Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber)

11 July 2014*

(Competition — Agreements, decisions and concerted practices — Paraffin waxes market — Slack wax market — Decision finding an infringement of Article 81 EC — Price fixing and market sharing — 2006 Guidelines on the method of setting fines — Duration of the infringement — Equal treatment — Proportionality — Unlimited jurisdiction)

In Case T-540/08,

Esso Société anonyme française, established in Courbevoie (France),

Esso Deutschland GmbH, established in Hamburg (Germany),

ExxonMobil Petroleum and Chemical BVBA, established in Antwerp (Belgium),

Exxon Mobil Corp., established in West Trenton, New Jersey (United States),

represented by R. Subiotto QC, R. Snelders, L.-P. Rudolf and M. Piergiovanni, lawyers,

applicants,

v

European Commission, represented by F. Castillo de la Torre, acting as Agent, and by M. Gray, Barrister,

defendant,

APPLICATION for the partial annulment of Commission decision C(2008) 5476 final of 1 October 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/39.181 — Candle Waxes) and for the reduction of the fine it imposes on the applicants,

THE GENERAL COURT (Third Chamber),

composed of O. Czúcz (Rapporteur), President, I. Labucka and D. Gratsias, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 21 March 2011,

gives the following

* Language of the case: English.

Judgment

Background to the dispute and the contested decision

Administrative procedure and adoption of the contested decision

1 By Decision C(2008) 5476 final of 1 October 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/39.181 — Candle Waxes) ('the contested decision'), the Commission of the European Communities found that the applicants, Esso Deutschland GmbH, Esso Société anonyme française ('Esso France'), ExxonMobil Petroleum and Chemical BVBA ('EMPC') and Exxon Mobil Corp. ('EMC') (together 'ExxonMobil' or 'the ExxonMobil group') had, with other undertakings, infringed Article 81(1) EC and Article 53(1) of the Agreement on the European Economic Area (EEA), by participating in a cartel concerning the paraffin waxes market in the EEA and the German slack wax market.

2 The addressees of the contested decision are, as well as the applicants, the following companies: ENI SpA.; H&R ChemPharm GmbH, H&R Wax Company Vertrieb GmbH and Hansen & Rosenthal KG; Tudapetrol Mineralölerzeugnisse Nils Hansen KG; MOL Nyrt.; Repsol YPF Lubricantes y Especialidades SA, Repsol Petróleo SA and Repsol YPF SA (together 'Repsol'); Sasol Wax GmbH, Sasol Wax International AG, Sasol Holding in Germany GmbH and Sasol Ltd (together 'Sasol'); Shell Deutschland Oil GmbH, Shell Deutschland Schmierstoff GmbH, Deutsche Shell GmbH, Shell International Petroleum Company Limited, the Shell Petroleum Company Limited, Shell Petroleum NV and the Shell Transport and Trading Company Limited (together 'Shell'); RWE Dea AG and RWE AG (together 'RWE'); and also Total SA and Total France SA (together 'Total') (recital 1 in the preamble to the contested decision).

3 Paraffin waxes are manufactured in refineries from crude oil. They are used for the production of a variety of products such as candles, chemicals, tyres and automotive products as well as in the rubber, packaging, adhesive and chewing-gum industries (recital 4 of the contested decision).

4 Slack wax is the raw material required for the manufacture of paraffin waxes. It is produced in refineries as a by-product in the manufacture of base oils from crude oil. It is also sold to end-customers, to producers of particle boards for instance (recital 5 of the contested decision).

5 The Commission began its investigation after Shell Deutschland Schmierstoff GmbH informed it, by letter of 17 March 2005, of the existence of a cartel and submitted an application to it for immunity under the Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3) (recital 72 of the contested decision).

6 On 28 and 29 April 2005, the Commission carried out, pursuant to Article 20(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), on-site inspections at the premises of 'H&R/Tudapetrol', ENI, MOL and also at those of the companies in the Sasol, ExxonMobil, Repsol and Total groups (recital 75 of the contested decision).

7 On 29 May 2007, the Commission sent a statement of objections to the companies listed in paragraph 1 above, including the applicants (recital 85 of the contested decision). By letter of 21 August 2007, the applicants replied to the statement of objections.

8 On 10 and 11 December 2007, the Commission held a hearing in which the applicants took part (recital 91 of the contested decision).

9 In the contested decision, in the light of the evidence available to it, the Commission considered that the addressees, which constituted the majority of the producers of paraffin waxes and slack wax in the EEA, had participated in a single, complex and continuous infringement of Article 81 EC and Article 53 of the EEA Agreement, covering the EEA territory. That infringement consisted in agreements or concerted practices aimed at price fixing, and exchanging and disclosing commercially-sensitive information affecting paraffin waxes. In the case of RWE (later Shell), ExxonMobil, MOL, Repsol, Sasol and Total, the infringement affecting paraffin waxes also consisted of customer and/or market allocation. Furthermore, the infringement committed by RWE, ExxonMobil, Sasol and Total, also related to slack wax sold to end-customers on the German market (recitals 2, 95 and 328, and Article 1 of the contested decision).

10 The unlawful practices took shape at anti-competitive meetings called 'technical meetings' or sometimes 'Blauer Salon' meetings of the participants and at 'slack wax meetings' devoted specifically to questions relating to slack wax.

11 The fines imposed in this case were calculated on the basis of the 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'), in force at the time the statement of objections was notified to the companies in paragraph 1 above.

12 The contested decision includes, in particular, the following provisions:

'Article 1

The following undertakings have infringed Article 81(1) [EC] and — from 1 January 1994 — Article 53 of the EEA Agreement by participating, for the periods indicated, in a continuing agreement and/or concerted practice in the paraffin waxes sector in the common market and, as of 1 January 1994, within the EEA:

…

Esso Deutschland GmbH: from 22 February 2001 to 20 November 2003;

Esso Société Anonyme Française: from 3 September 1992 to 20 November 2003;

ExxonMobil Petroleum and Chemical BVBA: from 30 November 1999 to 20 November 2003;

Exxon Mobil [Corp.]: from 30 November 1999 to 20 November 2003;

…

For the following undertakings, the infringement also includes slack wax sold to end customers on the German market for the periods indicated:

…

Esso Deutschland GmbH: from 22 February 2001 to 18 December 2002;

Esso Société Anonyme Française: from 8 March 1999 to 18 December 2002;

ExxonMobil Petroleum and Chemical BVBA: from 20 November 1999 to 18 December 2002;

Exxon Mobil [Corp.]: from 20 November 1999 to 18 December 2002;

…

Article 2

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

ENI SpA: EUR 29 120 000;

