Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

16 June 2016*

(Appeal — Competition — Article 81 EC — Agreements, decisions and concerted practices — Markets for calcium carbide powder, calcium carbide granulates and magnesium granulates in a substantial part of the European Economic Area — Price fixing, market sharing and exchange of information — Liability of a parent company for infringements of the competition rules committed by its subsidiaries — Decisive influence exercised by the parent company over its subsidiary — Rebuttable presumption in the case of a 100% shareholding — Condition for the rebuttal of that presumption — Disregard of an express instruction)

In Case C-155/14 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 3 April 2014,

Evonik Degussa GmbH, established in Essen (Germany),

AlzChem AG, formerly AlzChem Trostberg GmbH, established in Trostberg (Germany),

represented by C. Steinle and I. Bodenstein, Rechtsanwälte,

appellants,

the other party to the proceedings being:

European Commission, represented by G. Meessen and R. Sauer, acting as Agents, and A. Böhlke, Rechtsanwalt,

defendant at first instance,

THE COURT (Fifth Chamber),

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

Advocate General: P. Mengozzi,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 4 June 2015,

after hearing the Opinion of the Advocate General at the sitting on 3 September 2015,

* Language of the case: German.

gives the following

Judgment

1 By their appeal, Evonik Degussa GmbH ('Degussa') and AlzChem AG, formerly AlzChem Trostberg GmbH, asks the Court to set aside the judgment of the General Court of the European Union of 23 January 2014 in *Evonik Degussa and AlzChem* v *Commission* (T-391/09, not published, 'the judgment under appeal', EU:T:2014:22), by which it partially rejected their action for annulment of Commission Decision C(2009) 5791 final of 22 July 2009 relating to a proceeding under Article 81 EC and Article 53 of the EEA agreement (Case COMP/39.396 — Calcium carbide and magnesium based reagents for the steel and gas industries) ('the decision at issue'), in so far as that decision relates to them and, in the alternative, an application for that decision to be altered in such a way that, first, the fine imposed on them is annulled or its amount reduced and, second, SKW Stahl-Metallurgie GmbH ('SKW') is made jointly and severally liable with the appellants for the entire fine.

Legal context

2 Article 23 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1) provides for the system of fines which can be imposed by the European Commission under Articles 81 EC and 82 EC.

Background to the dispute and the decision at issue

3 The background to the dispute, set out in paragraphs 1 to 4 of the judgment under appeal, is as follows:

> '1 By the [decision at issue] the [Commission] found that the main suppliers of calcium carbide and magnesium for the steel and gas industries had infringed Article 81(1) EC and Article 53 of the Agreement on the European Economic Area (EEA) by participating in a single and continuous infringement from 7 April 2004 until 16 January 2007. The infringement consisted of market-sharing, quota-fixing, customer-allocation, price-fixing and the exchange of sensitive commercial information relating to prices, customers and sales volumes in the EEA, with the exception of Ireland, Spain, Portugal and the United Kingdom.
>
> 2 The procedure was initiated following an application for immunity, within the meaning of the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3, 'the Leniency Notice'), by Akzo Nobel NV.
>
> 3 By Article 1(f) of the [decision at issue], the Commission found that Degussa and AlzChem Hart GmbH (which became AlzChem Trostberg GmbH, then [AlzChem]), the [appellants], had participated in the infringement from 22 April to 30 August 2004. According to recitals 226 and 227 of the [decision at issue] the two companies were held responsible for the infringement at issue due to the direct participation in it of staff members from SKW Stahl -Technik GmbH & Co. KG, whose company name was changed, from 2005, to [SKW]. According to recitals 227, 228 and 235 of the [decision at issue], during the first part of the period of its participation in the cartel at issue, SKW was a subsidiary wholly owned by the [appellants].
>
> 4 By Article 2 of the [decision at issue], the Commission imposed on the [appellants] for their participation in the infringement at issue, first, a fine of EUR 1.04 million, designating them as jointly and severally liable with SKW for payment of the fine [Article 2 (g)], and, second, a fine of EUR 3.64 million, for the payment of which they were designated as jointly and severally liable [Article 2(h)].'

