Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

18 July 2013 *

(Appeal — Agreements, decisions and concerted practices — Market in butadiene rubber and emulsion styrene butadiene rubber — Fixing price targets, sharing clients by non-aggression agreements and exchanging commercial information — Imputability of the offending conduct — Discretion enjoyed by the Commission — Multiplier for deterrence — Equal treatment)

In Case C-499/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 26 September 2011,

The Dow Chemical Company, established in Midland (United States),

Dow Deutschland Inc., established in Schwalbach (Germany),

Dow Deutschland Anlagengesellschaft mbH, established in Schwalbach,

Dow Europe GmbH, established in Horgen (Switzerland),

represented by D. Schroeder and T. Kuhn, Rechtsanwälte, and by T. Graf, advokat,

appellants,

the other party to the proceedings being:

European Commission, represented by M. Kellerbauer and V. Bottka, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Berger (Rapporteur), A. Borg Barthet, E. Levits and J.-J. Kasel, Judges,

Advocate General: Y. Bot,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 16 January 2013,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: English.

gives the following

Judgment

1 By their appeal, The Dow Chemical Company ('Dow Chemical'), Dow Deutschland Inc. ('Dow Deutschland'), Dow Deutschland Anlagengesellschaft mbH ('Dow Deutschland Anlagengesellschaft') and Dow Europe GmbH ('Dow Europe') (collectively, 'Dow') seek the setting aside of the judgment in Case T-42/07 *Dow Chemical and Others* v *Commission* [2011] ECR II-4531 ('the judgment under appeal'), by which the General Court of the European Union dismissed in part their action, rejecting their claims for annulment of Commission Decision C(2006) 5700 final of 29 November 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F/38.638 — Butadiene Rubber and Emulsion Styrene Butadiene Rubber) ('the contested decision') in so far as that decision concerns Dow Chemical, and for reduction of the fine imposed on Dow.

Background to the dispute and the contested decision

2 On 20 December 2002, Bayer AG ('Bayer') approached the European Commission and expressed its desire to cooperate under the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3) ('the Leniency Notice'), with regard to butadiene rubber ('BR') and emulsion styrene butadiene rubber ('ESBR'), synthetic rubbers used essentially in tyre production.

3 On 16 October 2003, Dow Deutschland and Dow Deutschland Anlagengesellschaft met with Commission staff and expressed their desire to cooperate under the Leniency Notice. On 4 March 2005, Dow Deutschland was informed that the Commission intended to reduce its fine by between 30% and 50%.

4 On 7 June 2005, the Commission initiated a procedure, under Article 81 EC and Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3; 'the EEA Agreement'), concerning the BR and ESBR market. It sent a first statement of objections ('the first statement') to a number of companies, including Dow.

5 On 6 April 2006, the Commission issued a second statement of objections ('the second statement').

6 The administrative procedure culminated in the adoption of the contested decision on 29 November 2006. By Article 1 of that decision, it was decided that Dow and the other addressees – namely, Bayer, Versalis SpA, formerly Polimeri Europa SpA, and Eni SpA (collectively, 'Eni'); Shell Petroleum NV, Shell Nederland BV and Shell Nederland Chemie BV (collectively, 'Shell'); Unipetrol a.s.; Kaučuk a.s. ('Kaučuk'); and Trade-Stomil sp. z o.o. ('Stomil') – had infringed Article 81 EC and Article 53 of the EEA Agreement by participating in a single and continuous infringement by which they had agreed on price targets, shared customers through non-aggression agreements and exchanged sensitive information relating to prices, competitors and customers in the BR and ESBR sectors.

7 The duration of the infringement was defined as the period from 1 July 1996 to 28 November 2002 in the case of Dow Chemical; from 1 July 1996 to 27 November 2001 in the case of Dow Deutschland; from 22 February 2001 to 28 February 2002 in the case of Dow Deutschland Anlagengesellschaft; and from 26 November 2001 to 28 November 2002 in the case of Dow Europe.

8 According to recitals 16 to 21 to the contested decision, during the period of Dow's participation in the infringement, Dow Deutschland, Dow Deutschland Anlagengesellschaft and Dow Europe were entirely controlled – either directly or indirectly – by Dow Chemical.

9 The fine imposed by the contested decision was determined in accordance with the Commission communication entitled 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [ECSC]' (OJ 1998 C 9, p. 3; 'the Guidelines').

10 Accordingly, the Commission first of all categorised the infringement as 'very serious' and set the starting amount for calculation of the fine as a reflection of the differences established between each of the undertakings concerned in terms of their BR and ESBR sales for 2001. According to recital 469 to the contested decision, Dow had combined BR and ESBR sales of EUR 126.936 million in 2001. Dow was accordingly placed, in terms of BR and ESBR sales, in the second category of undertakings involved in the infringement. On that basis, the Commission set the starting amount for Dow's fine at EUR 41 million.

