



Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

26 November 2013*

(Appeal — Competition — Cartels — Industrial plastic bags sector — Whether the infringement by a subsidiary may be attributed to the parent company — Joint and several liability of the parent company for the payment of the fine imposed on the subsidiary — Excessive length of the proceedings before the General Court — Principle of effective legal protection)

In Case C-50/12 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 26 January 2012,

Kendrion NV, established in Zeist (Netherlands), represented by P. Glazener and T. Ottervanger, advocaten,

appellant,

the other party to the proceedings being:

European Commission, represented by F. Castillo de la Torre and S. Noë, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen, M. Safjan, Presidents of Chambers, J. Malenovský, E. Levits, A. Ó Caoimh, J.-C. Bonichot, A. Arabadjiev, D. Šváby and M. Berger (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 5 February 2013,

after hearing the Opinion of the Advocate General at the sitting on 30 May 2013,

gives the following

* Language of the case: Dutch.

Judgment

- 1 By its appeal, Kendrion NV ('Kendrion' or 'the appellant') seeks (i) to have set aside the judgment of the General Court of the European Union of 16 November 2011 in Case T-54/06 *Kendrion v Commission* ('the judgment under appeal'), by which that court dismissed the appellant's action for annulment in part of Commission Decision C(2005) 4634 final of 30 November 2005 relating to a proceeding pursuant to Article 81 [EC] (Case COMP/F/38.354 – Industrial bags) ('the contested decision') and (ii) the annulment or, in the alternative, reduction of the fine imposed on it by that decision.

Legal context

- 2 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), which replaced Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87), provides in Article 23(2) and (3), which replaced Article 15(2) of Regulation No 17, as follows:

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

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

...

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

...

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.'

The background to the dispute and the contested decision

- 3 Kendrion is a limited company governed by Netherlands law.
- 4 On 8 June 1995, Kredest Beheer BV, a wholly-owned subsidiary of Combattant Holding BV, itself wholly owned by Kendrion, took over from DSM NV all the assets and operations of the Fardem group at Edam (Netherlands) and Beerse (Belgium).
- 5 In November 1995, the appellant sold the operations of the Fardem group in Belgium. In December 1995, the subsidiary Kredest Beheer BV was renamed Fardem Holding BV ('Fardem Holding'). Fardem Holding was merged with the companies Fardem Packaging BV and CAT International BV in September 2001. The name Fardem Holding was changed to Fardem Packaging BV ('Fardem Packaging') at that time.
- 6 In November 2001, British Polythene Industries plc informed the Commission of the existence of a cartel in the industrial bags sector.

- 7 After carrying out inspections in June 2002, and sending requests for information to Fardem Packaging in 2002 and 2003, the Commission initiated the administrative procedure on 29 April 2004 and adopted a statement of objections against several companies, including Fardem Packaging and Kendrion.
- 8 In the meantime, in September 2003, Kendrion had sold Fardem Packaging to the directors of that company.
- 9 On 30 November 2005, the Commission adopted the contested decision, Article 1(1)(d) of which states that Fardem Packaging and Kendrion infringed Article 81 EC by participating, in the case of Fardem Packaging from 6 February 1982 until 26 June 2002 and in the case of Kendrion from 8 June 1995 until 26 June 2002, in a complex of agreements and concerted practices in the plastic industrial bags sector in Belgium, Germany, Spain, France, Luxembourg and the Netherlands; this consisted in (i) the fixing of prices and the establishment of common price calculation models, (ii) the sharing of markets and the allocation of sales quotas, (iii) the assignment of customers, deals and orders, (iv) the submission of concerted bids in response to certain invitations to tender and (v) the exchange of individualised information.
- 10 On that ground, the Commission imposed on Kendrion, in subparagraph (d) of the first paragraph of Article 2 of the contested decision, a fine of EUR 34 million, specifying that, of this amount, Fardem Packaging was jointly and severally liable for the sum of EUR 2.20 million.

The judgment under appeal

- 11 By application lodged at the General Court Registry on 22 February 2006, Kendrion brought an action for annulment of the contested decision. It claimed, in essence, that the General Court should, principally, annul that decision in whole or in part or, in the alternative, annul or reduce the fine imposed on it by that decision.
- 12 The General Court identified eight pleas in law in the arguments put forward by Kendrion. The first seven pleas alleged an infringement of Article 81 EC, Article 253 EC, Article 23(2) of Regulation No 1/2003 and several general principles of law, the appellant raising the following pleas: (i) the operative part of the contested decision is inconsistent with its grounds; (ii) the Commission incorrectly presumed that Kendrion and Fardem Packaging constituted an economic entity; (iii) the appellant was incorrectly held liable for an infringement committed by Fardem Packaging; (iv) the contested decision imposed on the appellant, as parent, a fine higher than that imposed on the subsidiary which had been held jointly and severally liable; and (v) the appellant was treated differently from the other parent companies held jointly and severally liable for the infringements of a subsidiary. The appellant alleged, in its sixth and seventh pleas in law respectively, an infringement of the abovementioned provisions in that the basic amount of Fardem Packaging's fine had been fixed at EUR 60 million and a fine of EUR 34 million had been imposed on the appellant itself. The eighth plea in law alleged an infringement of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3)
- 13 By letter of 12 January 2011, the appellant replied to a question put to it by the General Court pursuant to Article 64 of its Rules of Procedure, requesting it to express its views on the effect on the second plea in its action of the judgment in Case C-97/08 P *Akzo Nobel and Others v Commission* [2009] ECR I-8237.
- 14 At the hearing, which took place on 9 March 2011, Kendrion submitted that the length of the proceedings before the General Court had been excessive. That argument was rejected by the General Court, in paragraph 18 of the judgment under appeal, as ineffective.

