(b) of the 2002 Leniency Notice must be interpreted as meaning that evidence provided by an undertaking in the context of its application under that notice may be considered to be evidence relating to 'facts previously unknown to the Commission' only if it objectively presents significant added value with respect to the evidence already in the Commission's possession.

71 That interpretation follows, first, from the general scheme of the 2002 Leniency Notice. In accordance with points 7, 21 and 23(a) of that notice, a reduction of the fine imposed by the Commission under that notice presupposes that undertakings seeking to benefit from it provide evidence to the Commission which has a significant added value compared to that already in the Commission's possession. The same is also true as regards the partial immunity laid down in the final paragraph of point 23(b) of that notice.

72 Second, for the purposes of the application of that provision, it must be held that the Commission's possession of evidence amounts to knowledge of its content, regardless of whether that evidence was actually examined and analysed by its services.

73 In the present case, as follows from paragraph 64 of the present judgment, it was definitively found by the General Court, in paragraph 341 of the judgment under appeal, which refers to paragraph 592 of the decision at issue that, prior to the appellants' statement under the 2002 Leniency Notice, the Commission had information relating to the facts which occurred during the period from 1998 to 2002, obtained during the investigations carried out on 1 and 2 October 2002. Furthermore, the General Court definitively rejected the argument concerning the alleged added value of the facts related by Repsol as regards that period.

74 It is therefore without committing an error of law that, in paragraph 344 of the judgment under appeal, the General Court was able to find that the appellants were not entitled to request, on the basis of the final paragraph of point 23(b) of that notice, that account not be taken, in determining the amount of the fine, of the facts relating to that cartel, which occurred during the period from 1998 to 2002.

75 Consequently, the second ground of appeal must be rejected as being unfounded.

The third ground of appeal, alleging infringement of Article 261 TFEU and the principle of proportionality, in that the General Court failed to carry out a full review, exercising its unlimited jurisdiction, of the fines imposed

Arguments of the parties

76 The appellants submit that the General Court infringed Article 261 TFEU and the principle of proportionality by failing to carry out an independent and comprehensive review of the decision at issue as regards the determination of the basic amount of the fine imposed, which was set at an amount of EUR 40 000 000, that is, double the indicative basic amount laid down by the 1998 Guidelines for infringements categorised as 'very serious', even though the factors referred to in the decision at issue should have led to setting the basic amount at an amount less than or equal to EUR 20 000 000.

77 In that regard, the appellants claim that, in response to the sixth plea in law of their action for annulment by which they challenged the basic amount of the fine set by the Commission, by alleging, in particular, an infringement of the principle of proportionality, the General Court merely found, first, that the alleged infringement should in fact be categorised as 'very serious', and second, that the Commission had stated that it had taken into account the additional factors set out in the decision at issue, without having checked whether the assessment of those factors by that institution had been correctly carried out.

78 In paragraphs 245 to 250 of the judgment under appeal, the General Court accordingly merely recorded the factors taken into account in the decision at issue without itself having carried out a genuine and independent assessment; that did not allow the appellants to understand the reasons why

those factors could have led the Commission and, subsequently, the General Court, to adopt a basic amount of the fine corresponding to twice the minimum laid down by the 1998 Guidelines for infringements categorised as 'very serious'.

79 Finally, the appellants claim that, in the context of the exercise of its unlimited jurisdiction under Article 261 TFEU, the General Court should, in order to assess the proportionality of the basic amount of the fine imposed, have taken into consideration the lack of effect of the infringement and the size of that basic amount in relation to their turnover.

80 The Commission submits that the third ground of appeal must be rejected.

Findings of the Court

81 At the outset, it should be borne in mind that it is not for the Court, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the General Court exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of EU law (see, inter alia, judgment of 22 November 2012 in *E.ON Energie* v *Commission*, C-89/11 P, EU:C:2012:738, paragraph 125).