11 Next, the Commission applied multipliers for deterrence, graded according to the worldwide turnover achieved by the undertakings concerned in 2005. Concluding that no multiplier should be applied to Stomil, with its turnover of EUR 38 million, or to Kaučuk, with its turnover of EUR 2.718 billion, the Commission applied a multiplier of 1.5 to Bayer, 1.75 to Dow, 2 to Eni, and 3 to Shell, those undertakings having turnovers of EUR 27.383 billion, EUR 37.221 billion, EUR 73.738 billion and EUR 246.549 billion respectively.

12 In addition, the starting amount for Dow Chemical's fine was increased by 50%, one of the reasons being that the company had participated in the infringement for a period of 6 years and 4 months. Dow Deutschland's starting amount was increased by 40%. The starting amount for Dow Deutschland Anlagengesellschaft and Dow Europe was increased by 10%, reflecting the duration of their participation in the cartel.

13 Lastly, taking into account the fact that Dow had been the second undertaking to approach it under the Leniency Notice and the first undertaking to meet the requirements set out in point 21 of that notice, the Commission granted Dow a 40% reduction in the fine that would have been imposed on it if it had not cooperated with the investigation.

14 Accordingly, by Article 2(b) of the contested decision, the Commission imposed on Dow Chemical a fine of EUR 64.575 million, EUR 60.27 million of which was payable jointly and severally with Dow Deutschland and EUR 47.355 million of which was payable jointly and severally with Dow Deutschland Anlagengesellschaft and Dow Europe.

The action before the General Court and the judgment under appeal

15 By application lodged at the Registry of the General Court (then the Court of First Instance) on 16 February 2007, Dow brought an action challenging the contested decision, seeking, so far as Dow Chemical was concerned, the annulment of that decision in so far as it was addressed to that undertaking, and, so far as Dow Deutschland was concerned, the annulment of Article 1 of that decision in so far as it found that, from 1 July 1996, Dow Deutschland had infringed Article 81 EC and Article 53 of the EEA Agreement and, so far as all the applicants were concerned (including Dow Chemical, in whose case this was an alternative plea), a substantial reduction in the fine imposed on them.

16 In addition, Dow claimed that the General Court should order the Commission to pay all their costs and expenses in relation to the case as well as the costs which they had incurred in providing a bank guarantee in lieu of the amount of the fine imposed on them by the contested decision pending the judgment of that Court, and that it should take any other measures that it might deem appropriate.

17 By the first plea in law in support of its application, Dow claimed that the imputation of the infringement to Dow Chemical was unlawful. By the second plea, it alleged that the duration of Dow Deutschland's participation in the infringement had been incorrectly determined. By the third plea, divided into nine parts, Dow alleged that the amount to be paid by way of fines imposed on Dow had been incorrectly determined.

18 The General Court rejected the first plea in its entirety as unfounded. In particular, it found in paragraphs 74 and 75 of the judgment under appeal that Dow Chemical was 'the ultimate parent company of the group' and that 'there [was] no dispute about the fact that it control[led], albeit indirectly, all the capital of the companies which were directly involved in the infringement'. The General Court also found that 'the imputation of the infringement to the parent company [was] a power that [was] left to the Commission's discretion' and that 'the mere fact that the Commission [had] taken the view in previous decisions that the circumstances of a case [did] not justify imputing the conduct of a subsidiary to its parent company [did] not mean that it [was] obliged to make the same assessment in a later case'.

19 In paragraph 76 of the judgment under appeal, the General Court held that '[t]he fact that Dow Chemical [had been] unduly harmed by being an addressee of the contested decision [did] not affect the lawfulness of that decision'. Lastly, regarding the alleged lack of reasoning, the General Court pointed out in paragraph 77 of the judgment under appeal that '[t]he requirement to state reasons [had to] be assessed by reference to the circumstances of the case' and that '[t]he reasoning [was] not required to go into all the relevant facts and points of law, since the question whether it [met] the requirements of Article [296 TFEU] [had to] be assessed by reference not only to the wording of the measure in question but also to the context in which it [had been] adopted'. The Commission had 'clearly identified, in recitals 333 to 338 and 340 to 364 to the contested decision, the factors which [had] enabled it to find Dow Chemical liable in this instance' (see paragraph 79 of the judgment under appeal).

20 With regard to the second plea, the General Court found that, so far as Dow Deutschland was concerned, the Commission had not demonstrated to the requisite legal standard the existence of circumstances constituting an infringement in the period from 1 July to 2 September 1996.

21 With regard to the third plea, the General Court first stated, in paragraphs 123 and 124 of the judgment under appeal, that 'the individual contribution of each undertaking, in terms of actual economic capacity, to the success of the cartel [had to] be distinguished from the actual impact of the infringement referred to in the first paragraph of Section 1A of the Guidelines' and that, 'even if there [was] no measurable actual impact of the infringement, the Commission [could] decide, in accordance with the third, fourth and sixth paragraphs of Section 1A of the Guidelines, and after having classified the infringement as minor, serious or very serious, to differentiate between the undertakings concerned'.