Esso Société Anonyme Française: EUR 83 588 400,

of which jointly and severally with

ExxonMobil Petroleum and Chemical BVBA and Exxon Mobi1 [Corp.]: for EUR 34 670 400, of which jointly and severally with Esso Deutschland GmbH for 27 081 600 EUR;

Tudapetrol Mineralölerzeugnisse Nils Hansen KG: EUR 12 000 000;

Hansen & Rosenthal KG jointly and severally with H&R Wax Company Vertrieb GmbH: EUR 24 000 000,

of which jointly and severally with:

H&R ChemPharm GmbH for EUR 22 000 000;

MOL Nyrt.: EUR 23 700 000;

Repsol YPF Lubricantes y Especialidades SA jointly and severally with Repsol Petróleo SA and Repsol YPF SA: EUR 19 800 000;

Sasol Wax GmbH: EUR 318 200 000,

of which jointly and severally with

Sasol Wax International AG, Sasol Holding in Germany GmbH and Sasol Limited for EUR 250 700 000;

Shell Deutschland Oil GmbH, Shell Deutschland Schmierstoff GmbH, Deutsche Shell GmbH, Shell International Petroleum Company Limited, the Shell Petroleum Company Limited, Shell Petroleum NV and the Shell Transport and Trading Company [Ltd]: EUR 0;

RWE-Dea AG jointly and severally with RWE AG: EUR 37 440 000;

Total France SA jointly and severally with Total SA: EUR 128 163 000.'

The Exxon/Mobil merger and the attribution of liability for the infringement in the contested decision

13 On 30 November 1999, Exxon Corp. acquired Mobil Corp. and was subsequently renamed EMC ('the Exxon/Mobil merger'). On 6 May 2003, Mobil Oil Française ('Mobil France') was merged into Esso France.

14 The Commission described the attribution of liability for the anti-competitive activities to the various companies in the ExxonMobil group in particular in recitals 348 to 352 of the contested decision:

‘6.2.2 The ExxonMobil group

(348) It has been established in section 4 that throughout the period of its involvement, ExxonMobil participated in the collusion via employees of Mobil [France] (and its legal successor) and Esso Deutschland …

(349) Mobil [France] participated in the cartel via its own employees from the beginning of the infringement [on 3 September 1992] until it ceased to exist on 6 May 2003. Esso Deutschland participated via its own employees from at least 22 February 2001 onwards. As a starting point, the Commission held these companies liable for their direct participation in the cartel. …

(351) Mobil [France] was taken over by [Esso France on 6 May 2003].

(352) Thus, [Esso France] should be held liable for the [anti-competitive] activities of [Mobil France prior to 6 May 2003].’

15 EMPC was found liable as from the Exxon/Mobil merger, namely 30 November 1999, on the basis that is was the parent company of Esso Deutschland and Esso France. EMC was held liable as from the same date, on the basis that it was the parent company of EMPC (recitals 535 and 354 of the contested decision).

Calculation of the amount of the fine imposed on the applicants

16 In the present case, when calculating the basic amount of the fine, the Commission took into account a proportion of the value of the ExxonMobil group’s sales in the EEA and then multiplied the amount thus obtained by a coefficient reflecting the duration of the participation in the infringement by each of the applicants.

17 First, the Commission identified the annual value of sales for both paraffin wax and slack wax. For paraffin wax, the Commission took the revenue for the years 2000-2002 of the ExxonMobil group as the basis for calculating an annual average. For slack wax, the Commission took the revenue of the ExxonMobil group for 2000-2001 as the basis for calculating an annual average. This amounted to EUR 19 790 382 for paraffin wax and EUR 1 259 217 for slack wax. The gravity multipliers applied to each of those figures were 18% for paraffin wax and 15% for slack wax respectively.

18 Then, the Commission identified the durations of the applicants’ participation in the infringement in respect of both paraffin wax and slack wax. In that regard, for paraffin wax, Esso France was deemed to have participated for a period corresponding to a multiplier of 11.5. For Esso Deutschland the multiplier was 3, and for both EMPC and EMC the multiplier was 4.

19 Secondly, pursuant to point 25 of the 2006 Guidelines, the Commission supplemented those figures with the additional amount, known as the ‘entry fee’, corresponding to 18% of the value of sales for paraffin wax and 15% for slack wax.

20 Thirdly, no mitigating or aggravating circumstances which might affect the level of the fine were identified. The levels of the fines were, therefore, not changed on that basis.

21 Fourthly, the Commission considered that it was appropriate to apply a deterrence multiplier, because of the considerable size of the ExxonMobil group. Consequently, a multiplier of 2 was applied.

22 Fifthly, the Commission applied a reduction of 7% in the amount of the fine on account of the information provided by the applicants and their subsequent cooperation under the Commission Notice on immunity from fines and reduction of fines in cartel cases. This brought the level of fines to the following final figures: a fine of EUR 83 588 400 on Esso France, of which it was jointly and severally liable with Esso Deutschland for EUR 27 081 600, and jointly and severally liable with EMPC and EMC for EUR 34 670 40.

Procedure and forms of order sought

23 By application lodged at the Court Registry on 12 December 2008, the applicants brought the present action.

24 Acting upon a report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure. In the context of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, the Court requested the parties to answer a number of written questions and to produce certain documents. The parties complied with that request within the prescribed period.

25 By letter of 10 February 2011, the Commission requested the Court to remove from the file certain passages from the applicants' reply to the written questions. The applicants opposed that request. By order of 3 May 2011, the Court (Third Chamber) reserved that request for the final judgment.

26 The parties presented oral argument and replied to questions put by the Court at the hearing on 21 March 2011.

27 In the light of the factual links with Case T-541/08 *Sasol and Others* v *Commission*, Case T-543/08 *RWE and RWE Dea* v *Commission*, Case T-544/08 *Hansen & Rosenthal and H&R Wax Company Vertrieb* v *Commission*, Case T-548/08 *Total* v *Commission*, Case T-550/08 *Tudapetrol* v *Commission*, Case T-551/08 *H&R ChemPharm* v *Commission*, Case T-558/08 *ENI* v *Commission*, Case T-562/08 *Repsol Lubricantes y Especialidades and Others* v *Commission* and Case T-566/08 *Total Raffinage Marketing* v *Commission*, and the similarity of the legal issues raised, the Court decided to give judgment in the present case only after the hearings in those related cases, the last of which was held on 3 July 2013.

28 The applicants claim that the Court should:

— annul the contested decision in part;

— reduce the fine imposed on them;

— order the Commission to pay the costs.

29 The Commission contends that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Law

30 In support of their action, the applicants put forward two pleas in law. The first plea alleges an error of law in the calculation of the basic amount of the fine imposed on Esso France, since the calculation of that amount fails to reflect the fact that, before the merger, Exxon did not participate in the infringement. The second plea in law alleges that the end date of the applicants' participation in the paraffin wax part of the infringement was incorrectly determined.

