Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

27 September 2012*

(Competition — Agreements, decisions and concerted practices — Netherlands market in road pavement bitumen — Decision finding an infringement of Article 81 EC — Imputability of the unlawful conduct — Fines — Cooperation during the administrative procedure — Significant added value — Equal treatment)

In Case T-347/06,

Nynäs Petroleum AB, established in Stockholm (Sweden),

Nynas Belgium AB, established in Stockholm,

represented by A. Howard, Barrister, M. Dean and D. McGowan, Solicitors,

applicants,

v

European Commission, represented by F. Castillo de la Torre, acting as Agent, and by L. Gyselen, lawyer,

defendant,

APPLICATION, principally, for annulment of Commission Decision C(2006) 4090 final of 13 September 2006 relating to a proceeding under Article 81 [EC] (Case COMP/F/38.456 — Bitumen (Netherlands)) and, in the alternative, for reduction of the fine imposed on the applicants by that decision,

THE GENERAL COURT (Sixth Chamber),

composed of M. Jaeger, President, N. Wahl and S. Soldevila Fragoso (Rapporteur), Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 15 June 2011,

gives the following

* Language of the case: English.

Judgment

The facts

1 The Nynas group's activity is essentially the production and marketing of bitumen and naphthenic oils. Nynäs Petroleum AB ('Nynäs AB'), the parent company of the Nynas group, which is located in Sweden, carried on its activities in the bitumen sector in continental Europe through the Belgian company Nynas NV/SA ('Nynas NV'), which it wholly owned and which produced bitumen in a refinery located in Antwerp (Belgium) and marketed some of it in the Netherlands. On 14 February 2003, Nynas NV's bitumen marketing activities in Europe were transferred to Nynas Belgium AB ('Nynas Belgium'), a Swedish subsidiary wholly owned by Nynäs AB. On 31 December 2007, Nynas Belgium's assets were transferred to Nynas NV, but Nynas Belgium continues to hold 99.99% of the shares in that company.

2 By letter of 20 June 2002, British Petroleum ('BP') informed the Commission of the European Communities of the presumed existence of a cartel with regard to the supply of road pavement bitumen in the Netherlands and submitted a request for immunity from fines in accordance with the Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3, 'the 2002 Leniency Notice').

3 On 1 and 2 October 2002, the Commission carried out surprise inspections, in particular at the Belgian premises of Nynas NV. The Commission sent requests for information to several companies, including Nynas NV, on 30 June 2003. As Nynas Belgium had informed it that it had bought Nynas NV's bitumen operation, the Commission sent a new request for information on 23 July 2003, to which Nynas Belgium replied on 2 October 2003. The Commission sent an additional request for information on 10 February 2004, to which Nynäs AB replied on 25 March 2004, and a final request on 5 April 2004, to which, on that occasion, Nynas Belgium replied on 22 May 2004, supplementing it on 19 October 2004.

4 On 18 October 2004, the Commission initiated a proceeding and adopted a statement of objections, which was sent on 19 October 2004 to several companies, including the applicants, Nynäs AB and Nynas Belgium. On 24 May 2005, the applicants replied separately to that statement of objections.

5 Following the administrative hearing on 15 and 16 June 2005, the applicants provided clarifications of their statements concerning ExxonMobil, a bitumen supplier on which the Commission imposed no fine; these had been used in the statement of objections and had been contested by several parties to that hearing. Those clarifications were notified to all the parties to the hearing, giving rise to a number of responses.

6 On 13 September 2006, the Commission adopted Decision C(2006) 4090 final relating to a proceeding under Article 81 [EC] (Case COMP/F/38.456 — Bitumen (Netherlands), 'the contested decision'), a summary of which was published in the *Official Journal of the European Union* of 28 July 2007 (OJ 2007 L 196, p. 40), and which was notified to the applicants on 26 September 2006.

7 The Commission stated, in the contested decision, that the companies to which it was addressed had participated in a single and continuous infringement of Article 81 EC, by regularly fixing collectively, for the periods indicated, for sales and purchases of road pavement bitumen in the Netherlands, the gross price, a uniform rebate on the gross price for participating road builders and a smaller maximum rebate on the gross price for other road builders.

8 The applicants were found guilty of that infringement, for the period from 1 April 1994 to 15 April 2002, and a fine of EUR 13.5 million was imposed jointly and severally upon them.

9 As regards the calculation of the amount of the fines, the Commission described the infringement as very serious, given its nature, even though the relevant geographic market was limited (recital 316 of the contested decision).

10 In order to take account of the specific weight of the unlawful conduct of each of the undertakings involved in the cartel and of its real impact on competition, the Commission made a distinction between the undertakings concerned according to their relative importance on the market concerned, measured by their market share, and grouped them into six categories.

11 On this basis, the Commission applied a starting amount of EUR 7.5 million for the applicants (recital 322 of the contested decision).

12 As regards the duration of the infringement, the Commission considered that the applicants had committed an infringement of long duration, namely an infringement of more than five years, and took as a basis a total period of eight years, from 1 April 1994 to 15 April 2002, thus increasing the starting amount by 80% (recital 326 of the contested decision). The basic amount of the fine, determined according to the gravity and duration of the infringement, was therefore fixed at EUR 13.5 million for the applicants (recital 335 of the contested decision).

13 The Commission did not find any aggravating circumstances with regard to the applicants. It considered, moreover, that no mitigating circumstances could be accepted, as the possible existence of a third level of activity within the cartel, from which the Nynas undertaking ('Nynas') was excluded, could not be taken into account in that respect (recital 354 of the contested decision). Lastly, it rejected their request that their effective cooperation, namely the responses to the requests for information, the acknowledgement of the facts and the introduction of relevant disciplinary and compliance measures, should be regarded as an attenuating circumstance (recitals 367 to 371 of the contested decision).

14 The Commission did not apply the 2002 Leniency Notice, taking the view that the information provided by the applicants did not constitute significant added value (recitals 389 to 393 of the contested decision).

Procedure and forms of order sought

15 By application lodged at the Registry of the Court on 4 December 2006, the applicants brought the present action.

16 Acting upon a report of the Judge-Rapporteur, the Court (Sixth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of its Rules of Procedure, put written questions to the parties. The parties replied to those questions within the prescribed period.

17 The parties presented oral argument and replied to the Court's oral questions at the hearing on 15 June 2011.

18 As a member of the Sixth Chamber was unable to sit, the President of the General Court designated himself to complete the Chamber pursuant to Article 32(3) of the Rules of Procedure.

19 By order of 18 November 2011, the General Court (Sixth Chamber), in its new composition, reopened the oral procedure and the parties were informed that they could present oral argument at a further hearing.

20 By letters of 25 and 28 November 2011 respectively, the Commission and the applicants informed the General Court that they were waiving their right to be heard afresh.

21 Consequently, the President of the General Court decided to close the oral procedure.

22 The applicants claim that the Court should:

— annul Article 1 of the contested decision in so far as it imputes joint and several liability to Nynas AB;

— annul Article 2 of the contested decision in so far as it imposes a fine of EUR 13.5 million on them or, in the alternative, reduce that fine as appropriate; and;

— order the Commission to pay the costs.