22 Next, in paragraphs 126 and 127 of the judgment under appeal, the General Court held that 'Dow [was not calling] in question the unlawful nature of the cartel, as set out in the contested decision' and that '[t]he Commission [had not made] a mistake in finding that the practices at issue were, by their nature, very serious infringements, without taking account of the actual impact of the infringement on the market'. Moreover, the Commission had 'clearly stated in recital 462 to the contested decision that it would not take into account the actual impact of the infringement on the market in determining the amount of the fines'.

23 With regard to Dow's allegations that its right to a fair hearing had been infringed, the General Court held in paragraph 128 of the judgment under appeal that 'the Commission fulfils its obligation to respect the undertakings' right to be heard provided that it [has indicated] expressly in the statement of objections that it [was] going to consider whether it [was] appropriate to impose fines on the undertakings concerned and provided that it [has set] out the main elements of fact and of law which

might entail a fine'. In the present case, the Commission had not 'take[n] account of the impact of the cartel on the market in determining the gravity of the infringement (recital 462 to the contested decision)'. According to the General Court, '[i]n those circumstances, there [could not] have been any infringement of Dow's right to be heard in that respect'.

24 In paragraph 146 of the judgment under appeal, the General Court concluded that Dow's allegation, by the seventh part of the third plea, that the way in which a multiplier for deterrence had been applied was unlawful '[was] based on the arguments developed in connection with the first plea' and that, '[s]ince the first plea in law [had to] be rejected as unfounded, [that] part of the third plea in law …, in consequence, [had to] be rejected as being equally unfounded'.

25 Furthermore, the General Court pointed out in paragraphs 147 and 149 of the judgment under appeal that 'it [was] necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which [would ensure] that it ha[d] a sufficiently deterrent effect (fourth paragraph of Section 1A of the Guidelines)' and that '[t]his require[d] that the amount of the fine be adjusted in order to take account of the desired impact on the undertaking on which it [had been] imposed'. In paragraph 150 of the judgment under appeal, the General Court added that, in that regard, 'taking into account the overall turnover of each undertaking participating in a cartel [was particularly relevant when] setting the amount of the fine'.

26 Nor, according to the General Court, could the plea alleging breach of the principle of equal treatment be upheld. In that regard, it found in paragraph 153 of the judgment under appeal that 'Dow [did] not dispute the turnover figures referred to by the Commission in the contested decision' and '[i]n particular, … that it [had been] larger than Bayer and smaller than EniChem [that is, according to the definition provided in recital 36 to the contested decision, any company owned by Eni SpA] in 2005'. 'It [was], therefore, consistent and objectively justified for the multiplier for deterrence chosen for the calculation of the fines imposed on Dow to be higher than that chosen for the calculation of the fine imposed on Bayer and lower than that chosen for the calculation of the fine imposed on EniChem'.

27 From this, the General Court concluded in paragraph 154 of the judgment under appeal that, '[since] worldwide turnover for 2005 was EUR 27.383 billion for Bayer and EUR 37.221 billion for Dow (35.93% more than Bayer) …, the fact that the multiplier relating to Dow's fines was increased by 16.66% by comparison with that chosen when determining Bayer's fine (1.75 as opposed to 1.5) [did] not constitute a breach of the principle of equal treatment'. According to the General Court, 'it [was] apparent from the contested decision that the multiplier chosen for Dow [had been] calculated on the basis of that chosen for Bayer, not on the basis of those chosen for EniChem or Shell'. The General Court also emphasised that 'the Commission [had] a discretion when determining the amount of the fine and [was] not required to apply a precise mathematical formula'.

28 Lastly, in paragraph 155 of the judgment under appeal, the General Court found that 'Dow ha[d] not produced any detailed evidence to suggest that the multiplier chosen in its case [was] disproportionate in relation to the gravity of the infringement and to the objective of ensuring that fines [were] set at a level that [would serve] as a deterrent'.

29 The General Court concluded that the second plea raised by Dow Deutschland should be upheld and that Article 1 of the contested decision should be annulled in so far as Dow Deutschland was found to have participated in the infringement at issue from 1 July 1996 instead of from 2 September 1996. On the other hand, the General Court found that there was no need to reduce the fine. It rejected all the other pleas raised by Dow. The General Court rejected those other pleas as unfounded in so far as they were advanced in support of claims for an adjustment of the amount of the fine and, by the same token, rejected Dow's claim that the Commission should be ordered to pay the costs.

Forms of order sought

30 Dow Chemical claims that the Court should:

— set aside the judgment under appeal in so far as it dismisses its action for annulment of the contested decision in so far as it relates to Dow Chemical; and

— annul the contested decision in so far as it relates to Dow Chemical.

31 All the appellants claim that the Court should:

— set aside the judgment under appeal in so far as it dismisses their claim for a substantial reduction in their fines;

— substantially reduce their fines; and

— order the Commission to pay the costs and take any other measures that the Court considers appropriate.

32 The Commission contends that the Court should:

— dismiss the appeal; and

— order Dow to pay the costs.

