Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

13 June 2013*

(Appeals — Agreements, decisions and concerted practices — Market in butadiene rubber and styrene-butadiene rubber manufactured by emulsion polymerisation — Fixing price targets, sharing clients by non-aggression agreements and exchanging commercial information — Evidence — Attributability of unlawful conduct — Amount of the fine — Gravity and duration of the infringement — Aggravating circumstance — Repeated infringement)

In Case C-511/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 26 September 2011,

Versalis SpA, formerly Polimeri Europa SpA, established in Brindisi (Italy), represented by M. Siragusa, F. Moretti and L. Nascimbene, avvocati,

applicant,

the other party to the proceedings being:

European Commission, represented by V. Di Bucci, L. Malferrari and G. Conte, 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, Versalis SpA, formerly Polimeri Europa SpA ('Versalis') asks the Court to set aside the judgment of the General Court of the European Union in Case T-59/07 *Polimeri* v *Commission* [2011] ECR II-4687 ('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 the General Court thereby annulled the contested decision in part 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 of 2 May 1992 (OJ 1994 L 1, p. 3), 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 ('the first Statement'), inter alia, to Versalis, Eni, its parent company owning 100% of the capital in Versalis, 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 ('the second Statement'). 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, Versalis, Eni SpA and the other addressees of the contested decision, namely Bayer AG ('Bayer'), The Dow Chemical Company, Dow Deutschland Inc., Dow Deutschland Anlagengesellschaft mbH, Dow Europe (together 'Dow'), Shell Petroleum NV, Shell Nederland BV, Shell Nederland Chemie BV (together 'Shell'), Unipetrol a.s., Kaučuk a.s. ('Kaučuk') and Trade Stomil sp. z o.o. ('Stomil'), 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 Versalis 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, an undertaking indirectly controlled by Eni through its subsidiary EniChem SpA. On 1 November 1997, EniChem Elastomeri Srl 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 EniChem,

namely all the companies held by Eni SpA, the sales figures of BR and ESBR, according to recital 468 to the contested decision, 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 Versalis.

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 Stomil (turnover EUR 38 million) or Kaučuk (turnover EUR 2.718 billion), it applied multipliers of 1.5 in relation to Bayer, 1.75 in relation to Dow, 2 in relation to Eni and Versalis and 3 in relation to Shell, whose turnover amounted to EUR 27.383 billion, EUR 37.221 billion, EUR 73.738 billion and EUR 246.549 billion respectively.

10 In addition, as regards Versalis and Eni SpA, 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 'EniChem' had 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 85 of the EEC Treaty (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 85 of the Treaty (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 Versalis by 50% for repeated infringement.

12 Consequently, in Article 2(c) of the contested decision, the Commission imposed a fine of EUR 272.25 million on Versalis and its parent company Eni, 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 20 February 2007, Versalis 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, in essence, 16 pleas in law in support of its claim.

14 Those pleas in law alleged, inter alia, infringement of the rights of the defence (third plea), the unlawful imputation of the infringement to Versalis (seventh plea) and the unsubstantiated finding of the existence of a cartel and its participation therein (eighth and ninth pleas). With regard to the amount of the fine imposed on the applicant, it alleged the lack of any basis for the assessment of the gravity of the infringement (tenth plea), the incorrect calculation of the multiplier for deterrence (twelfth plea) and the unjustified increase in the basic amount of the fine for repeated infringement (fourteenth plea).

15 In the judgment under appeal, the General Court stated inter alia as follows.

16 With regard to the alleged infringement of the rights of the defence, arising out of a difference between the second Statement and the contested decision, the General Court held, in paragraph 84 of the judgment under appeal, that that plea was based on the premiss that 'in the statements of objections, the Commission found EniChem SpA (now Syndial) liable in respect of the period from 20 May 1996 to 1 January 2002, whereas, in the contested decision, the Commission finds only [Versalis] liable, including in respect of the abovementioned period during which it was not active in the production and distribution of the products concerned'.

17 The General Court noted, in paragraph 85 of the judgment under appeal, that the second Statement stated that Versalis 'must be held liable for the infringement in respect of the period from 20 May 1996 to 28 November 2002' and found, 'in line with the contested decision (recitals 365 to 373), [that Versalis is] liable for the whole period of the infringement'. In paragraph 86 of that judgment, the General Court held that that Statement specified, in addition, that, 'in so far as EniChem SpA controlled 100% of [Versalis's] capital between 1 January and 20 October 2002, Syndial must be held liable, jointly and severally, for [Versalis's] infringement in respect of that period'. It followed, in the view of the General Court, 'that the second Statement … [found] Syndial liable only for a limited period, in its capacity as [Versalis's] parent company between 1 January and 20 October 2002, and not for the entire duration of the infringement'. The General Court concluded, in paragraph 87 of the judgment under appeal, that Versalis's premiss was incorrect.

18 As regards the imputation of the infringement to the applicant, the General Court noted that, where two entities constitute the same economic unit, the fact that the entity which committed the infringement still exists does not in itself preclude the entity to which it transferred its economic activities from being subject to a penalty. The same is true, in the view of the General Court, where those entities have been subject to control by the same person and have carried out, in all material respects, the same commercial instructions.

19 In paragraph 126 of the judgment under appeal, the General Court held that, in this case, it was 'established that, at the time of their offending conduct, EniChem SpA and Versalis were wholly owned, directly or indirectly, by the same company, namely Eni SpA'. In those circumstances, in the view of the General Court, 'the principle of personal responsibility [did] not preclude the penalty for the infringement initially committed by EniChem SpA and subsequently continued by [Versalis] from being imposed in its entirety on [Versalis]'. In addition, in paragraph 129 of that judgment, the General Court considered that 'a penalty imposed on an undertaking that continues to exist in law, but has ceased economic activity, [was] likely to have no deterrent effect' and that 'undertakings could escape penalties by simply changing their identity through restructurings, transfers or other legal or organisational changes'.

20 With regard to the plea in law alleging that the finding of the existence of a cartel is unsubstantiated, the General Court held, in paragraph 168 of the judgment under appeal, firstly, that the complaint raised by Versalis against Section 4.3 of the contested decision, headed 'Cartel meetings', 'the main points of fact and law of which are set out only in Annexes A 23 to A 25 to the application, [did] not satisfy the requirements laid down by Article 21 of the Statute of the Court of Justice [of the European Union] and Article 44(1)(c) of the Rules of Procedure [of the General Court]'. In consequence, the General Court held that that complaint was inadmissible.

21 Furthermore, as regards the alleged contradictions between certain statements made by Bayer and Dow during the administrative procedure and other statements made by employees of those companies, the General Court noted in particular, in paragraphs 180 and 198 of the judgment under appeal, that 'the answers given on behalf of an undertaking as such carry more weight than that of an employee of the undertaking, whatever his individual experience or opinion'.