23 The Commission contends that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Law

1. *The claims for annulment of Article 1 of the contested decision*

24 In support of their claims for annulment of Article 1 of the contested decision, the applicants put forward a single plea in law, alleging manifest errors of assessment and an error of law made by the Commission by holding Nynäs AB liable for its subsidiary Nynas NV.

The error of law

Arguments of the parties

25 The applicants submit that the Commission wrongly applied the case-law on holding a parent company liable for the actions of a subsidiary (Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraphs 27 to 30), and that a parent company must actually have been actively involved in the unlawful conduct of its subsidiary for it to be held liable for that conduct.

26 However, in reply to a written question put by the Court relating to the consequences to be drawn from the judgments in Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, and Case C-90/09 P *General Química and Others* v *Commission* [2011] ECR I-1, the applicants abandoned the arguments relating to the interpretation of the case-law arising from *Stora Kopparbergs Bergslags* v *Commission*, paragraph 25 above, of the first part of their single plea for annulment and this was duly noted by the Court. However, they maintained their arguments relating to the rules governing rebuttal of the presumption that a parent company in fact exercises decisive influence over its wholly-owned subsidiary.

27 Thus, the applicants point out that a presumption that a parent company exercises a decisive influence over the conduct of its subsidiaries may be rebutted as soon as the parent company establishes that its subsidiary was acting independently. The Commission wrongly interpreted the case-law by requiring of

a parent company that it establish that it did not use its power to exercise a decisive influence over its subsidiary and that that subsidiary took all its strategic decisions without reference to it. Such proof is impossible to provide in practice and is incompatible with the principle of personal liability (Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 63).

28 The applicants submit that a parent company is always required to exert an influence, albeit minimal, on a subsidiary. They state that, in order to protect shareholders and third parties, Swedish law thus requires parent companies to fulfil certain supervisory requirements over their subsidiaries, such as approving transactions over a certain threshold, complying with internal reporting obligations and preparing consolidated accounts. It is therefore for the Commission to assess whether the parent company has exercised a decisive influence over the subsidiary's conduct on the relevant market, and not in a general and abstract manner.

29 The Commission rejects all the applicants' arguments.

Findings of the Court

30 The Commission found, in the contested decision (recitals 252 to 264), that, although Nynas NV was the legal person which participated directly in the cartel, Nynäs AB, as parent company with 100% ownership of Nynas NV, had been capable of exercising decisive influence over its commercial policy during the period of infringement.

31 It should be noted at the outset that European Union ('EU') competition law refers to the activities of undertakings (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 59) and that the concept of undertaking within the meaning of Article 81 EC includes economic entities which consist of a unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision (see Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 54 and the case-law cited). The concept of an undertaking, in the same context, must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 40).

32 The anti-competitive conduct of an undertaking can be imputed to another undertaking where it has not decided independently upon its own conduct on the market, but carried out, in all material respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them (Case C-294/98 P *Metsä Serla and Others* v *Commission* [2000] ECR I-10065, paragraph 27; 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 117; and *Akzo Nobel and Others* v *Commission*, paragraph 26 above, paragraph 58). Thus, the conduct of a subsidiary may be imputed to the parent company where the subsidiary does not decide independently upon its own conduct in the market but carries out, in all material respects, the instructions given to it by the parent company, since those two undertakings form an economic entity (Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, paragraphs 133 and 134).

33 It is therefore not because of a relationship between the parent company and its subsidiary in instigating the infringement or, *a fortiori*, because the parent company is involved in the infringement, but because they constitute a single undertaking in the sense described above that the Commission is able to address the decision imposing fines to the parent company of a group of companies. It must be borne in mind that EU competition law recognises that different companies belonging to the same

group form an economic entity and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not decide independently upon their own conduct on the market (Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 290).

34 In the specific case where a parent company has a 100% shareholding in a subsidiary which has committed an infringement, the parent company can exercise a decisive influence over the conduct of the subsidiary and, moreover, there is a rebuttable presumption that the parent company does in fact exercise such a decisive influence (see *Akzo Nobel and Others* v *Commission*, paragraph 26 above, paragraph 60 and the case-law cited).

35 In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to avail itself of the presumption that the parent company exercises a decisive influence over the subsidiary's commercial policy. The Commission will then be able to regard the parent company as jointly and severally liable for payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (*Stora Kopparbergs Bergslags* v *Commission*, paragraph 25 above, paragraph 29, and *Akzo Nobel and Others* v *Commission*, paragraph 37 above, paragraph 61).

36 The applicants submit that the Commission's interpretation of the presumption that a parent company in fact exercises decisive influence over its wholly-owned subsidiary makes it impossible to rebut that presumption.

37 It is however apparent from the case-law of the Court of Justice that, in order to rebut the presumption that a parent company which owns 100% of the capital of its subsidiary in fact exercises a decisive influence over that subsidiary, it is for the parent company to put before the Commission and then, where relevant, the Courts of the European Union, any evidence which in its view is apt to demonstrate that they do not constitute a single economic entity relating to the organisational, economic and legal links between its subsidiary and itself, which may vary from case to case and cannot therefore be set out in an exhaustive list (*Akzo Nobel and Others* v *Commission*, paragraph 26 above, paragraph 65, and *General Química and Others* v *Commission*, paragraph 26 above, paragraphs 51 and 52). Contrary to the applicants' submission, it is therefore a rebuttable presumption which it is for the applicants to rebut.

38 The applicants further submit that the obligations by which a parent company is constrained under national law make any rebuttal of the presumption that a parent company in fact exercises decisive influence over its subsidiary impossible. However, the Court would point out that a company may not rely on national law to shield itself from EU rules, since terms used in EU law must be uniformly interpreted and implemented throughout the European Union (Case 49/71 *Hagen* [1972] ECR 23, paragraph 6). In any event, in the light of all the principles referred to previously concerning the existence of such a presumption and the criteria which make its rebuttal possible, it is apparent that the considerations relating to the obligations imposed on parent companies by Swedish law regarding their subsidiaries, which are intended to establish close supervision over the latter, in order to protect shareholders and third parties, strengthen the presumption applied by the Commission with regard to Nynäs AB in relation to the control exercised over its subsidiary Nynas NV.

39 Lastly, the applicants submit that the interpretation adopted by the Commission of the presumption that a parent company in fact exercises decisive influence over its wholly-owned subsidiary is incompatible with the principle of personal liability. The applicants refer to the case-law arising from *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, paragraph 27 above, in accordance with which a natural or legal person may be penalised only for acts imputed to it individually. They submit that, by virtue of that principle, the Commission is not entitled to require a parent company

to establish that it did not use its power to exercise a decisive influence over its subsidiary and that that subsidiary took all its strategic decisions without reference to it in order not to impute to the parent company liability for the unlawful conduct of its subsidiary.

40 However, according to the case-law, the fact that the parent company of a group which exercises decisive influence over its subsidiaries can be held jointly and severally liable for their infringements of competition law does not in any way constitute an exception to the principle of personal responsibility, but is the expression of that very principle, since the parent company and the subsidiaries under its decisive influence are collectively a single undertaking for the purposes of EU competition law and responsible for that undertaking and, if that undertaking intentionally or negligently infringes the competition rules, that gives rise to the collective personal responsibility of all the principals in the group structure (see *Akzo Nobel and Others* v *Commission*, paragraph 26 above, paragraph 77 and the case-law cited). Thus, the principle of personal responsibility is recognised by the case-law (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 145; Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 78; and Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 39), but it applies to undertakings rather than companies. This complaint must therefore also be rejected.