4 Concerning the period from 1 September 2004 to 16 January 2007, during which SKW was no longer wholly owned by AlzChem and Degussa but by SKW Stahl-Metallurgie Holding ('SKW Holding') and Arques Industries AG, which became Gigaset AG, the Commission found that SKW, SKW Holding and Gigaset had participated and/or should be held liable for the infringement at issue. By Article 2(f) of the decision at issue as amended by the judgment in *Gigaset* v *Commission* (T-395/09, EU:T:2014:23), it imposed a fine of EUR 13 300 000 jointly and severally on SKW and SKW Holding, part of which, namely EUR 12.3 million, was also imposed on Gigaset, which was held jointly and severally liable for payment of that amount.

The procedure before the General Court and the judgment under appeal

5 By application lodged at the Registry of the General Court on 5 October 2009, the appellants sought the annulment of the decision at issue in so far as it concerns them or, in the alternative, first, the reduction of the fines imposed on them under Article 2(g) and (h) of that decision and, second, that SKW be held jointly and severally liable, with the appellants, for the fines in their entirety.

6 In support of their application, the appellants submitted arguments that did not contain structured pleas, which the General Court categorised as relating, first, to the imputation to the appellants of responsibility for the infringement committed by their subsidiary, SKW, second, to the amount of the fines imposed on them, third, to SKW's joint and several liability for the payment of fines and, fourth, to the inconsistency of the decision at issue with the judgment of 3 March 2011 in *Siemens and VA Tech Transmission & Distribution* v *Commission* (T-122/07 to T-124/07, EU:T:2011:70), with the latter complaint being raised on the occasion of an application for organisation of the procedure and at the hearing.

7 The General Court upheld the action in part in the judgment under appeal. The operative part of the judgment is worded as follows:

'(1) Article 2(g) and (h) of [the decision at issue] is annulled in so far as it relates to [Degussa] and [AlzChem], subject to the qualification that that annulment does not affect the discharging effect of any payment, by either of those two companies in connection with the fine imposed jointly and severally for infringement of Article 1(f) of that decision, as against [SKW], and the fine imposed on [SKW] under Article 2(g) of that decision;

(2) In respect of the infringement found in Article 1(f) of [the decision at issue] against [Degussa] and AlzChem, the following fines are imposed:

— on [Degussa] and AlzChem jointly and severally: EUR 2.49 million, subject to the qualification that [Degussa] and AlzChem will be deemed to have satisfied the payment of that fine up to the amount paid by [SKW] in respect of the fine imposed on it under Article 2 (f) and (g) of that decision;

— on [Degussa], which is exclusively liable for payment of that fine, EUR 1.24 million.

(3) The action is dismissed as to the remainder.

(4) [Degussa] and AlzChem shall bear two-thirds of their own costs and two-thirds of those of the [Commission]. The Commission is ordered to bear one-third of its own costs and one-third of those of [Degussa] and AlzChem.

8 It follows from that judgment that the fines imposed on the companies which form part of the economic entity owned by Degussa, the parent company, resulting from SKW's participation in the infringement in question for the period from 22 April 2004 to 30 August 2004 are:

— on SKW: EUR 1.04 million, under Article 2(g) of the decision at issue;

— jointly and severally on Degussa and AlzChem: EUR 2.49 million, but the General Court indicated that the two companies will be deemed to have paid that fine in the amounts paid by SKW with respect to the fines imposed on it in Article 2(f) and (g) of the decision at issue, for the period from 1 September 2004 to 16 January 2007 and 22 April 2004 to 30 August 2004, respectively;

— on Degussa: EUR 1.24 million.

Forms of order sought by the parties to the appeal

9 Degussa and AlzChem ask the Court:

— to set aside the judgment under appeal in its entirety in so far as it concerns them, and annul the decision at issue in so far as it concerns them;

— in the alternative, reduce the fines imposed on them under Article 2(g) and (h) of the decision at issue;

— in the further alternative, to amend Article 2(g) and (h) of the decision at issue such that SKW is held jointly and severally liable for fines imposed on them in their entirety;

— in the further alternative, to set aside the judgment under appeal and refer the case back to the General Court; and

— order the Commission to pay the costs.

10 The Commission contends that the Court of Justice should:

— dismiss the appeal; and

— order the appellants to pay the costs.