31 The Court considers it appropriate to begin by examining the second plea in law.

The second plea in law, relating to an error of law allegedly committed when determining the date on which the applicants' participation in the infringement ended

Preliminary observations

32 The applicants submit that the Commission incorrectly found that their participation in the first two parts of the infringement, concerning paraffin waxes, had ended on 20 November 2003. They state that they did not participate in the technical meetings held after that of 27 and 28 February 2003.

33 In that regard, the Commission founds as follows in the contested decision:

'…

(600) ExxonMobil states that the last meeting attended by one of its representatives was a technical meeting on 27 and 28 February 2003 in Munich. In reaction to the invitation for the meeting on 15 January 2004 which was sent by Mr [M.] of Sasol, Mr [Hu.] of ExxonMobil replies inter alia: "The agenda items seems to be of interest to us. However, as we understand this group of competitors meets without the support of an industry trade association and therefore without a structure and statutes. We feel uncomfortable with this and would like to suggest to bring these meetings under the umbrella of the [European Wax Federation] either as part of the technical committee, or as a separate subcommittee. ExxonMobil will not attend this meeting without the support of a statuted industrial trade association." This email of 20 November 2003 was sent to Mr [M.] of Sasol and copied to Mr [Hu.']s superiors at ExxonMobil. The Commission has no evidence that ExxonMobil continued to be involved in the infringement after this email was sent. Thus, the Commission considers that by virtue of this email to Sasol (the organiser of most of the technical meetings), ExxonMobil has publicly distanced itself from the cartel.

(601) It cannot, however, be accepted that ExxonMobil's participation in the infringement ended after the technical meeting on 27 and 28 February 2003. It is not sufficient to abstain from attending meetings for an involvement to be ended. The public distancing as required by the case law only occurred with Mr [Hu.]'s email of 20 November 2003. That such a public distancing was not seen by the other participants, in particular by Sasol, in abstaining from the meetings is demonstrated by the fact that ExxonMobil continued to receive invitations to the technical meetings which eventually provoked the email by Mr [Hu.] of 20 November 2003.'

34 The applicants dispute that assessment. They claim that they neither participated in, nor were informed of the outcome of, any technical meetings held after the meeting of 27 and 28 February 2003, at which Mr T. — the applicants' representative at the technical meetings — formally informed the other participants of his impending departure from ExxonMobil without having announced his successor. Equally, following Mr T.'s secondment and subsequent retirement, there is no evidence that the applicants knew of his previous participation in the infringement. To the contrary, the available evidence shows that Mr T. deliberately concealed the anti-competitive content of the technical meetings from his management and colleagues.

35 Consequently, the applicants argue that the Commission ought to have found that 28 February 2003, the date of the last meeting attended by Mr T., was the end date of ExxonMobil's participation in the cartel, or, in any event, 31 March 2003, the date of his secondment to Sasol, or 30 June 2003, the date of his retirement.

The need for ExxonMobil to distance itself from the activities of the cartel in order to prove the end of its participation in the infringement

36 The applicants submit that the Commission was incorrect to take the view, in the present case, that a distancing from the activities of the cartel was required by the case-law in order to prove that ExxonMobil's participation in the cartel had come to an end.

37 That line of argument is, however, inconsistent with the case-law.

38 The Court has held that it could not be concluded that an undertaking had definitively ceased to belong to a cartel unless it had publicly distanced itself from the content of the cartel (Case T-329/01 *Archer Daniels Midland* v *Commission* [2006] ECR II-3255, paragraph 246, and Case T-446/05 *Amann & Söhne and Cousin Filterie* v *Commission* [2010] ECR II-1255, paragraph 241).

39 The applicants' line of argument must therefore be rejected.

The understanding of the other members of the cartel as regards the alleged distancing of ExxonMobil

40 It should be noted that, according to the case-law, the understanding which the other participants in a cartel have of the intention of the undertaking concerned is of critical importance when assessing whether that undertaking sought to distance itself from the unlawful agreement (Case C-510/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-1843, paragraph 120).

41 In that regard, the applicants submit that, at the meeting held on 27 and 28 February 2003, Mr T. announced his departure without introducing a successor with a view to participating in future meetings. They also refer to Shell's statement that after Mr T. retired, Mr S. of Sasol no longer sent price increase letters to ExxonMobil.

42 First of all, as regards the evidence which may be relied on in that regard, the prevailing principle of EU law is that evidence may be freely adduced (Case T-50/00 *Dalmine* v *Commission* [2004] ECR II-2395, paragraph 72).

43 As regards the probative value of the various items of evidence, the only relevant criterion for the purposes of evaluating the evidence produced is its reliability (*Dalmine* v *Commission*, cited in paragraph 42 above, paragraph 72).

44 According to the general rules regarding evidence, the reliability and, thus, the probative value of a document depends on its origin, the circumstances in which it was drawn up, the person to whom it is addressed and its content (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95 to T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraphs 1053 and 1838).

45 In addition, it should be noted since the prohibition on participating in anti-competitive practices and agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place clandestinely, for meetings to be held in secret and for the associated documentation to be reduced to a minimum. The Commission cannot therefore be required to produce documents expressly attesting to contacts between the traders

concerned. Even if the Commission discovers such evidence, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction (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, paragraphs 55 to 57; see also Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank and Others* v *Commission* [2006] ECR II-3567, paragraphs 64 and 65).

46 That case-law is also applicable, by analogy, to the other cartel members' perception of an undertaking's alleged public distancing from the cartel in question and of its continued participation in it during a period in which that undertaking is not present at the anti-competitive meetings. There is no supposition that the other participants in the cartel would indicate their perception as to the continued participation of a member of a cartel whose representative does not attend certain anti-competitive meetings or that they would produce other contemporaneous evidence in that regard, precisely because they are attempting to avoid making any express reference to the anti-competitive arrangements in order to reduce the evidence against them to a minimum. Consequently, the perception of the other participants must be deduced, if necessary, from the body of indicia and indirect evidence which the Commission and the Court may have.

47 In the present case, the Court considers, on the basis of the documents before it, that ExxonMobil did not publicly distance itself from the cartel in the eyes of the other participants before its letter of 20 November 2003.

48 First, as the Commission correctly notes in the contested decision, Sasol continued to send invitations to the technical meetings until 20 November 2003, the date of Mr Hu.'s letter stating that ExxonMobil 'w[ould] not attend th[at] meeting without the support of a statuted industrial trade association', considered by the Commission as the end date of ExxonMobil's participation in the cartel. If Sasol had taken the view that ExxonMobil was no longer part of the cartel after Mr T.'s departure, because he had not named a successor, it would not have sent any more invitations after 31 March 2003.