22 As regards the classification of the infringement in question as 'very serious', the General Court recalled, in paragraph 222 of that judgment, that the contested decision penalised the conclusion of agreements on price targets and market sharing, and the exchange of sensitive commercial information and that these practices were, by their very nature, very serious infringements. It added that the Commission had stated, in that decision, 'that it [was] not possible to measure the actual impact of the cartel', which covered the entirety of the territory of the European Economic Area (EEA), although 'the agreements in question were implemented by the undertakings concerned and, therefore, had an effect on the market'. In paragraph 228 of that judgment, the General Court rejected the arguments put forward by Versalis alleging the absence of such effects. With regard to the size of the market, which is only one factor among others which the Commission may take into account, the

General Court held, in paragraph 229 of the judgment, that 'there [was] nothing to support a finding that the Commission erred in the contested decision by estimating the value of the market concerned at "at least" EUR 550 million in 2001 [and that any] underestimate of that figure was detrimental to [Versalis]'.

23 As regards the plea alleging an unlawful application of the multiplier for deterrence, the General Court considered, in paragraph 250 of the judgment under appeal, that the factors which enabled the Commission to fix the multipliers for deterrence in respect of Eni SpA and Versalis are clear from the contested decision and that it does not follow from that decision that the Commission referred explicitly to factors other than the overall turnover and relative size of the undertakings concerned. The General Court pointed out, in paragraph 251 of that judgment, that the worldwide turnover figures for 2005 were EUR 27.383 billion for Bayer, EUR 37.221 billion for Dow (35.93% more than Bayer) and EUR 73.738 billion for EniChem (169.28% more than Bayer and 98.11% more than Dow).

24 In those circumstances, the fact that the multiplier was increased as regards Versalis by 14.28% by comparison with the multiplier applied to Dow (2 as against 1.5), the latter multiplier having itself been increased by 16.66% by comparison with that applied to Bayer (1.75 as against 1.5), could not, in the view of the General Court, constitute a breach of the principle of equal treatment. On the contrary, the General Court held, in paragraph 251 of the judgment under appeal, that the Commission would have been entitled on that basis to select an even higher multiplier. It also recalled, in the same paragraph, that, since the Commission is not required to apply any particular mathematical formula in its calculation of the amount of the fine, it did not make a manifest error of assessment in taking into consideration the difference in the economic capacity of the undertakings concerned when selecting the multipliers that it applied.

25 With regard to the increase in the fine for repeated infringement, the General Court noted, in paragraphs 296, 298 and 299 of the judgment under appeal, that the contested decision refers to the Polypropylene and PVC II decisions and the fact that 'EniChem' was the addressee of those decisions. In the view of the General Court, the Commission considered, in essence, that the same undertaking, within the meaning of Article 101 TFEU, had repeated offending conduct. In that context, the General Court pointed out that the Commission made 'reference, 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"'. In the view of the General Court, that term is 'imprecise, at least as regards the legal persons forming the economic unit covered by the Polypropylene and PVC II decisions'. The General Court added that 'the company which was the subject of the Polypropylene decision, namely Anic [SpA], [was] not one of the legal persons mentioned in … recitals 26 to 35 to the contested decision[, which were] essentially intended to describe the development of the companies owned by Eni [SpA] during the infringement, which [post-dated] the adoption of the Polypropylene and PVC II decisions'.

26 In paragraph 300 of the judgment under appeal, the General Court has pointed out that the Commission does indeed refer, 'in footnote 262 to the contested decision, to the Polypropylene and PVC II decisions, stating that "Eni" was involved in those decisions', that the term 'Eni' was not, however, 'defined in the contested decision', since the Commission, to refer to Eni SpA 'as the parent company of the other companies, … [used] the term "Eni SpA"'. In paragraph 301 of the judgment under appeal, the General Court considered that, 'even if, by the use of the term "Eni" … the Commission [was] referring to the companies which form part of the "undertaking" within the meaning of Article 81 EC, consisting of the legal persons controlled by Eni, it [had to] be pointed out that the Commission [had not adduced] any detailed and specific evidence in that regard in the contested decision'. According to the General Court, 'the Commission merely [noted], in its pleadings before the Court, that Eni "wholly" controlled the companies addressed by the Polypropylene and PVC II decisions'. The General Court added that, 'apart from the fact that that assertion [was] not corroborated by any evidence, it was not included in the contested decision'.

27 In paragraph 302 of the judgment under appeal, the General Court took the view, however, that 'in this case, the development of the structure and control of the companies concerned [was] particularly complex' and that 'the Polypropylene decision was addressed to Anic [SpA], and Eni [SpA]'s name did not appear in that decision'. 'As for the PVC II decision, [in the view of the General Court], the Commission [referred] in recital 8 to that decision to the fact that Anic [SpA] [was] "now" EniChem SpA and, in recital 43, to the fact that that change [was] due to "various reorganisations", without providing further details'. The General Court noted that, '[m]oreover, here again, Eni [SpA]'s name does not appear in that decision' and that '[i]n 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", which the Commission failed to do.

28 Consequently, the General Court upheld the plea in law alleging that the increase in the basic amount of the fine for repeated infringement was unjustified, annulled Article 2(c) of the contested decision in so far as it set the amount of the fine imposed on the applicant at EUR 272.25 million and set that amount at EUR 181.5 million. It dismissed the remainder of the action and ordered each party to bear its own costs.

Forms of order sought by the parties

29 Versalis claims that the Court should:

— set aside in whole or in part the judgment of the General Court in so far as it dismissed the action brought by Versalis in Case T-59/07 and, consequently:

— annul in whole or in part the contested decision;

— and/or annul, or at least reduce, the fine imposed on Versalis by that 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 Versalis in Case T-59/07 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 both of the present proceedings and of the proceedings in Case T-59/07; and

— dismiss the cross-appeal brought by the Commission and order the Commission to pay the costs.

30 The Commission contends that the Court should:

— dismiss the appeal;

— set aside the judgment under appeal inasmuch as it annuls the contested decision in part as regards the finding of aggravating circumstances, namely repeated infringement, and consequently reduced the amount of the fine; and

— order the appellant to pay the costs.

The main appeal

31 In support of its appeal, Versalis raises six grounds of appeal, seeking the variation of the judgment under appeal and the annulment of the contested decision.

32 The first ground of appeal alleges that the General Court has erred in law and made an incorrect reading of the second Statement by finding that there was no infringement of the rights of the defence resulting from a discrepancy between that Statement and the contested decision. The second ground of appeal alleges an error of law as regards the imputation of the infringement in question to Versalis and insufficient reasons for the judgment under appeal in that regard. The third ground of appeal alleges, in essence, a breach of European Union law, a distortion of the evidence and a failure by the General Court to exercise its full judicial review. The fourth ground of appeal alleges an incorrect calculation of the fines and an unjustified classification of the infringement as 'very serious', a failure to state reasons and a failure to carry out a full judicial review. The fifth ground of appeal alleges, in essence, an error of assessment and insufficient reasons as regards the incorrect nature of the fixing of the multiplier and the infringement of the principle of equal treatment by the Commission. The sixth ground of appeal alleges that the General Court committed an infringement and made a wrongful application of European Union law and vitiated the judgment under appeal by a lack of reasons when it declared certain annexes to the application inadmissible.

