Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

27 April 2017 *

(Appeal — Agreements, decisions and concerted practices — European markets in tin stabilisers and in ESBO/esters heat stabilisers — Price fixing, market allocation and exchange of commercially sensitive information — Whether the unlawful conduct of the subsidiaries may be attributed to the parent company — Regulation (EC) No 1/2003 — Article 25(1) — Limitation period for the imposition of penalties on subsidiaries — Effects on the legal position of the parent company)

In Case C-516/15 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 24 September 2015,

**Akzo Nobel NV**, established in Amsterdam (Netherlands),

**Akzo Nobel Chemicals GmbH**, established in Düren (Germany),

**Akzo Nobel Chemicals BV**, established in Amersfoort (Netherlands),

represented by C. Swaak and R. Wesseling, advocaten,

appellants,

the other parties to the proceedings being:

**Akcros Chemicals Ltd**, established in Warwickshire (United Kingdom),

applicant at first instance,

**European Commission**, represented by V. Bottka and P. Rossi, acting as Agents,

defendant at first instance,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça (Rapporteur), President of the Chamber, M. Berger, A. Borg Barthet, E. Levits and F. Biltgen, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: English.

after hearing the Opinion of the Advocate General at the sitting on 21 December 2016,

gives the following

## Judgment

1 By their appeal, Akzo Nobel NV, Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV ask the Court to set aside the judgment of the General Court of the European Union of 15 July 2015, *Akzo Nobel and Others* v *Commission* (T-47/10, 'the judgment under appeal', EU:T:2015:506), by which the General Court upheld only in part their action for, principally, annulment of Commission Decision C(2009) 8682 final of 11 November 2009 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (Case COMP/38589 — Heat Stabilisers) ('the decision at issue'), and, in the alternative, a reduction of the amount of the fines imposed on them.

### Legal context

2 Article 7 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 [EC] (OJ 2003 L 1, p. 1), entitled 'Finding and termination of infringement', provides in paragraph 1:

'Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 [EC], it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. ... If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.'

3 Article 23 of that regulation, entitled 'Fines', provides in paragraph 2:

'The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article 81 or Article 82 [EC] ...

...'

4 Article 25 of that regulation, entitled 'Limitation periods for the imposition of penalties', provides in paragraphs 1 to 3:

'1. The powers conferred on the Commission by [Article 23] shall be subject to the following limitation periods:

(a) three years in the case of infringements of provisions concerning requests for information or the conduct of inspections;

(b) five years in the case of all other infringements.

2. Time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.

3. Any action taken by the Commission or by the competition authority of a Member State for the purpose of the investigation or proceedings in respect of an infringement shall interrupt the limitation period for the imposition of fines or periodic penalty payments. ...'

## Background to the dispute

5 The background to the dispute is set out in paragraphs 1 to 50 of the judgment under appeal. In order to ensure that the present case is understood, it is important to note the following.

6 By the decision at issue, the Commission found that a number of undertakings had infringed Article 81 EC and Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) by participating in two sets of anticompetitive agreements and concerted practices covering the territory of the European Economic Area and relating, first, to the tin stabilisers sector and, secondly, to the epoxidised soybean oil and esters sector ('the ESBO/esters sector').

7 According to Article 1 of the decision at issue, both of the infringements found by the Commission, which related to those two categories of heat stabilisers, consisted of price fixing, allocation of markets through sales quotas, allocation of customers and exchange of commercially sensitive information, in particular on customers, production and sales.

8 The decision at issue states that the undertakings concerned participated in those infringements during various periods between 24 February 1987 and 21 March 2000, in relation to the tin stabilisers sector, and between 11 September 1991 and 22 March 2000, in relation to the ESBO/esters sector.

9 The decision at issue was addressed, with respect to each infringement, to 20 companies, which had either participated directly in the infringements involved or were liable as parent companies.