49 In addition, according to Sasol's reply of 18 December 2006 to a request for information from the Commission, Mr T.'s successor, Mr Hu., never attended any technical meetings, but had bilateral contacts at least with Sasol.

50 Secondly, the applicants cannot properly rely on Shell's statement of 16 June 2006 according to which, after Mr T. left, Mr S. of Shell no longer sent price increase letters to ExxonMobil. As the Commission correctly notes, that fact can also be explained by Mr S. not having a person of trust at ExxonMobil after Mr T.'s departure. Consequently, the statement referred to by the applicants does not amount to proof that Shell's perception as to ExxonMobil's continued participation in the cartel had changed. In any event, that statement in no way affects the conclusion that Sasol, which organised the technical meetings, continued to perceive ExxonMobil as a member of the cartel, as is apparent from the evidence set out in paragraphs 48 and 49 above.

51 In addition, it must be borne in mind that the single, complex and continuous infringement at issue consisted in agreements or concerted practices aimed at price fixing, exchanging and disclosing commercially-sensitive information, and customer and/or market allocation. The fact that ExxonMobil no longer received price letters from Shell concerns only one aspect of the infringement, namely a part of the mechanism for controlling the price increases agreed by the participants on several occasions at the technical meetings. The fact that Shell no longer regularly communicated to ExxonMobil its new prices does not show that, in the eyes of the cartel's participants, ExxonMobil did not consider itself bound by the previous commitments which it had given in the context of the single, complex and continuous infringement.

52 Thirdly, it is apparent from the sworn statement of Mr Hu. that he replied to the invitation to a technical meeting received from Mr M. of Sasol on 26 June 2003, stating that he could not attend the following meeting because of 'scheduling conflicts'. Similarly, he replied to the invitation to the meeting of 24 September 2003, received from Mr M. on 17 July 2003, stating that he would be travelling towards the end of September and that 'the [technical] meeting should not be delayed for [him]'.

53 Those reactions of Mr Hu. also call in question the applicants' argument that ExxonMobil was perceived as having distanced itself from the cartel after the departure of Mr T. on 31 March 2003. First, if the other participants had perceived ExxonMobil as no longer being a member of the cartel, its representative would not have been sent emails seeking to set the date of the next technical meeting. Secondly, it is not reasonable to take to the view that, if the cartel participants had understood that ExxonMobil had distanced itself from the cartel, Mr Hu. would have referred to 'scheduling conflicts' in the course of an email exchange seeking a date that suited all the participants, since such conduct would give the impression to the other participants that he was open to continued participation.

54 Consequently, the Commission's analysis that, in the absence of public distancing, ExxonMobil had been perceived by the other participants as a member of the cartel until 20 November 2003 must be upheld.

The lack of knowledge of ExxonMobil's employees of the participation in the infringement after Mr T.'s departure

55 The applicants submit that ExxonMobil could not be required in any way to distance itself publicly, given that there is no evidence whatsoever that it was aware, following Mr T.'s departure, of his previous participation in the infringement and that the available evidence shows, on the contrary, that Mr T. had deliberately concealed the anti-competitive content of the technical meetings from his management and colleagues.

– Procedural questions

56 It must be borne in mind that the Commission lodged, in annex to its rejoinder, documentary evidence in order to rebut the applicant's claims that Mr T. was the only employee of ExxonMobil who was aware of its participation in the infringement.

57 In their answer of 21 December 2010 to the written questions from the Court, the applicants submitted detailed comments on the evidence annexed to the rejoinder, even though the questions did not relate to that issue.

58 First, by letter of 10 February 2011, the Commission requested the Court to remove from the file certain passages from the applicants' answer to the written questions; the applicants expressed their opposition, in their letter of 11 March 2011, to the partial removal of the document in question from the file.

59 It must be found that — as the Commission observes — in their answer to the written questions from the Court, the applicants did not simply reply to the questions from the Court and explain the context of their answers, but also replied to the arguments put forward by the Commission in its rejoinder and to the evidence annexed thereto.

60 Admittedly, a written response to a rejoinder is not envisaged in the rules of procedure. However, since the Court did not have the opportunity to determine, before the hearing, the admissibility of each point of that response, the applicants might have been led to believe that their response would be added to the file in its entirety and, therefore, not to repeat at the hearing certain passages, even if they had the possibility of doing so.

61 In addition, the Court considers that the applicants' comments concerning the evidence annexed to the rejoinder are of assistance in resolving the dispute. Consequently, in so far as the Court could, in the context of a measure of organisation of procedure, have invited the parties to define their positions on that evidence, it may, for reasons of procedural economy, decide to keep the comments in question in the file.

62 Consequently, having regard to both the right to a fair hearing and economy of procedure, the Court has decided to reject the Commission's request for the removal of a document from the file and to add the applicants' answers to the questions from the Court to the file in their entirety.

63 Secondly, in their answers to the written questions from the Court, the applicants submit that the Commission ought to have given reasons for the belated submission of the evidence annexed to the rejoinder. In the absence of such reasons, they claim that that evidence is inadmissible.

64 Under Article 48(l) of the Rules of Procedure, a party may offer further evidence in reply or rejoinder but must give reasons for the delay in offering it.

65 In the present case, it must be noted that, in the reply, the applicants significantly developed and substantiated their argument that ExxonMobil was unaware of the cartel after Mr T.'s departure and that none of their employees was aware of the cartel after that date. Consequently, since the Commission referred to those arguments advanced in the reply when putting forward the evidence in annex to the rejoinder, the reasons for which it submitted that evidence for the first time in its rejoinder are clearly comprehensible. In addition, it must be noted that, at the hearing, the Commission explained further that the evidence annexed to the rejoinder had been submitted in response to the applicants' arguments put forward in the reply and in Annex C.1 thereto.

66 Consequently, the Court considers that the Commission has given proper reasons for the late submission of the evidence, so that it must be declared admissible.

– Substance

67 The applicants refer to the sworn statement of Mr Hu., the ExxonMobil employee to whom Mr T. reported at the time. He stated that Mr T. had informed him of the existence of technical meetings organised by Sasol towards the end of March 2003, when Mr T. was preparing his departure. Mr T. did not disclose that market-related topics were also discussed. Mr Hu. stated that he had not nominated any replacement for Mr T. but was initially minded to attend one of the meetings himself since he did not have a good understanding of the technical discussions that took place at these meetings and wished to ascertain whether it was 'worthwhile' for ExxonMobil to continue to participate. Mr Hu. emphasised that he had no reason to suspect at that time that those meetings had anti-competitive content, or that Mr T. had participated in regular anti-competitive meetings from which he, on behalf of ExxonMobil, should have distanced himself.