The appeal

33 In support of its claims, Dow relies on four grounds of appeal, alleging respectively that: (i) the General Court erred in law in assuming that the Commission does not have to exercise its discretion properly and in not fully exercising its jurisdiction to review legality in relation to the Commission's exercise of its discretion in imputing liability to Dow Chemical; (ii) the General Court erred in law with respect to the differential treatment applied to the starting amounts for the fine; (iii) the General Court erred in law by confirming that the Commission was entitled to take Dow Chemical's turnover into account; and (iv) the General Court erred in law by confirming that the Commission's application of the multiplier for deterrence was not discriminatory.

First ground of appeal: in essence, the General Court's review of the way in which the Commission had used its discretion to attribute liability to Dow Chemical is vitiated by errors of law

Arguments of the parties

34 By its first ground of appeal, Dow claims that, when the General Court rejected the first plea raised at first instance, it erred in law in assuming that the Commission did not have to exercise its discretion properly and in not fully exercising its jurisdiction to review legality in relation to the Commission's exercise of its discretion in imputing liability to Dow Chemical for the conduct of its subsidiaries. According to Dow, the General Court simply found that the Commission had been entitled to hold Dow Chemical liable, without considering whether and how the Commission had exercised its discretion.

35 Dow states that, in its application at first instance, it claimed that the Commission had not weighed the arguments as to whether Dow Chemical was liable and that the contested decision lacked reasoning in that respect. According to Dow, the Commission must take account of all the relevant matters of law

and of fact in order to make such a decision, and, more specifically, it is under an obligation to state reasons. In recital 362 to the contested decision, the Commission merely referred to a purportedly general policy of imputing liability for an infringement to the parent company of the undertaking which has participated in such conduct, and rejected Dow's arguments as having an 'eminently political nature'.

36 According to Dow, in taking the view that it is under no obligation to explain the choice of addressees for its decision, the Commission did not take account of the fact that addressing the decision to Dow Chemical exposed that company to the risk of unwarranted civil litigation in the United States, which, given that Dow Chemical was a leniency applicant, was inconsistent with the Commission's leniency policy, as such practice would have the effect of deterring companies from seeking leniency. In any event, the Commission had not explained in the contested decision the reasons why it had not taken those factors into consideration.

37 Dow states that the Commission is not limited by a general policy such as the policy invoked in recital 362 to the contested decision, and that there are many decisions in which, even though a parent company has owned 100% of the shares of the subsidiary that committed the infringement, the Commission has not held the parent company liable.

38 According to Dow, the General Court was also wrong in finding in paragraph 76 of the judgment under appeal that '[t]he fact that Dow Chemical would be unduly harmed by being an addressee of the contested decision does not affect the lawfulness of that decision since … the Commission was entitled to impute liability for the infringement at issue to Dow Chemical'. Although the General Court had found in paragraph 75 of the judgment under appeal that the Commission was entitled to address the contested decision to Dow Chemical, since 'the imputation of the infringement to the parent company is a power that is left to the Commission's discretion', it failed to verify whether the Commission had in fact exercised that discretion and, if so, whether it had done so without erring in law or making a manifest error of assessment.

39 Dow submits that there is in fact no general policy of always holding the parent company liable and that its fear of exposure to unwarranted civil litigation in the United States is not 'of an "eminently political nature"'. The recitals to the contested decision to which the General Court refers in paragraph 79 of the judgment under appeal do not, according to Dow, address the reasons which moved the Commission to find Dow Chemical liable for the offending conduct of its subsidiaries. In failing to assess and consider the lack of reasoning in the contested decision, the General Court erred in law.

40 At the hearing, Dow produced a document containing some legal information on the proper exercise, under German, Spanish, Italian and Austrian law, of discretion by the national authorities.

41 According to the Commission, this ground of appeal is unfounded. The Commission argues that the General Court exercised in full its jurisdiction to review legality. It is settled case-law that the General Court is not required to provide an account which follows exhaustively, and one by one, all the arguments put forward by the parties to the dispute. An undertaking which infringes the competition rules under the Treaty on the Functioning of the European Union enjoys no right, according to the Commission, to have the Commission weigh the arguments for and against holding that undertaking liable for its infringement. Moreover, the risk that a party which has participated in an infringement might be exposed to civil litigation is a generally desirable consequence of its having engaged in wrongdoing.

42 In addition, the Commission contends, with regard to the document produced by Dow concerning other national laws on the exercise of discretion, that the Court should not take that document into account as it was produced out of time.

Findings of the Court

43 First, it should be stated that, under Article 23(2)(a) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1), the Commission 'may', by decision, impose fines on undertakings where, either intentionally or negligently, they infringe Article 101 TFEU.

44 It follows from the wording of that provision that (i) the Commission has discretion when choosing whether or not to impose a fine on an undertaking which has infringed Article 101 TFEU and (ii) any possible limits to the discretion thus conferred on the Commission are governed exclusively by EU law, given that Article 23(2) of Regulation No 1/2003 makes no reference to the laws of the Member States.

45 Accordingly, in the present case, it is necessary to treat as manifestly irrelevant the summary, set out in the document submitted to the Court by Dow at the hearing, of the case-law handed down by a number of national courts, and there is no need to rule on the question whether Dow submitted that document out of time.