10 As regards attribution of the infringements, Article 1 of the decision at issue holds Akzo Nobel, Akzo Nobel Chemicals GmbH and Akcros Chemicals Ltd liable for their participation in the infringement relating to tin stabilisers from 24 February 1987 until 21 March 2000 in the case of Akzo Nobel, from 24 February 1987 until 28 June 1993 in the case of Akzo Nobel Chemicals GmbH, and from 28 June 1993 until 21 March 2000 in the case of Akcros Chemicals.

11 Similarly, Article 1 of the decision at issue holds Akzo Nobel, Akzo Nobel Chemicals BV and Akcros Chemicals liable for their participation in the infringement relating to the ESBO/esters sector from 11 September 1991 until 22 March 2000 in the case of Akzo Nobel, from 11 September 1991 until 28 June 1993 in the case of Akzo Nobel Chemicals BV, and from 28 June 1993 until 22 March 2000 in the case of Akcros Chemicals.

12 In addition, the Commission divided the participation of Akzo Nobel, Akzo Nobel Chemicals GmbH, Akzo Nobel Chemicals BV and Akcros Chemicals in the infringements into three separate infringement periods.

13 With regard to the infringement period before 28 June 1993 ('the first infringement period'), the Commission found that some companies, which were indirectly wholly owned by Akzo NV, which became Akzo Nobel, had participated directly in the infringements, namely Akzo Nobel Chemicals GmbH, for the infringement relating to tin stabilisers, and Akzo Nobel Chemicals BV, for the infringement relating to the ESBO/esters sector.

14 With regard to the second infringement period, from 28 June 1993 to 2 October 1998, the Commission found that the direct participant in the infringements had been the Akcros Chemicals partnership, which had centralised the heat stabilisers production and sales activities of the Akzo Group, which did not have a legal personality in its own right.

15 With regard to the third infringement period, from 2 October 1998 to 21 March 2000, in the case of tin stabilisers, and from 2 October 1998 to 22 March 2000, in the case of the ESBO/esters sector, the Commission found that Akcros Chemicals, which had absorbed the business of the Akcros Chemicals partnership, had participated directly in the infringements.

16 Accordingly, in the decision at issue, Akzo Nobel, as the ultimate parent company of a group of companies, some of which had participated directly in the cartels, was held liable for the entire infringement period, that is to say, from 24 February 1987 until 22 March 2000.

17 As regards the attribution of the fines, Article 2 of the decision at issue states the following:

‘For the [infringement] in the tin stabiliser sector ..., the following fines are imposed:

...

(4) [Akzo Nobel], Akzo Nobel Chemicals GmbH and [Akcros Chemicals] are jointly and severally liable for: EUR 1 580 000;

...

(6) [Akzo Nobel] and Akzo Nobel Chemicals GmbH are jointly and severally liable for: EUR 9 820 000;

(7) [Akzo Nobel] is liable for: EUR 1 432 700;

...

For the [infringement] in the ESBO/esters sector ..., the following fines are imposed:

...

(21) [Akzo Nobel], Akzo Nobel Chemicals BV and [Akcros Chemicals] are jointly and severally liable for: EUR 2 033 000;

...

(23) [Akzo Nobel] and Akzo Nobel Chemicals BV are jointly and severally [liable] for: EUR 3 467 000;

(24) [Akzo Nobel] is liable for: EUR 2 215 303;

...’

18 By decision of the Commission of 30 June 2011, the decision at issue was amended to the extent that it was addressed to Akzo Nobel and to Akcros Chemicals (‘the amending decision’).

19 In recital 1 of the amending decision, the Commission recalled that it had imposed fines in the decision at issue on Akzo Nobel and Akcros Chemicals ‘jointly and severally’ with Elementis plc, Elementis Holdings Limited and Elementis Services Limited.

20 In recital 2 of the amending decision, the Commission stated that, in the light of the judgment of 29 March 2011, *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others* (C-201/09 P and C-216/09 P, EU:C:2011:190), it had decided to repeal the decision at issue to the extent that it was addressed, inter alia, to Elementis and Elementis Holdings Limited.