68 It must be noted that the applicants' allegation of fact is directly contradicted by the documents in the Court file, even though the Court has decided not to take into account certain documents lodged by the Commission in annex to the rejoinder, in the light of the explanations provided by the applicants in their reply to the written questions. It is apparent from the file that Mr Hu. (Mobil's special products manager for certain Member States of the European Union between 1996 and 2000 and the

ExxonMobil group's waxes and wax emulsions sales manager for several continents from 2000), to whom Mr T. reported during the period in question, was aware of ExxonMobil's participation in the infringement.

69 In that regard, it must be noted that, according to an email of Mr J. of Mobil dated 28 June 1999, sent to a number of people, including Mr Hu. and Mr P. of ExxonMobil, concerning a technical meeting for 9 July 1999 in Vienna (Austria), '[Sü. of Sasol] [was] trying to find agreement between manufacturers to volunteer to restrict product limits at the tighter to create market entrance barriers' and that 'Mobil['s] interest, [he guessed was] in principle be to support [Mr Sü's] approach' (recital 154 of the contested decision).

70 Similarly, by an internal email of 12 September 1997, Mr Hu. informed the recipients of that email of his intention to apply the price increase notified by Mr Sü. of Sasol. One of the recipients, Mr Su. of ExxonMobil, replied as follows:

'[T]hanks, good info. Would like to encourage the others to also follow.'

71 By email of 10 October 2000, sent by Mr Hu. to Mr P. and Mr S. of ExxonMobil, it was stated that 'the market [was] preparing for a + 15 DM price increase (minimum level than 140 DM) per Jan 1, 2001'. In their reply to the written questions of the Court, the applicants put forward another explanation, according to which Mr Hu. acquired the information on the price increase envisaged not from competitors, but from other sources, in particular customers. However, such an explanation must be rejected. It is not plausible that ExxonMobil's customers, having an interest in maintaining low prices, would have informed him of a precise amount of a price increase (and a minimum price level), associated with a precise date.

72 By email of 13 November 2000, Mr Hu. informed Mr K. of ExxonMobil that 'the general message in the market in europe [was] + 15% increase'.

73 The email of 19 November 2000, sent by Mr Hu. to Mr P. of ExxonMobil and headed 'RE: Wax price increases', shows that Mr Hu. was aware of the exchange of price lists between competitors. That email states that '[Mr C. of ExxonMobil] still receive[d] lots of info (letters) on waxes (EWF, [Mr Sü.], Total)'. That email was part of a series, including a previous email of Mr C. of ExxonMobil by which Mr Hu. had been informed that 'Total and [Mr Sü. of Sasol had] sent an official letter to the customers (already received by [ExxonMobil's] customers) to inform them about the next price increase on January 1, 2001', to which Mr Hu. had replied by email 'thank you [Mr C.], I know this'.

74 Those documents demonstrate clearly that Mr Hu. was aware of ExxonMobil's participation in the cartel, since they show that he received commercial data from the other participants and that ExxonMobil adjusted its commercial conduct in the light of that information.

75 The Court considers that Mr Hu.'s sworn statement of 6 August 2007 cannot call in question the finding in paragraph 74 above. As the Commission has noted, that document was drawn up after the applicants had received the statement of objections, for the purposes of defending their interests before the Commission. However, documents found during the investigations have greater evidential value than statements drawn up *in tempore suspecto* by the representatives or former representatives of the undertakings under investigation which seek to mitigate their liability (see, to that effect, Case T-59/02 *Archer Daniels Midland* v *Commission* [2006] ECR II-3627, paragraph 277, and the judgment of 8 July 2008 in Case T-54/03 *Lafarge* v *Commission*, not published in the ECR, paragraph 379).

76 In addition, as shown by the emails of 10 October and 19 November 2000 (see paragraphs 71 and 73 above), Mr Hu. sent sufficient information on the prices and commercial conduct of competitors to Mr P. (specialties manager for Europe, Africa and the Middle East) to enable him to understand ExxonMobil's participation in the anti-competitive practices. Mr P. continued to be employed by ExxonMobil until 2005.

77 Lastly, the applicants submit that the Court cannot take into account, when assessing the legality of the contested decision, the documentary evidence referred to in paragraphs 69 to 73 above, since it was produced by the Commission in annex to its rejoinder and was therefore submitted out of time.

78 That argument cannot succeed.

79 First, in recital 154 of the contested decision, the Commission referred to the document mentioned in paragraph 69 above. Secondly, all the documents mentioned in paragraphs 69 to 73 above were found at ExxonMobil's premises and, moreover, formed part of the file to which the applicants had had access during the administrative procedure, with the result that their contents were known to them. Consequently, this is not new information put forward by the Commission for the first time before the Court. Thirdly, it must be stated that while the applicants concentrated in their reply to the statement of objections on Mr Hu.'s sworn statement, before the Court and in particular in the reply they considerably developed and substantiated their argument that ExxonMobil was unaware of the cartel after the date of Mr T.'s departure and that none of the their employees was aware of the cartel after that date. In order to observe the Commission's rights of defence it must be permissible for the allegations of fact put forward by the applicants before the Court to be rebutted by the Commission on the basis of information in the administrative file, to which the applicants had access during the procedure before the Commission.

80 In the light of the foregoing, the applicants' argument that ExxonMobil was unaware of its participation in the cartel after Mr T.'s departure must be rejected.

81 Fourthly, the applicants submit that Mr T.'s attendance at the technical meetings did not have effects which could have persisted beyond the last technical meeting he attended, namely that of 27 and 28 February 2003.

82 First, in the light of the considerations developed in paragraphs 74 to 80 above, the arguments put forward by the applicants in that regard must be rejected in so far as they are based on the claim that Mr T. was the only employee of ExxonMobil who was aware of its participation in the cartel.

83 Secondly, according to the case-law, the conduct of a person engaging in fair competition is characterised by his independence in determining the policy that he intends to adopt in the common market. Even if the undertaking in question did not participate in the activities of the cartel after a certain date, it may be presumed that it took account of information already exchanged with its competitors in determining its conduct on that market (see, to that effect, Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 121; Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 162; and Case T-62/02 *Union Pigments* v *Commission* [2005] ECR II-5057, paragraph 39).

84 The mere fact that ExxonMobil did not participate in the technical meetings held between 28 February and 20 November 2003 in no way prevented it from using the information about the prices charged by its competitors which it received during the dozens of earlier technical meetings, which it attended, and from taking advantage of the market- and customer-sharing agreements put in place during the earlier technical meetings.

85 Consequently, the Commission properly concluded in the contested decision that the applicants had participated in the cartel until 20 November 2003.

86 In the light of the foregoing, the applicants' second plea in law must be rejected.

The first plea in law, alleging an error of law arising from the failure to take into account, when calculating the fine, the fact that Exxon did not participate in the infringement before the merger

87 The applicants challenge the calculation of the fine imposed on Esso France on the ground that it does not reflect the fact that, before the Exxon/Mobil merger in November 1999, Exxon had not participated in the infringement.