The appeal

11 In support of their appeal, the appellants raise five grounds.

12 Their first ground alleging infringement of Article 81 EC, the principle of personal responsibility, the presumption of innocence and the fault principle. By their second ground, they argue that the General Court infringed their right to be heard and Article 296 TFEU in that it refused to uphold their argument relating to the inconsistency of the decision at issue with the judgment of 3 March 2011 in *Siemens and VA Tech Transmission & Distribution* v *Commission* (T-122/07 to T-124/07, EU:T:2011:70). Their third ground relates to the breach by the General Court of its obligation to state reasons and the principle of equal treatment. In their fourth ground, in the alternative, they maintain that the General Court disregarded the principle of legal certainty, the principle of *nulla poena sine lege certa* and its obligation to state reasons. Lastly, in their fifth ground, also presented in the alternative, they allege infringement of Article 81 EC, of their right to be heard and of Article 23 of Regulation No 1/2003.

13 At the hearing, the appellants withdrew their second ground.

The first ground, alleging infringement of Article 81 EC, the principle of personal responsibility, the presumption of innocence and the fault principle

Arguments of the parties

14 In their first ground, directed against paragraphs 70 to 119 of the judgment under appeal, the appellants claim that the General Court infringed Article 81 EC and the principles of personal responsibility, the presumption of innocence and the fault principle, by making the rebuttal of the presumption of actual exercise of decisive influence by the appellants over SKW subject to overly strictly requirements, which resulted in the General Court disregarding the rebuttable nature of that presumption.

15 First, they challenge the refusal of the General Court, set out in paragraphs 102 to 107 of the judgment under appeal, to accept the rebuttal of the presumption when they had argued that SKW participated in the cartel at issue in blatant disregard of their explicit instructions, referred to in paragraphs 91 and 102 of the judgment under appeal, instructing the sole manager of SKW not to enter into agreements with competitors regarding desulfurisation products for cast iron. According to the appellants, that situation demonstrates the absence of actual exercise of decisive influence over SKW.

16 They also criticise the General Court for having considered irrelevant the statement of SKW's commercial director at the time of the events, referred to in paragraph 107 of the judgment under appeal, according to which the director of AlzChem did not have the means to ensure compliance with those instructions. However, such a statement is proof of the absence of the actual exercise of decisive influence by the author of the instructions on their recipient.

17 The appellants argue furthermore that, for the purposes of imputation of liability for an infringement of Article 81 EC, the decisive factor is not only the possibility of exercising decisive influence, but the actual exercise of the latter, which is confirmed by paragraph 62 of the judgment of 12 December 2007 in *Akzo Nobel and Others* v *Commission* (T-112/05, EU:T:2007:381). On numerous occasions and, in particular, in relation to SKW's turnover, mentioned in paragraphs 108 to 113 of the judgment under appeal, the General Court was satisfied with a hypothetical effect based on speculative elements and failed to show the actual exercise of such decisive influence by the appellants over SKW.

18 The appellants also complain that the General Court reached a conclusion on the period of the infringement, on the basis of an assessment of a situation prior to that the period, even though they argued that they had never exercised decisive influence. In addition they complain that the General Court merely assessed the relationship between themselves and SKW in relation to the distribution of shares and the management staff without actually examining whether they actually exercised decisive influence over their subsidiary.

19 Second, the appellants complain that the General Court refused to take note of the absence of actual exercise of decisive influence by them over SKW when the latter was managing its activities autonomously while the appellants were in the process of selling SKW and evidence attests to the latter's defiance of its parent companies, as is apparent from Mr N's statement referred to in paragraph 105 of the judgment under appeal.

20 In particular, the General Court erred in its assessment of the burden of proof in the rebuttal of the presumption of the actual exercise of decisive influence, relying on the appellants' theoretical influence over SKW, and not on the actual situation. According to the appellants, they did not have to prove that they could not exercise, in general, any decisive influence over SKW but only to prove

that, in the specific case, they had not actually exercised any influence of that nature. However, the General Court, in paragraphs 82, 83, 88, 89, 93, 94 to 98 and 108 to 113 of the judgment under appeal, relied solely on any theoretical influence they may have had over SKW.