21 Accordingly, the Commission amended the decision at issue to the extent that it was addressed to Akzo Nobel and Akcros Chemicals in so far as they had been held jointly and severally liable with Elementis for the fines imposed.

22 By application lodged at the General Court Registry on 12 September 2011, Akzo Nobel and Akcros Chemicals brought an action against the amending decision. That decision was annulled by the General Court by judgment of 15 July 2015, *Akzo Nobel and Akcros Chemicals* v *Commission* (T-485/11, EU:T:2015:517).

## The procedure before the General Court and the judgment under appeal

23 By application lodged at the General Court Registry on 27 January 2010, Akzo Nobel, Akzo Nobel Chemicals GmbH, Akzo Nobel Chemicals BV and Akcros Chemicals sought annulment of the decision at issue and, in the alternative, a reduction of the fines that had been imposed on them.

24 In support of their action, those companies put forward five pleas in law, the first of which alleged infringements of the rules on limitation. In the first part of the first plea, alleging infringement of Article 25(1)(b) of Regulation No 1/2003, they submitted that the Commission could no longer take action against Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV from 28 June 1998, since their participation in the infringements had ended on 28 June 1993. In consequence, neither they, nor Akzo Nobel, as their parent company, could be held liable for the first infringement period.

25 By the judgment under appeal, the General Court annulled Article 2(4), (6), (21) and (23) of the decision at issue in respect of the fines imposed on Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV for the first infringement period because the limitation period had expired, and dismissed the action as to the remainder.

## Forms of order sought

26 The appellants claim that the Court should:

— principally, set aside the judgment under appeal in so far as it holds that liability for the fines originally imposed on Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV for their participation in the infringements can still be attributed to Akzo Nobel after the annulment of those fines by the General Court;

— annul the decision at issue in so far as it establishes the participation of Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV in the infringements, and in particular Article 1(1)(b) and Article 1(2)(b) thereof;

— annul the decision at issue in so far as it attributes liability to, and/or imposes a fine on, Akzo Nobel on account of the unlawful conduct of Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV, and in particular Article 1(1)(a) for the period from 24 February 1987 to 28 June 1993 and Article 1(2)(a) for the period from 11 September 1991 to 28 June 1993 and/or Article 2(6) and (23);

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

— order the Commission to pay the costs.

27 The Commission contends that the appeal should be dismissed and the appellants ordered to pay the costs.

## The appeal

28 By their single ground of appeal, the appellants claim, in essence, that the General Court infringed the rules concerning the liability of parent companies for the unlawful conduct of their subsidiaries.

*Arguments of the parties*

29 The appellants note that the Court of Justice recently confirmed, in its judgment of 17 September 2015, *Total* v *Commission* (C-597/13 P, EU:C:2015:613), that, where the liability of a parent company is derived entirely from that of its subsidiary, the liability of the former cannot exceed that of the latter. In such situations, where the parent company has lodged an appeal with the same object as the subsidiary's, the parent company must benefit from the partial or full annulment of the fine imposed on the subsidiary.

30 Thus, the annulment of the fines imposed on Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV should have led to the annulment of the fine imposed on Akzo Nobel, as parent company, for the first infringement period, since that fine was imposed on it only on account of its subsidiaries' direct participation in the infringements. Akzo Nobel's liability was therefore purely derivative of that of its subsidiaries, within the meaning of the judgment of 22 January 2013, *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29).

31 They submit, in that regard, that the principle that a parent company's liability cannot exceed that of its subsidiaries seems to have been overlooked in the judgments of 26 November 2013, *Kendrion* v *Commission* (C-50/12 P, EU:C:2013:771), and of 30 April 2014, *FLSmidth* v *Commission* (C-238/12 P, EU:C:2014:284). However, as a general rule, the Court's reasoning is based on the premiss that, in a situation where the liability of the parent company is wholly derived from the actions of its subsidiary, to apply, in respect of the parent company, a fine which exceeds that for which its subsidiary is ultimately liable is tantamount to imposing a portion of a fine for which there is no legal basis.