46 As regards the limits placed by EU law on the Commission's discretion in matters of competition law, Article 105(1) TFEU requires the Commission – as it rightly argued at the hearing – to ensure that the principles laid down in Article 101 TFEU, inter alia, are observed.

47 One of those principles is indisputably the imposition of fines, on the basis of Article 23(2) of Regulation No 1/2003, on undertakings which have entered into an anti-competitive agreement, which means that, where the Commission decides, exceptionally, not to impose a fine on an undertaking even though that undertaking has infringed the EU rules on competition, it must base its decision on objective reasons capable of justifying such a departure from the principles set out in Article 101 TFEU. One such objective reason can be the fact that the Commission is unable, in a specific case, to prove to the requisite legal standard that the parent company has exercised a decisive influence over the conduct of its subsidiary, that being the company which was immediately involved in the infringement. According to settled case-law, proving such influence is significantly easier where a parent company holds 100% of the capital of a subsidiary (see, to that effect, inter alia, Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraph 60 and the case-law cited).

48 On that point, it should be borne in mind that, according to settled case-law, the possibility of imposing a fine on the parent company of a subsidiary which has directly participated in an infringement of EU competition law presupposes that the 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, regard being had in particular to the economic, organisational and legal links between those two legal entities, and that that is so because, in such a situation, the parent company and its subsidiary form a single economic unit and accordingly form a single undertaking for the purposes of the case-law (see, inter alia, *Akzo Nobel and Others* v *Commission*, paragraphs 58 and 59 and the case-law cited).

49 Since, in the situation described in the preceding paragraph, the parent company and its subsidiary form a single undertaking, the Commission's obligation under Article 105(1) TFEU to ensure the application of the principles laid down in Article 101 TFEU, inter alia, when deciding whether or not to impose a fine applies in the same way, whichever of the two companies is concerned, the parent company or its subsidiary. As the Court has held, there is no 'order of priority' when the Commission is imposing a fine on one or other of those companies (see, by analogy, Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraphs 81 and 82).

50 Moreover, another of the principles referred to in paragraph 46 above is that, where the Commission adopts, in respect of a cartel, one specific method for determining whether the parent companies concerned are liable for the infringements engaged in by their subsidiaries, it must – unless there are special circumstances – use the same criteria for all those parent companies (see, to that effect, 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, paragraphs 57 and 59).

51 Accordingly, in the present case, the only circumstances in which the Commission would have been justified in not also imposing a fine on Dow Chemical would have been if there had been objective reasons capable of justifying a departure from the principles laid down in Article 101 TFEU and if that decision would not have led to preferential treatment of Dow Chemical as compared with the other parent companies involved in the infringement in question. In the present case, however, it must be found that, as far as the Commission was concerned, those conditions had not been met.

52 First, the mere fact that Dow Chemical is running the risk of civil litigation in the United States clearly cannot make it justifiable for the Commission to refrain from imposing a fine on that company: Dow Chemical's subsidiaries also run the risk of being sued for damages, as, moreover, do all the addressees of the contested decision. That risk is based solely on the fact that Dow Chemical has been involved in anti-competitive conduct; there is no link between the risk and the fact that the Commission has made a formal finding that such conduct has been engaged in.

53 Moreover, the assertion that such litigation against Dow Chemical may take place in the United States, by reason of the fact that Dow Chemical has its seat in that country, is clearly irrelevant.

54 Secondly, it is clear from the contested decision that the Commission found all the parent companies and ultimate parent companies of the groups involved in the infringement liable, since those companies owned 100% or nearly 100% of their subsidiaries' shares, without verifying whether addressing the contested decision to those companies would lead to economic damage over and above the damage inherent in paying the fine. Accordingly, the Commission could not, without breaching the principle of equal treatment, have given consideration to the possibility of such damage only in the case of Dow Chemical.

55 It follows that the General Court was right to hold, in paragraph 76 of the judgment under appeal, that the Commission had been entitled to impute liability for the infringement to Dow Chemical.

56 Lastly, regarding the alleged lack of reasoning in the judgment under appeal in that respect, it should be borne in mind that, according to settled case-law, the Court of Justice does not require the General Court to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case and the General Court's reasoning may therefore be implicit on condition that it enables the persons concerned to know why that court has not upheld their arguments and provides the Court of Justice with sufficient material for it to be able to exercise its jurisdiction to review legality (see, inter alia, order of 13 December 2012 in Case C-593/11 P *Alliance One International* v *Commission*, paragraph 28 and the case-law cited).

57 As it is, in paragraphs 74 to 80 of the judgment under appeal, the General Court examined the issues relating to an alleged error on the part of the Commission in the exercise of its discretion and the alleged inadequacy of the reasons stated in that context. With regard to the merits of that plea, the General Court expressly ruled in paragraph 76 of that judgment that '[t]he fact that Dow Chemical would be unduly harmed by being an addressee of the contested decision does not affect the lawfulness of that decision'. Regarding the Commission's duty to state reasons, the General Court referred, in paragraph 79 of the judgment under appeal, to recitals 333 to 338 and 340 to 364 to the contested decision and went on to find that, in those recitals, the Commission had clearly identified the factors which had enabled it to find Dow Chemical liable.