The first ground of appeal, alleging an error of law and a manifestly incorrect reading of the second Statement in that the General Court held that there was no infringement of the rights of the defence resulting from a discrepancy between that Statement and the contested decision

Arguments of the parties

33 Versalis claims that the Commission, in the second Statement and also in the first Statement, regarded it as jointly liable with EniChem SpA (now Syndial) for almost the entirety of the duration of the infringement, whereas it had been active in the BR and ESBR sector only since 1 January 2002. In the contested decision, however, the Commission excluded any direct imputability to Syndial and made it liable for all of the infringement. The General Court rejected the plea alleging that discrepancy, pointing out that the second Statement held Syndial liable for only a limited period and that it resulted therefrom that the premiss put forward by Versalis was incorrect. The Commission found in paragraphs 415 and 416 of the second Statement that Syndial had participated individually in the infringement between 20 May 1996 and 20 October 2002.

34 Versalis argues, since its premiss was in fact correct, the General Court ought to have upheld the plea in law alleging the infringement of the rights of the defence. In fact, it did not have the opportunity to respond to the imputation of liability in the contested decision. It is appropriate to distinguish the fact of being held liable jointly and severally with another company from that of being held solely liable or jointly liable with one other company, given that the companies on which a fine which must be paid jointly is imposed are required, in principle, to contribute to the payment thereof in equal shares. In addition, before the Commission, the appellant adopted its defence strategy taking account of the fact that the second Statement referred to the joint and several liability of Syndial for almost all the infringement. Accordingly, Versalis decided to concentrate its defence on the events which took place during the period when it managed the activity in question itself, that is to say, from 1 January to 28 November 2002.

35 The Commission contends, in essence, that, in paragraph 416 of the second Statement, it clearly stated that Versalis was individually liable for the infringement in question for the period between 20 May 1996 and 28 November 2002 and that Syndial was individually liable for the period between 20 May 1996 and 20 October 2002. It also considered, in paragraph 353 of that Statement, that Syndial could be held jointly liable for the infringement committed by Versalis between 1 January and 20 October 2002. In that Statement, the appellant was held individually liable for the entire duration of the cartel.

36 In the submission of the Commission, it is hardly credible that Versalis decided not to defend itself adequately purely because part of the penalty, corresponding to the liability for the period between 1 January and 20 October 2002, could be borne jointly with another company from the same group.

Versalis and Syndial decided to coordinate their defence by concentrating on the different periods, but by each referring expressly to the other's pleadings as regards the remaining periods. Versalis did not try to prove that the procedure would have had a different outcome if the second Statement had excluded Syndial's liability.

Findings of the Court

37 With regard to the findings of the General Court in paragraphs 84 to 87 of the judgment under appeal, according to which, firstly, the second Statement held Syndial liable only for a limited period, in its capacity as parent company of Versalis, between 1 January and 20 October 2002, and not for the whole duration of the infringement and, secondly, the plea in law raised by Versalis before the General Court alleging a discrepancy between that Statement and the contested decision, are thus based on an incorrect premiss, it must be held that those findings are in fact incorrect.

38 As Versalis rightly pointed out in the appeal, in paragraph 416 of the second Statement, Syndial is deemed to have formed part of the undertaking which committed the infringement in question, consisting of Eni SpA, Versalis and Syndial, from 20 May 1996 to 20 October 2002, and not only between 1 January and 20 October 2002. The General Court was therefore not able to base its rejection of the plea raised by Versalis alleging a discrepancy between the second Statement and the contested decision, which decision, contrary to that Statement, was not addressed to Syndial, on the sole consideration that that plea was based on an 'incorrect' premiss.

39 Nevertheless, it is clear that the General Court did not err in holding that the contested decision was not, in that context, vitiated by an error giving rise to, as regards Versalis, an infringement of the rights of the defence.

40 As it apparent precisely from that Article 416, the Commission noted that Eni SpA, Versalis and Syndial had formed a single undertaking, within the meaning of Article 101 TFEU, in any event during the period between 20 May 1996 and 20 October 2002, that is to say during almost the entire duration of the infringement. Consequently, Versalis could not be in doubt as to the fact that any anticompetitive conduct by the undertaking thus defined and, accordingly, any anticompetitive conduct by Syndial would be imputed to it. If Versalis, despite that fact, decided not to make a statement regarding the alleged anticompetitive conduct between 20 May 1996 and 1 January 2002 and to rely, in that regard, on the defence submitted by Syndial, that decision follows from a choice made by that undertaking, which cannot constitute an infringement of the rights of the defence. Furthermore, and for the sake of completeness, it does not appear that that sharing of tasks in order to respond to the complaints raised by the Commission was prejudicial to Versalis.

41 The fact that, in paragraph 353 of the second Statement, the Commission noted that Versalis and Syndial had in addition to be held jointly liable for the infringement for the period between 1 January and 20 October 2002 cannot call that conclusion into question. Paragraph 353 merely underlines the fact, which is clearly stated in paragraphs 354 to 356 of that Statement, that there was, even during that period, when Versalis was only indirectly controlled by Eni SpA, uninterrupted economic continuity as regards the undertaking, within the meaning of Article 101 TFEU, formed by Eni SpA, Versalis and Syndial.

42 Furthermore, although Versalis claims that the premiss that it is made liable for an infringement only jointly with two other companies is clearly distinct from the premiss that it is made liable jointly with only with other company, it in no way shows how the contested decision could have led to a different result if it had known, during the proceeding before the Commission, that the contested decision would be addressed not to Syndial but only to Eni SpA and itself.

43 It follows that the arguments alleging an infringement of the rights of the defence, resulting from a discrepancy between the second Statement and the contested decision, in that the latter was not, in the end, addressed to Syndial, raised in support of the first ground of appeal, are without basis in law or in fact and that, on that ground, which must be substituted for that applied by the General Court, that ground of appeal must be rejected.

The second ground of appeal, alleging an error of law as regards the imputation of the infringement in question to Versalis and insufficient reasons for the rejection of the argument raised in that regard by the appellant in the judgment under appeal

Arguments of the parties

44 According to Versalis, the General Court infringed the fundamental principle of personal responsibility by disregarding the plea in law alleging a wrongful imputation of the liability resulting from the events which took place in the period between 20 May 1996 and 1 January 2002. In the submission of Versalis, the Commission ought to have identified two distinct liabilities, that of Syndial and that of Versalis, in respect of that period.

45 In that regard, Versalis submits that the Court of Justice has accepted the possibility of derogating from the principle of personal responsibility only in exceptional cases and in specific circumstances which are not found in the present case. Syndial did not cease to exist in law or economically, the activity connected with BR and ESBR was not transferred with the aim of avoiding the rules on the protection of competition and Versalis and Syndial did not come within the aegis of the same public authority. Nor did the appellant make a spontaneous statement in order to assume liability for the conduct of Syndial.

46 In addition, according to Versalis, there is no risk of there being a lack of deterrent effect if the liability were imputed to Syndial rather than Versalis, given that that company continues to carry out economic activities and is in a position to pay the amount of a fine. The risk of distortion of the deterrent effect is, in accordance with the case-law, the basic criterion enabling derogation from the principle of personal responsibility. In that regard, Versalis refers in particular to paragraph 144 of the judgment in Case C-352/09 P *ThyssenKrupp Nirosta* v *Commission* [2011] ECR I-2359.