32 The appellants submit that the application of the principle according to which the liability of a parent company cannot exceed that of its subsidiary is of particular importance in the present case since the cancellation of the fines imposed on Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV should have led to the annulment of the whole of the decision at issue vis-à-vis those two companies.

33 On that point, the appellants note that, following delivery of the judgment of 29 March 2011, *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others* (C-201/09 P and C-216/09 P, EU:C:2011:190), the Commission was confronted with the fact that its power to impose a fine on Elementis and on Ciba/BASF was time-barred. As was evident from the amending decision, the Commission therefore not only cancelled the fines but withdrew the finding as to any participation of those undertakings in the infringements.

34 In accordance with the principle of equal treatment, and so as to give full effect to the judgment under appeal, for the purposes of the first paragraph of Article 266 TFEU, the Commission should have adopted the same approach in relation to Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV. However, the decision at issue still contained a declaratory finding of an infringement addressed to those two undertakings. In addition, although Article 7 of Regulation No 1/2003 requires the Commission to have a legitimate interest for that type of finding, the Commission has no such interest in the present case, in the appellants' submission.

35 The Commission contends that the single ground of appeal put forward by the appellants should be rejected.

*Findings of the Court*

*Admissibility*

36 As regards the appellants' complaints concerning, first, the Commission's alleged breach of the principle of equal treatment and, secondly, the lack of a legitimate interest, within the meaning of the last sentence of Article 7(1) of Regulation No 1/2003, such as to justify the finding that Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV participated in the infringements at issue, it is apparent on examination of the file submitted to the Court that those complaints were not put forward at first instance.

37 The appellants merely claimed before the General Court that, in view of the expiry of the limitation period with respect to Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV, those companies could not be held liable.

38 According to settled case-law, to allow a party to put forward for the first time before the Court of Justice pleas and arguments which it did not raise before the General Court would be to authorise it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court. In an appeal, the Court's jurisdiction is thus confined to examining the assessment by the General Court of the pleas and arguments aired before it (see, in particular, judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 54).

39 These complaints put forward by the appellants must, therefore, be rejected as inadmissible.

*Substance*

40 By the judgment under appeal, the General Court accepted the appellants' arguments in so far as they maintained that Article 25(1)(b) of Regulation No 1/2003 prevented the Commission from imposing fines on Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV. The General Court therefore annulled Article 2(4), (6), (21) and (23) of the decision at issue in respect of the fines imposed on those companies for the first infringement period because the limitation period had expired.

41 The General Court stated, in essence, in paragraphs 121, 123 and 124 of the judgment under appeal, that the Commission's first actions for the purpose of the investigation or proceedings in respect of the infringements, within the meaning of Article 25(3) of Regulation No 1/2003, had been taken at the beginning of 2003, and thus after the expiry, for Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV, of the five-year period provided for in Article 25(1)(b) of that regulation, those companies having ceased to participate in the cartels on 28 June 1993.

42 By contrast, the General Court held, in essence, in paragraphs 125 and 126 of the judgment under appeal, that although the expiry of the limitation period could be invoked by Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV and had the effect of ensuring that they avoided penalties, it had no bearing on the liability of their parent company with regard to the first infringement period.

43 In particular, the General Court held, in paragraph 126 of the judgment under appeal, that 'the mere fact that a subsidiary of a group of companies, in the sense of an economic unit, benefits from the expiry of the limitation period does not result in the parent company's liability being called into question and prevent proceedings being brought against that parent company'.

44 The appellants essentially dispute the validity of those findings of the General Court.

45 Consequently, it is necessary to consider whether the fact that the Commission's power to impose penalties on Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV was time-barred precluded Akzo Nobel from being held liable in respect of the first infringement period, contrary to the conclusion which the General Court reached in paragraph 126 of the judgment under appeal.