58 Although the reasoning in the judgment under appeal seems somewhat concise on the question whether, given the possibility that Dow Chemical risked litigation in the United States, the Commission should not have held that company liable in the contested decision, the fact remains that that reasoning enabled Dow Chemical to understand that the General Court shared the Commission's point of view as set out in recital 362 to the contested decision, inter alia, according to which that argument, which was of an 'eminently political' nature, was not capable of affecting the lawfulness of the contested decision in that regard.

59 In the light of those factors, the judgment under appeal is not vitiated by any error in law; nor is it vitiated by inadequate reasoning in that context, or by an infringement of Article 47 of the Charter of Fundamental Rights of the European Union, as pleaded by Dow at the hearing.

60 Consequently, since all the arguments put forward by Dow in support of the first ground of appeal are unfounded, that plea must be rejected.

Second ground of appeal: the General Court erred in law with respect to the differential treatment applied to the starting amounts for the fine

Arguments of the parties

61 In support of its second ground of appeal, Dow claims that the Commission applied a differential treatment to the starting amounts for the fine, arguing in recital 466 to the contested decision that it was necessary 'to take account of the specific weight, and therefore the real impact on competition, of each undertaking's offending conduct', while at the same time declaring in recital 462 to that decision that it was not possible to measure the actual impact on the market in the European Economic Area (EEA) and that the Commission '[would] not take into account the impact on the market in determining the applicable fines in this case'. Dow claims that those recitals contradict each other.

62 Furthermore, according to Dow, the Commission failed to assess the real impact of the cartel on the market even though it was possible to measure that impact. It neither estimated the probability of such an impact, nor did it prove the implementation of the infringement in question. Moreover, the Commission infringed Dow's right to be heard by not giving it an opportunity to express its point of view regarding the way in which the Commission intended to take account of the real impact on competition of each undertaking's offending conduct.

63 Dow argues that the General Court rejected those arguments by ruling in paragraph 124 of the judgment under appeal that 'even if there [was] no measurable actual impact of the infringement, the Commission [was able to] decide, in accordance with the third, fourth and sixth paragraphs of Section 1A of the Guidelines … to differentiate between the undertakings concerned'. However, according to Dow, in the absence of an actual impact on the market, there can be no real impact on competition and, accordingly, the Commission cannot then take that impact into account in order to differentiate the starting amount for the fines. In that regard, by withdrawing the first statement and subsequently issuing the second statement, which did not deal with either the actual impact on the market or the real impact on competition, the Commission infringed Dow's right to be heard.

64 In consequence, according to Dow, the starting amount for the appellants' fine cannot exceed that used for the other undertakings concerned and must therefore be reduced to EUR 5.5 million, which would mean fines of EUR 8 662 500 for Dow Chemical, EUR 8 085 000 for Dow Deutschland and EUR 6 352 000 for Dow Deutschland Anlagengesellschaft and for Dow Europe.

65 According to the Commission, the General Court correctly found in paragraphs 127 and 128 of the judgment under appeal that there was no need to hear Dow on the actual impact of the infringement and that Dow's right to be heard in that regard had not been infringed. The Commission maintains

that, in recital 462 to the contested decision, it did indeed establish that the cartel had been implemented, although that implementation was not taken into account when the level of the fine was assessed. In addition, the Commission contends that, by indicating expressly in the second statement that it would consider whether it was appropriate to impose fines on the undertakings concerned, and by setting out the principal elements of fact and of law that might give rise to a fine, it fulfilled its obligation to respect the undertakings' right to be heard.

66 Lastly, regarding the actual impact of the cartel, the Commission contends that it is clear from recital 465 to the contested decision that the differential treatment applied is based on the 'economic capacity' to cause damage to competition and that, accordingly, it is not necessary to measure the actual impact of the infringement on the market. That approach is consistent with the Guidelines and with the case-law of both the Court of Justice and the General Court.

Findings of the Court

67 It is first necessary to discount as inaccurate Dow's assertion that the Commission neither estimated the probability of the infringement having a real impact on the market in question nor proved that the infringement had been implemented. In fact, in recital 462 to the contested decision, the Commission expressly pointed out that 'with regard to the EEA, the cartel arrangements were implemented by the European producers and … such implementation did have an impact on the market, even if its actual effect is difficult to measure'. Dow puts forward no argument in fact or in law capable of refuting that finding.

68 Consequently, as it has been established that the infringement had a real effect – albeit difficult to measure – on the market, Dow's argument that, 'in the absence of an actual impact on the market, there can be no real impact on competition and, accordingly, the Commission cannot then take that impact into account in order to differentiate the starting amount of the fines' is ineffective.