Preliminary observations

88 Point 13 of the 2006 Guidelines states that, in order to calculate the amount of the fine, the Commission will normally take the value of an undertaking's sales during the last full business year of its participation in the infringement.

89 In the present case, the last full year of the infringement was 2004 for the undertakings which participated in the cartel until it ended, and 2002 as regards ExxonMobil. However, the Commission took as the reference year not the last full year of the participation in the cartel, but the average of the last three full years, because of the European Union's enlargement in 2004 (recital 634 of the contested decision). The Commission calculated the average value of sales of the last three years of participation in respect of all the participants in the cartel.

90 In addition, the Commission rejected the applicants' request, submitted in their reply to the statement of objections, to take into account the fact that Exxon had not been involved in the infringement before the Exxon/Mobil merger, stating as follows:

'ExxonMobil calls on the Commission to split ExxonMobil's period of involvement into a pre-merger and a post-merger period and to only take Mobil's sales for the pre-merger period into account to reflect the fact that Exxon was not involved in the infringement. ExxonMobil argues that instead of the year 2002, the Commission should take into account that, between 1992 and 2000, Exxon was not involved in the infringement. The Commission does not share this view. The 2006 Guidelines … stipulate that normally the last full business year of the participation in the infringement should be taken as a reference year, which, in ExxonMobil's case, is 2002. ExxonMobil does not put forward any argument as to why this should not be the case. Given that Exxon and Mobil merged in 1999, the Commission sees no reason not to take ExxonMobil's value of sales of the year 2002 into account. As demonstrated in section 6.2.2 [see recitals 348 to 352 of the contested decision], the responsibility for Mobil's involvement lies with ExxonMobil and it is this company upon which the fine is imposed and, consequently, ExxonMobil's value of sales must be taken into account.'

91 On the basis of those considerations, the Commission took the average value of sales of the ExxonMobil group during the years 2000 to 2002 in order to calculate the amount of the fine. The amount of fine of all the applicants, including that of Esso France, was calculated on the basis of that value of sales.

The legality of the contested decision

92 The applicants submit that, when calculating the amount of the fine imposed on Esso France, the Commission erred in taking into account the value of the sales after the merger of the ExxonMobil group (the average of the years 2000 to 2002) and by multiplying that value also by the number of years (from 1992 to 1999) in which Mobil alone (by means of Mobil France, subsequently merged into Esso France) participated in the cartel, when Exxon was not a member of it.

93 The applicants submit that, in so doing, the Commission imposed the same amount of fine on Esso France as if Exxon had in fact participated in the infringement for the slightly more than seven years before the merger (1992-1999). That approach is inconsistent with the findings of fact made in the contested decision. In addition, it infringes the principles of equal treatment and of proportionality, Article 23(3) of Regulation No 1/2003 and the 2006 Guidelines.

94 First of all, it must be noted that under point 6 of the 2006 Guidelines, the combination of the value of sales 'to which' the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement.

95 According to the case-law, even though the Commission may, as a rule, rely on the last year of participation in the infringement as the reference period in order to calculate the value of sales, such a choice does not always have to be made. A method should be chosen that permits account to be taken of the size and economic power of each of the undertakings concerned, as well as of the scope of the infringement committed by each of them, in light of the economic reality as it appeared at the time the infringement was committed (Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, and Case T-40/06 *Trioplast Industrier* v *Commission* [2010] ECR II-4893, paragraph 92).

96 In addition, to the extent to which reliance is to be placed on the turnover of the undertakings involved in the same infringement for the purpose of determining the proportions between the fines to be imposed, the period to be taken into consideration must be ascertained in such a way that the resulting turnovers are as comparable as possible. Consequently, an individual undertaking cannot compel the Commission to rely, in its case, upon a period different from that used for the other undertakings, unless it proves that, for reasons peculiar to it, its turnover in the latter period does not reflect its true size and economic power or the scale of the infringement which it committed (Case T-319/94 *Fiskeby Board* v *Commission* [1998] ECR II-1331, paragraph 42).

97 The applicants do not deny that ExxonMobil's average turnover on the market subject to the cartel, during the period from 2000 to 2002, correctly reflects the scale of the infringement by it and its relative weight in the cartel, as regards the period following its merger, that is between November 1999 and November 2003 (four years). However, they criticise the fact that the basic amount calculated from that turnover was multiplied by 11.5 as regards Esso France and that, accordingly, the Commission used ExxonMobil's turnover after the merger for the period from September 1992 to November 1999 (seven and a half years), when Mobil alone participated in the cartel. The applicants submit the value of sales after the ExxonMobil group's merger does not reflect Mobil's relative weight in the infringement concerning the period from September 1992 to November 1999.

98 The Commission contends that ExxonMobil's average turnover between 2000 and 2002 correctly reflects the relative weight of ExxonMobil in the cartel for a significant part of its duration, namely the period following the merger, so that those figures were representative. In addition, the Commission refers to the wide discretion which it enjoys when selecting the reference period and to the case-law in the area.

99 First, according to the case-law, the criteria of the gravity and the duration of the infringement, referred to in Article 23(3) of Regulation No 1/2003, leave the Commission wide discretion when calculating the amount of the fine, which allows it to adopt sanctions taking account of the degree of illegality of the conduct in question (Case T-279/02 *Degussa* v *Commission* [2006] ECR II-897, paragraph 76, and Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik* v *Commission* [2008] ECR II-2567, paragraph 37).

100 In addition, in setting the amount of fines such as those at issue in the present case, the Commission is required to comply with the general principles of law, in particular the principles of equal treatment and proportionality (*Degussa* v *Commission*, cited in paragraph 99 above, paragraphs 77 and 79, and *Schunk et Schunk Kohlenstoff-Technik* v *Commission*, cited in paragraph 99 above, paragraph 41).

101 Secondly, according to the case-law, the principle of equal treatment is breached only where comparable situations are treated differently or different situations are treated in the same way, unless such treatment is objectively justified (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, and Case T-304/02 *Hoek Loos* v *Commission* [2006] ECR II-1887, paragraph 96).

102 In the present case, ExxonMobil was in a different situation from that of the other undertakings participating in the cartel, in that almost half of its paraffin waxes production — Exxon's production — had not been affected by the cartel before the Exxon/Mobil merger in 1999. However, the Commission treated it in the same way as the other participants in the cartel, in that it took into account the average of ExxonMobil's value of sales during the last three years of its participation.

103 Consequently, the Commission infringed the principle of equal treatment.

104 Thirdly, the complaints alleging infringement of Article 23(3) of Regulation No 1/2003 and of the principle of proportionality must be examined together.