21 Finally, the appellants argue that, by inferring from SKW's mere reporting obligation to AlzChem the actual exercise of decisive influence, the General Court distorted the evidence.

22 The Commission argues that this ground is inadmissible in that the appellants thereby challenge the assessment by the General Court of the facts and evidence submitted to it. In any event, according to the Commission, that ground must be rejected as unfounded.

Findings of the Court

– Admissibility

23 It should be observed that, according to the settled case-law of the Court of Justice, the General Court has exclusive jurisdiction to find and assess the facts and, in principle, to examine the evidence it accepts in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. That assessment does not, therefore, constitute, save where the clear sense of that evidence has been distorted, a point of law which is subject, as such, to review by the Court of Justice (judgment of 20 January 2016 in *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, paragraph 40). Moreover, such a distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and evidence (judgment of 28 January 2016 in *Éditions Odile Jacob* v *Commission*, C-514/14 P, EU:C:2016:55, paragraph 73 and the case-law cited).

24 In the present case, as noted by the Advocate General in point 75 of his Opinion, the Court did not distort the evidence submitted to it, when, in paragraph 87 of the judgment under appeal, it held that the requirement that the manager of SKW send regular reports to the director of AlzChem constituted an indicium in support of the argument that AlzChem had decisive influence over SKW's decisions.

25 Thus, in so far as the appellants contest the General Court's assessments of the factual evidence, including those contained in paragraphs 87 and 107 of the judgment under appeal, their complaints are inadmissible.

26 However, in so far as (i) the appellants dispute the methodology used by the Court to assess the probative value of the evidence put forward by the appellants in order to rebut the presumption of exercise of decisive influence by them over SKW, (ii) criticise the General Court for having considered that the demonstration that a subsidiary's conduct is in blatant contradiction to the instructions of its parent company fails to rebut that presumption, and (iii) also accuse the General Court of having adopted a far too restrictive criterion which resulted in making that presumption irrebuttable, their complaints are admissible. The question, posed by those complaints, whether the General Court has taken the right legal criterion as the basis for its appraisal of the facts and the evidence is a question of law, which is amenable to review by the Court of Justice in the present appeal (see, to that effect, judgment of 11 July 2013 in *Commission* v *Stichting Administratiekantoor Portielje*, C-440/11 P, EU:C:2013:514, paragraph 59 and the case-law cited).

– Substance

27 At the outset, it must be recalled, from the Court of Justice's settled case-law, that responsibility for the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities. In such a situation, since the parent company and its subsidiary are part of the same economic unit and therefore form a single undertaking for the purposes of Article 81 EC, the Commission may address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement (see, to that effect, judgment in *Commission and Others* v *Versalis and Others*, C-93/13 P and C-123/13 P, EU:C:2015:150, paragraph 40 and the case-law cited).

28 It also follows from the Court of Justice's settled case-law that, in the particular case in which a parent company holds, directly or indirectly, all or almost all of the capital in a subsidiary which has committed an infringement of the EU competition rules, there is a rebuttable presumption that that parent company actually exercises a decisive influence over its subsidiary (judgments of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 56 and the case-law cited, and of 5 March 2015 in *Commission and Others* v *Versalis and Others*, C-93/13 P and C-123/13 P, EU:C:2015:150, paragraph 41).

29 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, directly or indirectly, by the parent company in order to take the view that that presumption is fulfilled. Accordingly, the Commission will then be able to regard the parent company as responsible for its subsidiary's conduct and as jointly and severally liable for the payment of the fine imposed on that 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, to that effect, judgment in *Commission and Others* v *Versalis and Others*, C-93/13 P and C-123/13 P, EU:C:2015:150, paragraphs 42 and 43 and the case-law cited).

30 Therefore, when that presumption is established, as is not disputed by the appellants in this case, such a presumption implies, unless it is rebutted, that the actual exercise of decisive influence by the parent company over its subsidiary is considered established and gives grounds for the Commission to hold the former company responsible for the conduct of the latter, without having to produce any further evidence.

31 Once the presumption of actual exercise of decisive influence is established, it is solely for the parent company holding all or almost all of the capital of its subsidiary to rebut it.

