

JUDGMENT OF THE COURT (Second Chamber)

5 December 2013 (*)

(Appeals – Agreements, decisions and concerted practices – European market for hydrogen peroxide and sodium perborate – Decision finding an infringement of Article 81 EC – Duration of the infringement – Concepts of ‘agreement’ and ‘concerted practice’ – Leniency Notice – Obligation to state reasons – Reduction of the fine)

In Case C-455/11 P,

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

Solvay SA, established in Brussels (Belgium), represented by O. W. Brouwer, advocaat, and M. O'Regan, Solicitor,

appellant,

the other party to the proceedings being:

European Commission, represented by V. Bottka, A. Biolan and J. Bourke, acting as Agents, and by M. Gray, BL, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.L. da Cruz Vilaça, G. Arestis (Rapporteur), J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: M. Wathelet,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 24 January 2013,

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

gives the following

Judgment

- 1 By its appeal, Solvay SA ('Solvay'), seeks to have set aside in part the judgment of the General Court of the European Union in Case T-186/06 *Solvay v Commission* [2011] ECR II-2839 ('the judgment under appeal'), by which that court dismissed its application for the annulment in part of Decision C(2006) 1766 final of 3 May 2006

relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement against Akzo Nobel NV, Akzo Nobel Chemicals Holding AB, EKA Chemicals AB, Degussa AG, Edison SpA, FMC Corporation, FMC Foret SA, Kemira Oyj, L'Air Liquide SA, Chemoxal SA, Snia SpA, Caffaro Srl, Solvay SA/NV, Solvay Solexis SpA, Total SA, Elf Aquitaine SA and Arkema SA (Case COMP/F/38.620 – Hydrogen peroxide and perborate), a summary of which is published in the *Official Journal of the European Union* (OJ 2006 L 353, p. 54; 'the contested decision').

- 2 The European Commission has brought a cross-appeal, by which it seeks, first, to have the judgment under appeal set aside in part in so far as that judgment reduces the fine imposed on Solvay and, second, to set the fine imposed on that company, pursuant to Article 2(h) of the contested decision, at EUR 156.938 million.

Legal context

- 3 Points 21 to 23 of the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3) ('the Leniency Notice'), provide:

'21. In order to qualify [for a reduction of the fine], an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence.

22. The concept of "added value" refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the facts in question. In this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Similarly, evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance.

23. The Commission will determine in any final decision adopted at the end of the administrative procedure:

- (a) whether the evidence provided by an undertaking represented significant added value with respect to the evidence in the Commission's possession at that same time;
- (b) the level of reduction an undertaking will benefit from, relative to the fine which would otherwise have been imposed, as follows. For the:
 - first undertaking to meet point 21: a reduction of 30-50%,
 - second undertaking to meet point 21: a reduction of 20-30%,
 - subsequent undertakings that meet point 21: a reduction of up to 20%.

In order to determine the level of reduction within each of these bands, the Commission will take into account the time at which the evidence fulfilling the

condition in point 21 was submitted and the extent to which it represents added value. It may also take into account the extent and continuity of any cooperation provided by the undertaking following the date of its submission.

In addition, if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these elements into account when setting any fine to be imposed on the undertaking which provided this evidence.'

- 4 Article 23(2) and (3) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) provides:

'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]

...

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

Background to the dispute

- 5 Solvay is a company incorporated under Belgian law which at the material time manufactured, inter alia, hydrogen peroxide and sodium perborate.
- 6 On 7 May 2002 Solvay acquired 100% ownership of Ausimont SpA (now Solvay Solexis SpA), which at the material time was 100% controlled by Montedison SpA (now Edison SpA).
- 7 In November 2002 Degussa AG ('Degussa') informed the Commission of the existence of a cartel in the hydrogen peroxide and sodium perborate markets and requested the application of the Leniency Notice. Degussa also supplied to the Commission material evidence which enabled it to carry out investigations on 25 and 26 March 2003 at the premises of certain undertakings, including those of Solvay. Following those investigations, several undertakings, including Solvay, also requested the application of that notice and sent to the Commission evidence relating to the cartel in question.
- 8 On 26 January 2005, the Commission sent a statement of objections to Solvay. The latter then requested access, first, to the non-confidential versions of the replies given by the other undertakings concerned by that statement of objections and, second, to certain confidential documents in the case provided by Degussa. The Commission refused access to the replies to that statement of objections and partially disclosed the documents provided by Degussa.
- 9 By letter of 8 May 2006, the contested decision was notified to Solvay; it is stated therein that Solvay participated, from 31 January 1994 until 31 December 2000, in a

single and continuous infringement of Article 81 EC and Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3), regarding hydrogen peroxide and sodium perborate. The infringement found consisted mainly of competitors exchanging commercially important and confidential market and company information, limiting and controlling production as well as potential and actual production capacities, allocating market shares and customers and fixing and monitoring adherence to target prices.