105 Article 23(3) of Regulation No 1/2003 provides that, in fixing the amount of the fine, regard is to be had both to the gravity and to the duration of the infringement.

106 According to the case-law, the principle of proportionality requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13; Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 96; and judgment of the Court of 12 September 2007 in Case T-30/05 *Prym and Prym Consumer* v *Commission*, not published in the ECR, paragraph 223).

107 In the procedures initiated by the Commission in order to penalise infringements of the competition rules, the application of that principle requires that fines must not be disproportionate to the objectives pursued, that is to say, by reference to compliance with those rules, and that the amount of the fine imposed on an undertaking for an infringement in competition matters must be proportionate to the infringement, seen as a whole, having regard, in particular, to its gravity and duration (see, to that effect, *Prym and Prym Consumer* v *Commission*, cited in paragraph 106 above, paragraphs 223 and 224 and the case-law cited). In particular, the principle of proportionality requires the Commission to set the fine proportionately to the factors taken into account to assess the gravity of the infringement and also to apply those factors in a way which is consistent and objectively justified (Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraphs 226 to 228, and *Amann & Söhne and Cousin Filterie* v *Commission*, cited in paragraph 38 above, paragraph 171).

108 It must be noted that, under point 6 of the 2006 Guidelines, '[t]he combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement'. Such a provision is the basis for the general method applied by the Commission under the guidelines, consisting in multiplying a certain proportion of the value of sales during the reference period (18% in the present case for paraffin waxes) by the number of years of participation in the infringement.

109 The fact that, according to that methodology, the basic amount is arithmetically proportionate to the duration of the participation in the infringement (except for the minor part constituted by the 'entry fee') shows that, in the scheme of the 2006 Guidelines, the combination of the value of sales and the duration must constitute a proxy for the entire duration of the participation, not only for the last full year or a 'significant part' of such participation. Such a finding is moreover required on the basis of the case-law cited in paragraph 95 above, according to which a method of calculation should be chosen that permits account to be taken of the size and economic power of each of the undertakings concerned, as well as of the scope of the infringement committed by each of them, in light of the economic reality as it appeared at the time the infringement was committed.

110 The basic amount calculated on the basis of the value of sales during the reference period, multiplied by the duration coefficient, provides an appropriate proxy, reflecting the economic reality for the entire duration of the infringement, only if the component which constitutes its starting point — the value of sales — is at least approximately representative of the entire duration of the infringement.

111 Admittedly, the Commission's margin of assessment when calculating the amount of the fine allows it, under normal circumstances, to take into account the last year of participation in the infringement as the reference period. Such a general approach is justified, since that margin of assessment allows the Commission to disregard any fluctuation in the value of sales during the years of the infringement, and since an increase in the value of sales may be the result of the cartel itself.

112 However, where a merger has taken place during the course of a cartel in which only one of the parties participated before the merger, the value of the sales, during the last full year, of the entity resulting from the merger, multiplied by the number of years of the participation not only of that entity but also of the party which participated alone in the cartel before the merger, cannot constitute an 'appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement' for the entire duration of the participation. By multiplying the value of sales of the entity resulting from the merger also by the number of years in which only one of the parties to the merger participated in the infringement, the Commission artificially increases the basic amount of the fine in a manner which does not reflect the economic reality during the years preceding the merger.

113 This occurred in the present case, since the Commission calculated the basic amount used in order to determine the amount of Esso France's fine, by multiplying the value of sales of the ExxonMobil group during the period from 2000 to 2002 by a number of years which included those in which Mobil alone participated in the cartel (from 1992 to 1999). The basic amount thus obtained is disproportionate to the gravity of the infringement, because it does not reflect appropriately the economic importance of the infringement committed by Mobil France before the merger, or its relative weight in the cartel.

114 Consequently, the Commission infringed Article 23(3) of Regulation No 1/2003 and the principle of proportionality.

115 The Commission's other arguments cannot call in question the considerations developed in paragraphs 103 and 114 above.

116 First, the Commission contends that it took into account the Exxon/Mobil merger when calculating the amount of the fine, since multipliers reflecting shorter durations were applied to Esso Deutschland, EMC and EMPC.

117 However, it must be found that the value of ExxonMobil's sales taken into account by the Commission for the purposes of calculating the amount of Esso France's fine includes the value of sales linked to 'hydro-finished waxes' activity, inherited from Exxon, which was not involved in the cartel before the Exxon/Mobil merger.

118 The present argument must therefore be rejected.

119 Secondly, the Commission's arguments based on the case-law in the area must be examined.

120 First, at the hearing, the Commission referred to paragraphs 124 and 127 of the judgment in Joined Cases T-122/07 to T-124/07 *Siemens and VA Tech Transmission & Distribution* v *Commission* [2011] ECR II-793, in which the Court upheld the Commission's approach of taking the value of the sales of the undertaking created following the merger of Reyrolle Ltd, Schneider Electric High Voltage SA and Nuova Magrini Galileo SpA, during the last full business year of the infringement, in order to calculate the starting amount with regard to all those companies, even though their merger did not occur until two years after they began to participate in the infringement.

121 In that regard, it is sufficient to note, as the applicants have correctly observed, that Reyrolle, Schneider Electric High Voltage and Nuova Magrini Galileo had participated separately in the infringement before the merger (*Siemens and VA Tech Transmission & Distribution* v *Commission*, cited in paragraph 120 above, paragraph 19), unlike Exxon in the present case. The Court considers that that fact constitutes a very considerable factual difference, so that the judgment in question cannot properly be relied upon by the Commission in the present case.

122 Secondly, the Commission refers to the judgment of 30 September 2009 in Case T-175/05 *Akzo Nobel and Others* v *Commission*, not published in the ECR (paragraphs 139 to 146), which also concerns a cartel during the course of which the applicants had acquired a company which had not participated in the cartel prior to the concentration.

123 It is appropriate to refer to the content of the judgment in *Akzo Nobel and Others* v *Commission*, cited in paragraph 122 above, which was given in the 'monochloroacetic acid' ('MCAA') case, in which the Commission applied 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 1998 Guidelines').

124 The Court held, in paragraph 143 of *Akzo Nobel and Others* v *Commission*, cited in paragraph 122 above, that the taking account of the turnover of each of the undertakings during the reference year, namely the last full year of the infringement found, made it possible to assess the size and economic power of each undertaking and the scale of the infringement committed by each of them, those factors being relevant to an assessment of the gravity of the infringement committed by each undertaking.

125 Next, the Court upheld the Commission's analysis, which had placed Akzo Nobel in the first category of offender, for which the basic amount of fine was set at EUR 30 million, in front of Hoechst, placed in the second category, for which the basic amount of the fine was set at EUR 21 million, the latter being the largest producer of MCAA for the greater part of its participation in the cartel (from 1984 to 1994). Akzo had participated in the cartel from 1984 to 1999, but it was not until 1994, after its merger with Nobel Industrier, which had participated in the cartel from 1993, that Akzo Nobel became the largest producer of MCAA, in front of Hoechst.

