Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

5 March 2015*

(Appeal — Competition — Agreements, decisions and concerted practices — Chloroprene rubber market — Succession of production entities — Imputability of the unlawful conduct — Fines — Repeated infringement — Unlimited jurisdiction)

In Joined Cases C-93/13 P and C-123/13 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, lodged on 25 February 2013 and 12 March 2013, respectively,

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

appellant,

the other parties to the proceedings being:

Versalis SpA, formerly Polimeri Europa SpA, established in Brindisi (Italy),

Eni SpA, established in Rome (Italy),

represented by M. Siragusa, G.M. Roberti, F. Moretti, I. Perego, F. Cannizzaro, A. Bardanzellu, D. Durante, and V. Laroccia, avvocati,

applicants at first instance,

and

Versalis SpA, formerly Polimeri Europa SpA,

Eni SpA,

represented by M. Siragusa, G.M. Roberti, F. Moretti, I. Perego, F. Cannizzaro, A. Bardanzellu, D. Durante, and V. Laroccia, avvocati,

appellants,

the other party to the proceedings being:

* Language of the case: Italian.

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

defendant at first instance,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, A. Rosas (Rapporteur), E. Juhász and D. Šváby, Judges,

Advocate General: P. Cruz Villalón,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 27 February 2014,

after hearing the Opinion of the Advocate General at the sitting on 17 July 2014,

gives the following

Judgment

1 By their appeals, the European Commission, in Case C-93/13 P, and Versalis SpA ('Versalis') and Eni SpA ('Eni'), in Case C-123/13 P, ask the Court to set aside the judgment of the General Court of the European Union of 13 December 2012 (*Versalis and Eni* v *Commission*, T-103/08, EU:T:2012:686, 'the judgment under appeal'), concerning an action, brought jointly by Versalis and Eni, seeking the annulment of Commission Decision C(2007) 5910 final, of 5 December 2007, relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38629 — Chloroprene Rubber, 'the decision at issue'), or, in the alternative, the cancellation or reduction of the amount of the fine imposed jointly on Versalis and Eni by that decision.

2 By its appeal, the Commission asks the Court to set aside the judgment under appeal in so far as the General Court reduced the amount of the fine imposed by the decision at issue on Versalis and Eni to EUR 106 200 000. Versalis and Eni's appeal asks the Court to set aside the judgment under appeal in so far as the General Court dismissed their action.

Background to the dispute and the decision at issue

The entities at issue

3 Eni is the ultimate parent company of the group of the same name, which entered the chloroprene rubber ('CR') market at the end of 1992 by purchasing the CR branch of the Rhône-Poulenc group, whose CR company was called 'Distugil'. During the period from 13 May 1993 to 31 October 1997, the company responsible for the CR business ('the CR business') within the Eni group was EniChem Elastomeri Srl ('EniChem Elastomeri'), wholly owned by EniChem SpA ('EniChem'), which was itself controlled, in part directly and in part indirectly, by Eni at a level between 99.93% and 99.97% of its share capital. On 1 November 1997 EniChem Elastomeri merged with EniChem. EniChem took over the liability for the previous activities of EniChem Elastomeri, which ceased to exist as a separate legal entity. On 1 January 2002 EniChem transferred its CR business to its wholly-owned subsidiary Polimeri Europa Spa ('Polimeri Europa'). On 21 October 2002 Eni acquired full direct control of Polimeri Europa. On 30 April 2003 EniChem changed its business name to '[*confidential*]'. In April 2012 Polimeri Europa changed its business name and is now known as 'Versalis'.

The procedure before the Commission

4 On 18 December 2002 Bayer AG ('Bayer') informed the Commission of the European Communities of the existence of a cartel on the CR market and expressed its willingness to cooperate with the Commission under the terms of the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the 2002 Leniency Notice'). By decision of 27 January 2003, Bayer was granted conditional immunity from fines by the Commission.

5 Following the communication of information from Bayer, the Commission carried out unannounced inspections at the premises of Dow Deutschland Inc. on 27 March 2003 and at the premises of Denka Chemicals GmbH ('Denka Chemicals') on 9 July 2003.

6 On 15 July 2003 Tosoh Corp. and Tosoh Europe BV ('Tosoh Europe'), and on 21 November 2003 DuPont Dow Elastomers LLC ('DDE'), a joint venture held in equal shares by EI DuPont de Nemours and Company ('EI DuPont') and The Dow Chemicals Company ('Dow'), applied for leniency in accordance with the 2002 Leniency Notice.

7 In March 2005 the Commission sent the first requests for information to the addressees of the decision at issue, pursuant to Article 18 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).

8 Upon receiving the first request for information, [*confidential*] (formerly EniChem) and Polimeri Europa (now Versalis) submitted leniency applications on 15 April 2005. [*confidential*] submitted to the Commission further statements in connection with that leniency application in May 2005 and November 2006.

9 By letters of 7 March 2007 the Commission informed Tosoh Corp., Tosoh Europe and DDE that it had reached the provisional conclusion that the evidence which they had submitted constituted significant added value within the meaning of point 22 of the 2002 Leniency Notice and that it therefore intended to reduce the amount of the fine which it otherwise would have determined by an amount included in one of the bands referred to in the first subparagraph of point 23(b) of that notice, namely a reduction of 30% to 50% for Tosoh Corp. and Tosoh Europe and a reduction of 20% to 30% for DDE. By letters of the same date, [*confidential*] (formerly EniChem) and Polimeri Europa (now Versalis) were informed that their applications did not meet the conditions set out in point 8(a) or (b) of that notice and that, in application of points 15 and 17 of that notice, they would not be granted conditional immunity from fines.

10 On 13 March 2007, the Commission initiated the administrative procedure and adopted a statement of objections concerning an infringement of Article 81 EC and Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3, 'the EEA Agreement'), addressed to 12 companies, including Eni, Polimeri Europa (now Versalis) and [*confidential*] (formerly EniChem). In reply, all the addressees of the statement of objections submitted observations in writing to the Commission and exercised their right to be heard, at a hearing which took place on 21 June 2007.

The decision at issue

11 On 5 December 2007 the Commission adopted the decision at issue. That decision was notified to Eni on 10 December 2007 and to Polimeri Europa (now Versalis) on 11 December 2007. A summary of the decision at issue, as amended by Commission Decision C(2008) 2974 final of 23 June 2008, was published in the *Official Journal of the European Union* of 3 October 2008 (OJ 2008 C 251, p. 11). The latter decision was addressed solely to EI DuPont, DuPont Performance Elastomers SA, DuPont Performance Elastomers LLC and Dow.

12 It is apparent from the decision at issue that, during the period from 1993 to 2002, several producers of CR, addressees of the decision at issue, participated in a single and continuous infringement of Article 81 EC and Article 53 of the EEA Agreement, covering the entire territory of the European Economic Area (EEA) and consisting of agreements and concerted practices concerning the allocation and the stabilisation of markets, market shares and sales quotas for CR, coordinating and implementing several price increases, agreeing upon minimum prices, allocating customers and exchanging competitively sensitive information. Those producers met on a regular basis several times a year, in multilateral or bilateral meetings.