32 In order to rebut that presumption, a parent company must, in the context of the actions against a Commission decision, put before the EU judicature any evidence relating to the organisational, economic and legal links between its subsidiary and itself which are such as to demonstrate that they do not constitute a single economic entity (see, to that effect, judgment of 20 January 2011 in *General Química and Others* v *Commission*, in C-90/09 P, EU:C:2011:21, paragraph 51 and the case-law cited).

33 In order to assess whether that subsidiary decides independently upon its own conduct on the market or carries out, in all material respects, the instructions given to it by its parent company (see, to that effect, judgment of 11 July 2013 in *Commission* v *Stichting Administratiekantoor Portielje*, C-440/11 P, EU:C:2013:514, paragraph 38 and the case-law cited), the EU judicature must take into consideration all relevant factors, which may vary from case to case and therefore cannot be set out in an exhaustive list (judgment of 26 September 2013 in *The Dow Chemical Company* v *Commission*, C-179/12 P, not published, EU:C:2013:605, paragraph 54).

34 As part of that review, it is for the General Court to carry out an assessment of the facts which are contemporaneous with the period of the infringement, but without prejudice to the possibility of relying on elements relating to a prior period, in so far as it is able to establish the relevance of those elements to the period of the infringement and it does not automatically apply to the period of the infringement the conclusions stemming from the assessment of elements prior to that period.

35 In the present case, it is apparent from reading of paragraphs 100 to 107 of the judgment under appeal as a whole that the General Court's assessment was in accordance with those requirements.

36 Thus, having concluded, in paragraph 99 of the judgment under appeal that the appellants had failed to demonstrate that they did not actually exercise, prior to 1 January 2004, a decisive influence over the commercial policy of SKW, the General Court, in paragraph 100 of the judgment under appeal, stated that it was necessary to review whether a similar finding had to be reached in relation to the period of the infringement and, more generally, the period after 1 January 2004. In that context the General Court stated, in paragraphs 106 and 107 of the judgment under appeal, that the appellants' claims, described in paragraphs 102 to 105 of that judgment, which are either not disputed or not validly challenged in the present appeal, were insufficient to demonstrate that they no longer actually exercised, during 2004, such influence, which is a matter for assessment by the General Court, as noted in paragraph 23 above.

37 Consequently, the General Court did not err in law by taking into consideration the situation prior to 1 January 2004 in order to reject the appellants' argument by which they claimed to have rebutted the presumption of their actual exercise of decisive influence over SKW.

38 Inasmuch as the appellants criticise the General Court for having wrongly rejected, in particular in paragraphs 84 to 87, 88 and 89, 93 to 98 and 108 to 113, the rebuttal of the presumption of actual exercise of decisive influence by the appellants over SKW by relying on the existence of a potential or theoretical influence, that complaint is based on a misreading of the judgment under appeal and must therefore be rejected. Contrary to the appellants' claim, it is clear from that judgment that the General Court did not rely on the existence of their potential or theoretical influence over SKW, but merely found that their arguments did not show the absence of their actual exercise of decisive influence over SKW and thus were not sufficient to rebut the shareholding presumption.

39 As regards the complaint alleging that the General Court's refusal to consider SKW's participation in the infringement concerned was in blatant contradiction with the appellants' explicit instructions, as referred to in paragraphs 106 and 107 of the judgment under appeal, it should be recalled, as has been stated in paragraphs 32 and 33 above, that the EU judicature must, when it examines whether the presumption of actual exercise of decisive influence is rebutted, take into consideration all the evidence submitted to it.

40 As part of this overall assessment, although the existence of an express instruction given by a parent company to its subsidiary not to participate in any anticompetitive practices in a given market can be a strong indication of the actual exercise of decisive influence by the parent over the subsidiary, the fact that the subsidiary did not comply with this instruction cannot be regarded by the General Court, as it did in paragraphs 90 to 92 of the judgment under appeal, as a strong indication of actual exercise of such influence.