82 It is only inasmuch as the Court considers that the level of the penalty is not merely inappropriate, but also excessive to the point of being disproportionate, that it would have to find that the General Court erred in law, on account of the inappropriateness of the amount of a fine (see, inter alia, judgment of 30 May 2013 in *Quinn Barlo and Others* v *Commission*, C-70/12 P, EU:C:2013:351, paragraph 57 and the case-law cited).

83 It follows that, as by the third ground of appeal, the appellants dispute the General Court's assessment as to the proportionality of the basic amount of the fine in the light of the factual circumstances of the case, without establishing or even arguing that that amount is not only inappropriate but also excessive, to the point of being disproportionate, that ground of appeal must be rejected as being inadmissible.

84 As to the remainder, it must be borne in mind that, with regard to judicial review of decisions whereby the Commission imposes a fine or periodic penalty payment for infringement of the competition rules, in addition to the review of legality provided for in Article 263 TFEU, the European Union judicature has the unlimited jurisdiction which it is afforded by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU, and which empowers it to substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or periodic penalty payment imposed (judgment of 22 October 2015 in *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 74 and the case-law cited).

85 However, it is important to note that the exercise of powers of unlimited jurisdiction provided for in Article 261 TFEU and in Article 31 of Regulation No 1/2003 does not amount to a review of the Court's own motion and that proceedings before the Courts of the European Union are inter partes. With the exception of pleas involving matters of public policy, which the Courts are required to raise of their own motion, it is therefore for the applicant to raise pleas in law against the decision at issue and to adduce evidence in support of those pleas (judgment of 22 October 2015 in *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 75 and the case-law cited).

86 On the other hand, in order to satisfy the requirements of the principle of effective judicial protection enshrined in the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and bearing in mind that Article 23(3) of Regulation No 1/2003 provides that the amount of the fine must be fixed by reference to the gravity and duration of the infringement, the General Court is bound, in the exercise of the powers conferred by Articles 261 and 263 TFEU, to

examine all complaints based on issues of fact and law which seek to show that the amount of the fine is not commensurate with the gravity or the duration of the infringement (judgment of 22 October 2015 in *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 76 and the case-law cited).

87 In the present case, it is important to state that the General Court considered, in paragraphs 250 and 258 of the judgment under appeal, that there was no error in the determination, by the Commission, of the amount of EUR 40 000 000 which served as a basis for calculating the fine imposed on the appellants and that it did not appear disproportionate.

88 To that effect, the General Court, first, assessed, in paragraphs 245 to 249 of that judgment, the gravity of the infringement committed, the scope of the geographic market concerned by it and the appellants' market share and, second, in paragraphs 251 to 257 of that judgment, responded to the requisite legal standard and with sufficient reasoning, to the arguments alleging, in particular, the lack of actual impact of the cartel at issue or the fact that the basic amount of the fine imposed on the appellants represented a significant proportion of their turnover.

89 In so doing, the General Court did not err in law in the exercise of its judicial review.

90 It should also be noted that the 1998 Guidelines provide in the third indent of point 1.A that the basic amount of the fine envisaged for very serious infringements is above EUR 20 000 000. Accordingly, the amount of EUR 20 000 000 is only a minimum amount set by those guidelines above which the Commission sets the starting amount for the calculation of fines for such infringements.

91 In so far as the appellants claim that the General Court erred in law in rejecting their argument that the Commission should have taken into consideration the lack of actual impact of the infringement on the market, suffice it to note, as the Commission did, that the appellants did not, on this issue, challenge before the General Court the decision at issue, which, moreover, made no mention of such a lack of impact, nor did they adduce evidence before the General Court that the effects of the infringement were measurable. In those circumstances, the appellants' argument must be rejected as being inadmissible.

92 Consequently, the third ground of appeal must be rejected as being in part inadmissible and in part unfounded.

The fourth ground of appeal, alleging a failure by the General Court to adjudicate within a reasonable period

Arguments of the parties

93 By their fourth ground of appeal, the appellants claim that the General Court infringed Article 47 of the Charter and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, by not adjudicating within a reasonable period, which justifies a reduction of the fine imposed on them or the finding of the existence of that failure.