46 In this regard, it must be noted, in the first place, that the authors of the Treaties chose to use the concept of an undertaking to designate the perpetrator of an infringement of competition law, who is liable to be punished pursuant to Article 81 or 82 EC, now Article 101 or 102 TFEU (judgment of 18 July 2013, *Schindler Holding and Others* v *Commission*, C-501/11 P, EU:C:2013:522, paragraph 102).

47 It is apparent from the case-law of the Court of Justice that EU competition law refers to the activities of undertakings and that the concept of an undertaking covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed (judgment of 11 December 2007, *ETI and Others*, C-280/06, EU:C:2007:775, paragraph 38).

48 The Court has also stated that, in the same context, the term 'undertaking' must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (judgment of 20 January 2011, *General Química and Others* v *Commission*, C-90/09 P, EU:C:2011:21, paragraph 35).

49 When such an economic entity infringes the competition rules, it is for that entity, according to the principle of personal responsibility, to answer for that infringement (judgment of 29 March 2011, *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, C-201/09 P and C-216/09 P, EU:C:2011:190, paragraph 95).

50 In the second place, the infringement of EU competition law must be imputed unequivocally to a legal person on whom fines may be imposed and to whom the statement of objections must be addressed (see, to that effect, judgment of 10 September 2009, *Akzo Nobel and Others* v *Commission*, C-97/08 P, EU:C:2009:536, paragraph 57).

51 Neither Article 23(2)(a) of Regulation No 1/2003 nor the case-law lays down which legal or natural person the Commission is obliged to hold responsible for the infringement or to punish by the imposition of a fine (see, to that effect, judgment of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 159).

52 By contrast, according to the settled case-law of the Court, the unlawful conduct of a subsidiary may be attributed to the parent company in particular where, although having a separate legal personality, that subsidiary does not determine independently its own conduct on the market, but essentially carries out the instructions given to it by the parent company, having regard especially to the economic, organisational and legal links between those two legal entities (see, to that effect, judgments of 14 July 1972, *Imperial Chemical Industries* v *Commission*, 48/69, EU:C:1972:70, paragraphs 131 to 133; of 25 October 1983, *AEG-Telefunken* v *Commission*, 107/82, EU:C:1983:293, paragraphs 49 to 53; of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 157; and of 17 September 2015, *Total* v *Commission*, C-597/13 P, EU:C:2015:613, paragraph 35).

53 That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of EU competition law (judgment of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 157).

54 On that aspect, in the particular case in which a parent company holds all or almost all of the capital in a subsidiary which has committed an infringement of the EU competition rules, there is a rebuttable presumption that that parent company actually exercises a decisive influence over its subsidiary (see, to that effect, judgment of 26 November 2013, *Groupe Gascogne* v *Commission*, EU:C:2013:770, paragraph 38).

55 Such a presumption implies, unless it is rebutted, that the actual exercise of decisive influence by the parent company over its subsidiary is established and gives grounds for the Commission to hold the former responsible for the conduct of the latter, without having to produce any further evidence (see, to that effect, judgment of 16 June 2016, *Evonik Degussa and AlzChem* v *Commission*, C-155/14 P, EU:C:2016:446, paragraph 30).

56 It must be pointed out, in the third place, that, according to the well-established case-law of the Court, the parent company to which the unlawful conduct of its subsidiary is attributed is held individually liable for an infringement of the EU competition rules which it is itself deemed to have infringed, because of the decisive influence which it exercised over the subsidiary and by which it was able to determine the subsidiary's conduct on the market (see, to that effect, judgments of 14 July 1972, *Imperial Chemical Industries* v *Commission*, 48/69, EU:C:1972:70, paragraphs 140 and 141; of 16 November 2000, *Metsä-Serla and Others* v *Commission*, C-294/98 P, EU:C:2000:632, paragraphs 28 and 34; of 26 November 2013, *Kendrion* v *Commission*, C-50/12 P, EU:C:2013:771, paragraph 55; of 10 April 2014, *Commission and Others* v *Siemens Österreich and Others*, C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 49; and of 8 May 2014, *Bolloré* v *Commission*, C-414/12 P, not published, EU:C:2014:301, paragraph 44).