41 However, the fact that a subsidiary does not comply with an instruction given by its parent company is not sufficient, by itself, to establish the absence of actual exercise of decisive influence by the parent over the subsidiary, given that the Court of Justice has already stated that it is not necessary for the subsidiary to carry out all the parent company's instructions to demonstrate decisive influence, as long as the failure to carry out those instructions is not the norm (see, to that effect, judgment of 24 June 2015 in *Fresh Del Monte Produce* v *Commission and Commission* v *Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, EU:C:2015:416, paragraphs 96 and 97).

42 Consequently, the General Court did not err in law in concluding, in paragraphs 106 and 107 of the judgment under appeal, despite the appellants' instructions to SKW not to participate in anti-competitive agreements on the markets concerned, that they had failed to prove, to the requisite legal standard, that they did not exercise decisive influence over SKW during the period of the infringement.

43 Finally, the appellants complain that the General Court adopted an excessively restrictive criterion which made the presumption of actual exercise of decisive influence irrebuttable.

44 In that regard, the Court has already held that the fact that it is difficult to adduce the evidence necessary to rebut a presumption of actual exercise of decisive influence 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 (judgment in *Commission and Others* v *Versalis and Others*, C-93/13 P and C-123/13 P, EU:C:2015:150, paragraph 46 and the case-law cited).

45 Similarly, the fact that the General Court, in its assessment of the facts and evidence, found in the present case that the appellants had not rebutted the presumption of actual exercise of decisive influence does not permit the inference that it erred in law by making that presumption irrebuttable.

46 Accordingly this complaint cannot be upheld.

47 Since all the complaints raised by the appellants have been rejected and the assessment of facts and evidence falls within the jurisdiction of the General Court, the first ground of appeal must be rejected as, in part, inadmissible and, in part, unfounded.

The third ground, alleging infringement by the General Court of the principle of equal treatment, the appellants' right to be heard as well as its obligation to state reasons

Arguments of the parties

48 By their third ground, directed against paragraphs 287 to 289 of the judgment under appeal, the appellants argue that, by not reducing the fine imposed on them, the General Court infringed the principle of equal treatment, their right to be heard and also its obligation to state reasons.

49 In that regard, they argue that the reduction of their fine was required for two reasons. First, the General Court should have drawn the conclusions from its own findings in paragraphs 272 to 275 of the judgment under appeal, according to which the Commission had, in the calculation of SKW's overall joint and several liability, wrongly failed to take account of the 'entry fee' mentioned in paragraph 25 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), and therefore violated the principle of equal treatment and principles for setting joint and several fines.

50 Second, they maintain that, as is apparent from the judgment of 23 January 2014 in *SKW Stahl-Metallurgie Holding and SKW Stahl-Metallurgie* v *Commission* (T-384/09, not published, EU:T:2014:27), which related to the infringement period from 1 September 2004 to 16 January 2007, the Commission should not have reduced SKW's fine under the Leniency Notice, as the leniency application made by the appellants did not apply to SKW and SKW had not submitted such an application in its own name and on its own behalf. The appellants conclude that, if the Commission had not made those errors, the fine imposed on SKW for the first part of the infringement for the period from 22 April 2004 to 30 August 2004 should have been considerably higher.

51 By not reducing the fines imposed on the appellants in order to redress the unlawful disproportion between the fines imposed on them and those imposed on SKW under Article 2(g) of the decision at issue, the General Court infringed the principle of equal treatment, even though, in the judgment of 23 January 2014 in *Gigaset* v *Commission* (T-395/09, not published, EU:T:2014:23), relating to an action against Article 2(f) of that decision, the General Court, in a similar situation, reduced the amount of the fine imposed on Gigaset, SKW's parent company after its sale by the appellants, which the Commission held liable for SKW's conduct for the period from 1 September 2004 to 16 January 2007.

52 In that regard, the appellants note that, in paragraph 192 of the judgment of 23 January 2014 in *Gigaset* v *Commission* (T-395/09, not published, EU:T:2014:23), the General Court, after stating that 'the equal treatment of the different situations of [Gigaset] and SKW resulted in the imposition on them of a fine in the same amount, even though the amount of the fine imposed on these two companies should have differed by one million euros' decided 'in order to remedy the unequal treatment found to the detriment of [Gigaset]', in the exercise of its unlimited jurisdiction, to 'reduce by one million euros the fine imposed on [Gigaset] in the [decision at issue]'.