13 According to Articles 1 to 3 of the decision at issue, as amended by Decision C(2008) 2974 final:

‘Article 1

The following undertakings have infringed Article 81 [EC] and — from 1 January 1994 — Article 53 of the EEA Agreement by participating, for the periods indicated, in a single and continuing agreement and/or concerted practice in the [CR] sector:

(a) Bayer ...: from 13 May 1993 to 13 May 2002;

(b) [EI DuPont]: from 13 May 1993 to 13 May 2002; DuPont Performance Elastomers SA, DuPont Performance Elastomers LLC and [Dow]: from 1 April 1996 to 13 May 2002;

(c) Denki Kagaku Kogyo K.K. [(‘Denki Kagaku Kogyo’)] and Denka Chemicals ...: from 13 May 1993 to 13 May 2002;

(d) Eni ... and Polimeri Europa [(now Versalis)]: from 13 May 1993 to 13 May 2002;

(e) Tosoh [Corp.] and Tosoh Europe ...: from 13 May 1993 to 13 May 2002.

Article 2

For the infringement referred to in Article 1, the following fines are imposed:

(a) Bayer ...: EUR 0;

(b) [EI DuPont]: EUR 59 250 000; of which jointly and severally with

(i) DuPont Performance Elastomers SA: EUR 44 250 000 and

(ii) DuPont Performance Elastomers LLC: EUR 44 250 000 and

(iii) [Dow]: EUR 44 250 000;

(c) Denki Kagaku Kogyo ... and Denka Chemicals ...: jointly and severally EUR 47 000 000;

(d) Eni … and Polimeri Europa [(now Versalis)], jointly and severally: EUR 132 160 000;

(e) Tosoh [Corp.] and Tosoh Europe ..., jointly and severally: EUR 4 800 000;

(f) [Dow]: EUR 4 425 000.

…

Article 3

The undertakings listed in Article 1 shall immediately bring to an end the infringements referred to in that Article in so far as they have not already done so.

They shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or similar object or effect.'

14 In determining the basic amount of the fines, the Commission relied on its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the 2006 Guidelines'). It took into account a certain proportion of the value of the sales of CR made by each undertaking involved within the EEA during the 2001 calendar year, the last full year of participation in the infringement, which it multiplied by the number of years of infringement.

15 In order to determine that proportion, the Commission considered that the horizontal market-sharing and price-fixing were by their very nature among the most serious restrictions of competition. In that regard, the Commission also considered that the combined market share of the undertakings participating in the infringement amounted to 100% within the EEA, that the geographic scope of the infringement was worldwide and that the infringement had been systematic.

16 The Commission decided that the proportion of the value of sales of each undertaking involved to be taken into account for the purpose of establishing the basic amount of the fine to be imposed was 21%.

17 As the participation in the infringement had lasted for nine years for EI DuPont, Bayer, Denki Kagaku Kogyo, Denka Chemicals, Eni and Polimeri Europa (now Versalis) and Tosoh Corp. and Tosoh Europe (together, 'Tosoh'), and for six years and one month for DuPont Performance Elastomers SA and DuPont Performance Elastomers LLC (together, 'DPE') and Dow, the Commission, applying point 24 of the 2006 Guidelines, multiplied the basic amounts of the fines determined by reference to the value of sales by 9 for Eni and Polimeri Europa (now Versalis), EI DuPont, Bayer, Denki Kagaku Kogyo, Denka Chemicals and Tosoh and by 6.5 for DPE and Dow.

18 In order to deter the undertakings concerned from participating in an agreement relating to market-sharing or horizontal price-fixing agreements such as those in issue in the present case, and taking into account in particular the factors referred to in paragraph 15 of this judgment, the Commission, applying point 25 of the 2006 Guidelines, included in the basic amount of the fines an additional amount of 20% of the value of sales of each undertaking involved.

19 In the light of those factors, the basic amount of the fine to be imposed on Eni and on Polimeri Europa (now Versalis) was fixed at EUR 59 million.

20 As regards the adjustments to the basic amounts of the fines for, first, aggravating circumstances, the basic amount of the fine to be imposed on Eni and on Versalis was increased by 60% and the basic amount of the fine to be imposed on Bayer was increased by 50% on the ground that those undertakings were repeat infringers. The Commission made a finding of the aggravating circumstance of repeated infringement on the part of Versalis and Eni because of the participation of Anic SpA ('Anic') in a cartel in the polypropylene sector, an infringement found by its Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article [81 EC] (IV/31.149 — Polypropylene) (OJ 1986 L 230, p. 1, 'the Polypropylene decision'), and of EniChem in a cartel in the PVC sector, an infringement found by Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article [81 EC] (IV/31.865 — PVC) (OJ 1994 L 239, p. 14, 'the PVC II decision'). The aggravating circumstance of repeated infringement was found against Bayer only in respect of a single infringement prior to the decision at issue.

21 Secondly, no reduction of the basic amounts of the fines was granted for mitigating circumstances referred to in point 29 of the 2006 Guidelines, as the Commission rejected all the applications for a reduction which had been submitted on that basis.

22 The Commission also applied a specific increase to the basic amount of the fine of certain addressees of the decision at issue in order to ensure that the fines would have a sufficiently deterrent effect, taking into account the particularly large turnover of those undertakings beyond the goods and services to which the infringement related. The basic amount of the fine to be imposed on Polimeri Europa (now Versalis) and on Eni was multiplied by 1.4 and the basic amount of the fine to be imposed on Dow was multiplied by 1.1.

23 Therefore, the basic amount of the fine to be imposed on Eni and on Polimeri Europa (now Versalis) was increased to EUR 132.16 million.

24 As regards the application of the 2002 Leniency Notice, the Commission granted a 100% reduction in the basic amount of the fine to Bayer, 50% to Tosoh and 25% to EI DuPont, DPE and Dow. The Commission rejected the applications for a reduction of that amount submitted under that notice by [*confidential*] (formerly EniChem) and Polimeri Europa (now Versalis).

25 The amount of the fine imposed on Eni and on Polimeri Europa (now Versalis) was thus set at EUR 132.16 million, an amount for which they are held jointly and severally liable.

The judgment under appeal

26 By an application lodged at the Registry of the General Court on 20 February 2008, Polimeri Europa (now Versalis) and Eni sought primarily the annulment of the decision at issue and, in the alternative, the annulment or reduction of the amount of the fine imposed jointly and severally on them by that decision.

27 Before the General Court, Versalis and Eni put forward 11 pleas, of which six sought annulment of the decision at issue and alleged (i) infringement of Article 81 EC and a lack of reasoning in the decision at issue as regards the imputation of the infringement to Eni, (ii) infringement of the rights of the defence, since the decision at issue was contrary to the letter closing the procedure in relation to [*confidential*] (formerly EniChem), (iii) infringement of Article 81 EC and a lack of reasoning in the decision at issue as regards the imputation of the infringement to Polimeri Europa (now Versalis), (iv) a lack of reasoning in the decision at issue and contradictory reasons, a failure to conduct a proper preliminary investigation and infringement of Article 81 EC as regards the assessment of the facts and the evidence by the Commission, in particular regarding the participation of [*confidential*] (formerly EniChem) and Polimeri Europa (now Versalis) in the meetings which took place in 1993 and 2002, (v) a lack of reasoning in the decision at issue and contradictory reasons, a failure to conduct a proper preliminary investigation and infringement of Article 81 EC because of the categorisation of the infringement as a single and continuous infringement, and (vi) a lack of reasoning in the decision at issue and a failure to conduct a proper preliminary investigation as regards the calculation of the duration of the infringement.