- 15 After examining each of the pleas raised by Kendrion in support of its action, the General Court dismissed the action in its entirety.

Forms of order sought and procedure before the Court

- 16 Kendrion claims that the Court should:

- set aside the judgment under appeal in whole or in part;
- annul the contested decision in whole or in part, in so far as it concerns the appellant;
- annul or reduce the fine which was imposed on the appellant;
- in the alternative, refer the case back to the General Court;
- order the Commission to pay the costs.

- 17 The Commission contends that the Court should:

- dismiss the appeal;
- order Kendrion to pay the costs.

- 18 In accordance with Article 24 of the Statute of the Court of Justice of the European Union and Article 61 of its Rules of Procedure, the Court invited the parties, the European Parliament, the Council of the European Union and the Member States to answer questions concerning (i) the criteria allowing the reasonableness of the length of proceedings before the General Court to be assessed and (ii) the measures capable of remedying the consequences of the excessive length of such proceedings.

The appeal

The second ground

Arguments of the parties

- 19 By its second ground, which must be examined first in that it relates to the question whether Kendrion and its subsidiary, Fardem Packaging, may be considered to constitute an economic entity, the appellant complains that the General Court (i) erred in law in the distribution of the burden of proof as to whether Kendrion exercised a decisive influence over its subsidiary and (ii) carried out an incorrect and insufficiently reasoned assessment of the evidence submitted in that regard by the Commission and the appellant itself.
- 20 Kendrion submits that, in the contested decision, in order to establish that its subsidiary and itself constituted an economic unit, the Commission did not rely solely on the presumption that a parent company exercises a decisive influence over its wholly-owned subsidiary, but also on additional evidence. Having accepted that analysis, and stated, in paragraph 33 of the judgment under appeal, that ‘it is appropriate to examine whether the Commission made an error of assessment, both regarding the additional factors referred to in the [contested] decision and the evidence put forward by the [appellant] in order to rebut the presumption of decisive influence’, the General Court erred in law, in

paragraph 53 of the judgment under appeal, in stating that it would restrict itself to ‘consider[ing] ... whether the [appellant] has succeeded in rebutting those four additional factors’. It therefore disregarded the fact that the burden of proof lay with the Commission.

- 21 In addition, it is because of an incorrect assessment of those additional factors that the General Court reached the conclusion, in paragraph 68 of the judgment under appeal, that the Commission was fully entitled to find that the appellant and Fardem Packaging constituted a single economic entity. In any event, the General Court gave insufficient reasons for its decision in that regard.
- 22 Even if the General Court’s assessment of the additional factors at issue is correct, the fact remains that that court failed to have regard to, or did not examine sufficiently, the arguments relied on by Kendrion in order to show that Fardem Packaging was commercially independent.
- 23 The Commission contends that the second ground of appeal relied on by the appellant must be rejected.
- 24 In declaring that Kendrion was liable for the infringement committed by Fardem Packaging, the Commission relied solely on the fact that the latter was a wholly-owned subsidiary of the appellant at the material time and on the presumption that the parent company exercises a decisive influence over its subsidiary in such a situation. Although the contested decision refers to four additional factors tending to show the existence of such an influence, they were not considered to be determinative.
- 25 As regards the General Court’s assessment of the evidential value of the additional factors referred to in the contested decision as evidence relied on by Kendrion in order to show that it did not exercise a decisive influence over its subsidiary, the Commission contends that Kendrion’s arguments are inadmissible.

Findings of the Court

- 26 In order to assess the present ground of appeal, it is necessary to refer to the arguments put forward by Kendrion at first instance.
- 27 As is apparent from paragraphs 31 and 32 of the judgment under appeal, after the delivery of the judgment in *Akzo Nobel and Others v Commission*, the appellant withdrew its argument that the mere fact that a parent company has a 100% shareholding in a subsidiary is insufficient to give rise to a rebuttable presumption that the parent company exercises a decisive influence over the conduct of its subsidiary. By referring to paragraph 155 of the judgment in Case T-24/05 *Alliance One International and Others v Commission* [2010] ECR II-5329, the appellant none the less argued that, where the Commission bases the presumption that a parent company exercises a decisive influence on its subsidiary not only on the fact that it owns all the shares in it but also on additional factors, it must be ascertained whether those factors establish to the requisite legal standard that the parent company does actually exercise such an influence over the conduct of its subsidiary.
- 28 In that regard, it must be pointed out that, in the present case, the Commission referred expressly, in recital 580 of the contested decision, to the presumption that a parent company in fact exercises a decisive influence over the subsidiary in which it owns all the shares, before stating, in recital 584 of that decision, that that approach must be applied on a case-by-case basis for each undertaking concerned. In the recitals concerning Fardem Packaging, the Commission noted first, in recital 590 of the contested decision, that Kendrion held, through an interposed company, 100% of the shares in Fardem Packaging and that this had led it to address the statement of objections to Kendrion. It referred, second, in recitals 594 to 597 of that decision, to the additional factors, coming to light during the subsequent phase of the administrative procedure, which in its view demonstrated that Kendrion exercised an influence over its subsidiary.