69 In addition, it follows from the foregoing that there is no contradiction, as alleged by Dow, between recital 462 to the contested decision and recital 466: recital 462, in which the Commission stated that it '[would] not take into account the impact on the market in determining the applicable fines', is to be found in Section 9.1 of the contested decision, entitled 'Gravity [of the infringement]', and relates only to the categorisation of the infringement as 'very serious'; recital 466, on the other hand, which is to be found in Section 9.2 of that decision, entitled 'Differential treatment', concerns only the differentiation of the starting amounts for the fines as a reflection of each undertaking's effective economic capacity to restrict competition, which may legitimately, as in the present case, be based on the sales figures achieved by each of the undertakings concerned in respect of the goods covered by the infringement, even where the effect on the market cannot be measured.

70 Lastly, Dow's argument that its right to be heard was infringed cannot succeed. In that regard, it should be borne in mind that, according to the settled case-law of the Court, provided that – as it has done in the present case – the Commission indicates expressly in the statement of objections that it will consider whether it is appropriate to impose fines on the undertakings concerned and provided that it sets out the principal elements of fact and of law that may give rise to a fine, such as the gravity and the duration of the alleged infringement and the fact that it has been committed 'intentionally or negligently', it fulfils its obligation to respect the undertakings' right to be heard. In so doing, the Commission provides them with the necessary elements to defend themselves not only against a finding of infringement but also against being fined for that infringement (see, inter alia, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 428 and the case-law cited).

71 For the sake of completeness, it must be noted in that regard that the Commission did indeed state in paragraph 425 of the grounds of the second statement that it intended to take into consideration the 'actual impact [of the infringement] on the market, where this can be measured'. In addition, in the third indent of paragraph 430 of the grounds of that statement, the Commission mentioned that it would take account in the contested decision of the 'impact of the offending conduct of each undertaking on competition'. It cannot therefore be held that Dow's right to be heard was infringed.

72 In those circumstances, the General Court did not, in any way, err in finding in paragraph 124 of the judgment under appeal that the Commission could decide to differentiate between the undertakings concerned, even if the impact of the infringement could not be measured.

73 In the light of the foregoing, the second ground of appeal must be rejected as unfounded.

Third ground of appeal: the General Court erred in law by confirming that the Commission was entitled to take Dow Chemical's turnover into account

Arguments of the parties

74 By its third ground of appeal, Dow submits that, for the reasons set out in connection with its first ground of appeal, the contested decision should not have been addressed to Dow Chemical and the Commission was therefore wrong to take Dow Chemical's turnover into consideration in order to determine a multiplier for deterrence. According to Dow, in paragraph 146 of the judgment under appeal, the General Court rejected as unfounded the seventh part of the third plea in law raised by Dow, which was based on the same arguments as those put forward in connection with the first plea, on the ground that it had also rejected the first plea, alleging that the imputation of the infringement to Dow Chemical was unlawful, as unfounded.

75 Dow argues that, since the General Court erred in law in rejecting the first plea at first instance, it also erred in law in rejecting the argument relating to Dow Chemical's turnover being taken into consideration. Dow infers from this that Dow Chemical's fine should be annulled.

76 According to the Commission, since the first ground of appeal relied upon by Dow is unfounded, the present ground of appeal cannot be upheld either.

Findings of the Court

77 Dow's third ground of appeal is based on the premiss that the contested decision should not have been addressed to Dow Chemical as the ultimate parent company of the Dow group. That argument lies at the heart of the first ground of appeal.

78 However, as is clear from the considerations set out in paragraph 43 et seq. above, that premiss is false, so much so that, in paragraph 60 above, the first ground of appeal was rejected as unfounded. In consequence, the third ground of appeal must also be rejected as unfounded.

Fourth ground of appeal: the General Court erred in law by confirming that the Commission's application of the multiplier for deterrence was not discriminatory

Arguments of the parties

79 By its fourth ground of appeal, Dow submits – as it did before the General Court – that the multiplier of 1.75 applied to Dow for deterrence is excessive and discriminatory. The General Court rejected the corresponding plea at first instance on the ground that, given how Dow's turnover compared with Bayer's, the multiplier relating to Dow's fines did not constitute a breach of the principle of equal treatment.

80 As regards the comparison of the multiplier for deterrence applied to Dow with those applied to EniChem and Shell, the General Court held in paragraph 154 of the judgment under appeal that 'the multiplier chosen for Dow [(1.75)] was calculated on the basis of that chosen for Bayer [(1.5)], not on the basis of those chosen for EniChem [(2)] or Shell [(3)]'. Dow argues that, in comparing Dow with Bayer alone and not also with EniChem and Shell, the General Court erred in law.

81 Dow submits that applying the same increment between two undertakings with a turnover differential of 36% – namely Bayer, with a turnover of EUR 27.383 billion, and Dow, with a turnover at that time of EUR 37.221 billion – and between two undertakings with a turnover differential of 100% – namely Dow and EniChem, the latter of which had a turnover of EUR 73.738 billion – is clearly discriminatory.

82 At the hearing, Dow submitted to the Court a document setting out a mathematical formula which would enable the multiplier for deterrence in the present case to be calculated in such a way as to avoid (i) any discrimination between the addressees of the contested decision and (ii) application of a multiplier for deterrence greater than 3. On the basis of that formula, the multiplier to be applied to Dow should be approximately 1.3.