41 It follows from all the foregoing that the Commission did not err in law in imputing to Nynäs AB liability for the infringement committed by its subsidiary Nynas NV.

The manifest errors of assessment made in the present case by imputing liability to Nynäs AB

Arguments of the parties

42 In the first place, according to the applicants, the Commission made a manifest error of assessment by overlooking the considerable commercial autonomy of the subsidiaries within their group. Their organisation chart shows that the commercial operations and the strategic development of the 'Bitumen' division in the Netherlands came under Nynas NV and that its sister companies active in bitumen in Europe had transferred important policy and operational decisions to it. The parent company was responsible only for approving certain exceptional operations, without affecting the autonomy of Nynas NV.

43 In the second place, the Commission manifestly erred in its assessment of the conduct of Nynäs AB and of its subsidiary Nynas NV on the relevant market. Thus the Commission overlooks, first, the fact that the role of Nynas NV was exclusively limited to negotiating contracts and appointing staff on the bitumen market in the Netherlands and, second, the function of Nynäs AB was clearly limited to questions of strategic management, overall risk and coordination of the group, and it had no role on the relevant market. The Commission was thus manifestly wrong to attribute a decisive role to Nynäs AB in setting objectives and strategy on that market, while the thresholds above which it had to intervene in the decisions of Nynas NV were very high and the transactions it had to approve were exceptional. The Commission did not, moreover, produce any factors to assess the role of Nynäs AB in relation to the anti-competitive conduct at issue of Nynas NV.

44 In the third place, the elements which the Commission relies upon in taking the view that Nynäs AB in fact exercised a decisive influence over Nynas NV are very formalistic. Thus it applies undue weight to elements such as the existence of reporting mechanisms between Nynas NV and Nynäs AB, consolidated accounts and the participation of members of the board of Nynas NV in the executive management of Nynäs AB. It does not moreover take account of the fact that the functions of the chief business executive ('the CBE') of the bitumen division of Nynas NV were limited to reporting and financial performance analysis for the executive committee of Nynäs AB.

45 The Commission disputes all the applicants' arguments.

Findings of the Court

46 In order to respond to the complaints alleging that the Commission made manifest errors of assessment by imputing liability to Nynäs AB for the infringement committed by Nynas NV, it is necessary to determine whether the applicants have adduced evidence capable of rebutting the presumption that Nynäs AB exercised decisive influence over Nynas NV.

47 In recitals 252 to 264 of the contested decision, the Commission states that it was entitled to apply the presumption that Nynäs AB in fact exercised decisive influence over Nynas NV during the period 1 April 1994 to 15 April 2002 on account of the 100% shareholding structure between those companies. It then took the view that several elements relating to the hierarchical structure of the group reinforced that presumption. Thus, first of all, although Nynas NV carries out the function of a European main office within the group for the bitumen business, it does not however have authority, over a specific threshold, to take certain decisions without referring to Nynäs AB (capital expenditure, negotiation and conclusion of agreements, granting of credit to customers and scrapping of plant). Moreover, the parent company, through its Executive Committee, is responsible for determining the overall objectives, strategies and direction for the group, as well as high-level decisions in relation to the group budget, its major projects and functional co-ordination. In addition, it is stated that the parent company is organised vertically, and delegates some of its powers to its subsidiaries, by means of committees. Lastly, the Commission states that two of the three members of the board of Nynas NV are part of Nynäs AB, in which they hold the positions of Managing Director and 'Chief Refining Officer', and that the third member of the board of Nynas NV is Nynas NV's own managing director, who also sits on the board of Nynäs AB.

– The autonomy of Nynas NV's commercial policy

48 As noted in paragraph 37 above, although, according to the case-law, the assessment of the influence of the parent company over its subsidiary is not limited to an examination of the commercial policy stricto sensu, the Courts of the European Union none the less retain the right to take account of matters relating to commercial policy in order to assess whether the two companies form a single economic entity.

49 It is apparent inter alia from the 'organisation book' of the Nynas group that its structure is very integrated and hierarchical. The group is organised by activity, in three divisions, each one being managed by a CBE. Nynas NV is thus the division responsible for the day-to-day operational and commercial management of all the subsidiaries in the 'Bitumen' division.

50 Overall coordination of the divisions is carried out by the President of Nynäs AB, whereas day-to-day coordination of all the subsidiaries is carried out by committees specialised by function ('corporate functional managers' and 'coordinators'), in particular in commercial matters, which operate at the group level. Those committees, most of which report directly to the parent company whilst others are hosted directly by the subsidiaries, are required to send all information directly to the President and the Vice-President of the parent company. The CBEs of each division are permanent members of the executive committee of the parent company Nynäs AB, that committee consisting, moreover, of the President and Vice-President of Nynäs AB. That executive committee is responsible for setting monthly the objectives, strategy, direction and high-level budgetary decisions of the group, its large-scale projects and its functional coordination.

51 Although the applicants submit that the CBEs send to the parent company only a monthly analysis of their financial performances, without informing it about day-to-day decisions relating to purchases and sales, examination of the organisation of the group none the less shows that the parent company is closely and regularly involved in the business of its subsidiaries, by means of the executive committee and the specialist committees. Indeed, the applicants have not produced any elements capable of

proving that Nynäs AB did not use its power to exercise a decisive influence over Nynas NV. Moreover, the fact that Nynas NV largely conducted an autonomous commercial policy, below a certain threshold, does not in itself undermine the finding that, as a 100% shareholder, and in the light of the corporate structure of the group, Nynäs AB in fact exercised decisive influence over Nynas NV.

52 The applicants moreover submit that the fact that Nynas NV was responsible for the day-to-day operational and commercial management of all the subsidiaries in the 'Bitumen' division, those subsidiaries having delegated to Nynas NV their powers to adopt fundamental policy and operational decisions pursuant to a 'management service agreement', shows that Nynas NV's functions went beyond the usual functions of a subsidiary and that it therefore enjoyed very extensive autonomy. However, the Courts of the European Union have recognised that, where a company supervises a sister company involved in unlawful conduct, the Commission is entitled to presume that it is the common parent company which entrusted those supervisory powers to that sister company (see, to that effect, Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraph 129). Thus, the fact that Nynas NV exercised some control over a number of other companies in the group within the bitumen sector, although these were not its own subsidiaries, is further evidence of the existence of reporting lines between Nynäs AB and Nynas NV, since the control exercised by Nynas NV over its sister companies could only have been delegated to it by the parent company.

– The conduct of the parent company on the relevant market and its role in the infringement

53 The applicants submit that the Commission ought to have relied on evidence enabling the role of the parent company on the anti-competitive conduct in question to be assessed in order to find that the parent company could be held liable for the infringement committed by its subsidiary. However, as noted in paragraph 33 above, it is settled case-law that the control exercised by the parent company over its subsidiary does not necessarily have to have a connection with the unlawful conduct (*Akzo Nobel and Others* v *Commission*, paragraph 26 above, paragraph 59, and *General Química and Others* v *Commission*, paragraph 26 above, paragraphs 38, 102 and 103). Moreover, the Court would point out that the Commission was not required to adduce evidence in addition to Nynäs AB's 100% ownership of its subsidiary in order to avail itself of the presumption that the parent company exercised a decisive influence over the subsidiary's commercial policy. It is not therefore necessary to examine whether Nynäs AB in fact exercised influence over Nynas NV's unlawful conduct.