57 As has been observed in paragraph 49 of the present judgment, EU competition law is based on the principle of the personal responsibility of the economic unit which has committed the infringement. Thus, if the parent company is part of that economic unit, it is regarded as personally jointly and severally liable with the other legal persons making up that unit for the infringement committed (see, to that effect, judgment of 10 September 2009, *Akzo Nobel and Others* v *Commission*, C-97/08 P, EU:C:2009:536, paragraph 77).

58 That is why the joint and several liability as between two companies constituting an economic unit cannot be reduced, as regards the payment of the fine, to a type of security provided by the parent company in order to guarantee payment of the fine imposed on the subsidiary (see, to that effect, judgments of 26 November 2013, *Kendrion* v *Commission*, C-50/12 P, EU:C:2013:771, paragraphs 55 and 56, and of 19 June 2014, *FLS Plast* v *Commission*, C-243/12 P, EU:C:2014:2006, paragraph 107).

59 In the fourth place, according to the case-law of the Court, in a situation in which the parent company's liability results exclusively from the direct participation of its subsidiary in the infringement and the two companies have brought parallel actions having the same object, the General Court may, without ruling *ultra petita*, take account of the annulment of the finding that the subsidiary committed an infringement for a certain period and make a corresponding reduction in the amount of the fine imposed on the parent company jointly and severally with its subsidiary (see, to that effect, judgment of 22 January 2013, *Commission* v *Tomkins*, C-286/11 P, EU:C:2013:29, paragraphs 34, 38, 39 and 49).

60 The Court has stated in that respect, first, that, in order to hold any entity within an economic unit liable, it is necessary to prove that one entity at least has committed an infringement of the EU competition rules and that that fact be noted in a decision which has become definitive, and, secondly, that the reason for which it was found that the subsidiary had not acted unlawfully is irrelevant (see, to that effect, judgment of 22 January 2013, *Commission* v *Tomkins*, C-286/11 P, EU:C:2013:29, paragraphs 37 and 38).

61 It is in that context that the Court referred to the wholly derivative nature of the liability incurred by the parent company solely because of a subsidiary's direct participation in the infringement (see, to that effect, judgment of 22 January 2013, *Commission* v *Tomkins*, C-286/11 P, EU:C:2013:29, paragraphs 34, 38, 43 and 49). In that situation, the parent company's liability arises from its subsidiary's unlawful conduct, which is attributed to the parent company in view of the economic unit formed by those companies. Consequently, the parent company's liability necessarily depends on the facts constituting the infringement committed by its subsidiary and to which its liability is inextricably linked.

62 For the same reasons, the Court has made clear that, in a situation in which no factor individually reflects the conduct for which the parent company is held liable, the reduction of the amount of the fine imposed on the subsidiary jointly and severally with its parent company must, in principle, where the necessary procedural requirements are satisfied, be extended to the parent company (see, to that effect, judgment of 17 September 2015, *Total* v *Commission*, C-597/13 P, EU:C:2015:613, paragraphs 10, 37, 38, 41 and 44).

63 In the fifth place, it is apparent from the case-law of the Court that the Commission's power to impose penalties can be time-barred vis-à-vis the subsidiary but not the parent company, even though the parent company's liability may be entirely based on the unlawful conduct of that subsidiary (see, to that effect, judgment of 29 March 2011, *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourgand Others*, C-201/09 P and C-216/09 P, EU:C:2011:190, paragraphs 102, 103, 148 and 149).

64 In the present case, it is common ground, as is evident from Article 1 of the decision at issue, that Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV participated directly in the cartels in question, from 24 February 1987 until 28 June 1993, in the case of the former, and from 11 September 1991 until 28 June 1993, in the case of the latter company.

65 It is also common ground that, during the first infringement period, Akzo Nobel indirectly owned the entire share capital of Akzo Nobel Chemicals GmbH and of Akzo Nobel Chemicals BV and exercised decisive influence over them, with the result that, during that infringement period, the three companies formed one and the same undertaking for the purposes of EU competition law.