47 In any event, the General Court failed to examine the intensity of the economic and organisational links between Syndial and Versalis and merely noted that those two companies ‘were wholly owned, directly or indirectly, by the same company, namely [Eni SpA]’. It therefore erred in law. Nor did it state sufficient reasons for its rejection of the arguments raised before it in that regard.

48 The Commission responds that the Court of Justice has not restricted the cases of liability of a transferee company to situations where a transferring company has ceased all economic activity. In accordance with the case-law, only the existence of a ‘structural link’ between two companies forming part of the same group is decisive and that principle is not limited to situations where the companies concerned fall within the aegis of the same public authority.

49 The Commission regards as irrelevant the argument put forward by Versalis that, as Syndial is an existing and operational company, there is no risk of there being a lack of deterrent effect if liability were imputed to Syndial rather than to the appellant, since the case-law does not limit the possibility of penalising the transferee company to the sole situation where the transferring company has ceased to exist in law or economically.

50 As regards the economic and organisations links between Syndial and Versalis, the Court of Justice found, in its judgment in 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, that there were

structural links justifying the imposition of a penalty on the transferee company, because of the mere fact that the undertaking involved in the cartel had transferred the activities in question to another company of which it controlled 50%. It is therefore clear that, in the present case, the transferee being wholly owned, there was economic continuity. The judgment under appeal gives sufficient reasons in that regard.

Findings of the Court

51 In accordance with settled case-law, European Union competition law refers to the activities of undertakings and that the concept of an undertaking covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed. When such an entity infringes competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement (see, to that effect, Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraphs 38 and 39 and the case-law cited).

52 The Court of Justice has already held that, where two entities constitute one economic entity, the fact that the entity that committed the infringement still exists does not as such preclude imposing a penalty on the entity to which its economic activities were transferred. In particular, applying penalties in this way is permissible where those entities have been subject to control by the same person and have therefore, given the close economic and organisational links between them, carried out, in all material respects, the same commercial instructions (see *ETI and Others*, paragraphs 48 and 49 and the case-law cited).

53 In the present case, the Commission, as is apparent from recitals 368 and 369 to the contested decision, held that Eni SpA, Versalis and Syndial formed, during the infringement in question, a single undertaking. In addition, given that Eni SpA, during that entire period, held, directly or indirectly, all or almost all of the capital not only in Versalis but also in Syndial, which Versalis does not dispute, the Commission was entitled, in accordance with settled case-law, to rely on the presumption that Eni SpA actually exercised a decisive influence over its subsidiaries (see, to that effect, judgment of 3 May 2012 in Case C-289/11 P *Legris Industries* v *Commission*, paragraphs 46 to 48 and the case-law cited). That presumption has not been rebutted in the present case.

54 Having regard to those factors, it must be held that the Commission was correct to attribute all the anticompetitive conduct committed by Syndial to Versalis, irrespective of the fact that Syndial still exists.

55 That finding cannot be called into question by the fact that the Court of Justice, in the judgment in *ThyssenKrupp Nirosta* v *Commission*, has stated that the situation referred to in paragraph 52 of this judgment also covers one where the entity that has committed the infringement has ceased to exist, either in law or economically, since a penalty imposed on an undertaking which is no longer economically active is likely to have no deterrent effect (see *ThyssenKrupp Nirosta*, paragraph 144), since it precisely does not follow from that judgment that the imputation of an infringement to an entity which did not commit that infringement is restricted to cases where the application of a penalty to the company which did commit the infringement would not meet its objective of deterrence.

56 In the judgment in *ETI and Others*, to which the Court of Justice expressly referred in paragraph 144 of the judgment in *ThyssenKrupp Nirosta* v *Commission*, the Court of Justice held that the Commission was entitled to impute the infringement to a company which had not committed the infringement where the entity which had done so continued to exist as an economic operator on other markets (see *ETI and Others*, paragraph 45). The Court of Justice based that assessment on the fact that, at the time of the infringement, the companies concerned were held by the same public entity (*ETI and Others*, paragraph 50).

57 It must also be noted that the scope of the judgment in *ETI and Others* is not limited, contrary to the submissions of Versalis, to cases in which the entities concerned are controlled by a public authority. In paragraph 44 of that judgment, the Court of Justice stated that the fact that the decision to transfer an activity is taken not by individuals, but by the legislature in view of a privatisation, is equally irrelevant. The Court therefore took the view that there could be doubts as to the imputability of an infringement to the successor entity, where, at the very most, both were controlled by a public authority, but those doubts were dispelled by the Court. However, there can be no doubt as regards that imputability where that control, as in the present case, is exercised by a company under private law.

58 In the light of these factors, the General Court therefore did not err in law by holding that the Commission was entitled to impute all the infringements in question to Versalis.

59 With regard to the alleged failure to state reasons, the General Court has set out in detail, in paragraphs 120 to 131 of the judgment under appeal, the reasons why it considered the plea in law raised in that regard at first instance to be unfounded. The grounds for that judgment therefore leave no room for doubt as to the considerations on which the General Court based its decision on that point and, as a consequence, they enable the Court of Justice to carry out its review. It follows that the judgment under appeal is not vitiated by any failure to state reasons in that regard.

60 Since none of the arguments raised in support of the second ground of appeal has succeeded, that ground must be rejected as unfounded.

The third ground of appeal, alleging infringement of European Union law, an incorrect application of that law, a distortion of the evidence and a failure by the General Court to carry out a full judicial review

Arguments of the parties

61 According to Versalis, the General Court was wrong to reject the arguments alleging contradictions between three statements made by Bayer, through its legal advisor, Mr K., and the arguments put forward by Versalis concerning a statement made by Mr N., an employee of Dow. In that regard, the General Court took as its basis, in paragraphs 180 and 198 of the judgment under appeal, the principle that answers to the Commission's questions given on behalf of an undertaking as such carry more weight than those of an employee of the undertaking.

62 However, those arguments related, in each case, to contradictions between the statements made on behalf of the undertakings concerned. As is apparent in particular from the transcripts of the oral statements made during the administrative procedure, Mr N., who was a direct witness of the infringement in question and provided a description of the facts very different from the reconstructions made by the Commission in the contested decision, made his statements on behalf of Dow and not for himself. The General Court therefore erred in applying the 'principle of precedence' of the statements issued by the undertakings concerned themselves over those of the employees of those undertakings and, in consequence, rejected the exculpatory evidence adduced by Versalis of the number of facts to be taken into account in order to make assessments relating to the existence of that cartel.

63 Versalis is of the opinion that a fresh examination of those arguments is necessary in order to ascertain whether the contacts between competitors referred to in the contested decision actually constituted an cartel with a view to price fixing and market sharing or whether these were merely occasional infringements of European Union competition rules consisting, at most, of exchanges of commercially sensitive information. Versalis notes that certain facts supplied by the leniency applicants were already refuted in the judgments of the General Court in Cases T-44/07 *Kaučuk* v *Commission* [2011] ECR

II-4601; T-45/07 *Unipetrol* v *Commission* [2011] ECR II-4629; and T-53/07 *Trade-Stomil* v *Commission* [2011] ECR II-4657, delivered in the actions brought by three other companies to which the contested decision was addressed, namely Kaučuk, Unipetrol a.s. and Stomil, and led to the annulment in full of that decision in respect of those companies.