28 Five pleas sought annulment or reduction of the amount of the fine and alleged (i) incorrect determination of the basic amount of the fine, (ii) breach of the principle of proportionality and a lack of reasoning in the decision at issue as regards the adjustments of the basic amount of the fine for the repeated infringement, for mitigating circumstances and in order to ensure deterrent effect, (iii) errors in the determination of the ceiling of 10% of turnover, (iv) failure to take account of cooperation outside the scope of the 2002 Leniency Notice, and (v) failure to reduce the amount of the fine pursuant to that notice.

29 The General Court confirmed the legality of the decision except, in paragraphs 287 and 386 of the judgment under appeal, as regards the taking into account of the aggravating circumstance of repeated infringement and the level of the multiplier of the basic amount of the fine used for deterrent purposes. Holding that the aggravating circumstance of repeated infringement could be found not on the part of Eni, but only on the part of Versalis, the General Court reduced the percentage increase in that amount for that circumstance from 60% to 50%. It also reduced that multiplier from 1.4 to 1.2. The General Court consequently reduced the amount of the fine imposed jointly on Polimeri Europa (now Versalis) and on Eni from EUR 132.16 million to EUR 106.2 million.

Forms of order sought

In Case C-93/13 P

30 The Commission contends that the Court should:

— set aside the judgment under appeal in so far as it reduced the amount of the fine imposed by the decision at issue on Versalis and Eni to EUR 106 200 000;

— dismiss the action for annulment brought before the General Court in its entirety; and

— order Versalis and Eni to pay the costs of both instances.

31 Versalis and Eni contend that the Court should:

— dismiss the Commission's appeal in its entirety; and

— order the Commission to pay the costs.

In Case C-123/13 P

32 Versalis and Eni contend that the Court should:

— set aside, in whole or in part, the judgment under appeal in so far as it dismissed their joint action at first instance and consequently:

  — annul the decision at issue, in whole or in part,

  — and/or annul, or at least reduce, the fine imposed on them by that decision;

— in the alternative, set aside, in whole or in part, the judgment under appeal in so far as it dismissed their action at first instance and refer the case back to the General Court for an adjudication on the merits in the light of the guidance which the Court of Justice will provide; and

— order the Commission to pay the costs incurred in relation to the two proceedings.

33 The Commission contends that the Court should:

— dismiss the appeal; and

— order Versalis and Eni to pay the costs.

34 By order of the President of the Court of 21 January 2014, Cases C-93/13 P and C-123/13 P were joined for the purposes of the written and oral part of the procedure and the judgment.

The appeals

35 The grounds of appeal will be set out following the order of the contested paragraphs of the judgment of the General Court.

The first ground of appeal in Case C-123/13 P

Arguments of the parties

36 By their first ground of appeal, relating to paragraphs 53 to 78 of the judgment under appeal, Versalis and Eni submit that, in imputing to the parent company, Eni, the infringement allegedly committed by the companies controlled by it in the CR sector, the General Court disregarded, in breach of Article 81 EC, the relevant case-law of the Court of Justice and its duty to state reasons when assessing the evidence submitted in order to rebut the presumption of actual exercise of decisive influence, with the result that the General Court also infringed the fundamental principles of legality, personal responsibility as far as concerns cartels, the presumption of innocence, the rights of the defence and the limited liability of companies.

37 Versalis and Eni draw attention to a number of considerations which they set out before the General Court, in particular, that Eni did not participate in the infringement in question, that it has never been active in the chemical sector and, more specifically, in the CR sector, that there was no situation of combination of functions between the members of its management bodies and those of its subsidiaries, that the decision-making process of those subsidiaries is specific to each of them, that there are no reporting lines of those subsidiaries to their parent company, and that Eni merely exercised the typical role of a holding company with regard to subsidiaries that are active in a sector of lesser size than the sector in which it carries out its main activities and which, in any event, is different from that sector.

38 Versalis and Eni claim that the judgment is invalidated in so far as, in an inconsistent manner and without any relevant reasoning, the General Court considered entirely irrelevant that set of substantively established factors which, in accordance with the case-law of the Court of Justice, was such as to prove the absence of effective exercise by Eni of decisive influence over its subsidiaries. In practice, that finding of the General Court is tantamount to considering the presumption of actual decisive influence to be an irrebuttable presumption, contrary to the principles set out in the judgment in *Akzo Nobel and Others* v *Commission* (C-97/08 P, EU:C:2009:536) and in breach of the principles of the personal nature of liability and punishment as well as the presumption of innocence and the rights of the defence.

39 Referring to the judgment in *Eni* v *Commission* (C-508/11 P, EU:C:2013:289), in which the Court responded to a similar ground of appeal relating to the same entities, the Commission considers that the first ground of appeal is clearly unfounded.

Findings of the Court

40 Versalis and Eni's first ground of appeal concerns the application to Eni of the presumption of decisive influence of parent companies over subsidiaries involved in infringements of the European Union competition rules. As the Court noted in paragraph 46 of the judgment in *Eni* v *Commission* (EU:C:2013:289) to which the Commission refers, it is established case-law that the conduct of a

subsidiary may be imputed, for the purposes of the application of Article 81 EC, to the parent company particularly where, although having separate legal personality, that subsidiary does not autonomously determine its conduct on the market but essentially applies the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links which unite those two legal entities. In such a situation, since the parent company and its subsidiary form part of a single economic unit and thus form a single undertaking for the purpose of Article 81 EC, the Commission may address a decision imposing fines to the parent company without being required to establish its individual involvement in the infringement.

41 It also follows from settled case-law of the Court that, in the particular case in which a parent company holds all or almost all of the capital in a subsidiary which has committed an infringement of the European Union competition rules, there is a rebuttable presumption that that parent company actually exercises a decisive influence over its subsidiary (judgment in *Eni* v *Commission*, EU:C:2013:289, paragraph 47).

42 In such a situation, it is sufficient for the Commission to prove that all or almost all of the capital in the subsidiary is held by the parent company in order to take the view that that presumption is fulfilled. The Commission will then be able to regard the parent company as jointly and severally liable for the 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 (see judgments in *Akzo Nobel and Others* v *Commission*, EU:C:2009:536, paragraph 61; and *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 57).

43 In addition, in the specific case where a holding company holds all or almost all of the capital of an interposed company which, in turn, holds all or almost all of the capital of a subsidiary of its group which has committed an infringement of EU competition law, there is also a rebuttable presumption that that holding company exercises a decisive influence over the conduct of the interposed company and indirectly, via that company, also over the conduct of that subsidiary (see, to that effect, judgment in *Eni* v *Commission*, EU:C:2013:289, paragraphs 48 and 49 and the case-law cited).

44 In the present case, as the General Court held in paragraph 63 of the judgment under appeal, it is established that throughout the period of the infringement at issue Eni held, in part directly and in part indirectly, 99.93% to 100% of the capital of the companies responsible within its group for the CR business, namely, in turn, EniChem Elastomeri, EniChem and Polimeri Europa (now Versalis). Consequently, the presumption referred to in paragraphs 41 and 43 of this judgment is applicable to Eni.