– The excessively formalistic nature of the elements taken into account

54 The applicants submit that the Commission applies undue weight to elements such as the existence of reporting mechanisms between Nynas NV and Nynäs AB, consolidated accounts and the participation of members of the board of Nynas NV in the executive management of Nynäs AB.

55 However, as was recalled in paragraph 37 above, according to the case-law, when assessing whether there is a single economic entity between the parent company and its subsidiary, the Courts of the European Union must take into account all the evidence adduced by the parties relating to the organisational, economic and legal links between them, the nature and importance of which may vary according to the specific features of each case (*Akzo Nobel and Others* v *Commission*, paragraph 26 above, paragraph 65). Although certain circumstances, such as consolidation of the accounts at the group level, are irrelevant (*General Química and Others* v *Commission*, paragraph 26 above, paragraph 108), other elements, which are not alone capable of establishing the existence of a single economic entity, may none the less constitute as a whole a body of sufficient consistent evidence.

56 It is therefore necessary to take account of elements which make it possible to establish the existence of strong hierarchical links between the two companies, such as, in the present case, the reporting mechanisms between the subsidiary and the parent company and the crossover of board members of

one company in the decision-making bodies of the other company. Moreover, the fact that the contested decision incorrectly mentions the presence of the CBE of Nynas NV on the board of Nynäs AB, whereas that person sat on the executive committee of Nynäs AB, does not affect the legality of the contested decision since it is apparent from the documents before the Court that the executive committee of Nynäs AB plays a fundamental role in the high-level decisions of the group (see paragraph 50 above).

57 It follows from the foregoing that the evidence submitted by the applicants is not sufficient to rebut the presumption that, by holding a 100% stake in Nynas NV, Nynäs AB in fact exercised decisive influence over Nynas NV's policy. The Court therefore concludes that Nynäs AB constitutes with Nynas NV an undertaking within the meaning of Article 81 EC, without there being any need to ascertain whether Nynäs AB exercised influence over the conduct in question. The first plea must therefore be rejected in its entirety.

58 It follows from all the foregoing that the claims in the application for the annulment of Article 1 of the contested decision must be rejected.

2. *The claims for annulment of Article 2 of the contested decision*

59 The applicants adduce two pleas in law in support of their claims for annulment of Article 2 of the contested decision. The first plea alleges manifest errors of assessment, errors of law and infringement of the principle of equal treatment committed by the Commission in its application of the provisions of Section B of the 2002 Leniency Notice and the second plea aims to establish that the Commission should have taken account of their effective cooperation outside the scope of the provisions of the 2002 Leniency Notice, in accordance with Section 3 of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3; 'the Guidelines').

The refusal to grant a reduction on the basis of the provisions of Section B of the 2002 Leniency Notice

60 According to point 20 of the 2002 Leniency Notice, '[u]ndertakings that do not meet the conditions [to obtain exemption from a fine] under section A above may be eligible to benefit from a reduction of any fine that would otherwise have been imposed'. Point 21 of the Leniency Notice states that, '[i]n order to qualify, an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence'. Furthermore, point 22 of the 2002 Leniency Notice states '[t]he concept of "added value" refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the facts in question', that, '[i]n this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established' and that, '[s]imilarly, evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance'.

61 The Commission indicated in the contested decision that, although Nynas had not submitted a formal application for a reduction of its fine under the 2002 Leniency Notice, it had provided detailed information in its reply of 2 October 2003 to the Commission's request for information. That information included inter alia a precise 9-page account of the system of cartel meetings which it had not been requested to provide and therefore had significant added value. However, the Commission found that that evidence did not strengthen its ability to prove the facts because on that date it already had in its possession the documents seized during inspections, BP's and Kuwait Petroleum's leniency applications and certain replies to its first set of requests for information sent on 30 June 2003. Moreover, that evidence did not enable the Commission to prove any new important features of

the cartel, in particular because Nynas reformulated certain statements regarding ExxonMobil. The Commission therefore found that, since Nynas had not provided information with significant added value, it could not grant it a reduction of its fine under the 2002 Leniency Notice (recitals 389 to 393 of the contested decision).

62 According to the case-law, the Commission has a certain margin of assessment in the matter and judicial review is limited to ascertaining whether there has been a manifest error of assessment. It is settled case-law that cooperation in the investigation which does not go beyond that which the undertakings are already obliged to provide under Article 18(3) and (4) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) does not warrant a reduction in the fine (Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraphs 341 and 342, and Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 260). On the other hand, such a reduction is warranted where the undertaking has provided information well in excess of that which the Commission may require under Article 18 of Regulation No 1/2003 (*Cascades* v *Commission*, paragraphs 261 and 262, and Case T-230/00 *Daesang and Sewon Europe* v *Commission* [2003] ECR II-2733, paragraph 137). In order to justify reduction of a fine for cooperation under the 2002 Leniency Notice, the conduct of an undertaking must facilitate the Commission's task of finding and bringing to an end infringements of competition rules and reveal a true spirit of cooperation. Therefore, the Court must first consider whether the Commission disregarded the extent to which the cooperation of the undertakings in question exceeded what was required under Article 18 of Regulation No 1/2003. In that connection, the Court should undertake a comprehensive review concerning, in particular, the extent to which the undertakings' rights of defence limit their obligation to reply to requests for information. Second, the Court should verify, as in the present case, whether the Commission correctly appraised, in the light of the 2002 Leniency Notice, the extent to which the cooperation provided helped to establish the infringement. Within the limits laid down by that notice, the Commission has a discretion in assessing whether the information or documents voluntarily provided by the undertakings have facilitated its task and whether it is appropriate to grant a reduction to an undertaking under that notice. That assessment is the subject of limited review by the Court (Case C-511/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-5843, paragraph 152; Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraphs 529 to 532, confirmed in Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraph 249).

63 Moreover, whilst the Commission is required to state the reasons for which it considers that information provided by undertakings under the 2002 Leniency Notice constitutes a contribution which does or does not justify a reduction of the fine, it is incumbent on undertakings wishing to contest the Commission's decision in that regard to show that, in the absence of such information provided voluntarily by the undertakings, the Commission would not have been in a position to prove the essential elements of the infringement and therefore adopt a decision imposing fines (*Erste Group Bank and Others* v *Commission*, paragraph 62 above, paragraph 297).

64 When applying the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the 1996 Leniency Notice), the Courts of the European Union have held that the grant of a reduction in the amount of the fine under that notice requires, in particular, that the undertaking concerned has been the first to adduce decisive evidence of the cartel's existence and that, although that evidence need not be sufficient in itself to establish the cartel's existence, it must none the less be decisive for that purpose. It must therefore not be simply an indication as to the direction which the Commission's investigation should take but must be material which may be used directly as principal evidence supporting a decision finding an infringement (Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraphs 492, 493, 517, 518, 521, 522, 526 and 568, and Case T-26/02 *Daiichi Pharmaceutical* v *Commission* [2006] ECR II-713, paragraphs 150, 156, 157 and 162).