53 Furthermore, by not responding to the arguments, which it regarded as out of time on the grounds that they had been raised for the first time in the reply, alleging breach of the principle of equal treatment, the General Court infringed their right to be heard and the obligation to state reasons. The appellants explain that they were not able to invoke those arguments at an earlier stage of the proceedings.

54 The Commission submits that this ground is inadmissible in that it goes beyond the subject matter of the first-instance proceedings and is, in any event, unfounded.

Findings of the Court

55 As a preliminary point, it must be recalled that an appellant is entitled to lodge an appeal relying on pleas arising from the judgment under appeal itself and which seek to criticise, in law, its merits (see, to that effect, judgments of 10 April 2014 in *Commission and Others* v *Siemens Österreich and Others*, C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 102, and 10 April 2014 in *Areva and Others* v *Commission* C-247/11 P and C-253/11 P, ECR, EU:C:2014:257, paragraphs 118 and 170 and the case-law cited).

56 It is undisputed that the appellants claim that the General Court erred in law in its reassessment of the fines which it imposed on them, a reassessment which the General Court carried out, as is apparent from paragraph 269 the judgment under appeal, in the exercise of its unlimited jurisdiction within the meaning of Article 261 TFEU.

57 Therefore, contrary to what the Commission contends, this ground is admissible.

58 That said, it is settled case-law of the Court of Justice that the principle of equal treatment, relied on by the appellants, must be reconciled with the principle of legality, according to which a person may not rely, to his benefit, on an unlawful act committed in favour of a third party (judgment of 10 November 2011 in *The Rank Group*, C-259/10 and C-260/10, EU:C:2011:719, paragraph 62 and the case-law cited).

59 Accordingly, in so far as they relied to their benefit, as is clear from paragraphs 49 and 50 above, on the allegedly unlawful determination of the amount of the fine imposed on SKW, the appellants, in any event, cannot rely on the principle of equal treatment and the judgment of 23 January 2014 in *Gigaset* v *Commission* (T-395/09, not published, EU:T:2014:23) to contest the fines which the General Court imposed on them.

60 Finally, and in light of the above, the Court cannot accept, even if proved, the appellants' complaints alleging infringement, first, of their right to be heard and, second, an obligation to state reasons resulting from the General Court's failure to examine their argument alleging infringement of the principle of equal treatment.

61 Accordingly, the third ground must be rejected as in part, ineffective, and in part, unfounded.

The fourth ground, alleging infringement of the principle of legal certainty, the principle of nulla poena sine lege certa and the obligation to state reasons

Arguments of the parties

62 In their fourth ground, submitted in the alternative and directed against both paragraph 288 of the judgment under appeal and the last part of the first indent of paragraph 2 of the operative part of that judgment, the appellants claim that the General Court committed an error of law by not explicitly indicating that a payment from SKW will have the effect of discharging not only them, but also Gigaset, and they add that this omission will be likely to lead the Commission, when recovering fines imposed on them, to challenge the discharging effect, to Gigaset's benefit, of any payment by SKW. In that regard, they argue that, in the event that the Commission takes the view that a payment from SKW will be a discharge only for the appellants, and not for Gigaset, they would not be able to determine the amount they will ultimately owe and the national court before which a dispute in that regard may be brought could not give a ruling on that point.

63 In doing so, the General Court infringed not only the principle of legal certainty which prevails in relation to the joint and several nature of the payment of fines but also the principle of *nulla poena sine lege certa*, its obligation to state reasons, and also Article 296 TFEU.

64 The Commission argues that that ground is new and therefore inadmissible and, in any event, unfounded.

Findings of the Court

65 At the outset, it should be noted that, by that ground, which is directed against both paragraph 288 of the judgment under appeal and the last part of the first indent of paragraph 2 of the operative part of that judgment, the appellants claim that the General Court erred in law by stating that any sums paid by SKW with respect to the fines imposed on it under Article 2(f) and (g) of the decision at issue would discharge only the appellants.

66 According to the Court of Justice's settled case-law, the interest in bringing proceedings — a condition of admissibility — must continue up until the Court's ruling on the substance. Such an interest exists as long as the appeal may, if successful, procure an advantage for the party bringing it (judgment of 24 March 2011 in *Ferrero* v *OHIM*, C-552/09 P, EU:C:2011:177, paragraph 39 and the case-law cited).