45 As for the matters put forward by Versalis and Eni, it must be noted that the General Court examined them in paragraphs 66 to 72 of the judgment under appeal. The grounds for that judgment 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. The General Court did not, therefore, err in law in concluding, in paragraph 73 of the judgment under appeal, that Versalis and Eni had not succeeded in rebutting the presumption of Eni's decisive influence over its subsidiaries EniChem Elastomeri, EniChem and Polimeri Europa (now Versalis), since it had not adduced sufficient evidence capable of showing that those subsidiaries acted autonomously on the relevant market.

46 Contrary to Versalis and Eni's submissions, that finding of the General Court is not tantamount to considering the presumption of actual decisive influence to be an irrebuttable presumption. The fact that it is difficult to adduce the evidence necessary to rebut a presumption does not in itself mean that that presumption is in fact irrebuttable, especially where the entities against which the presumption operates are those best placed to seek that evidence within their own sphere of activity (see judgment in *Elf Aquitaine* v *Commission*, EU:C:2011:620, paragraph 70).

47 Therefore, the complaint alleging that, in accepting the irrebuttable nature of that presumption, the General Court infringed the principles of the personal nature of liability and punishment as well as the presumption of innocence and the rights of the defence cannot succeed either.

48 Consequently, Versalis and Eni's first ground of appeal must be rejected as unfounded.

The second ground of appeal in Case C-123/13 P

Arguments of the parties

49 By their second ground of appeal, relating to paragraphs 94, 95 and 97 of the judgment under appeal, alleging infringement of the principle of personal responsibility, Versalis and Eni claim that, in imputing to Versalis the infringement committed by [*confidential*] (formerly EniChem), the General Court misapplied the relevant case-law of the Court of Justice and failed to set out sufficient reasons for the rejection of their arguments.

50 Relying on the judgments in *ETI and Others* (C-280/06, EU:C:2007:775) and *ThyssenKrupp Nirosta* v *Commission* (C-352/09 P, EU:C:2011:191), Versalis and Eni maintain essentially that the Court has accepted the possibility of derogating from the principle of personal responsibility only in exceptional cases and in specific circumstances which are not present in this case. In that regard, they observe in particular that [*confidential*] (formerly EniChem) did not cease to exist in law or economically. They also allege that insufficient reasons were stated for the judgment under appeal.

51 The Commission considers that the risk that [*confidential*] (formerly EniChem) might become an 'empty shell', stated in paragraph 95 of the judgment under appeal, is a factual element which it is not for the Court of Justice to review. It adds that, in any event, the Court has not restricted the cases of liability of a transferee company to situations where a transferor company has ceased all economic activity. In accordance with the Court's case-law in the judgments in *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6) and *ETI and Others* (EU:C:2007:775), only the existence of a 'structural link' between the transferor company and the transferee company forming part of the same group is decisive for the purposes of the liability of the transferee company.

Findings of the Court

52 Versalis and Eni's second ground of appeal in Case C-123/13 P concerns the question of the succession of undertakings. As the Court observed in paragraph 51 of the judgment in *Versalis* v *Commission* (C-511/11 P, EU:C:2013:386), it is settled case-law that EU 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.

53 The Court 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 judgments in *ETI and Others*, EU:C:2007:775, paragraphs 48 and 49 and the case-law cited, and *Versalis* v *Commission*, EU:C:2013:386, paragraph 52).

54 In paragraphs 91 and 92 of the judgment under appeal, the General Court noted the links between the companies successively responsible for the CR business within the group and the direct or indirect holding by Eni, as the parent company, of more than 99% of the share capital of all those companies. In the light of those factors, the General Court was right to conclude, in paragraph 93 of the judgment under appeal, that there was economic continuity between the transferor company involved in the cartel, namely EniChem (now [*confidential*]), and the transferee company, namely Polimeri Europa (now Versalis).

55 The General Court also held, in paragraph 95 of the judgment under appeal, that there was a risk that the original operator of the CR business within the Eni group, namely EniChem (now [*confidential*]), would become an 'empty shell' following the internal restructuring of that group and that the penalty imposed on it under antitrust law would be ineffective in that case. That is an assessment of fact which it is not for the Court of Justice to review in an appeal.

56 Having regard to those considerations, the General Court did not commit an error of law in finding, in paragraph 98 of the judgment under appeal, that the Commission was correct to attribute all the anticompetitive conduct by EniChem (now [*confidential*]) to Polimeri (now Versalis), irrespective of the fact that [*confidential*] still existed.

57 That finding cannot be called into question by the fact that the Court of Justice, in paragraph 144 of the judgment in *ThyssenKrupp Nirosta* v *Commission* (EU:C:2011:191), held that the possibility referred to in paragraph 53 of the present judgment also applies in a situation 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; it does not follow from that judgment that an infringement may be imputed to an entity which did not commit the infringement only in cases where the application of a penalty to the company which did commit the infringement would not achieve its objective of deterrence (see judgment in *Versalis* v *Commission*, EU:C:2013:386, paragraph 55).

58 In the judgment in *ETI and Others* (EU:C:2007:775) to which the Court of Justice expressly referred in paragraph 144 of the judgment in *ThyssenKrupp Nirosta* v *Commission* (EU:C:2011:191), 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 judgment in *ETI and Others*, EU:C:2007:775, 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 (see judgments in *ETI and Others*, EU:C:2007:775, paragraph 50, and *Versalis* v *Commission*, EU:C:2013:386, paragraph 56).

59 It must also be noted that the scope of the judgment in *ETI and Others* (EU:C:2007:775) is not limited, contrary to the submissions of Versalis and Eni, 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 (see judgment in *Versalis* v *Commission*, EU:C:2013:386, paragraph 57).

60 In the light of the foregoing, 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.

61 With regard to the alleged failure to state reasons, the General Court set out in detail, in paragraphs 89 to 98 of the judgment under appeal, the reasons why it considered unfounded the plea in law raised at first instance that those infringements should not be imputed to Versalis. The grounds for that

judgment 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.

62 Since none of the arguments relating to Versalis and Eni's second ground of appeal has succeeded, that ground must be rejected as unfounded.

The third ground of appeal in Case C-123/13 P

Arguments of the parties

63 Within the context of the third ground of their appeal, Versalis and Eni complain that the General Court applied incorrectly, and in a contradictory manner, the principle in case-law that there must be an express distancing from a cartel if the infringement is not to be imputable, and infringed the principle of *in dubio pro reo* by holding, in paragraph 173 of the judgment under appeal, that EniChem (now [*confidential*]) took part in the meeting of 12 June or 13 June 1993 in Florence and, in paragraph 183 of that judgment, that the meetings which took place in 2002, in which Polimeri Europa (now Versalis) took part, had been anticompetitive in nature. Similarly, Versalis and Eni claim that the General Court distorted the evidence by finding, as the Commission states, that the two meetings held in 2002 were anticompetitive in nature. Consequently, by holding that EniChem and Polimeri Europa had participated in the cartel during its entire duration, that is to say between May 1993 and May 2002, not only did the General Court make an incorrect assessment, but it also failed to exercise a substantive judicial review.

64 The Commission argues that Versalis and Eni's arguments seek to challenge the General Court's findings of fact and that the ground of appeal must therefore be declared inadmissible.

Findings of the Court

65 By that ground of appeal, Versalis and Eni contest findings and assessments of fact which do not, save where they distort the evidence, constitute a point of law which is subject, as such, to review by the Court of Justice.