66 Consequently, in accordance with the case-law referred to in paragraphs 52 to 58 of the present judgment, the unlawful actions taken by Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV during the first infringement period were attributed to Akzo Nobel. Akzo Nobel was thus held individually liable for actions contrary to EU competition rules which it was itself deemed to have taken during that period.

67 Furthermore, it is also undisputed in the present case that Akzo Nobel was held liable because of its participation in the infringements at issue throughout the three infringement periods, that is to say, from 24 February 1987 until 21 March 2000, in the case of the infringement relating to tin stabilisers, and from 11 September 1991 until 22 March 2000, as regards the infringement relating to the ESBO/esters sector, as the ultimate parent company of the Akzo undertaking the various legal entities of which, including Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV, had participated directly in the cartels.

68 It is important to note in this regard that the applicants at first instance had relied, before the General Court, on the expiry of the limitation period provided for in Article 25(1)(b) of Regulation No 1/2003 only with respect to Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV, on the ground that their unlawful conduct had ceased on 28 June 1993.

69 As has been noted in paragraphs 40 and 41 of the present judgment, the General Court accepted the arguments of the applicants at first instance, ruling that the Commission's power to impose fines on Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV was time-barred.

70 Admittedly, as the General Court in essence underlined in paragraphs 125 and 126 of the judgment under appeal, the fact that the Commission's power to impose penalties is time-barred pursuant to Article 25(1)(b) of Regulation No 1/2003 means that a penalty can no longer be imposed on the companies in respect of which the limitation period has expired.

71 By contrast, the fact that penalties can no longer be imposed on certain companies because the limitation period has expired does not preclude another company, which is considered personally responsible and jointly and severally liable with those companies for the same anticompetitive behaviour, and in respect of which the limitation period has not expired, from having proceedings instituted against it.

72 Contrary to the appellants' contention, the fact that Akzo Nobel's liability in respect of the first infringement period arises exclusively from the direct participation of its subsidiaries in the cartels does not alter that conclusion.

73 First, the anticompetitive activities in relation to the first infringement period are nevertheless regarded as having been carried out by Akzo Nobel itself, since it formed an economic unit, within the meaning of the case-law of the European Union, with Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV.

74 Secondly, as the Advocate General stated, in essence, in points 58 and 59 of his Opinion, it is apparent from the case-law of the Court mentioned in paragraph 62 of the present judgment that factors specific to the parent company may justify assessing the parent company's liability and that of its subsidiary differently, even if the liability of the former is based exclusively on the unlawful conduct of the latter.

75 That is the case here, since, unlike Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV, whose participation in the cartels ended on 28 June 1993, Akzo Nobel, as has been noted in paragraph 67 of the present judgment, was involved in the infringements in question beyond that date, until 21 and 22 March 2000, as regards the infringement concerning the tin stabilisers sector and the infringement concerning the ESBO/esters sector, respectively.

76 Having regard to all of those considerations, it must be concluded that the General Court was fully entitled to find, in paragraph 126 of the judgment under appeal, that the fact that the Commission's power to impose penalties on Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV was time-barred did not preclude Akzo Nobel from being held liable in respect of the first infringement period.

77 The single ground of appeal must, therefore, be rejected as being in part inadmissible and in part unfounded.

78 It follows from all of the foregoing that the appeal must be dismissed in its entirety.

## Costs

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

80 Under Article 138(1) of those rules of procedure, which applies to appeal proceedings 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. Since the Commission has applied for costs and the appellants have been unsuccessful as regards their single ground of appeal, the appellants must be ordered to pay the costs of this appeal.

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

1. **Dismisses the appeal;**

2. **Orders Akzo Nobel NV, Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV to pay the costs.**

Da Cruz Vilaça Berger Borg Barthet

Levits Biltgen

Delivered in open court in Luxembourg on 27 April 2017.

A. Calot Escobar
Registrar

J.L. da Cruz Vilaça
President of the Fifth Chamber