83 The Commission contends that the multiplier chosen for setting the starting amount of a fine needs to reflect the arithmetical proportions only approximately. In the present case, there was a great disparity in the size of the undertakings participating in the infringement. Consequently, according to the Commission, it would have been unfeasible and mathematically impossible to apply a multiplier which could be exactly proportional to the ratio of turnovers for all of the companies concerned.

84 The Commission states that it therefore decided to apply multipliers starting from the smaller undertakings and making sure that the multiplier for each undertaking was more or less proportionate to the turnover of the undertaking immediately below it. As the General Court rightly pointed out, the Commission would have been entitled on that basis to select an even higher multiplier for Dow.

85 The Commission contends that the document submitted by Dow at the hearing is inadmissible, since it was produced after the close of the written procedure.

Findings of the Court

86 The Court has consistently held that the purpose of the multiplier for deterrence and of taking into consideration, in that context, the size and global resources of the undertaking in question resides in the desired impact on that undertaking, and the penalty must not be negligible in the light, particularly, of the financial capacity of that undertaking (see, to that effect, inter alia, Case C-413/08 P *Lafarge* v *Commission* [2010] ECR I-5361, paragraphs 104 and 105, and order of 7 February 2012 in Case C-421/11 P *Total and Elf Aquitaine* v *Commission*, paragraph 82). The Court has also had occasion to state that disproportionate importance must not be attributed to turnover (*Total and Elf Aquitaine* v *Commission*, paragraph 80).

87 Accordingly, in order to calculate fines imposed on undertakings which have participated in a cartel, differentiated treatment of the undertakings concerned is inherent in the exercise of the Commission's powers in that area. In exercising its discretion, the Commission is required to fit the penalty to the individual conduct and specific characteristics of those undertakings, in order to ensure that, in each case, the EU competition rules are given full effect (see Case C-564/08 P *SGL Carbon* v *Commission* [2009] ECR I-191 (summary publication), paragraph 43 and the case-law cited).

88 On the basis of the case-law referred to in paragraph 86 above, the Commission is primarily required to ensure that the penalty does not become 'negligible' in the light, inter alia, of the financial capacity of the undertakings concerned, but that does not mean that an undertaking with a particularly high turnover as compared with that of its fellow cartel members must have its fine increased in strict accordance with the ratio of its turnover to that of all the other undertakings involved in the cartel. If that were the case, the fines imposed on the largest undertakings in a cartel, increased on the basis of such an arithmetic method, would admittedly be likely to have a sufficiently deterrent effect, but would run the risk of being disproportionate to the gravity of the infringement actually committed, particularly where, as in the present case, there is a considerable difference between the turnovers of the undertakings concerned (see Case C-511/11 P *Versalis* v *Commission* [2013] ECR, paragraph 105).

89 It is also settled law that, in the exercise of its powers of unlimited jurisdiction, the General Court cannot, through mechanical recourse to an arithmetical formula based only on the turnover of the undertaking concerned, divest itself of its own power of assessment as regards the setting of fines (see, to that effect, inter alia, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 121; Case C-283/98 P *Mo och Domsjö* v *Commission* [2000] ECR I-9855, paragraph 47; and *Dansk Rørindustri and Others* v *Commission*, paragraph 243).

90 In the light of those considerations, the General Court cannot be criticised for upholding, in essence, the approach taken by the Commission, which had set a multiplier for deterrence of 1.75 for Dow, 2 for EniChem, and 3 for Shell. The intention underlying that approach is (i) to ensure that the fine imposed on each undertaking is not negligible in relation to its financial capacity and (ii) not to apply disproportionate multipliers for deterrence to larger undertakings, which, if the calculation is based entirely on the mathematical relationship between their turnover and the turnover of smaller undertakings alone, could in theory be subject to significantly higher multipliers for deterrence.

91 Moreover, no relevance can be attributed to the fact that, according to the document produced by Dow at the hearing (there being no need to rule on the admissibility of that document), calculating multipliers for deterrence purely on the basis of each undertaking's turnover while still maintaining a maximum multiplier of 3 is mathematically feasible. A purely arithmetical calculation of that kind would prevent the Commission from fulfilling its obligation – arising, inter alia, from the case-law cited in paragraphs 86 to 89 above – to impose fines which, for each undertaking, are neither negligible nor disproportionate.

92 Accordingly, Dow's fourth ground of appeal cannot be upheld either.

93 Consequently, since none of the grounds of appeal relied upon by Dow has succeeded, that appeal must be dismissed in its entirety.

Costs

94 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, that Court is to make a decision as to the costs. Under Article 138(1) of those Rules, applicable to appeal proceedings under 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 Dow has been unsuccessful, Dow must be ordered to pay the costs.

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

1. **Dismisses the appeal;**

2. **Orders The Dow Chemical Company, Dow Deutschland Inc., Dow Deutschland Anlagengesellschaft mbH and Dow Europe GmbH to bear their own costs and to pay those incurred by the European Commission.**

[Signatures]