64 The Commission submits that the infringement in question was found on the basis of a number of pieces of evidence, of which only some have been disputed before the General Court. The fact that the General Court gave more evidential weight to a statement made by Bayer than to other statements arises from the fact that that statement was corroborated by other parts of the file, not disputed by Versalis. In any event, the statements referred to by Versalis are unlikely to contradict the other statements on which the contested decision is based and it is clear that those questions form part of the findings of fact, which is outside the scope of the review of the Court of Justice.

Findings of the Court

65 By its third ground of appeal, Versalis submits, in essence, that the General Court has erred in attributing to certain statements made on behalf of Bayer and Dow a particularly high probative value, while other statements, issued by the same undertakings and also made on their behalf, contradict those first statements.

66 It follows from settled case-law that the General Court thus has exclusive jurisdiction, firstly, to find the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, secondly, to assess those facts. Save where the evidence adduced before the General Court has been distorted, the appraisal of the facts therefore does not constitute a point of law which is subject to review by the Court of Justice (see, inter alia, *Legris Industries* v *Commission*, paragraph 51 and the case-law cited).

67 In the present case, Versalis does not base its allegations on any substantive inaccuracy of the findings of the General Court resulting from the documents in the file.

68 With regard to any distortion of the evidence, Versalis starts from the premiss, set out in paragraph 35 of its appeal, that its argument 'relates to' a distortion such as that committed by the General Court, in that it rejected important exculpatory evidence adduced by Versalis of the number of facts to be taken into account in order to make assessments relating to the existence of the cartel in question.

69 In that regard, it is clear from the wording of paragraphs 180 and 198 of the judgment under appeal that that premiss, according to which, in essence, the General Court failed to take account of exculpatory evidence adduced by Versalis because it placed more evidential value on certain of the statements made on behalf of Bayer and Dow, is incorrect. The General Court merely held, in paragraphs 180 and 198 of that judgment, that the statements of the employees of Bayer and Dow could not have 'more' evidential value than those made by those companies themselves.

70 In addition, as is apparent, in particular, from paragraphs 180 and 197 of the judgment under appeal, the General Court did not base its assessment of the facts solely on certain of the statements from Bayer and Dow but also on statements from Shell and an amount of documentary evidence.

71 It follows that, in reality, Versalis is criticising the actual assessment made by the General Court of the facts, the evidence and the arguments relating to them and thus complains that the General Court did not regard the argument which it put forward as sufficient to show that there was no infringement. Accordingly, Versalis is trying to obtain from the Court of Justice a fresh assessment of the facts found by the General Court and of the evidence put forward which, in accordance with the case-law cited in paragraph 66 of the present judgment, is outside the scope of the review of the Court of Justice.

72 Accordingly, the arguments put forward by Versalis in support of the third ground of appeal and the ground of appeal itself must be rejected as inadmissible.

The fourth ground of appeal, alleging an infringement of European Union law as regards the calculation of the fines and the classification of the infringement as 'very serious', a failure to state reasons and a failure to carry out a full judicial review

Arguments of the parties

73 Firstly, Versalis submits that the General Court was incorrect to hold, in paragraph 225 of the judgment under appeal, 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'. According to Versalis, it follows from the first paragraph of point 1A of the Guidelines and the case-law of the General Court that, in order to undertake the assessment of the gravity of an infringement, the Commission is required to take into consideration its actual impact on the market, where that impact appears to be measurable. The first Statement, in which the Commission made an exhaustive analysis in that regard, unlike the approach followed in the second Statement, and the studies annexed to the application show that, in the present case, that impact, which was limited, was in fact measurable.

74 Furthermore, it is apparent from the case-law of the General Court that horizontal price agreements can be regarded as merely 'serious' or justify the imposition of a reduced fine if, as, according to Versalis, in this case, their harmful effects on the market are limited.

75 In the alternative, Versalis submits that the Commission was required to state the other factors which it took into account to justify the increase of the basic amount of the fine beyond the applicable minimum of EUR 20 million laid down for 'very serious' infringements. In failing to note that point, the General Court therefore erred in law.

76 Secondly, in the submission of Versalis, the General Court did not rule 'reasonably and coherently' on the essential factors taken into consideration in order to assess the gravity of the infringement. The General Court merely affirmed that it was sufficient that the Commission had stated, in that regard, the intrinsically 'very serious' nature of the relevant conduct and failed to take into consideration the impact of the infringement on the market. Nevertheless, the appellant supplied data to the General Court for it to carry out a specific examination, and there it was required to carry out such an examination, to give its own assessment of those data and to draw the conclusions which followed upon the application for the reduction in the fine.

77 Thirdly, Versalis argues that the General Court distorted the facts in that it failed correctly to take into consideration important factors in the dispute. In paragraph 229 of the judgment under appeal, it held that 'there [was] nothing to support a finding that the Commission erred in the contested decision by estimating the value of the market concerned at "at least" EUR 550 million in 2001'. None the less, as is apparent from the documents in the file at first instance, the Commission drastically reduced the overall value of the market concerned and, in consequence, wrongly assumed that the cartel involved almost 90% of that market instead of 60% thereof, as it stated in the second Statement.

78 Contrary to the considerations in paragraph 229 of the judgment under appeal, according to which 'there [was] nothing to support a finding that an underestimate of that figure was detrimental to [Versalis]', the market shares held by the undertakings involved in an infringement form part of the factors potentially relevant for the assessment of the gravity of the infringement. In addition, the

market share concerned by the alleged cartel ought to be regarded, in any event, as lower still than that calculated in the contested decision, because of the exclusion from the group of members of that cartel of two of the undertakings initially materially involved, namely Kaučuk and Stomil.

79 The Commission responds that it is settled case-law that horizontal price agreements are very serious infringements of European Union law. It follows in particular from Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraph 75 and Case C-272/09 P *KME Germany and Others* v *Commission* [2011] ECR I-12789, paragraph 34 and the Guidelines that the actual impact of the infringement on the market is not a decisive factor for determining the level of fines but only one among a number of factors which, if it can be measured, can be taken into account. The fact that, in the second Statement, the Commission abandoned the analysis of the development of the prices on the markets in question referred to in the first Statement does not, however, mean that the cartel at issue did not affect the market, which the appellant has also failed to show.

80 In any event, in the view of the Commission, the identification of particular effects on the market constituted only an additional factor which enabled it to increase the starting amount for calculation of the fine.

81 Finally, the General Court was correct not to take into consideration the studies of the market produced by Versalis, given that the infringement in question could be regarded as 'very serious' and that the studies referred to were based on incomplete data. As regards the value of the market concerned, the Commission submits that the General Court in no way distorted the facts by estimating it at 'at least' EUR 550 million in 2001. For the purposes of assessing the gravity of the infringement, the Commission did not in any event base its findings on the market share controlled by the participating undertakings.

Findings of the Court

82 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 gravity 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 *KME Germany and Others* v *Commission*, paragraph 34 and Case C-389/10 P *KME Germany and Others* v *Commission* [2011] ECR I-13125, paragraph 44).

83 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 of 13 December 2012 in Case C-654/11 P *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 (*Prym and Prym Consumer* v *Commission*, paragraph 75).