- 29 The General Court's reasoning in the judgment under appeal must be examined in that context. After recalling, in paragraphs 49 to 51 thereof, the case-law relating to the presumption that decisive influence is exercised by a parent company over its wholly-owned subsidiary, the General Court added, in paragraph 52 of the judgment under appeal, that, in order to rebut that presumption, 'first, it is for the parent company to put before the Commission any evidence relating to the economic and legal organisational links between its subsidiary and itself ... and, second, the Commission, is indeed, for its part, required to assess any evidence relating to the links apt to demonstrate that the subsidiary operated independently of its parent company and that those two companies thus did not constitute an economic entity'.
- 30 In paragraph 53 of the judgment under appeal, the General Court found that, in the present case, the Commission had not relied solely on the fact that the appellant held 100% of the shares in Fardem Packaging, but had also referred to four additional factors. It inferred from this that it was appropriate to examine whether the appellant had succeeded in rebutting those four additional factors. The General Court considered that point in paragraphs 54 to 60 of the judgment under appeal, before examining, in paragraphs 63 to 67 thereof, the factors relied on by the appellant for the purpose of rebutting the existence of a decisive influence by it over its subsidiary's conduct.
- 31 In paragraph 68 of the judgment under appeal, the General Court concluded that 'the appellant [had] succeeded in rebutting neither the evidential value of most of the additional evidence put forward by the Commission nor the presumption that it exercised actual control over its subsidiary's conduct'.
- 32 In the light of the reasoning thus expounded by the General Court, the Court of Justice cannot uphold the appellant's argument that the General Court erred in law, in paragraph 53 of the judgment under appeal by placing an obligation on the appellant to 'rebut' the four additional factors relied on by the Commission in the contested decision, when it was for the Commission to establish the evidential value of those factors. First, it is apparent from paragraphs 54 to 60 of that judgment that the General Court examined the evidential value of those additional factors and concluded that the appellant had succeeded in rebutting the evidential value of only one of the additional pieces of evidence. Second, it is apparent from paragraphs 63 to 67 of that judgment that Kendrion did not succeed in rebutting the presumption that it actually exercised a decisive influence over its subsidiary.
- 33 This present case is therefore different from that giving rise to the judgment in Joined Cases C-628/10 P and C-14/11 P *Alliance One International and Standard Commercial Tobacco v Commission and Commission v Alliance One International and Others* [2012] ECR. In that regard, it is sufficient to note that, in the first instance judgment in that case, the General Court had found that none of the evidence in the contested decision was capable of supporting the presumption that the parent company actually exercised a decisive influence over its subsidiary (*Alliance One International and Standard Commercial Tobacco v Commission and Commission v Alliance One International and Others*, paragraph 54).
- 34 The General Court did not therefore err in law when it held, in paragraph 68 of the judgment under appeal, that, in the light of the presumption that a parent company exercises decisive influence over its wholly-owned subsidiary, on the one hand, and of the three additional pieces of evidence confirming such a decisive influence, on the other, '[t]he Commission was fully entitled ... to take the view that the appellant and Fardem Packaging constituted a single economic entity and, therefore, that the appellant could be held liable for the anti-competitive conduct of Fardem Packaging'.
- 35 Inasmuch as Kendrion submits that the reasoning in the judgment under appeal regarding the General Court's assessment of the evidence examined is insufficient, it must be found that that argument seeks, in fact, to call in question that assessment. To that extent, and inasmuch as Kendrion also submits that the General Court assessed that evidence incorrectly, it is sufficient to note that assessment of the evidence falls within the jurisdiction of the General Court and the Court of Justice does not have the task of reviewing that assessment in an appeal.