126 In that regard, it must be noted that the general method followed by the Commission under the 2006 Guidelines differs substantially from that applied under the 1998 Guidelines.

127 There was no provision in the 1998 Guidelines that required the Commission to take into account the value of the sales of the undertakings concerned in the market subject to the cartel. The starting amount of the fine had to be set in the light of the gravity of the infringement, 'the effective economic capacity of offenders to cause significant damage to other operators', the 'the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition', in a such a way that it 'ensures that it has a sufficiently deterrent effect' for the undertaking concerned.

128 Consequently, the 1998 Guidelines allowed the Commission much greater discretion when determining the starting amount of the fine, which it often did by placing the undertakings participating in the infringement in several categories according, in particular, to their respective market shares. By contrast, in the 2006 Guidelines, the Commission bound itself to use a method requiring the basic amount to be arithmetically proportionate to the value of sales, since that amount is equivalent to a 'proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement', to which is added a sum known as the 'entry fee' of between 15% and 25% of the value of sales in order to deter undertakings from taking part in the most serious agreements.

129 Consequently, the approach adopted in *Akzo Nobel and Others* v *Commission*, cited in paragraph 122 above, with regard to the application of the 1998 Guidelines, cannot be applied to the present case, in the light of the difference in methodology applied by the Commission in the contested decision, adopted under the 2006 Guidelines.

130 In the light of the foregoing, the Court must uphold the first plea in law and annul the contested decision in respect of Esso France as regards the calculation of the value of sales for paraffin waxes, and it is not necessary to examine the applicants' other complaints and pleas. The inferences that must be drawn for the determination of the amount of the fine will be examined at paragraph 134 et seq. below.

131 The remainder of the action must be dismissed.

The exercise of the Court's unlimited jurisdiction and the determination of the final amount of the fine

132 It should be borne in mind that review of the lawfulness of decisions adopted by the Commission is supplemented by the unlimited jurisdiction conferred on the Courts of the Union by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU. That jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed. The review provided for in the Treaties therefore implies, in accordance with the requirements of the principle of effective judicial protection set out in Article 47 of the Charter of Fundamental Rights of the European Union, that the Courts of the Union exercise their review both *de lege* and *de facto* and that they are empowered to assess the evidence, annul the contested decision and vary the amount of fines (see, to that effect, Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraphs 60 to 62, and Case T-368/00 *General Motors Nederland and Opel Nederland* v *Commission* [2003] ECR II-4491, paragraph 181).

133 It is therefore for the Court, in the exercise of its unlimited jurisdiction, to assess, on the date on which it adopts its decision, whether the applicants received a fine the amount of which properly reflects the gravity and the duration of the infringement in question, in such a way that the fines are proportionate in the light of the criteria set out in Article 23(3) of Regulation No 1/2003 (see, to that effect, Case T-156/94 *Aristrain* v *Commission* [1999] ECR II-645, paragraphs 584 to 586, and Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 93). It must, however, be pointed out that the exercise of unlimited jurisdiction does not amount to a review undertaken of the Court's own motion, and it must be borne in mind that proceedings before the Courts of the European Union are *inter partes*.

134 In order to redress the illegalities committed by the Commission, established in paragraphs 103 and 114 above, it is appropriate to take as a basis the separate values of sales as regards the periods before and after the Exxon/Mobil merger.

135 As regards Esso France's participation in the infringement during the period between 3 September 1992 and 29 November 1999, in the absence of available data for 1999, it is appropriate to take into account the value of the sales of Esso France in 2000 and to multiply this by 7.5 in order to reflect the duration of that part of the infringement.

136 As regards Esso France's participation in the infringement following the Exxon/Mobil merger, between 30 November 1999 and 20 November 2003, it is appropriate to take into account the value of the sales of the ExxonMobil group, as fixed by the Commission in the contested decision, namely the average value of sales between 2000 and 2002. That amount must by multiplied by 4 in order to take into account the duration of that part of the infringement.

137 The other elements of the calculation of the amount of the fine remain unchanged. In particular, the Court finds that, pursuant to point 30 of the 2006 Guidelines, the Commission applied a deterrence multiplier of 2, because of the large size of the ExxonMobil group, which it set by taking into account solely the ratio between the value of sales and ExxonMobil's total turnover, but ensuring proportionality with the multipliers applied to the other undertakings participating in the cartel, and without setting a minimum amount of fine for the purposes of deterrence (see recitals 712 and 713 of the contested decision). Accordingly, in the absence of arguments and evidence to the contrary, the Court considers that it is appropriate to proceed in the same manner and, because of the size of ExxonMobil's group, to apply a multiplier of 2 to the basic amount of the fine imposed on Esso France, as calculated in accordance with the method described in paragraphs 135 and 136 above. It follows that the amount of the fine imposed on Esso France in Article 2 of the contested decision must be set at EUR 62 712 895.

138 In any event, the Court considers, in the exercise of its unlimited jurisdiction, that the amount of the fine as thus set is appropriate in the light of the gravity and the duration of the infringement committed by Esso France.

Costs

139 Pursuant to Article 87(3) of the Rules of Procedure, the Court may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads.

140 In the present case, the Court has upheld the applicants' first plea concerning the errors made by the Commission when calculating the amount of the fine imposed on Esso France in respect of the period of participation before the Exxon/Mobil merger. The arguments relating to that plea formed the major part of the application, the length of which was considerably less than the maximum length of pleadings, as set in point 15 of the Practice Directions to Parties before the General Court. By contrast, the Court has rejected all the arguments put forward in the second plea in law, in support of a reduction in the amount of the fine with regard to the period of participation in the cartel after the Exxon/Mobil merger. The amount of the fine imposed on Esso Deutschland, EMPC and EMC on a joint and several basis refers only to that second period. Accordingly, it is fair in the circumstances of the case to decide that the Commission is to bear its own costs and pay those incurred by Esso France and that Esso Deutschland, EMPC and EMC are to bear their own costs.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. **Sets the amount of the fine imposed on Esso Société anonyme française in Article 2 of Commission Decision C(2008) 5476 final of 1 October 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/39.181 — Candle Waxes) at EUR 62 712 895;**

2. **Dismisses the action as to the remainder;**

3. **Orders the European Commission to bear its own costs and to pay those incurred by Esso Société anonyme française;**

4. **Orders Esso Deutschland GmbH, ExxonMobil Petroleum and Chemical BVBA and Exxon Mobil Corp. to bear their own costs.**

Czúcz Labucka Gratsias

Delivered in open court in Luxembourg on 11 July 2014.

[Signatures]