65 As provided in points 7, 21 and 22 of the 2002 Leniency Notice, the Commission must assess each undertaking's actual contribution, in terms of quality and timing, to the establishment of the infringement and the concept of 'significant added value' refers to the extent to which the evidence provided strengthens, by its nature and its level of detail, the Commission's ability to prove the facts constituting the infringement. The Commission therefore ascribes particular value to evidence which might enable it, together with other evidence already in its possession, to establish the existence of a cartel or to evidence that enables it to corroborate evidence that exists already, or to evidence that has direct consequences on the gravity or duration of the cartel. On the other hand, contrary to the applicants' submission, the decisive criterion is not limited to whether an undertaking 'facilitated the Commission's task'. The Court would point out that the case-law on which the applicants seek to rely in that regard (Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 331) does not concern the application of the 2002 Leniency Notice and, in any event, states merely that an undertaking which expressly states that it is not contesting the factual allegations on which the Commission bases its objections may be regarded as having facilitated the Commission's task and may, on that basis, be granted a reduction of its fine.

66 Moreover, the continuous nature of an undertaking's cooperation cannot be taken into consideration by the Commission at the stage of the assessment of the significant added value of the evidence provided, since point 23 of the 2002 Leniency Notice limits the taking into account of the extent and continuity of an undertaking's cooperation to the stage of the determination of the exact level of the reduction of the fine within certain bands, when the Commission has already found that the evidence provided has significant added value.

67 It is in the light of those principles that it is necessary to examine the arguments submitted by the applicants in support of the plea alleging manifest errors of assessment, errors of law and infringement of the principle of equal treatment committed by the Commission in its application of the provisions of Section B of the 2002 Leniency Notice.

The errors of law

– Arguments of the parties

68 The applicants maintain that the Commission made three errors of law. Thus, first, in order to assess the added value of the information provided, it wrongly applied the same criteria at the stage of the preliminary conclusion, which must be reached no later than the date on which a statement of objections is notified, and at the stage of the final determination. Second, it took an irrational view that the reformulation of the statements relating to ExxonMobil diminished the value of the other evidence which the applicants had voluntarily provided. Lastly, third, the Commission unfairly gave too much weight to timing when assessing the added value of the applicants' information. According to the case-law, the appraisal of the extent of the cooperation shown by undertakings cannot depend on purely random factors, such as the order in which they are questioned by the Commission (*Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, paragraph 27 above, paragraph 246).

69 The Commission rejects all the applicants' arguments.

– Findings of the Court

70 First, the applicants submitted, at the stage of the reply, that the Commission was not entitled to apply the same criteria for assessing the added value of information provided at the stage of the preliminary conclusion and at the stage of the final determination. They therefore submit that, at the preliminary stage, the Commission must assess the evidence submitted by an undertaking only in isolation from evidence submitted by the other undertakings.

71 As regards the admissibility of that argument in the light of Article 48(2) of the Rules of Procedure, which admissibility the Commission challenged in the rejoinder, the Court would point out that that argument put forward in the reply seeks only to expand on the plea — raised in the application — alleging errors of law by the Commission in refusing to grant Nynas a reduction of its fine under the 2002 Leniency Notice and that, in accordance with the case-law, it must therefore be regarded as admissible (Case 2/57 *Compagnie des Hauts Fourneaux de Chasse* v *High Authority* [1957 and 1958] ECR 211, p. 213).

72 Moreover, on the substance, it is apparent from points 26 and 27 of the 2002 Leniency Notice, which relate to the procedure, that '[i]f the Commission comes to the preliminary conclusion that the evidence submitted by the undertaking constitutes added value within the meaning of point 22, it will inform the undertaking in writing, no later than the date on which a statement of objections is notified, of its intention to apply a reduction of a fine within a specified band as provided in point 23(b)' and that '[t]he Commission will evaluate the final position of each undertaking which filed an application for a reduction of a fine at the end of the administrative procedure in any decision adopted'.

73 The applicants submit that the sole reference, in that point 26, to point 22 of the 2002 Leniency Notice, and not to point 21 as the Commission indicated, permits the conclusion that point 26 is referring only to the 'added value' and not to the 'significant added value' of the evidence provided by an undertaking.

74 However, it is apparent that the sole purpose of point 22 of the 2002 Leniency Notice, which gives a definition of the concept of 'added value', is to clarify point 21 which refers to the concept of 'significant added value'. Moreover, the very concept of 'added value' indicates that, whatever the stage of the administrative procedure, the Commission must assess the value of the evidence provided in comparison with the other evidence at its disposal, either from inspections or as a result of submissions by the other undertakings. Lastly, even if the applicants' reasoning were to be followed, any recognition at the preliminary stage that the evidence submitted has added value would not in any event have any effect on the Commission's final assessment and on the level of reduction granted to the undertaking, which is determined only at that final assessment stage. The Court must therefore reject that argument.

75 Second, the applicants submit that the Commission was not entitled to penalise them for having revised their statements relating to ExxonMobil's participation in the cartel. However, the Court would point out that, in the contested decision, the Commission mentioned only that the evidence provided by Nynas did not enable the Commission to prove any new important features of the cartel, in particular because Nynas reformulated certain statements regarding ExxonMobil. Thus, the Commission did not penalise Nynas for those reformulations, but merely treated the evidence regarding ExxonMobil, set out in its reply of 2 October 2003 to the request for information, as having provided the Commission with no significant added value. The Court must therefore reject that argument.

76 Third, the applicants submit that the Commission unfairly gave too much weight to timing when assessing the added value of their information. They rely in support of that assertion on *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, paragraph 27 above. However, the Court would point out that that judgment concerns the application of the 1996 Leniency Notice, and not the 2002 Leniency Notice which is applicable in the present case. Moreover, that judgment concerns the application of Section D of the 1996 Leniency Notice, which relates to undertakings which may benefit from a significant reduction in their fine, which does not provide for different treatment for the undertakings concerned on the basis of the order in which they cooperated with the Commission. A contrario, in the case-law relating to Sections B and C of the 1996 Leniency Notice - which relate to undertakings benefiting from non-imposition of a fine, or a very substantial or a substantial reduction in its amount and which make express reference to the chronological criterion — it was held that the Commission was entitled to take account of the chronological factor (*BASF* v *Commission*,

paragraph 64 above, paragraph 550; Case T-322/01 *Roquette Frères* v *Commission* [2006] ECR II-3137, paragraphs 237 to 239, and Case T-329/01 *Archer Daniels Midland* v *Commission* [2006] ECR II-3255, paragraphs 319 to 321 and 341). With respect to the 2002 Leniency Notice, it is expressly clear from points 7 and 23 thereof that the Commission must, when assessing the value of the information provided, take account of the time at which it was submitted to the Commission. The case-law relating to that notice has moreover confirmed the importance of the time at which the information is submitted (judgment of 18 December 2008 in Case T-85/06 *General Química and Others* v *Commission*, not published in the ECR, paragraphs 147, 148 and 152 to 154). That argument must therefore also be rejected.