36 It follows from the foregoing that the second ground of appeal relied on by Kendrion must be rejected.

The first ground

Arguments of the parties

- 37 By its first ground of appeal, Kendrion complains that the General Court erred in law and gave contradictory and insufficient reasons in the judgment under appeal in so far as it held, in paragraphs 22 to 30 thereof, that the Commission had provided sufficient reasons justifying its decision to impose a higher fine on the appellant than on its subsidiary, Fardem Packaging.
- 38 In the judgment under appeal, after noting, in paragraph 22 thereof, that ‘the operative part of an act is inextricably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption’, the General Court concluded, in paragraph 29 of that judgment, that, ‘[n]otwithstanding its ambiguous wording, the scope and content of [subparagraph (d) of the first paragraph of Article 2] of the [contested] decision are thus fully capable of being understood on reading the recitals’ of that decision.
- 39 Kendrion, which submits that the operative part of the contested decision is inconsistent with the grounds of that decision, complains that the General Court failed to apply correctly the principle referred to in paragraph 22 of the judgment under appeal. In paragraphs 24 and 25 of that judgment, the General Court disregarded the fact that, according to the recitals of the contested decision, the Commission took the view that Kendrion was one of the parent companies jointly and severally liable for the infringements committed by their subsidiaries and could therefore be held liable jointly and severally for the payment of the fine to be imposed on Fardem Packaging. However, in the operative part of that decision, the Commission reversed the roles by imposing the fine on Kendrion and holding Fardem Packaging in part jointly and severally liable for its payment. The operative part of that decision is not only ‘ambiguously’ drafted, as the General Court noted, but is contrary to the recitals.
- 40 The Commission submits that parent companies and subsidiaries are equally liable for an infringement of the competition rules. There is no difference between the joint and several liability of a parent company and the individual responsibility of a subsidiary; both companies are jointly and severally liable because they form part of an economic entity which has infringed the competition rules.

Findings of the Court

- 41 It must be recalled that the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review (see, in particular, *Alliance One International and Standard Commercial Tobacco v Commission* and *Commission v Alliance One International and Others*, paragraph 72).
- 42 In the context of individual decisions, according to the Court’s settled case-law, the purpose of the obligation to state reasons for an individual decision is both to enable the Court to review the legality of the decision and to provide the person concerned with sufficient information to make it possible to ascertain whether the decision may be vitiated by a defect which may permit its legality to be contested (see, in particular, *Alliance One International and Standard Commercial Tobacco v Commission* and *Commission v Alliance One International and Others*, paragraph 73).

- 43 In assessing the adequacy of the reasoning in the contested decision as to why it imposed, in subparagraph (d) of the first paragraph of Article 2 thereof, a fine on Kendrion, as parent, for the payment of which Fardem Packaging, as subsidiary, is in part jointly and severally liable, it is necessary to proceed on the premiss that, as is clear from the assessment of the second ground of appeal above, the Commission was fully entitled to find that Kendrion and Fardem Packaging constituted a single economic entity and, consequently, that liability for Fardem Packaging's anti-competitive conduct could be imputed to the appellant (see paragraph 34 above).
- 44 In paragraph 25 of the judgment under appeal, the General Court found that 'the [contested] decision contains numerous explanations regarding the reasons which led the Commission to find that the parent companies and their subsidiaries should be held jointly and severally liable for the infringement', stating that those reasons are explained in general terms in recitals 577 to 583 of that decision and, more specifically, in recitals 587 to 599 thereof. In paragraph 26 of the judgment under appeal, the General Court established that, 'the [...] decision shows that the Commission imposed a fine on the [appellant] by reason of the fact that it constituted a single economic entity with Fardem Packaging between 1995 and 2003' and that it followed from this that since Fardem Packaging's anti-competitive conduct could be attributed to the appellant because each was a member of the same economic entity, 'the [appellant] was deemed to have committed the infringement itself as a result of that attribution of liability'.
- 45 It must be added that the Commission's reasoning in that regard was supplemented, in recitals 578 to 580 of the contested decision, by numerous references to the case-law in that area of both the General Court and the Court of Justice.
- 46 In those circumstances, the General Court was fully entitled to find that the statement of reasons given in the contested decision was sufficient to enable the appellant to understand the basis on which it had been held to be liable.
- 47 Since Kendrion's liability is based, as is apparent from the General Court's findings, on the principle of personal liability of the economic entity which it formed with its subsidiary (see, to that effect, Case C-440/11 P *Commission v Stichting Administratiekantoort Portielje and Others* [2013] ECR, paragraphs 37 to 39 and the case-law cited), Kendrion cannot successfully argue that subparagraph (d) of the first paragraph of Article 2 of the contested decision contradicts the grounds of that decision, in that it imposes a fine on it personally.
- 48 Is so far as that provision of the contested decision holds Kendrion's subsidiary, Fardem Packaging, jointly and severally liable for part of the fine imposed on Kendrion as parent, it must be found, as the General Court did in paragraph 29 of the judgment under appeal, that although the wording of the provision in question is ambiguous, its scope and content are fully capable of being understood on reading the recitals of that decision, in particular – as the General Court observed in paragraph 28 of the judgment under appeal – recitals 814 and 815 thereof. It is indeed apparent from those recitals that the imposition on Fardem Packaging of a fine appreciably lower than that imposed on its parent company is due to the application of the 10% ceiling laid down by Article 23(2) of Regulation No 1/2003.
- 49 In so far as Kendrion submits that it was not possible to impose on it a fine higher than that imposed on Fardem Packaging, that argument is inseparable from the argument comprising the first part of the third ground of appeal with which it will be examined.
- 50 It follows from the foregoing that the first ground of appeal must be rejected.