- 10 Article 1(m) of the contested decision states that Solvay Solexis SpA infringed Article 81(1) EC and Article 53 of the EEA Agreement by participating in the infringement from 31 January 1994 until 31 December 2000. In Article 2(h) of that decision, the Commission imposed on it a fine of EUR 167.062 million.

The procedure before the General Court and the judgment under appeal

- 11 By application lodged at the Registry of the Court on 17 July 2006, Solvay brought an action seeking, first, the annulment in part of the contested decision and, second, in the alternative, the annulment or reduction of the fine imposed on it.
- 12 In support of its action, Solvay relied on five pleas in law, alleging errors of law and in assessment of the facts in relation to, first, the finding of its participation in the infringement for the period from 31 January 1994 until August 1997, second, the finding of its participation in the infringement for the period from 18 May to 31 December 2000, third, the application of the Leniency Notice, fourth, the determination of the amount of the fine and, fifth, the refusal of access to certain material in the file.
- 13 The General Court annulled the contested decision in part with respect to the duration of Solvay's participation in the infringement found and reduced the amount of the fine imposed on it to EUR 139.5 million.

The procedure before the Court of Justice and the forms of order sought

- 14 Solvay claims that the Court should:
- set aside paragraphs 121 to 170 of the judgment under appeal;
 - set aside paragraphs 394, 395 and 402 to 427 of that judgment;
 - give final judgment and annul the contested decision in so far as it declared that, first, Solvay infringed Article 81 EC between May 1995 and August 1997 and, second, Solvay was the third undertaking to satisfy the requirements of point 21 of the Leniency Notice, and to reduce accordingly the fine imposed upon Solvay, or, in the alternative, to refer the case back to the General Court;
 - dismiss the Commission's cross-appeal as in part inadmissible and in part manifestly unfounded; and
 - order the Commission to pay all the costs incurred in connection with the proceedings before the General Court and the Court of Justice, including in connection with the cross-appeal.

15 The Commission contends that the Court should:

- dismiss the appeal;
- set aside paragraphs 428 to 441 of the judgment under appeal;
- annul the finding at paragraph 2 of the operative part of that judgment, and set the amount of the fine imposed on Solvay in Article 2(h) of the contested decision at EUR 156.938 million; and
- order Solvay to bear the entirety of the costs of the proceedings at first instance and those of these proceedings;

The main appeal

The first ground of appeal, relating to Solvay's participation in the infringement for the period from May 1995 to August 1997

16 By its first ground of appeal, which is subdivided into three parts, Solvay requests the Court to set aside paragraphs 121 to 170 of the judgment under appeal in so far as the General Court wrongly upheld the Commission's findings that Solvay had participated in an infringement of Article 81 EC between May 1995 and August 1997, on grounds that its conduct during this period fell within the initial stage of the price-fixing cartel and was part of the same anti-competitive scheme and/or constituted a concerted practice.

17 As regards that first ground of appeal, it is necessary, in the first place, to examine the first part of that ground, alleging distortion by the General Court of the evidence relating to both the existence and nature of the discussions and exchanges of information between hydrogen peroxide producers during the period from May 1995 to August 1997, then, in the second place, the third part of that ground of appeal, by which Solvay alleges that the General Court wrongly categorised that conduct as a 'concerted practice', and, in the third place, the second part of that ground of appeal, alleging that the General Court erred in categorising that conduct as an 'agreement'.

The first part of the first ground of appeal, relating to an alleged distortion of the evidence regarding both the existence and the nature of the discussions and exchanges of information between hydrogen peroxide producers

- Arguments of the parties

18 Solvay submits, in essence, that the General Court distorted the evidence before it by holding, in paragraph 150 of the judgment under appeal, that the Commission had established, in the contested decision, that Solvay had discussed and/or exchanged information on prices and on its commercial strategy during the period from May 1995 to August 1997.

19 Solvay submits that the General Court incorrectly found that it had disclosed or discussed prices at four encounters with competitors: meetings of 23 October 1995 in Paris (France) and on 21 November 1995 in Italy, an unofficial dinner which it attended on 24 May 1996 in Gothenburg (Sweden) and meetings surrounding an official assembly in November 1996 in Brussels (Belgium). According to Solvay, there is no

evidence that it attended those meetings, let alone disclosed prices to its competitors at those meetings.