66 As regards the complaint relating to the distortion of that evidence, it must be stated that Versalis and Eni has not alleged that the General Court manifestly distorted that evidence.

67 The third ground of appeal must therefore be declared inadmissible.

The fourth ground of appeal in Case C-123/13 P

Arguments of the parties

68 By the fourth ground of their appeal, relating to paragraph 239 et seq. of the judgment under appeal, Versalis and Eni claim that the General Court infringed EU law in failing to identify the errors committed by the Commission in determining the basic amount of the fine in accordance with the 2006 Guidelines.

69 First, they complain that the General Court failed to state reasons in the judgment under appeal and that judgment does not reflect the complaints set out in the proceedings at first instance. In addition, they claim that the General Court infringed the principles of proportionality and equal treatment by failing to undertake a substantive analysis, in the light of the facts brought to its attention, of the

compliance by the Commission of the principles of equity, proportionality and equal treatment when setting the basic amount of the fine according to the gravity of the infringement and the additional amount.

70 Secondly, Versalis and Eni complain that, by failing to respond to their plea, raised at the hearing, relating to the non-application by the Commission of point 18 of the 2006 Guidelines, the General Court infringed the principles of proportionality and equal treatment.

71 Thirdly, they complain that the General Court did not use, for the purpose of the calculation of the basic amount of the fine, the number of years corresponding to the duration of the infringement as indicated by the evidence relied on within the context of the third ground of appeal in Case C-123/13 P.

72 First of all, the Commission submits that the fourth ground of appeal in that case is unclear and reproduces the arguments put forward at first instance. Next, the Commission claims that some of Versalis and Eni's complaints relate to the assessment of facts. Lastly, the Commission submits that no specific plea relating to the application of point 18 of the 2006 Guidelines on the method for setting fines was raised at first instance. As regards the duration of the infringement, the Commission considers that no error can be attributed to the General Court.

Findings of the Court

73 As the Advocate General stated in point 35 of his Opinion, Versalis and Eni's first complaint is inadmissible in so far as, by that complaint, they do not criticise the judgment under appeal, but refer to the arguments which they put forward at first instance.

74 The second complaint is also inadmissible, since Versalis and Eni do not establish that they raised, before the General Court, a plea relating to the non-application by the Commission of point 18 of the 2006 Guidelines.

75 The third complaint, in so far as it is based on the assumption of the success of the second ground of appeal in Case C-123/13 P, must be rejected.

76 Consequently, the fourth ground of appeal in that case is in part inadmissible and in part unfounded.

The first ground of appeal in Case C-93/13 P

Arguments of the parties

77 In the context of its first ground of appeal, the Commission criticises paragraphs 272 to 275 of the judgment under appeal, which are worded as follows:

'272 In the present case, it must be stated that, in the cases cited in the [decision at issue] in order to establish the existence of repeated infringement on Eni's part, namely the cases which gave rise to the Polypropylene and PVC II decisions (see paragraph 257 [of the judgment under appeal]) (see footnote 517 of the [decision at issue]), the Commission has neither claimed nor shown that the companies concerned by those decisions, namely [Anic] and EniChem respectively, had not independently determined their conduct on the market at issue over the course of the infringement periods selected and that they therefore constituted, with their parent company Eni, an economic entity and therefore an undertaking within the meaning of Articles 81 EC and 82 EC. The Commission found an infringement only on the part of those subsidiaries and not on

the part of their parent company. As observed by the applicants, without being contradicted by the Commission, Eni was not heard in the context of the administrative procedure which led to the adoption of those decisions.

273 However, the principle of respect for the rights of the defence precludes a competition decision from being held to be lawful in a case where the Commission imposes a fine on an undertaking without first having informed it of the objections relied on against it. The statement of objections must also indicate in which capacity a legal person is called on to answer the allegations (judgments in *Papierfabrik August Koehler and Others* v *Commission*, [C-322/07 P, C-327/07 P and C-338/07 P, EU:C:2009:500], paragraphs 37 and 39; and [*Akzo Nobel and Others* v *Commission*, EU:C:2009:536], paragraph 57).

274 Therefore, it cannot be accepted that, when making a determination as to the aggravating circumstance of repeated infringement on Eni's part, the Commission is entitled to decide that Eni should be held liable for a previous infringement in relation to which it was not penalised by a Commission decision and in the establishment of which it was not the addressee of a statement of objections, with the result that it was not given an opportunity to present its arguments with a view to disputing that it formed an economic unit with certain other undertakings — in the present case, Anic and EniChem — at the time of the earlier infringement.

275 It follows that the infringement found in Article 1 of the [decision at issue] cannot be regarded as a repeated infringement on Eni's part.'

78 Criticising, more specifically, paragraphs 273 and 274 of the judgment under appeal, the Commission complains that the General Court infringed the principles of law relating to the exercise of the rights of the defence by holding that those principles required, in order to find the aggravating circumstance of repeated infringement on Eni's part, that Eni had been an addressee of the statement of objections relating to the first infringement and of the decision finding that infringement.

79 According to the Commission, the rights of the defence are guaranteed if, at the time when it announces its intention to make a finding of repeated infringement, it gives the parties an opportunity to demonstrate that the conditions for repeated infringement are not met. The Commission observes that, in the present case, Eni had the opportunity to rebut the presumption of control of its subsidiary.

80 In the second part of that ground of appeal, specifically relating to paragraph 274 of the judgment under appeal, the Commission contends that characterisation as a repeated infringement does not necessarily require a first fine to have been imposed on the parent company, but only the finding of a first infringement. According to the Commission, it is sufficient to find that the parent company formed, with a subsidiary which it controls almost entirely, an undertaking which committed a new infringement and for which an increase for repeated infringement is justified. The Commission takes the view that, in order to assess whether an undertaking drew the inferences from a first finding of infringement, it is appropriate to consider the propensity of that economic entity to commit a new infringement, and not that of the companies which make it up taken separately.

81 The Commission claims that the General Court's reasoning is liable to affect enforcement by the Commission, which would be under an obligation to send a statement of objections automatically to all the companies constituting the undertaking involved in the first infringement, regardless of the question whether, in the case at issue, a fine must be imposed on them. Moreover, according to the Commission, it cannot be accepted that the aggravating circumstance of repeated infringement does not apply to companies belonging to such an undertaking solely because of the organisational structure of the group to which those companies belong.

82 Versalis and Eni claim that the Commission's first ground of appeal must be rejected. They maintain that Eni was never heard or involved in the procedures leading up to the Polypropylene and PVC II decisions and consider that it is not reasonable to state that Eni was able, in the procedure prior to the decision at issue, to adduce evidence capable of rebutting the presumption of Eni's decisive influence over Anic and EniChem (now [*confidential*]) for the periods contemporaneous with the proceedings long since concluded which gave rise to the Polypropylene and PVC II decisions.

83 In addition, Versalis and Eni claim that the fact that the Commission did not involve Eni in those proceedings shows that the Commission considered that the fact of a parent company's control of 100% of the capital of an involved subsidiary was irrelevant in that regard. Versalis and Eni submit that the ownership of the entire capital of the subsidiary by the parent company was therefore insufficient to establish the decisive influence of that parent company and that the Commission should have proved the actual exercise by Eni of such an influence over Anic and EniChem.