84 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. The argument thus raised by Versalis 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).

85 Secondly, as regards the argument alleging that the General Court did not rule 'reasonably and coherently' on the essential factors taken into consideration in order to assess the gravity of the infringement, in that it did not examine the data provided by Versalis, did not give its own assessment of those data or draw the conclusions which followed upon the application for reduction of the fine, it is sufficient to state that, in paragraphs 219 to 233 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).

86 Thirdly, the argument that the General Court distorted the facts in holding that there was nothing to support a finding that the Commission erred by estimating the value of the market concerned 'at "at least" EUR 550 million in 2001' cannot succeed.

87 In that regard, it must be pointed out that Versalis has failed to show either that the finding of the General Court in paragraph 229 of the judgment under appeal, that 'there [was] nothing to support a finding that an underestimate of [the value of the market concerned] was detrimental to [Versalis]', is incorrect, or that that finding constitutes a distortion of the facts.

88 Versalis itself confirms, in paragraph 64 of the appeal, that the market shares held by the undertakings involved in an infringement form part of the factors 'potentially' relevant for the assessment of the gravity of the infringement. Nevertheless, the Commission, in fixing the different starting amounts for the fine for each undertaking involved in the infringement in question, took as its basis, in recitals 66 and 467 to the contested decision, precisely not the market shares held by those undertakings but the amounts of sales of BR and ESBR made by them. The argument put forward by Versalis that the Commission corrected its estimate of the market concerned in the contested decision compared to that referred to in the second Statement is, in consequence, ineffective.

89 Accordingly, since none of the arguments raised in support of the fourth ground of appeal is well founded, that ground of appeal must be rejected.

The fifth ground of appeal, alleging infringement of European Union law in that the twelfth plea in law before the General Court was rejected

The first part of the fifth ground of appeal, alleging an error of assessment and insufficient and contradictory reasoning as regards the adequacy of the reasoning, by the Commission, for the determination of the multiplier

– Arguments of the parties

90 Versalis complains that the General Court did not take adequate account of the failure by the Commission to indicate all the factors which enabled it to determine a multiplier equal to 2 as regards the companies controlled by Eni SpA and that it gave insufficient and contradictory reasons in that regard.

91 The General Court considered that the deterrence factor 'is assessed by taking into account a large number of factors and not merely the particular situation of the undertaking concerned', as the Court of Justice has already held in paragraphs 23 and 24 of the judgment in Case C-289/04 P *Showa Denko* v *Commission* [2006] ECR I-5859. However, the General Court contradicted itself when it held that the overall turnover and relative size of the undertakings taken into consideration by the Commission were sufficient and that 'it [was] not apparent from the contested decision that the Commission referred

explicitly to [other] factors', despite the fact that it held at the same time, in paragraphs 249 and 250 of the judgment under appeal, that the generic expression 'circumstances of the case' used in the text of the contested decision was not such as to create confusion as to the existence of other factors which the Commission took into account.

92 Versalis argues that when the General Court took the view in paragraph 250 of the judgment under appeal that 'the expression "circumstances of the case" [could] be understood as referring … to the overall turnover and relative size of the undertakings concerned', it did not state reasons sufficient in law for that assessment. In that regard, it is irrelevant that the Commission confirmed that fact at the hearing.

93 According to the Commission, the reasoning of the General Court set out in paragraph 250 of the judgment under appeal is clear and flawless. There is nothing in the contested decision to indicate that the Commission took into consideration factors other than the overall turnover and relative size of the undertakings concerned.

– Findings of the Court

94 Firstly, with regard to the reference to the judgment in *Showa Denko* v *Commission*, it is clear that Versalis has read that judgment incorrectly. The Court of Justice, in holding in paragraph 23 of that judgment that the deterrence factor is assessed by taking into account a large number of factors and not merely the particular situation of the undertaking concerned, referred to points 53 to 55 of the Opinion in that case of Advocate General Geelhoed, who noted, in essence, that the multiplier for deterrence can refer not only to 'general deterrence', in the sense of an action seeking to discourage all companies in general from committing the infringement in question, but also 'specific deterrence', to dissuade the specific defendant from infringing the rules again in the future. Thus, the Court of Justice uniquely confirmed, in that judgment, that the Commission is not required to restrict its assessment to factors relating only to the specific situation of the undertaking concerned.

95 However, the Court of Justice has not held that the Commission, or, if appropriate, the General Court, when setting a multiplier for deterrence, is in any event requiring to take account of factors other than the overall turnover and the relative size of the undertakings concerned.

96 In that context, secondly, it is appropriate to note that the criteria taken into account by the Commission in setting the multiplier for deterrence, namely the relative size of the undertakings concerned and their overall turnover, are clear from recitals 474 and 475 to the contested decision. As the General Court rightly held in paragraph 250 of the judgment under appeal, the fact that the Commission also referred to the 'circumstances of the case' cannot call that conclusion into question, given that it does not follow from the contested decision that the Commission expressly referred to factors other than those already mentioned and that the expression 'circumstances of the case' must be understood as referred precisely to the overall turnover and the relative size of the undertakings concerned.

97 As regards the reasoning relating to the criteria used to set the multiplier for deterrence, the view must be taken that the General Court has given detailed reasons for its assessments in that regard in paragraphs 242 to 250 of the judgment under appeal. That reasoning is not vitiated by any contradiction or error of law and clearly and unequivocally discloses the General Court's thinking, so that Versalis can be apprised of the justification for the decision taken and the Court of Justice can exercise its power of review (see, to that effect, inter alia, Case C-202/07 P *France Télécom* v *Commission* [2009] ECR I-2369, paragraph 29 and the case-law cited).

98 The first part of the fifth ground of appeal is, consequently, unfounded.

The second part of the fifth ground of appeal, alleging an error of assessment and insufficient and contradictory reasoning as regards the infringement of the principle of equal treatment by the Commission

– Arguments of the parties

99 Versalis submits that, since the Commission chose to apply an arithmetic method to calculate the fine, it is bound by the rules inherent thereto, save where there is express justification as regards all the members of a cartel. The General Court accepted, in Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, the existence of an infringement of the principle of equal treatment where a multiplier of 1.25 was set for one undertaking and a multiplier of 2.5 applied to another undertaking when the turnover of one undertaking was only the double of the other's turnover. That judgment clearly establishes the existence of a direct link between an increase in the turnover and an increase in the multiplier. In the judgment under appeal, the General Court departed from those principles.

100 According to the appellant, given the turnovers of the undertakings involved in the infringement in question, the General Court, in order to ensure compliance with the principle of equal treatment and the principle of proportionality, and at the same time to avoid the application of a multiplier higher than 3, should have applied a multiplier of 1.25 and not of 1.5 to Bayer and, in consequence, a lower multiplier to all the other undertakings concerned, namely a multiplier of 1.33 to Dow, of approximately 1.66 to EniChem and of 3 to Shell. The statement of the General Court in paragraph 251 of the judgment under appeal, that 'it is apparent from the contested decision that the multiplier chosen for EniChem was calculated on the basis of that chosen for Dow, not on the basis of that chosen for Shell' is ineffective, since the principle of equal treatment applies to all the members of the same cartel.