The third ground

- 51 The third ground of appeal relied on by Kendrion is in three distinct parts which it is appropriate to examine in turn.

The first part of the third ground

– Arguments of the parties

- 52 Kendrion complains that the General Court misconstrued the concept of joint and several liability.
- 53 Referring to paragraphs 40 and 89 of the judgment in Case C-90/09 P *General Química and Others v Commission* [2011] ECR I-1, Kendrion submits that that judgment lays down a rule of law according to which, on the basis of the presumption that a decisive influence is in fact exercised by the parent company over its wholly owned subsidiary, the Commission may hold the parent company jointly and severally liable for payment of the fine imposed on its subsidiary. The concept of joint and several liability, whose rationale is the need to ensure that the fine is actually recovered, implies therefore that the parent company may be liable only for payment of the fine imposed on the subsidiary.
- 54 The Commission contests those arguments on the same grounds as those relied in response to the first ground of appeal.

– Findings of the Court

- 55 First of all, it should be recalled that both Kendrion's liability as parent and Fardem Packaging's liability as former subsidiary are based on the fact that both companies formed part of the economic entity which breached Article 81 EC. As the General Court observed, in paragraph 26 of the judgment under appeal, the appellant itself is, accordingly, deemed to have committed the infringement of the EU competition rules.
- 56 It follows that, as regards the payment of the fine, the joint and several liability between two companies constituting such an economic entity cannot be reduced to a type of security provided by the parent company in order to guarantee payment of the fine imposed on the subsidiary.
- 57 In the present case, as the General Court observed in paragraph 87 of the judgment under appeal, the amount which the Commission considered appropriate in order to penalise Fardem Packaging's participation in the cartel for a period exceeding 20 years was not the EUR 2.20 million referred to in the operative part of the contested decision, but EUR 60 million, that is an amount higher than the EUR 34 million established for Kendrion for the period in which Kendrion and Fardem Packaging constituted a single undertaking for the purpose of Article 81 EC. As the General Court observed in paragraph 89 of the judgment under appeal, the reason why the Commission, in the contested decision, imposed a fine of EUR 34 million on the appellant and a fine of EUR 2.20 million on Fardem Packaging was because of the application to Fardem Packaging of the 10% ceiling laid down by Article 23(2) of Regulation No 1/2003. In that context, the General Court was fully entitled to hold, in paragraphs 92 and 93 of the judgment under appeal, that, where two separate legal persons, such as a parent company and its subsidiary, no longer constitute an undertaking within the meaning of Article 81 EC on the date on which a decision imposing a fine on them for breach of the competition rules is adopted, each of them is entitled to have the 10% ceiling applied individually to itself and that, in those circumstances, Kendrion could not claim to benefit from the ceiling applicable to its former subsidiary.

- 58 Kendrion's argument that it could not be ordered to pay a fine higher than that imposed on its subsidiary is therefore unfounded and must, consequently, be rejected.

The second part of the third ground

– Arguments of the parties

- 59 Kendrion complains that the General Court disregarded the fact that, in the contested decision, the Commission failed to observe the principle of equal treatment.

- 60 Kendrion submits that it is the only parent company on which a higher fine was imposed than on its subsidiary, for an infringement by the latter in which, as a parent company, it had not participated. The General Court erred, in paragraph 109 of the judgment under appeal, in referring to the 10% ceiling of turnover in Article 23(2) of Regulation No 1/2003 as explaining that difference in treatment. The application of the 10% ceiling could explain a difference in the amount of the fine but not the difference in principle that the Commission introduced between Kendrion and other parent companies.

- 61 The Commission contends that the General Court was correct to find, in paragraph 109 of the judgment under appeal, that it is apparent from the contested decision that the Commission applied one and the same method for determining the amount of the fines applicable to all the addressees of that decision. The fact that, in two cases, that method resulted in higher fines being imposed on the parent company than on the subsidiary is simply the result of applying the chosen calculation method consistently.

– Findings of the Court

- 62 The general principle of equal treatment, as a general principle of EU law, requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified (see, in particular, Case C-127/07 *Arcelor Atlantique and Lorraine and Others* [2008] ECR I-9895, paragraph 23 and the case-law cited).

- 63 In particular, when the amount of the fine is determined, there cannot, by the application of different methods of calculation, be any discrimination between the undertakings which have participated in an agreement or a concerted practice contrary to Article 81 EC (see, in particular, *Alliance One International and Standard Commercial Tobacco v Commission* and *Commission v Alliance One International and Others*, paragraph 58 and the case-law cited).

- 64 In the present case, the appellant does not dispute the General Court's finding, in paragraph 109 of the judgment under appeal, that 'it is clear from the [contested] decision that the Commission applied one and the same method for determining the amount of the fines applicable to all the addressees of the [contested] decision, including the applicant, which were held responsible as parent companies of a subsidiary implicated in the cartel'. On the other hand, it submits that it is the victim of discrimination inasmuch as of all the parent companies to which the decision is addressed it is the only one which had a higher fine imposed on it than its subsidiary, when it did not participate in the latter's infringement.