77 In conclusion, the Court considers that the Commission did not make errors of law in refusing to grant the applicants a reduction of their fine on the basis of Section B of the 2002 Leniency Notice.

The manifest errors of assessment

– Arguments of the parties

78 First, the applicants submit that the Commission underestimated the extent and the value of their voluntary cooperation. Thus it failed to take account of the scope and the level of detail of the information provided and of the decisive character of some of that information, which the applicants alone provided and which was used extensively in the statement of objections and the contested decision. It also omitted to take account of the exceptional conduct they exhibited during the procedure, spontaneously pointing out organisational changes which had occurred within the group, thus giving up their rights of defence by providing evidence concerning another level of cartel and by forwarding information obtained from a third company. Under the provisions of point 23(b) of the 2002 Leniency Notice, the Commission must take account of the extent and continuity of companies' cooperation.

79 Second, they submit that the fact that the applicants did not reply to the Commission until 2 October 2003 was due solely to the Commission, which initially addressed its request for information to Nynas NV instead of Nynas Belgium.

80 Third, the Commission was wrong to take the view that, in its reply of 2 October 2003, Nynas Belgium did not express the wish for a reduction in the fine when it had itself stated that it sought to assist the Commission in its investigation by providing significant added value.

81 The Commission disputes all the applicants' arguments.

– Findings of the Court

82 As a preliminary point, the applicants may not rely on allegedly exceptional conduct in order to benefit from the provisions of the 2002 Leniency Notice. As regards the argument that Nynas Belgium presented itself spontaneously to the Commission as Nynas NV's successor de, the Commission would probably have been able, in any event, to impute liability for the infringement to Nynas NV's economic successor. Moreover, as regards the information that the applicants claim to have provided relating to the existence of a third level of activity within the cartel, the Court notes that the Commission found in the contested decision (recital 354) that it had insufficient evidence in that regard and that it did not therefore use the material provided by the applicants in this respect. Lastly, by obtaining information from Petroplus, the applicants did, admittedly, enable the Commission to avoid having to send requests for information to that company, but that alone cannot justify the application of the 2002 Leniency Notice.

83 First, in the light of the principles referred to in paragraphs 62 to 66 above, it is apparent that the Commission did not make a manifest error of assessment in refusing to grant the applicants the benefit of the 2002 Leniency Notice.

84 Although, as the Commission acknowledged, the information provided spontaneously by the applicants on 2 October 2003 was very detailed, it did not however strengthen the Commission's ability to prove the infringement, since, on that date, it already had in its possession information submitted by BP and documents seized during the inspections carried out in October 2002, BP's leniency application and other information provided by BP subsequently in the procedure, Kuwait Petroleum's leniency application of 12 September 2003 and the replies of most of the companies to the set of requests for information sent on 30 June 2003.

85 It is moreover apparent from the parties' pleadings that the evidence that the applicants consider to have been adduced exclusively by them was not decisive for the Commission in order to enable it to prove the infringement.

86 The same is true of Nynas's participation in the pre-meetings and the consultation meetings on the price of bitumen, which the Commission was already in a position to prove from evidence and witness statements of other undertakings, such as documents seized during inspections at the premises of Heijmans Infrastructuur en Milieu BV ('Heijmans'), and from information provided by Kuwait Petroleum on 16 September 2003 and by BP in 2002 (see recitals 57, 68 and 77 of the contested decision).

87 Similarly, as regards the names of the companies and persons participating in the cartel, it is apparent from the documents before the Court that those names had already been submitted by other companies (see footnotes 145, 201, 202, 224 and 226 of the contested decision) and that, so far as concerns the names of the ExxonMobil employees and of other Shell employees that it did not yet have, the Commission was not able to corroborate that information and did not use it in the contested decision. As regards the names of employees of Esha (a group that produced and marketed bitumen in the Netherlands and which was found to have participated in the infringement and received a fine of EUR 11.5 million) participating in the cartel, although it is true that the contested decision (footnote 216) mentions Kuwait Petroleum's statement of 9 October 2003 and Esha's reply of 30 December 2003 to a request for information, which postdate the reply to a request for information provided by the applicants, that is not however sufficient on its own for a finding that the applicants provided evidence of significant added value to the Commission, since the latter was already aware of Esha's participation in the cartel by means of earlier documents from Heijmans, HGB, BP and Kuwait Petroleum (see recitals 57 and 68 of the contested decision).

88 As regards the location of the bitumen supplier's pre-meetings, the Court would point out that the applicants mentioned only one location additional to those given in BP's statements of 2002 and Kuwait Petroleum's reply of 16 September 2003 to a request for information, and that that information could not be corroborated, was challenged at the administrative hearings and was therefore not used in the contested decision (recital 69 of the contested decision, footnotes 176 and 177). Similarly, although the Commission cited an excerpt from the applicants' reply of 2 October 2003 to a request for information in order to assert that the cartel meetings generally took place at the premises of Koninklijke Wegenbouw Stevin BV ('KWS') (recital 59 of the contested decision), it should be noted that the Commission already had that information by means of documents seized during inspections at KWS, a reply by Kuwait Petroleum of 16 September 2003 to a request for information and a statement by Kuwait Petroleum of 1 October 2003 (see Annex 2 to the statement of objections).

89 Similarly, as regards the participation of Ballast Nedam and Dura Vermeer in the cartel, the Court notes that the Commission already possessed evidence from which it was possible to establish that participation as a result of the documents seized during inspections at the premises of NBM

Noord-West BV, Hollandsche Beton Groep Civiel BV and KWS, and as a result of Dura Vermeer's reply, on 12 September 2003, to a request for information (see recitals 76 and 77 of the contested decision, footnotes 200, 220, 223, 224 and 226).

90 Lastly, as regards the mechanisms for punishing bitumen suppliers which did not comply with the cartel agreements, the documents submitted by Nynas (fax sent by Hollandsche Beton Groep and invoice incriminating Heijmans and Ballast Nedam) also merely confirmed and clarified evidence already in the Commission's possession. In its statements of 12 July 2002 and 16 September 2003, BP had in particular already submitted evidence in this regard, just as Kuwait Petroleum had in its statement of 12 September 2003 (recitals 84 and 86 of the contested decision). The punishment mechanism was also referred to in documents seized during inspections at Shell Nederland Verkoopmaatschappij BV and KWS (footnotes 238 and 286).

91 It follows from all the foregoing that the applicants have failed to establish that, in the absence of the information which they provided voluntarily to the Commission, the latter would not have been in a position to prove the essential elements of the infringement and therefore adopt a decision imposing fines.

92 In conclusion, the Court finds that the Commission did not make a manifest error of assessment in taking the view that the information provided exclusively by the applicants did not have significant added value.

93 Second, the applicants submit that the lateness with which they submitted their information to the Commission is due to the Commission, which addressed its request for information to Nynas NV instead of Nynas Belgium, the latter having received that request only on 23 July 2003, that is three weeks after the other undertakings, which had already received that request by 30 June 2003.