94 In that regard, they submit that their action for annulment was lodged on 18 December 2007, that the written procedure was closed on 25 September 2008, that their opinion was requested on 11 July 2012 on the possibility of joining the present case with Cases T-462/07, T-482/07, T-495/07 and T-497/07, that the hearing took place on 14 January 2013 and that the judgment under appeal was delivered on 16 September 2013.

95 They also state that the entirety of the proceedings lasted approximately 5 years and 9 months, with a period of inactivity, between the lodging of the application and the request for an opinion on the possibility of joining the present case with the others, of 4.5 years, analogous to that found by the Court of Justice in the judgment of 26 November 2013 in *Groupe Gascogne* v *Commission* (C-58/12 P, EU:C:2013:770).

96 In that regard, the appellants claim that there is no exceptional circumstance which may justify the delay accordingly found in the investigation of the case, which is not due either to the interventions or omissions on their part or to the particular complexity of the case.

97 The Commission contends that the fourth ground of appeal must be rejected.

Findings of the Court

98 It should be borne in mind that the sanction for a breach, by a Court of the European Union, of its obligation under the second paragraph of Article 47 of the Charter to adjudicate on the cases before it within a reasonable period must be an action for damages brought before the General Court, since such an action constitutes an effective remedy. It follows that a claim for compensation in respect of the damage caused by the General Court's failure to adjudicate within a reasonable period may not be made directly to the Court of Justice in the context of an appeal, but must be brought before the General Court itself (see judgments of 10 July 2014 in *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 66; of 9 October 2014 in *ICF* v *Commission*, C-467/13 P, EU:C:2014:2274, paragraph 57; and of 12 November 2014 in *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363, paragraphs 17 and 18).

99 The General Court, which has jurisdiction under Article 256(1) TFEU, hearing a claim for damages, is required to rule on such a claim sitting in a different composition from that which heard the dispute which gave rise to the procedure whose duration is criticised (see, to that effect, judgments of 10 July 2014 in *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 67; of 9 October 2014 in *ICF* v *Commission*, C-467/13 P, EU:C:2014:2274, paragraph 58; and of 12 November 2014 in *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363, paragraph 19).

100 That said, where it is clear, without any need for the parties to adduce additional evidence in that regard, that the General Court infringed, in a sufficiently serious manner, its obligation to adjudicate on the case within a reasonable time, the Court of Justice may note that fact (see, to that effect, judgments of 9 October 2014 in *ICF* v *Commission*, C-467/13 P, EU:C:2014:2274, paragraph 59, and of 12 November 2014 in *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363, paragraph 20).

101 That is the situation here. The duration of the proceedings before the General Court, namely almost 5 years and 9 months, which includes, in particular, a period of almost 4 years and 4 months which elapsed between the end of the written procedure and the hearing, cannot be explained by either the nature or the complexity of the case or by its context. The proceedings brought before the General Court were not particularly complex. Moreover, it is apparent neither from the judgment under appeal nor from the evidence presented by the parties that that period of inactivity could be objectively justified or that the appellants contributed to it. In that regard, the fact that the General Court requested the appellants' opinion on 11 July 2012 on the possibility of joining the present case with Cases T-462/07, T-482/07, T-495/07 and T-497/07 is irrelevant.

102 However, it follows from the considerations set out in paragraph 98 of the present judgment that the fourth ground of appeal must be rejected.

103 Since none of the appellants' grounds of appeal is able to be upheld, the appeal must be dismissed.

Costs

104 In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court shall make a decision as to costs.

105 Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) of those rules, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings.

106 Since the Commission has applied for costs to be awarded against Repsol Lubricantes y Especialidades, Repsol Petróleo and Repsol and the latter have been unsuccessful, they must be ordered to pay the costs relating to the present appeal proceedings.

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

1. **Dismisses the appeal;**

2. **Orders Repsol Lubricantes y Especialidades SA, Repsol Petróleo SA and Repsol SA to pay the costs.**

[Signatures]