- 65 A breach of the principle of equal treatment as a result of different treatment presumes, however, that the situations concerned are comparable, having regard to all the elements which characterise them (see, in particular, *Arcelor Atlantique and Lorraine and Others*, paragraph 25).

- 66 However, as the Advocate General observed at point 104 of her Opinion, Kendrion's circumstances were particular when compared with those of other parent companies, in that, since it sold its subsidiary in September 2003 it no longer constituted an economic entity with its subsidiary during the business year which, under Article 23(2) of Regulation No 1/2003, had to be regarded as relevant for calculating the 10% ceiling of the total turnover of the undertaking.
- 67 It is that particular circumstance which led the Commission to calculate separately, for each of the two companies in question, the ceiling on the basis of the turnover obtained in the business year preceding the adoption of the contested decision.
- 68 Since the difference in treatment alleged by the appellant is attributable to a circumstance particular to it, it cannot successfully argue that there has been a failure to observe the principle of equal treatment to its detriment.

The third part of the third ground

- 69 Kendrion submits that the General Court's reasoning is contradictory and incomplete. After holding, in paragraph 51 of the judgment under appeal, that, if it is established that the parent company and the subsidiary constitute an economic unit, the Commission has the option of imputing liability for the infringing conduct to the parent company, to the subsidiary or to the parent company joint and severally with the subsidiary, the General Court then incorrectly accepted that, in the present case, the Commission was justified in opening up a fourth possibility in holding the subsidiary jointly and severally liable for the payment of part of the fine imposed on the parent company.
- 70 In that regard, it is sufficient to note that the appellant's argument disregards the fact that Kendrion and its subsidiary formed part of the undertaking which breached Article 81 EC. As is apparent from paragraph 55 above, paragraphs 87 to 89 of the judgment under appeal make perfectly clear that the fine imposed on Fardem Packaging in subparagraph (d) of the first paragraph of Article 2 of the contested decision is a consequence of its own liability in the infringement.
- 71 Since none of the parts of the third ground of appeal can be upheld, that ground must be rejected in its entirety.

The fourth ground

Arguments of the parties

- 72 The fourth ground of appeal relied on by Kendrion is directed at paragraph 18 of the judgment under appeal, in which the General Court rejected as ineffective the appellant's argument alleging that the procedure before the General Court had been excessively lengthy. The General Court held in that regard that only the contested decision fell within its jurisdiction and that '[t]he legality of that decision may be considered only in the light of the facts and circumstances at the disposal of the Commission at the date of adoption'.
- 73 The appellant infers from this that the General Court considers that it does not have jurisdiction either to rule on the irregularities which have occurred during a procedure before it or to remedy them. The appellant disputes that analysis and submits that, where there has been a failure to observe the general principles of law, which are guaranteed by the Charter of Fundamental Rights of the European Union ('the Charter') and the European Convention on the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 – which includes the reasonable time principle – the

General Court is even under an obligation to intervene. In refusing in advance to carry out any examination of its own functioning in the specific case before it, the General Court therefore breached EU law and that breach gives good grounds for setting aside the judgment under appeal.

- 74 In the alternative, Kendrion claims that the fine imposed on it should be annulled or reduced. In that regard, it submits that, even if the General Court does not itself have jurisdiction to reduce, on account of the excessive length of the proceedings before it, the amount of the fine imposed in a Commission decision, there would be nothing to prevent the Court of Justice, in any event, from ruling on that fundamental issue for the legal certainty of litigants and to draw the necessary inferences therefrom.
- 75 Referring to the assessment criteria identified from the Court's case-law, Kendrion emphasises the duration of the proceedings at first instance, which it assesses at 6 years and 9 months. It states that the case was important for it, since the amount of the fine represented a multiple of its net profit equal to half of its share capital. In addition, that fine is prejudicial to its reputation and seriously affects its investment and expansion possibilities. In the light of those factors, the appellant submits that a reduction of 5% of the fine imposed on it is justified.
- 76 Principally, the Commission disputes the statement that the General Court erred in law in refusing to examine its own functioning, since, first, according to the Court of Justice's case-law, the duration of the proceedings before the General Court cannot lead to the annulment of the contested decision and, second, it would be inappropriate to require the General Court to review, in the context of an action for annulment, whether it has offered effective legal protection to the parties to the dispute, because, in that case, it would be acting as its own judge. In the alternative, the Commission doubts whether, in the present case, the General Court has failed to observe the principle that it must adjudicate within a reasonable time.