101 The Commission considers that the appellant does not show any error of law but rather suggests an alternative method of calculation, which would lead to a lower multiplier being applied to it. Since that request relates also to the fines imposed on other undertakings, it is inadmissible. Furthermore, the Commission refers to the judgment in Case C-283/98 P *Mo och Domsjö* v *Commission* [2000] ECR I-9855, paragraph 47, pursuant to which it cannot, by mechanical recourse to arithmetical formulas alone, divest itself of its own power of assessment. The choice not to apply multipliers higher than 3, with which Versalis appears to agree, entails a certain degression in the multipliers in relation to the size of the undertakings, from which degression, moreover, the appellant has greatly benefited.

– Findings of the Court

102 In accordance with settled case-law, the purpose of the multiplier for deterrence and the taking into consideration of the size and global resources of the undertaking in question resides in the impact sought on that undertaking, and the sanction must not be negligible in the light, particularly, of its financial capacity (see, to that effect, Case C-413/08 P *Lafarge* v *Commission* [2010] ECR I-5361, paragraph 104, and the order of 7 February 2012 in Case C-421/11 P *Total and Elf Aquitaine* v *Commission*, paragraph 82).

103 It is also settled case-law that the General Court, in the context of its unlimited jurisdiction, by mechanical recourse to arithmetical formulas based on the turnover alone of the undertaking concerned, divest itself of its own power of assessment as regards the fixing of fines (see, to that effect, inter alia, *Mo och Domsjö* v *Commission*, paragraph 47). The fixing of an appropriate fine cannot be the result of a simple arithmetical calculation based on turnover (see, to that effect, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 121, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 243).

104 When calculating the fines imposed on undertakings which have participated in a cartel, applying differential treatment to the undertakings concerned is therefore inherent to the powers held by the Commission in that respect. In the context of its discretion, the Commission is required to tailor the penalty according to the conduct and characteristics of those undertakings in order to ensure, in each case, the full efficiency of the European Union competition rules (judgment of 12 November 2009 in Case C-564/08 P *SGL Carbon* v *Commission*, paragraph 43 and the case-law cited).

105 On the basis of the case-law referred to in paragraph 102 of the present judgment, the Commission is primarily required to ensure that the penalty does not become 'negligible' in the light, inter alia, of the financial capacity of the undertakings concerned, which does not, however, require that an undertaking having a particularly high turnover compared to that of other members of a cartel must have a fine increased strictly according to the relation between its turnover and that of all the other undertakings involved in the cartel in question. If that were the case, the fines imposed on the largest undertakings in a cartel, increased on the basis of such an arithmetic method would indeed be likely to have a sufficiently deterrent effect, but would run the risk of being disproportionate to the gravity of the infringement actually committed, particularly where, as in the present case, there is a considerable difference between the turnovers of the undertakings concerned.

106 In the light of those considerations, it cannot be claimed that the General Court endorsed, in essence, the approach used by the Commission, which fixed a multiplier for deterrence of 2 in respect of Versalis and of 3 in respect of Shell, an approach which sought to avoid applying disproportionate multipliers for deterrence to the largest undertakings which, on the sole basis of the mathematical relation between their turnover and that of smaller undertakings, could in theory have had multipliers for deterrence imposed upon them which were appreciably higher.

107 Although Versalis submits, in that regard, that since the Commission chose to apply an arithmetic method to calculation a fine, it is bound by the rules inherent thereto, it suffices to note that, in the present case, the Commission did not choose such a method. That fact, confirmed, moreover, by the Commission at the oral hearing, is apparent, in essence, from the contested decision, in which the Commission expressly points out, in recital 474 thereto, that there were considerable differences between the turnovers of the undertakings concerned.

108 As regards the alleged inadequacy of the reasons given by the General Court, it must be held that it stated, in paragraph 251 of the judgment under appeal, all the relevant criteria for fixing the multiplier for deterrence. Although the General Court, with regard to an alleged unequal treatment of Versalis and Shell, merely states that 'the multiplier chosen for EniChem was calculated on the basis of that chosen for Dow, not on the basis of that chosen for Shell', that finding is, indeed, very concise, but must be read in conjunction with the clarification added by the General Court in the same paragraph, which states that 'the Commission has a discretion when determining the amount of the fine and is not required to apply any particular mathematical formula'.

109 In the light of the latter findings by the General Court, Versalis could not have been misled as to the essential considerations which led the General Court to endorse, in essence, the assessment of the deterrence made by the Commission, since those considerations, as follows from paragraphs 102 to 106 of the present judgment, prove to be correct. Nor, accordingly, can it be accepted that there was a lack of reasons in the judgment under appeal in that regard.

110 In consequence, the second part of the fifth ground of appeal must be considered unfounded and that ground of appeal must be rejected in its entirety.

The sixth ground of appeal, alleging that the General Court infringed and wrongly applied European Union law and vitiated the judgment under appeal with a lack of reasoning for its declaration of inadmissibility of certain annexes to the application initiating proceedings

Arguments of the parties

111 Versalis argues, in essence, that the rejection of its argument raised against Section 4.3 of the contested decision, headed 'Cartel meetings', as inadmissible is based on a legalistic comparison, by the General Court, of the names of the parties to that decision and the titles of the parties comprising 'Section E' of the application at first instance. Paragraphs 54 to 56 of that application referred to and summarised the content of the annexes thereto and the argument thus raised is apparent with sufficient clarity from the text of the application itself.

112 In addition, those annexes, of which particular parts are referred to in paragraphs 61, 62, 64, 94 and 121 of that application, do not contain any legal argument. The General Court therefore wrongly held that the elements in those annexes '[did] not satisfy the requirements laid down by Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure [of the General Court]' and that 'it [was] not for the Court to seek and identify in the annexes the pleas and arguments'. In any event, the judgment is vitiated by a lack of reasoning in that regard.

113 The considerations in paragraph 169 of the judgment under appeal, according to which Versalis cannot compensate for a deficiency in the application 'by introducing, at the reply stage, certain factual or legal data … and by referring to annexes … to the application or by providing new annexes to the reply'. However, the fact that the General Court declared those annexes inadmissible made it impossible for Versalis to put forward important exculpatory factors in support of its arguments.

114 In the submission of the Commission, with regard to the rejection of the annexes in question, the judgment under appeal follows the case-law of the General Court and the Court of Justice. The General Court carefully examined all the arguments put forward, even if succinctly and in summary, in the application. However, it was correct to reject the overall reference to the annexes made in paragraphs 54 to 56 of the application and a late attempt on the part of the application to compensate for deficiencies therein.

Findings of the Court

115 First of all, it must be borne in mind, as did the General Court in paragraph 161 of the judgment under appeal, that, by virtue of Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the General Court, each application is required to state the subject matter of the proceedings and a summary of the pleas in law on which the application is based. It is necessary, for an action to be admissible, that the basic matters of law and fact relied on be indicated, at least in summary form, coherently and intelligibly in the application itself. Whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provisions, must appear in the application. Similar requirements are called for, as the General Court pointed out in paragraph 162 of that judgment, where a submission is made in support of a plea in law.