67 Such a condition of admissibility is needed both for the appeal in its entirety and for each of the grounds raised in support of it.

68 In the present case, as pointed out by the Advocate General in paragraphs 96 and 98 of his Opinion, the General Court expressly stated, in paragraph 288 of the judgment under appeal and the last part of the first indent of paragraph 2 of the operative part of that judgment, that the payments by SKW of the fines imposed on it in Article 2(f) and (g) of the decision at issue would have the effect of extinguishing the corresponding amounts of the fines owed by the appellants. Thus, the present

ground amounts in essence, to requesting the Court to recognise that such payments had the effect of extinguishing the corresponding amounts for a third party, in the present case Gigaset, from which the appellants cannot derive any benefit.

69 Accordingly, the fourth ground of appeal must be rejected as inadmissible.

The fifth ground, alleging infringement of Article 81 EC, Article 23 of Regulation No 1/2003 and the principle of equal treatment, the appellants' right to be heard and the obligation to state reasons

Arguments of the parties

70 By their fifth ground, submitted in the alternative and directed both against paragraph 288 of the judgment under appeal and the first indent of paragraph 2 of the operative part of that judgment, the appellants alleged that the General Court infringed Article 81 EC, Article 23 of Regulation No 1/2003 and the principle of equal treatment, the right to be heard and the obligation to state reasons in connection with the reassessment of the fines imposed on the appellants, by deducting, from the part of the fine deemed to have been paid by the appellants in the event of payment by SKW, the reduction unlawfully granted to the appellants under the Leniency Notice, without having responded to their arguments in that regard.

71 In support of this, the appellants argue that, without the reduction in the fine from which SKW unlawfully benefitted under the leniency application that the appellants had submitted solely for their own benefit and not that of SKW, the proportion of the fine imposed on the appellants in the first indent of paragraph 2 of the operative part of the judgment under appeal — namely, EUR 2.49 million — for which payments made by SKW have a discharging effect would have been higher, and would have been EUR 3.47 million. It follows from this that the General Court thus indirectly took into account, to the detriment of the appellants, an illegal reduction of the fine from which SKW benefitted.

72 Consequently, the appellants ask the Court of Justice to find that a payment by SKW releases Degussa from its obligations in connection with the corresponding fine in an amount equal to EUR 3.47 million.

Findings of the Court

73 By that ground, the appellants criticise the General Court for having, in essence, as regards the fine of EUR 2.49 million that the General Court imposed on them jointly and severally in the first indent of paragraph 2 of the operative part of the judgment under appeal, set at an amount of EUR 2.49 million and not EUR 3.47 million as the amount for which a payment by SKW of fines imposed on it under Article 2(f) and (g) of the decision at issue would have a discharging effect on Degussa.

74 In that regard, it should be noted that, under the mechanism applicable to the fine imposed jointly and severally on the appellants by the General Court in the first indent of paragraph 2 of the operative part of the judgment under appeal, SKW is already liable, on account of the payments of fines imposed on it by Article 2(f) and (g) of the decision at issue, to release the appellants from their obligations for the entire EUR 2.49 million fine which was imposed jointly and severally on them.

75 As the Advocate General observed in paragraph 106 of his Opinion, SKW cannot be required to pay, even in part, the fine of EUR 1.24 million provided for in the second indent of paragraph 2 of the operative part of the judgment under appeal. As is clear from paragraph 289 of that judgment and the

second indent of paragraph 2 of its operative part, which are not contested in the present appeal, that fine was imposed exclusively on Degussa for repeated infringement and thus will not be affected by any payments made by SKW to discharge the fine imposed on it.

76 The fifth ground of appeal must therefore be rejected.

77 The appeal must therefore be dismissed in its entirety.

Costs

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

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

80 Since Degussa and AlzChem have been unsuccessful and the Commission has applied for costs, they must be ordered to bear their own costs and pay those of the Commission.

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

1. **Dismisses the appeal;**

2. **Orders Evonik Degussa GmbH and AlzChem AG to bear their own costs and pay those of the European Commission.**

[Signatures]