Findings of the Court

- 77 It should be borne in mind, at the outset, that the second paragraph of Article 47 of the Charter provides that '[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law'. As the Court of Justice has held on several occasions, that article relates to the principle of effective judicial protection (see, in particular, Case C-385/07 P *Der Grüne Punkt - Duales System Deutschland v Commission* [2009] ECR I-6155, paragraph 179 and the case-law cited).
- 78 On that basis, such a right, which was affirmed as a general principle of EU law before the Charter entered into force, is applicable in the context of proceedings brought against a Commission decision (see, in particular, *Der Grüne Punkt - Duales System Deutschland v Commission*, paragraph 178 and the case-law cited).
- 79 In the present case, the General Court rejected as ineffective the plea alleging that it had failed to observe the principle that it must adjudicate within a reasonable time, which Kendrion had put forward at the hearing, on the ground that only the legality of the decision fell within its review jurisdiction.
- 80 In order to assess whether that rejection was well founded, it is appropriate to define the remedies and means of redress open to the party concerned where the abovementioned principle has not been observed.
- 81 First of all, it should be pointed out that, according to the European Court of Human Rights, a failure to adjudicate within a reasonable time must, as a procedural irregularity constituting the breach of a fundamental right, give rise to an entitlement of the party concerned to an effective remedy granting him appropriate relief (see, *Kudla v. Poland*, no. 30210/96, § 156 and 157, ECHR 2000-XI).

- 82 Although the appellant seeks to have the judgment under appeal set aside and, in the alternative, a reduction of the fine imposed on it, the Court notes that it has held that, where there are no indications that the excessive length of the proceedings before the General Court affected their outcome, failure to deliver judgment within a reasonable time cannot lead to the setting aside of the judgment under appeal (see, to that effect, *Der Grüne Punkt – Duales System Deutschland v Commission*, paragraphs 190 and 196 and the case-law cited).
- 83 That case-law is based, in particular, on the consideration that, where the failure to adjudicate within a reasonable time has no effect on the outcome of the dispute, the setting aside of the judgment under appeal would not remedy the infringement of the principle of effective legal protection committed by the General Court (*Der Grüne Punkt – Duales System Deutschland v Commission*, paragraph 193).
- 84 In the present case, the appellant has not provided any evidence to the Court from which it may be inferred that a failure by the General Court to adjudicate within a reasonable time could have affected the outcome of the dispute before it.
- 85 It follows that the fourth ground of appeal cannot lead to the setting aside of the judgment under appeal in its entirety.
- 86 In so far as the appellant complains that the General Court failed to draw the appropriate inferences from its failure to adjudicate within a reasonable time, it must be pointed out that the appellant does not claim to have provided any evidence to the General Court from which it could be inferred that the procedural irregularity in question could have affected the outcome of the dispute before it and, on that basis, could give grounds for annulling the contested decision.
- 87 In addition, it should be recalled that, having regard to the need to ensure that the competition rules of European Union law are complied with, the Court of Justice cannot allow an appellant to reopen the question of the validity or amount of a fine, on the sole ground that there was a failure to adjudicate within a reasonable time, where all of its pleas directed against the findings made by the General Court concerning the amount of that fine and the conduct that it penalises have been rejected (see, to that effect, *Der Grüne Punkt – Duales System Deutschland v Commission*, paragraph 194).
- 88 It follows that the failure to adjudicate within a reasonable time in a legal action against a Commission decision imposing a fine on an undertaking for infringing the EU competition rules cannot lead to the annulment, in whole or in part, of the fine imposed by that decision.
- 89 In so far as the appellant requested, before the General Court, a reduction in the fine imposed on it in order to take into account the adverse consequences for the appellant of the excessive length of the proceedings before the General Court, it must be found that, first, the purpose of such a request is different from annulment proceedings, which are limited to reviewing the lawfulness of the contested measure and, second, the request entails the examination of facts different from those taken into consideration in a procedure for annulment. It follows that the General Court did not err in law in holding, in paragraph 18 of the judgment under appeal, that, in an action for annulment before it, the legality of the contested decision could be assessed only in the light of the facts and circumstances at the Commission's disposal as at the date on which it was adopted.
- 90 In those circumstances, the General Court was fully entitled to reject as ineffective Kendrion's complaint alleging a failure to have regard to the principle that judgment must be given within a reasonable time.
- 91 In so far as the appellant requests the Court of Justice, in the alternative, to reduce, for the same reasons as those relied on before the General Court, the fine which was imposed on it, it must be borne in mind that, when first faced with a similar situation, the Court of Justice granted such an application,

for reasons of economy of procedure and in order to ensure an immediate and effective remedy regarding a procedural irregularity of that kind and, accordingly, reduced the amount of the fine (Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, paragraph 48).