84 Versalis and Eni also contend that the current Eni is a completely different company from the company which it was at the time of the Polypropylene and PVC II decisions, namely a public body controlled and directed by the Italian Government to enable the Italian State to manage its shareholdings in certain sectors considered to be in the national interest.

85 As regards the second part of the Commission's first ground of appeal, Versalis and Eni claim that the Commission misreads paragraph 274 of the judgment under appeal. According to Versalis and Eni, the General Court does not refer to a penalty taking the form of a fine, but rather to the non-liability of Eni in the Polypropylene and PVC II decisions, in so far as it was not one of the undertakings penalised.

Findings of the Court

86 The Commission's first ground of appeal concerns the aggravating circumstance of repeated infringement found against Eni on the basis of the penalty imposed on Anic and EniChem by the Polypropylene and PVC II decisions, respectively, for their participation in cartels.

87 As follows from point 28 of the 2006 Guidelines and from the case-law of the Court of Justice, the aggravating circumstance of repeated infringement is characterised by the continuation or repetition by an undertaking of the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 81 EC or 82 EC (see, to that effect, judgment in *Groupe Danone* v *Commission*, C-3/06 P, EU:C:2007:88, paragraphs 40 and 41).

88 It must be borne in mind that EU competition law refers to the activities of undertakings and that the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see judgment in *Akzo Nobel and Others* v *Commission*, EU:C:2009:536, paragraph 54 and the case-law cited).

89 When such an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement. None the less, the infringement of EU competition law must be imputed unequivocally to a legal person on whom fines may be imposed and the statement of objections must be addressed to that person (see, to that effect, judgment in *Akzo Nobel and Others* v *Commission*, EU:C:2009:536, paragraphs 56 and 57 and the case-law cited).

90 As regards the conduct of a subsidiary, according to the established case-law cited in paragraph 40 of this judgment, that conduct may be imputed, for the purposes of the application of Article 81 EC, to the parent company where the parent company and its subsidiary form part of a single economic unit and form a single undertaking for the purpose of that article.

91 Thus, in order to establish the aggravating circumstance of repeated infringement on the part of the parent company, it is not necessary for that company to have been the subject of previous legal proceedings giving rise to a statement of objections and a decision. For that purpose, what matters is an earlier finding of a first infringement resulting from the conduct of a subsidiary with which the parent company involved in the second infringement formed, already at the time of the first infringement, a single undertaking for the purpose of Article 81 EC.

92 The objective of suppressing conduct that infringes the competition rules and preventing its reoccurrence by means of deterrent penalties (see judgment in *ETI and Others*, EU:C:2007:775, paragraph 41 and the case-law cited) would be jeopardised if an undertaking encompassing a subsidiary concerned by a first infringement were able, by altering its legal structure through the creation of new subsidiaries against which proceedings could not be brought on the basis of the first infringement, but which are involved in the commission of the new infringement, to make impossible or particularly difficult, and therefore avoid, a penalty for repeated infringement.

93 It is true that, as the General Court held in the judgment under appeal, it is necessary to observe the rights of the defence of the legal person against which an allegation of repeated infringement has been made. However, such observance does not require, as the General Court wrongly stated in paragraph 274 of the judgment under appeal, that the legal person must have been able, in the proceedings conducted on the basis of a first infringement, to dispute that it formed a single economic unit with other entities against which proceedings were also brought. What matters is simply that that legal person must be able to defend itself at the time when the repeated infringement is alleged against it.

94 In all proceedings in which penalties, especially fines or penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of EU law which must be fully complied with even if the proceedings in question are administrative proceedings (judgments in *Hoffmann-La Roche* v *Commission*, 85/76, EU:C:1979:36, paragraph 9; *ARBED* v *Commission*, C-176/99 P, EU:C:2003:524, paragraph 19; and *Papierfabrik August Koehler and Others* v *Commission*, EU:C:2009:500, paragraph 34).

95 In proceedings for infringement of the competition rules, it is the statement of objections which constitutes the essential procedural safeguard in this respect (see, to that effect, judgments in *Musique Diffusion française and Others* v *Commission*, 100/80 to 103/80, EU:C:1983:158, paragraph 10, and *Papierfabrik August Koehler and Others* v *Commission*, EU:C:2009:500, paragraph 35).

96 Where the Commission intends to impute an infringement of competition law to a legal person and invoke repeated infringement against it, the statement of objections must contain all the information necessary for that person to defend itself. In particular, if the legal person is a parent company against which the aggravating circumstance of repeated infringement is alleged on account of the anticompetitive conduct established by the Commission on the part of one of its subsidiaries, but for which that parent company was not, prior to that statement, an addressee of a decision finding a first infringement, the statement of objections addressed to that parent company must contain the information demonstrating that the conditions for a finding of repeated infringement are satisfied and, in particular, proving that that legal person formed, at the time of the first infringement, a single undertaking with the company found to have committed the first infringement. In that regard, it is for the Commission to prove that the legal person concerned by the second infringement already exercised, at the time of the first infringement, a decisive influence over the subsidiary involved in the first infringement.

97 Contrary to what Eni claims, the period which separates a first infringement of the competition rules from a second infringement does not, in principle, prevent the aggravating circumstance of repeated infringement from being applied to a legal person which was not the subject of proceedings for the first infringement. However, the Commission must take into account, in its assessment of the undertaking's propensity to infringe the competition rules, the time which has elapsed between the two infringements (see, to that effect, judgment in *Lafarge* v *Commission*, C-413/08 P, EU:C:2010:346, paragraph 70). Moreover, when the EU judicature reviews whether the principle of the rights of the defence has been observed, it must take all the circumstances of the case at issue into consideration, inter alia the possible difficulties of proof resulting from the time elapsed since the first infringement, structural changes in the undertaking or the evolution of the competition law rules.

98 Furthermore, it is for the Commission to prove that the conditions for a finding of repeated infringement are satisfied, both in the statement of objections and in the decision. Thus, when imposing a fine on a company for an infringement of EU 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, the Commission is required to provide, with the decision imposing the fine, a statement of reasons enabling the Courts of the European Union and that company to understand in what capacity and to what extent it is alleged to have been involved in the earlier infringement. In particular, if the Commission considers that that company was part of the undertaking to which the decision relating to the earlier infringement was addressed, the Commission must give sufficient reasons for that assertion (judgments in *Eni* v *Commission*, EU:C:2013:289, paragraph 129, and *Versalis* v *Commission*, EU:C:2013:386, paragraph 142).

99 As for the aggravating circumstance of repeated infringement invoked against Eni, it is sufficient to note, without even examining the statement of objections, that only recital 540 of the decision at issue mentions the fact that EniChem had already been the addressee of previous decisions concerning cartel activities, referring to a footnote citing the Polypropylene decision, 'where [the Commission] found [that Anic], a subsidiary of the ENI group[,] participated in the cartel', and the PVC II decision, 'where [the Commission] found [that EniChem] participated in the cartel'. That recital also states that Eni is a repeat offender, without further explanation.

100 Since the Polypropylene decision was addressed, inter alia, to Anic and the PVC II decision, inter alia, to EniChem, it is clear that the statements made in the decision at issue and referred to in the preceding paragraph do not at all enable it to be understood in what capacity and to what extent Eni, which was not an addressee of the Polypropylene decision or the PVC II decision, was involved in the infringements found by those decisions.