94 However, it is apparent from the documents before the Court, and in particular from the exchange of correspondence between Nynas's lawyer and the Commission, that the first request for information was addressed to Nynas NV, to the same contact person and to the same address as that subsequently given by Nynas Belgium, and that Nynas Belgium acknowledged that it had received that request at the same time as the other addressees, namely on 4 July 2003. In any event, the date on which the Commission's formal request for information was sent or received does not affect the assessment of the order in which the undertakings' leniency applications were submitted in the present case, since those applications could have been submitted at any point in time, in particular following the Commission's surprise inspections, and irrespective of the date on which the request for information was sent.

95 Third, the applicants submit that the Commission was wrong to take the view that, in its reply of 2 October 2003, Nynas Belgium did not express the wish for a reduction in the fine. As provided in points 24 and 25 of the 2002 Leniency Notice, '[a]n undertaking wishing to benefit from a reduction of a fine should provide the Commission with evidence of the cartel in question' and '[t]he undertaking will receive an acknowledgement of receipt from the Directorate-General for Competition recording the date on which the relevant evidence was submitted'. The 2002 Leniency Notice does not therefore lay down any specific formal obligation for submitting a leniency application. However, the wording used by Nynas in its reply of 2 October 2003 to the request for information does not show clearly that it sought to rely on the provisions of the 2002 Leniency Notice, its legal adviser stating merely that Nynas had managed to obtain 'copies of documentation which we would hope assist the Commission's investigation by providing significant added value'. In any event, the assessment as to whether Nynas Belgium's reply of 2 October 2003 already constituted a leniency application has no influence on the outcome of the dispute, given that the Commission definitively assesses the quality of the evidence adduced only at the end of the administrative procedure, and that it is apparent from the contested decision that the Commission, whilst taking the view that Nynas had not submitted a formal

application for a reduction of its fine under the 2002 Leniency Notice, took that document into account when assessing the possibility of reducing the fine imposed on Nynas under the 2002 Leniency Notice.

96 In conclusion, the Court takes the view that the Commission did not make a manifest error of assessment in finding that the information provided by the applicants had no significant added value and that it could not therefore grant them a reduction of their fine under the 2002 Leniency Notice.

The principle of equal treatment

– Arguments of the parties

97 The applicants submit that the Commission infringed the principle of equal treatment by unjustifiably treating them differently from Kuwait Petroleum. First of all, they submit that no other undertaking was penalised for reformulating its statements concerning ExxonMobil and that Kuwait Petroleum was able in particular to benefit from a 30% reduction in the amount of its fine, when it had acted in the same way as they did. Moreover, they accuse the Commission of having treated the information differently from that provided by Kuwait Petroleum. That company did not forward decisive information until 9 October 2003, and it merely corroborated the information obtained during the surprise inspections and was in any case less detailed than that provided by Nynas Belgium. In the contested decision, the Commission, however, chose to rely on the statements made by Kuwait Petroleum rather than on those made by the applicants and, moreover, failed to attribute those statements to them as the source of many factual elements. By acting in that way, the Commission failed in its obligations to ensure good administration and to state reasons for its decisions.

98 The Commission rejects the applicants' arguments.

– Findings of the Court

99 As a preliminary point, the Court notes, in accordance with paragraph75 above, that, in its decision, the Commission mentioned only that the evidence provided by Nynas did not enable the Commission to prove any new important features of the cartel, in particular because Nynas reformulated certain statements regarding ExxonMobil, but that it did not penalise Nynas for those reformulations. It is therefore necessary to reject the applicants' arguments relating to an infringement of the principle of equal treatment vis-à-vis Kuwait Petroleum in that regard.

100 According to the case-law, in the exercise of its discretion in assessing the extent to which undertakings have cooperated, the Commission is not entitled to disregard the principle of equal treatment, which is infringed where comparable situations are treated differently or different situations are treated in the same way, unless such difference of treatment is objectively justified and that principle precludes the Commission from treating in different ways cooperation on the part of undertakings covered by the same decision (see *Raiffeisen Zentralbank Österreich and Others* v *Commission*, paragraph 62 above, paragraph 533 and the case-law cited). However, according to the case-law, the Commission does not contravene that principle if it reduces, or does not reduce, fines according to the level of cooperation that it has received from the undertaking concerned during the administrative procedure (Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraphs 309 to 313, and Case T-317/94 *Weig* v *Commission* [1998] ECR II-1235, paragraphs 287 to 289). Moreover, a difference in the treatment of the undertakings concerned must be capable of being ascribed to differences in the degree of cooperation provided, particularly where different information was provided or where information was supplied at different stages in the administrative procedure or in dissimilar circumstances (Case T-48/02 *Brouwerij Haacht* v *Commission* [2005] ECR II-5259, paragraphs 108 and 109).

101 The Court would also point out that, although it might previously have been possible to take the view that, in order that it could be considered comparable, the undertakings' cooperation did not necessarily have to commence on the same day, but at the same stage of the procedure (Case T-13/03 *Nintendo and Nintendo of Europe* v *Commission* [2009] ECR II-947, paragraph 178), that principle applied to Section D of the 1996 Leniency Notice, which did not provide for different treatment for the undertakings concerned on the basis of the order in which they cooperated with the Commission, unlike the 2002 Leniency Notice (see paragraph 76 above).

102 Lastly, where an undertaking providing cooperation does no more than confirm, in a less precise and explicit manner, certain information already provided by another undertaking by way of cooperation, the extent of the cooperation provided by the former undertaking, while possibly of some benefit to the Commission, cannot be treated as comparable to that provided by the undertaking which was the first to supply that information. A statement which merely corroborates to a certain degree a statement which the Commission already had at its disposal does not facilitate the Commission's task significantly. Accordingly, it cannot be sufficient to justify a reduction of the fine for cooperation (Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 455, and Case T-343/08 *Arkema France* v *Commission* [2011] ECR II-2287, paragraph 137).

103 In the present case, it is apparent that the Commission did not infringe the principle of equal treatment by granting Kuwait Petroleum a 30% reduction of its fine on the basis of the 2002 Leniency Notice and by refusing to grant such a reduction to the applicants, since those undertakings were in different situations. It should be noted that Kuwait Petroleum submitted an application under the 2002 Leniency Notice as early as 12 September 2003, to which a corporate statement was attached, and that it requested that part of the information supplied on 16 September 2003 be taken into account under its leniency application. On 18 September 2003, a meeting was held between the Commission and Kuwait Petroleum and, on 1 and 9 October 2003, three former employees of Kuwait Petroleum were heard by the Commission. The latter found in the contested decision that the information supplied on 12 and 16 September 2003 and on 1 and 9 October 2003 had strengthened by its level of detail the Commission's ability to prove the infringement, but that it had to take account of the fact that the leniency application had only been submitted 11 months after the surprise inspections and after it had sent its request for information, that it already had in its possession certain items of evidence submitted by other companies, and that Kuwait Petroleum had revised some of its statements made against ExxonMobil. Thus, contrary to the applicants' assertion, Kuwait Petroleum did not wait until 9 October 2003 to provide decisive information, but, already on 12 September 2003, it enabled the Commission to corroborate the existing information and therefore to prove the infringement, in particular by being the first to provide direct evidence of the bitumen consultation meetings, since BP, the first undertaking to have informed the Commission of the existence of the cartel, was not a regular attendant of those meetings (recital 383 of the contested decision).