- 92 In a later case concerning a Commission decision finding that there had been abuse of a dominant position yet not imposing a fine, the Court held that the failure on the part of the General Court to adjudicate within a reasonable time can give rise to a claim for damages (*Der Grüne Punkt – Duales System Deutschland v Commission*, paragraph 195).
- 93 Admittedly, the present case concerns a situation analogous to that giving rise to the judgment in *Baustahlgewebe v Commission*. However, a claim for damages brought against the European Union pursuant to Article 268 TFEU and the second paragraph of Article 340 TFEU constitutes an effective remedy of general application for asserting and penalising such a breach, since such a claim can cover all the situations where a reasonable period of time has been exceeded in proceedings.
- 94 It is therefore appropriate for the Court of Justice to rule that the sanction for a breach, by a Court of the European Union, of its obligation under the second paragraph of Article 47 of the Charter to adjudicate on the cases before it within a reasonable time must be an action for damages brought before the General Court, since such an action constitutes an effective remedy.
- 95 It follows that a claim for compensation for the damage caused by the failure by the General Court to adjudicate within a reasonable time may not be made directly to the Court of Justice in the context of an appeal, but must be brought before the General Court itself.
- 96 As regards the criteria for assessing whether the General Court has observed the reasonable time principle, it must be borne in mind that the reasonableness of the period for delivering judgment is to be appraised in the light of the circumstances specific to each case, such as the complexity of the case and the conduct of the parties (see, in particular, *Der Grüne Punkt – Duales System Deutschland v Commission*, paragraph 181 and the case-law cited).
- 97 The Court has held in that regard that the list of relevant criteria is not exhaustive and that the assessment of the reasonableness of a period does not require a systematic examination of the circumstances of the case in the light of each of them, where the duration of the proceedings appears justified in the light of one of them. Thus, the complexity of the case or the dilatory conduct of the applicant may be deemed to justify a duration which is *prima facie* too long (see, in particular, *Der Grüne Punkt – Duales System Deutschland v Commission*, paragraph 182 and the case-law cited).
- 98 In examining those criteria, it must be borne in mind that, in the case of proceedings concerning infringement of competition rules, the fundamental requirement of legal certainty on which economic operators must be able to rely and the aim of ensuring that competition is not distorted in the internal market are of considerable importance not only for an applicant itself and its competitors but also for third parties, in view of the large number of persons concerned and the financial interests involved (see, in particular, *Der Grüne Punkt – Duales System Deutschland v Commission*, paragraph 186 and the case-law cited).
- 99 It will also be for the General Court to assess both the actual existence of the harm alleged and the causal connection between that harm and the excessive length of the legal proceedings in dispute by examining the evidence submitted for that purpose.
- 100 In that regard, it should be noted that, in an action for damages based on a breach by the General Court of the second paragraph of Article 47 of the Charter, in so far as it failed to have regard to the requirement that the case be dealt with within a reasonable time, the General Court must, in accordance with the second paragraph of Article 340 TFEU, take into consideration the general principles applicable in the legal systems of the Member States for actions based on similar breaches.

In that context, the General Court must, in particular, ascertain whether it is possible to identify, in addition to any material loss, any other type of harm sustained by the party affected by the excessive period, which should, where appropriate, be suitably compensated.

- 101 It is therefore for the General Court, which has jurisdiction under Article 256(1) TFEU, to determine such claims for damages, sitting in a different composition from that which heard the dispute giving rise to the procedure whose duration is criticised and applying the criteria set out in paragraphs 96 to 100 above.
- 102 That said, it must be stated that the length of the proceedings before the General Court, which amounted to approximately 5 years and 9 months, cannot be justified by any of the particular circumstances of the present case.
- 103 It is apparent, in particular, that the period between the end of the written procedure, when the Commission's rejoinder was lodged in February 2007, and the opening, in December 2010, of the oral procedure lasted for approximately 3 years and 10 months. The length of that period cannot be explained by the circumstances of the case, whether it be the complexity of the dispute, the conduct of the parties or supervening procedural matters.
- 104 As regards the complexity of the dispute, it is apparent from examining the action brought by the appellant, as summarised in paragraph 12 above, that, while requiring a detailed examination, the pleas relied on did not present any particular difficulties. Although it is true that around 15 addressees of the contested decision brought actions for its annulment before the General Court, that fact could not prevent it from scrutinising the documents in the case and preparing for the oral procedure within a period of less than 3 years and 10 months.
- 105 As regards the conduct of the parties and supervening procedural matters, it must be noted that it was only after a period of 3 years and 10 months that the General Court adopted, in December 2010, a measure of organisation of procedure, by inviting Kendrion to respond in writing to a question. The appellant responded on 12 January 2011 within the period prescribed, and its conduct did not therefore have any effect on the overall length of the proceedings.
- 106 In the light of the foregoing, it must be found that the procedure in the General Court breached the second paragraph of Article 47 of the Charter in that it failed to comply with the requirement that it adjudicate within a reasonable time, which constitutes a sufficiently serious breach of a rule of law that is intended to confer rights on individuals (Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, paragraph 42).
- 107 It is, however, clear from the considerations set out at paragraphs 81 to 95 above that the fourth ground of appeal must be rejected.
- 108 It follows from the foregoing considerations that none of the grounds relied on by the appellant in support of its appeal can be upheld and, accordingly, the appeal must be dismissed in its entirety.

Costs

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

¹¹⁰ 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. Since the Commission has applied for costs to be awarded against the appellant and the latter has been unsuccessful, the appellant must be ordered to bear its own costs and to pay those incurred by the Commission.

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

- 1. Dismisses the appeal;**
- 2. Orders Kendrion NV to pay the costs of this appeal.**

[Signatures]