101 Since the decision at issue clearly contains no reasoning enabling Eni to defend itself and the EU judicature to carry out its review, it is necessary to rule out the application to Eni of the aggravating circumstance of repeated infringement.

102 It follows from all the foregoing considerations that the General Court committed an error of law when, in paragraph 274 of the judgment under appeal, it set out the conditions for repeated infringement. However, since the decision of the General Court, in paragraph 275 of the judgment under appeal, ruling out, so far as concerns Eni, the aggravating circumstance of repeated infringement is well founded on other legal grounds, that error is not capable of leading to the annulment of that decision or of the inferences which the General Court drew from it concerning the amount of the fine, and a substitution of grounds must be made (see, to that effect, judgment in *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 187 and the case-law cited).

103 The first ground of appeal in Case C-93/13 P must therefore be rejected.

The fifth ground of appeal in Case C-123/13 P

Arguments of the parties

104 By the fifth ground of their appeal, Versalis and Eni claim that the General Court infringed the rules of EU law on repeated infringement in confirming, in paragraphs 278 to 280 of the judgment under appeal, that the aggravating circumstance of repeated infringement was applicable to Versalis and was justified by the economic succession from Polimeri Europa to EniChem (now [*confidential*]), which had participated in the infringement referred to in the PVC II decision. Versalis and Eni also claim that the General Court committed an error of law, in paragraph 276 of the judgment under appeal, in maintaining Eni's joint and several liability for payment of the fine, including for the part of that fine attributable to the aggravating circumstance of repeated infringement.

105 First, Versalis and Eni claim insufficient reasoning so far as concerns the links between the undertakings liable for the various infringements. Secondly, they dipsute the use of the criterion of economic succession. Thirdly, they claim that the General Court exceeded the limits of its competence in confirming the applicability of the aggravating circumstance of repeated infringement by using a different reasoning from that of the Commission. Fourthly, relying on the circumstances of Bayer, referred to in paragraph 367 of the judgment under appeal, Versalis and Eni claim that the General Court infringed the principle of equal treatment by setting the percentage reduction in the increase of the fine in respect of the aggravating circumstance of repeated infringement at only 10%. Fifthly, Versalis and Eni take the view that, in respect of the joint and several nature, with regard to Eni, of the obligation to pay that increase, the General Court infringed its obligation to state reasons and departed from the case-law of the Court of Justice deriving from the judgment in *Arkema* v *Commission* (C-520/09 P, EU:C:2011:619), where it was acknowledged that a parent company which constitutes an undertaking with a subsidiary liable for an infringement of the competition rules is not jointly and severally liable for the part of the fine corresponding to the subsidiary's repeated infringement, provided that that parent company did not constitute an economic unit with that subsidiary at the time when the first infringement was committed.

106 The Commission contends that those complaints are not well founded.

Findings of the Court

107 The present ground of appeal relates to the aggravating circumstance of repeated infringement found against Versalis on the basis of the penalty imposed on EniChem by the PVC II decision. In the course of its examination of the appellants' third plea at first instance, to which the General Court refers in paragraph 278 of the judgment under appeal, the General Court fully described the links between the various legal persons to which the infringements are imputed. Furthermore, it is apparent from the examination of Versalis and Eni's second ground of appeal in Case C-123/13 P that the continuity of the undertaking between EniChem (now [*confidential*]) and Polimeri Europa (now Versalis) could reasonably be found. In any event, the General Court did not exceed its powers, but relied on the information in the decision at issue in order to hold that the conditions for repeated infringement were fulfilled. The first three complaints are therefore unfounded.

108 Since the repeated infringement was found on the part of Versalis (formerly Polimeri Europa) in respect of a single infringement prior to the decision at issue, the General Court was right to hold, in paragraph 367 of the judgment under appeal, that Versalis and Eni's situation was comparable to that of Bayer, for which a repeated infringement in respect of a single infringement had also been found. The fourth complaint is therefore unfounded.

109 The fifth complaint, which seeks to call into question the application to Eni of the presumption of influence of the parent company over its subsidiaries involved in the infringement, relates to Versalis and Eni's first ground of appeal. However, it is apparent from paragraphs 40 to 45 of this judgment that that ground of appeal has been rejected. As for the judgment in *Arkema* v *Commission* (EU:C:2011:619), it is sufficient to state that Versalis and Eni's argument is based on an incorrect reading of that judgment, in which the Court of Justice simply reviewed the calculation of the fine on the basis of the Commission's choices, without expressing any view on the conditions for repeated infringement.

110 It follows from the foregoing that Versalis and Eni's fifth ground of appeal must be rejected as unfounded.

The second ground of appeal in Case C-93/13 P

Arguments of the parties

111 Within the context of the second ground of its appeal, which relates to paragraph 316 et seq. of the judgment under appeal, the Commission contests the comparison between the multiplier intended to ensure a sufficiently deterrent effect which was used in order to determine the amount of the fine imposed on Versalis and Eni and the multiplier applied in the decision at issue to Dow, and also the reduction, on grounds of infringement of the principle of equal treatment, of the multiplier applied to Versalis and Eni.

112 The Commission contends that the General Court exceeded the limits of its competence and infringed the principle that the subject-matter of an action is delimited by the parties, Article 21 of the Protocol on the Statute of the Court of Justice of the European Union and also Articles 44(1) and 48(2) of the Rules of Procedure of the General Court by examining a question of law relating to an alleged infringement of the principle of equal treatment so far as concerns the multiplier used for deterrent purposes, in the calculation of the fine, when that question had not been raised by Versalis and Eni in the application initiating proceedings.

113 The Commission observes that, in that application, Versalis and Eni had requested the General Court to find that the application of that multiplier was unlawful due to the fact that, by virtue of the size of that multiplier, its application infringed the principle of proportionality. In the alternative, Versalis and Eni had requested that that multiplier be reduced. According to the Commission, it is only at the hearing before the General Court that Versalis and Eni referred to the infringement of the principle of equal treatment. The Commission claims that, in raising that plea of its own motion, the General Court infringed the abovementioned provisions and, in particular, the principle that the subject-matter of an action is delimited by the parties.

114 Versalis and Eni contest the Commission's second ground of appeal. They state that they relied on the difference between the multipliers applied for deterrent purposes in the calculation of the fines on the various undertakings in support of their plea alleging infringement of the principle of proportionality. According to Versalis and Eni, the principle of equal treatment is linked to the principle of proportionality. They contend that the General Court did not therefore raise a new plea of its own motion. They state that, moreover, the Commission did not complain, at that hearing, of the submission of a new plea by Versalis and Eni.

115 Versalis and Eni also draw attention to the case-law of the Court of Justice relating to the unlimited jurisdiction of the General Court.

Findings of the Court

116 As the Advocate General stated in point 101 of his Opinion, on several occasions and, in particular, in their application at first instance, Versalis and Eni complained that the Commission applied a multiplier for deterrent purposes which was higher than that applied to other undertakings. By that complaint, Versalis and Eni put forward, in essence, a plea alleging infringement of the principle of equal treatment, which was therefore open for discussion by the parties. It follows that the General Court did not rule, of its own motion, on that plea.