104 In the final analysis, it is apparent from the various material in the documents before the Court that the applicants' situation was not comparable to Kuwait Petroleum's, as regards both the date of submission of the information to the Commission and its content. Indeed, the applicants acknowledged themselves in the reply that the quality of the evidence given by Kuwait Petroleum was higher. Furthermore, when the applicants were questioned inter alia on that point at the hearing, they did not in any way substantiate their assertion that the Commission relied on the material that they submitted to it on 2 October 2003 to conduct the hearing of a former employee of Kuwait Petroleum on 9 October 2003. Lastly, the fact that the Commission found that the evidence adduced by Kuwait Petroleum at the administrative hearing of 9 October 2003 had significant added value does not affect the Commission's assessment of the value of the evidence adduced at an earlier stage by that company, and does not therefore affect the assessment of the value of the information provided by the applicants.

105 Accordingly, since the situations of Kuwait Petroleum and the applicants are not comparable, in so far as the applicants provided information to the Commission only belatedly and that information did not have the same level of quality, the Commission did not infringe the principle of equal treatment by refusing to grant the applicants a reduction of their fine on the basis of the 2002 Leniency Notice.

106 The applicants also raise under this plea complaints relating to an infringement of the principle of good administration and the duty to give reasons, stating merely that it was for the Commission to attribute the source for its findings and to award fair recognition for equivalent evidence.

107 Under Article 44(1) of the Rules of Procedure, the application initiating proceedings must contain a summary of the pleas in law on which it is based. That summary must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. The application must accordingly specify the nature of the grounds on which the action is based, so that a mere abstract statement of the grounds does not satisfy the requirements of the Rules of Procedure. Similar requirements apply where a submission is made in support of a plea in law (Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraph 68, and Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 333).

108 In the present case, the formulation of the complaint relating to the infringement of the principle of good administration by the Commission is insufficiently precise to enable the Court to identify its substance. The applicants do not specify in which specific points of the contested decision the Commission allegedly chose to rely arbitrarily on statements provided by Kuwait Petroleum rather than on their own statements and in which points it might moreover have omitted to cite the applicants' statements as the source. This complaint must therefore be rejected as inadmissible.

109 The complaint alleging that the contested decision lacks a proper statement of reasons is also formulated very vaguely. However, even on the assumption that this plea is admissible, the duty to state reasons must, according to the case-law, first, be such as to enable the person concerned to ascertain the matters relied upon to justify the measure adopted so that, if necessary, he can defend his rights and verify whether the decision is well founded and, secondly, enable the Courts of the European Union to exercise their power of review of legality. The requirement of a statement of reasons must be considered in the light of the circumstances of the case, in particular the content of the measure in question, the nature of the reasons relied on and the context in which the measure was adopted (*Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, paragraph 27 above, paragraph 129).

110 In the present case, it is apparent that the Commission set out in a sufficiently precise and clear manner the reasons for its decision to grant a reduction of the fine to Kuwait Petroleum and no reduction of the fine to the applicants. It is apparent from recitals 382 to 385 and 389 to 393 of the contested decision that the Commission took the view that the information provided by Kuwait Petroleum on 12 and 16 September 2003 and on 1 and 9 October 2003 had strengthened by its level of detail the Commission's ability to prove the infringement, whereas although the information provided by Nynas on 2 October 2003 was very detailed and was supplied spontaneously, it did not strengthen the Commission's ability to prove the infringement, since, on that date, it already had in its possession information necessary to prove the infringement in all its main elements. The Commission specified inter alia the other sources already in its possession, which, in its view, enabled it to prove the main elements of the infringement.

111 This complaint must therefore be rejected as unfounded. In view of all the foregoing, it is therefore necessary to reject in its entirety the plea alleging refusal to grant a reduction on the basis of Section B of the 2002 Leniency Notice.

The refusal to grant a reduction on the basis of the Guidelines

Arguments of the parties

112 The applicants submit, in the alternative, that the Commission should have taken account of their effective cooperation outside the scope of the provisions of the 2002 Leniency Notice, in accordance with point 3 of the Guidelines.

113 The Commission rejects the applicants' arguments.

Findings of the Court

114 According to the sixth indent of Section 3 of the Guidelines, the Commission may reduce the basic amount of the fine for 'effective cooperation by the undertaking in the proceedings, outside the scope of the 1996 [Leniency] Notice on the non-imposition or reduction of fines in cartel cases'. The Courts of the European Union have therefore specified that the Commission can grant an undertaking which has cooperated during proceedings for infringement of the competition rules a reduction of the fine under the Guidelines only in cases where the 1996 Leniency Notice is not applicable (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 32 above, paragraphs 380 to 382, and *BASF* v *Commission*, paragraph 64 above, paragraphs 585 and 586).

115 In a manner similar to the 1996 Leniency Notice which it replaced, under certain conditions, from 14 February 2002, the 2002 Leniency Notice applies to secret cartels between two or more competitors aimed at fixing prices, production or sales quotas, sharing markets including bid-rigging or restricting imports or exports, and therefore excludes vertical cartels or cartels falling within the scope of Article 82 EC.

116 In the present case, since the infringement in question does fall within the scope of the 2002 Leniency Notice, the provisions of the sixth indent of Section 3 of the Guidelines were not applicable to the applicants. This plea, alleging infringement of provisions which are not therefore applicable in the present case, must be rejected as ineffective.

117 It follows from all the foregoing that the applicants' claims for annulment of Article 2 of the contested decision must be rejected.

3. *The claims for a reduction of the amount of the fine*

118 As regards the claims seeking a variation of the contested decision, as no element in the present case is capable of justifying a reduction of the amount of the fine, those claims should not be upheld. It follows from all the foregoing that the action must be dismissed in its entirety.

Costs

119 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. Dismisses the action;

2. Orders Nynäs Petroleum AB and Nynas Belgium AB to pay the costs.

Jaeger Wahl Soldevila Fragoso

Delivered in open court in Luxembourg on 27 September 2012.

[Signatures]

Table of contents

The facts . . . 1

Procedure and forms of order sought . . . 3

Law . . . 4

1. The claims for annulment of Article 1 of the contested decision . . . 4

The error of law . . . 4

Arguments of the parties . . . 4

Findings of the Court . . . 5

The manifest errors of assessment made in the present case by imputing liability to Nynäs AB . . . 7

Arguments of the parties . . . 7

Findings of the Court . . . 8

– The autonomy of Nynas NV's commercial policy . . . 8

– The conduct of the parent company on the relevant market and its role in the infringement . . 9

– The excessively formalistic nature of the elements taken into account . . . 9

2. The claims for annulment of Article 2 of the contested decision . . . 10

The refusal to grant a reduction on the basis of the provisions of Section B of the 2002 Leniency Notice . . . 10

The errors of law . . . 12

– Arguments of the parties . . . 12

– Findings of the Court . . . 12

The manifest errors of assessment 14

– Arguments of the parties 14

– Findings of the Court 14

The principle of equal treatment 17

– Arguments of the parties 17

– Findings of the Court 17

The refusal to grant a reduction on the basis of the Guidelines 20

Arguments of the parties 20

Findings of the Court 20

3. The claims for a reduction of the amount of the fine 20

Costs 20