116 Next, it is appropriate to note that the General Court, having regard to the rule thus recalled, rejected an argument relating to Section 4.3 of the contested decision, entitled 'Cartel meetings', as inadmissible. The General Court took the view that that argument was fully explained, in law and in fact, only in certain annexes to the application.

117 In that regard, it is clear, first of all, that Versalis, by its sixth ground of appeal, disputes, as is apparent from the wording thereof and from paragraph 98 of the appeal, the 'declaration of inadmissibility of certain annexes to the application initiating proceedings'. The General Court did not declare the annexes in question inadmissible, as the appellant claims, but an argument which appeared, among a number of other elements, only in those annexes. In that regard, Versalis has therefore read the judgment under appeal incorrectly.

118 The fact that Versalis reads the relevant part of the judgment under appeal in that way is corroborated by the potentially misleading argument, in paragraph 94 of the appeal, claiming that the rejection of that argument by the General Court is based on a 'legalistic' comparison of the names of the parties to that decision and the titles of the parties comprising the relevant section of its application at first instance. The General Court rejected that argument not on the ground that it was not correctly worded, but because it was not set out in the application itself. The fact that, in addition, there was no wording corresponding to the argument concerned in the application at first instance was pointed out by the General Court, in paragraph 167 of the judgment under appeal, merely for the sake of completeness.

119 Finally, with regard to paragraphs 54 to 56 of the application at first instance, set out in paragraph 165 of the judgment under appeal, and the notes referring thereto which, according to Versalis, referred to and summarised the content of the annexes in question, it is clear that it is not possible to deduce any specific legal or factual argument from the text of those paragraphs or notes. Consequently, the conclusion of the General Court that the main points of fact and law relating to Section 4.3 of the contested decision are not set out in the application is well founded.

120 It follows that the General Court did not err in law by declaring, in paragraph 170 of the judgment under appeal, that the argument put forward by Versalis related to Section 4.3 of the contested decision was inadmissible. Accordingly, the sixth ground of appeal must be rejected.

121 In consequence, since none of the grounds of appeal put forward by Versalis in support of its appeal is well founded, that appeal must be dismissed in its entirety.

The cross-appeal

The plea that there is no need to adjudicate on the cross-appeal

122 At the hearing, Versalis raised a plea that there was no need to adjudicate on the Commission's cross-appeal, on the ground that the Commission no longer had any interest in bringing proceedings. After delivery of the judgment under appeal, the Commission informed the appellant of its intention to reopen the inquiry in so far as it concerned a repeated infringement by Versalis, with a view to adopting a new Statement of Objections.

123 That plea is unfounded.

124 In that regard, it must be borne in mind, first of all, that a loss of interest in bringing proceedings during the course of a case does not, in principle, affect admissibility, but may lead the Court to rule that there is no further need to adjudicate (see, to that effect, order of 5 March 2009 in Case C-183/08 P *Commission* v *Provincia di Imperia*, paragraph 31).

125 In the present case, as the Commission rightly pointed out at the hearing, it has however retained its interest in bringing proceedings given that the pecuniary penalty imposed on Versalis by the contested decision, together with interest since the date of its adoption, continues to exist in the event that the Court of Justice should uphold the Commission's cross-appeal, which would not be the case if the

Commission were to adopt a fresh decision. Thus, in a similar situation, the Court of Justice has already held that the fact that the Commission prepares a draft regulation with a view to complying with a decision of the General Court does not imply, as such, that the Commission has lost any interest in bringing an appeal (see, to that effect, Case C-248/99 P *France* v *Monsanto and Commission* [2002] ECR I-1, paragraph 31).

126 In those circumstances, the plea raised by Versalis cannot be upheld.

The single ground of appeal

Arguments of the parties

127 In support of its cross-appeal, the Commission raises one 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.

128 The Commission recalls, first of all, 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. Versalis did not take a position in that regard during the procedure before the Commission. For the first time in its application at first instance, Versalis 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.

129 However, Versalis 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 SpA, 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 such circumstances that the same undertaking had already been censured for the same type of infringement.

130 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.

131 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*.

132 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.

133 Versalis argues, firstly, that the Commission's arguments based, inter alia, on the case which gave rise to the judgment in *Versalis and Eni* v *Commission* are purely factual. Those arguments did not appear either in the contested decision or in the documents produced by the Commission before the General Court and are therefore inadmissible.

134 Secondly, the appellant points out that it was formed in 1989, many years after the end of the conduct penalised by the Polypropylene and PVC II decisions and after the transfer of the activities concerned to unrelated companies or their allocation to joint undertakings. There is therefore no economic or operational continuity between those activities and the activity transferred to the appellant on 1 January 2002 by a company named 'EniChem SpA', which is not the company EniChem SpA to which the PVC II decision was addressed. The parent company of the group was, during the period which was the subject matter of the preceding decisions, Ente Nazionale Idrocarburi, a public body and not Eni SpA.

135 Thirdly, Versalis submits that the fact that the Commission raised the merely theoretical possibility of imputing, at that time, infringements which were the subject matter of the Polypropylene and PVC II decisions to that parent company amounts to creating an irrebuttable presumption that a parent company is liable for the past conduct of its wholly owned subsidiaries. In addition, the Commission ought to have shown, in accordance with the criterion applied by the Commission when adopting those decisions, that the parent company in question exercised a decisive influence over Anic SpA and EniChem SpA, which it failed to do either in those decisions or in the contested decision.

136 In addition, Eni SpA was not regarded as liable for the conduct of Anic SpA and EniChem SpA at the time of the adoption of the preceding decisions and has therefore never given its views in that regard.

137 Fourthly, with regard to its attitude and that of Eni SpA during the administrative procedure, Versalis submits that, in particular at the hearing, it did indeed challenge the imputation of repeated infringements. In any event, it was not obliged to submit observations on the second Statement. The judgment in *Portugal* v *Commission* is irrelevant in that context, since the Court of Justice confirmed in that judgment that the Commission may state summary reasons only where they concern subjects in respect of which the opposing party has not supplied any indications despite being expressly obliged to do so. There is no such obligation in the present case.

138 Fifthly, as regards the alleged infringement of the *audi alteram partem* rule, Versalis points out that its arguments were not submitted out of time and that the defect penalised by the General Court related to the substantive argument, so that it was not possible to remedy it during the proceedings before the Court. In any event, the reasons for a decision must be communicated to the party concerned at the same time as the decision having adverse effect and cannot be brought into order during the proceedings before the European Union courts. The Commission's argument is therefore unfounded.

Findings of the Court

139 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).

140 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).

141 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).

142 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 state sufficient proper reasons for that assertion.

143 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.

144 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 Versalis, which is not among the addressees of the Polypropylene decision or the PVC II decision, was involved in those decisions.

145 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 299 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 Versalis 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.

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

147 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, as is apparent from the case-law cited in paragraph 141 of the present judgment, the Commission was required to state sufficient reasons when the contested decision was adopted. 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 supplied to the General Court would have been likely to affect the outcome of the dispute before that Court in any way.

148 With regard to the argument that Versalis or Eni SpA, 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 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.

149 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 Versalis at EUR 272.25 million.

150 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

151 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.

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

153 As regards the cross-appeal, since Versalis 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 Versalis SpA to pay the costs of the main appeal;

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

[Signatures]