117 The Commission's second ground of appeal must therefore be rejected.

The third ground of appeal in Case C-93/13 P

Arguments of the parties

118 Within the context of the third ground of its appeal, which relates to paragraphs 323 to 325 of the judgment under appeal, the Commission claims that the General Court committed an error of law in the interpretation and application of the principle of equal treatment so far as concerns the multiplier of the fine, used for deterrent purposes. According to the Commission, the judgment under appeal is also vitiated by a failure to state reasons. In particular, the General Court failed to have regard for the Commission's discretion in determining the amount of the fines in the light of the relevant circumstances and obliges the Commission to make a purely mathematical calculation in order to determine the multiplier to be applied to Versalis and Eni's fines. Furthermore, the General Court erred in requiring that the increase in the fine for deterrence be proportional to the respective turnovers of the undertakings involved, and not that the multipliers or the fines resulting from the application of the multipliers be proportional to the total turnover of those undertakings.

119 Versalis and Eni claim that, under the cloak of the third ground of its appeal, the Commission is seeking from the Court of Justice a fresh assessment of the multiplier applied for deterrent purposes. They argue that that ground of appeal is therefore inadmissible. They submit that that ground is in any event unfounded. Versalis and Eni claim that the General Court acted in the exercise of its unlimited jurisdiction and the Commission has not shown that the method advocated by the General Court has less deterrent effect than the method proposed by the Commission, which could have disproportionate results.

Findings of the Court

120 As the Advocate General observed in point 105 of his Opinion, the Commission's third ground of appeal does not relate to the necessity of observing the principle of equal treatment between the various participants in the same cartel, but to the factors to be taken into account in order to review the proportionality of the fines imposed. In that regard, the General Court relied on the information contained in the decision at issue, gave precise reasons for its decision and did not commit an error of law in holding, in paragraph 325 of the judgment under appeal, that the choice of the 1.4 multiplier was inappropriate in the light of the difference in turnover between Eni and Dow.

121 That ground of appeal must be rejected as unfounded.

The sixth ground of appeal in Case C-123/13 P

Arguments of the parties

122 Within the context of the sixth ground of their appeal, Versalis and Eni contend that the General Court manifestly misapplied Article 23(2) of Regulation No 1/2003 in determining the maximum amount of the fine other than on the basis of the turnover of [*confidential*] (formerly EniChem) alone.

123 The Commission considers that that ground of appeal is indissociable from Versalis and Eni's first and second grounds of appeal.

Findings of the Court

124 That ground of appeal is based on the assumption that the first and second grounds of that appeal are upheld. Since those last two grounds of appeal have been rejected, it is not necessary to respond to Versalis and Eni's sixth ground of appeal.

The seventh ground of appeal in Case C-123/13 P

Arguments of the parties

125 Within the context of the seventh ground of their appeal, Versalis and Eni challenge the General Court's rejection of the tenth plea in the action at first instance, alleging that the Commission did not take into account the cooperation of [*confidential*] and of Versalis outside the scope of the 2002 Leniency Notice, and also of the eleventh plea of that action, concerning the failure to reduce the amount of the fine in accordance with the 2002 Leniency Notice. Versalis and Eni contend that the General Court failed to exercise its powers of review and that, in any event, it made an error of assessment and failed to fulfil its obligation to state reasons by considering that the Commission had not infringed the principles of equity, equal treatment and the protection of legitimate expectations when assessing that cooperation.

126 Versalis and Eni complain that, by referring to the discretion conferred on the Commission as regards the method for calculating the fines, the General Court reproduced, in paragraph 355 of the judgment under appeal, the Commission's assessment of the information which Versalis and Eni provided in the course of that cooperation. According to Versalis and Eni, the General Court should have carried out its review in the light of the manner in which the Commission applied the 2002 Leniency Notice in other cases. Versalis and Eni submit that the General Court also did not take into account the lateness with which they became aware of the investigation, although that had an effect on the added value of the information which they were able to provide. Versalis and Eni also complain that the Commission did not carry out an inspection earlier.

127 Versalis and Eni submit that the General Court also committed an error of law in not finding that the Commission had infringed the principle of the protection of legitimate expectations, although the information provided by Versalis and Eni constituted significant added value by comparison with the information provided in cases giving rise to other Commission decisions and although they could reasonably take the view that their total, sincere and continuous cooperation would be duly rewarded. They contest paragraph 358 of the judgment under appeal as being unfounded.

128 Likewise, Versalis and Eni consider that they suffered discrimination in comparison with the other undertakings which asked for a reduction of their fine, whose statements were inconsistent, imprecise and unreliable.

129 The Commission submits that Versalis and Eni's seventh ground of appeal is inadmissible in that it merely repeats the arguments relied on before the General Court and seeks to obtain a new factual assessment of the information provided by [*confidential*] (formerly EniChem) to the Commission.

Findings of the Court

130 By the seventh ground of their appeal, Versalis and Eni essentially contest the General Court's response to the eleventh plea of their application at first instance. After having considered, in paragraph 354 of the judgment under appeal, the concept of 'added value' as set out in the 2002 Leniency Notice, the General Court examined the evidence provided by Versalis and Eni in order to determine whether it added significant value in relation to the evidence already in the Commission's possession.

131 In paragraphs 357 to 363 of the judgment under appeal, the General Court carried out a precise and reasoned analysis of the evidence, which it is not for the Court of Justice to review in the context of an appeal. In the light of that assessment, the General Court did not err in law in rejecting Versalis and Eni's various arguments.

132 Versalis and Eni's seventh ground of appeal must therefore be rejected.

The eighth ground of appeal in Case C-123/13 P

Arguments of the parties

133 Within the context of the eighth ground of their appeal, Versalis and Eni submit that the General Court did not carry out a full review of the amount of the final fine, which is unfair, inappropriate and disproportionate. They consider that the General Court did not thoroughly examine their arguments and restricted itself to a mere review of the legality of the decision at issue.

134 The Commission considers that the General Court carried out a thorough examination of Versalis and Eni's arguments. According to the Commission, Versalis and Eni seek to have the Court of Justice carry out a review of the amount of the fine.

Findings of the Court

135 It must be held that that ground of appeal concerns the judgment in its entirety and does not specify the paragraphs in the grounds of the judgment under appeal which are contested. On that basis, it is too imprecise and too obscure for a response to be given.

136 Moreover, it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the General Court exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of EU law (see, in particular, judgment in *E.ON Energie* v *Commission*, C-89/11 P, EU:C:2012:738, paragraph 125).

137 It follows from the above that Versalis and Eni's eighth ground of appeal must be dismissed as inadmissible.

138 Since all the grounds of appeal have been dismissed in Case C-93/13 P and in Case C-123/13 P, both appeals must be rejected.

Costs

139 In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those Rules, which apply to the procedure on appeal by virtue of Article 184(1) of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

140 As regards the appeal in Case C-93/13 P, since Versalis and Eni applied for costs against the Commission and since the Commission's grounds of appeal were unsuccessful, it must be ordered to pay the costs.

141 As regards the appeal in Case C-123/13 P, since the Commission applied for costs against Versalis and Eni and since Versalis and Eni's grounds of appeal were unsuccessful, they must be ordered to pay the costs.

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

1. Rejects the appeals in Cases C-93/13 P and C-123/13 P;

2. Orders the European Commission to pay the costs relating to the appeal in Case C-93/13 P;

3. Orders Versalis SpA and Eni SpA to pay the costs relating to the appeal in Case C-123/13 P.

[Signatures]