- 20 With respect to the meeting of 23 October 1995 in Paris, Solvay submits that it did not take part in this meeting and that the contested decision itself establishes this. As regards the meeting of 21 November 1995 in Italy, Solvay states, first, that it never admitted attending this meeting and that, second, the finding that Solvay discussed prices is based upon the allegations of only one undertaking, namely Arkema SA (formerly Atofina SA) ('Arkema'); which does not constitute sufficient evidence to establish that Solvay disclosed or discussed, let alone agreed, prices for hydrogen peroxide.
- 21 Moreover, as regards the exchanges which allegedly took place in Gothenburg and Brussels during 1996, Solvay contests its presence and states that the only evidence relied on by the Commission to establish the existence of an infringement that Solvay allegedly committed was Degussa's general statement about exchanges of 'sensitive data for competition'. In that regard, Solvay observes that the General Court held, in paragraphs 106 to 109 of the judgment under appeal, that Degussa's statements could not be relied upon as adequate proof of Solvay's participation in the infringement in question. Solvay submits that, consequently, that reasoning should have applied a *fortiori* to the uncorroborated suggestions in the contested decision that Solvay exchanged pricing information with its competitors at those meetings.
- 22 Furthermore, Solvay submits that the contents of the contested decision did not permit the General Court to find, in paragraph 150 of the judgment under appeal, that Solvay had disclosed its commercial strategy to its competitors. In doing so, the General Court exceeded its powers of judicial review, committed an error of law and manifestly distorted the evidence before it, including the contents of that decision.
- 23 The Commission replies that those arguments must be rejected as inadmissible and, in any event, unfounded.

– Findings of the Court

- 24 By the first part of its first ground of appeal, Solvay submits in essence that the General Court distorted the evidence before it, including the contents of the contested decision, by holding, in paragraph 150 of the judgment under appeal, that the Commission had established that Solvay had discussed and/or exchanged information on prices and on its commercial strategy during the period from May 1995 to August 1997.
- 25 In that regard, it should be recalled at the outset that, under Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal lies on points of law only. The General Court has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and the assessment of that evidence thus do not, save where the facts or evidence are distorted, constitute points of law subject, as such, to review by the Court of Justice on appeal.

- 26 It should also be borne in mind that, according to settled case-law, a distortion of the evidence must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and the evidence.
- 27 In this case, it must be stated that the alleged distortion of the evidence claimed by Solvay is not obvious from the documents on the Court's file. That claim necessarily requires a new assessment of the facts and the evidence to be carried out, so that that company has failed to satisfy the requirements incumbent on it under that case-law.
- 28 In reality, under guise of a ground of appeal alleging such a distortion, Solvay seeks to challenge the assessment of the evidence carried out by the General Court in its examination of the existence and content of the meetings between the hydrogen peroxide producers during the period from May 1995 to August 1997 and thus seeks to have the Court of Justice substitute its own appraisal for the General Court's, which is not, as is apparent from paragraph 25 of this judgment, in principle, allowed at the appeal stage. By that ground of appeal, that company ultimately seeks to establish that the General Court ought to have assessed those facts in a different manner and criticises it for not having ruled differently.
- 29 In any event, the General Court's findings, in paragraph 150 of the judgment under appeal, do not contain anything capable of suggesting that the facts or evidence were distorted at first instance. The alleged distortion claimed by Solvay is based rather on an incomplete and erroneous reading of that paragraph.
- 30 Consequently, the first part put forward by Solvay in support of its first ground of appeal must be rejected.

The third part of the first ground of appeal, relating to the categorisation of the concept of a 'concerted practice'

– Arguments of the parties

- 31 Solvay submits that the General Court committed errors of law, by upholding, in paragraphs 146 to 163 of the judgment under appeal, the finding of the contested decision that the discussions and exchanges of information between the hydrogen peroxide producers from May 1995 to August 1997 constituted a 'concerted practice' within the meaning of Article 81 CE.
- 32 First, Solvay submits that the General Court's statement of law, at paragraph 148 of the judgment under appeal, that 'it is sufficient, in order to find an infringement of Article 81(1) EC, that the competitors have made direct contact with a view to 'stabilising the market' is based on a misapplication of the judgments in Case T-148/89 *Tréfilunion v Commission* [1995] ECR II-1063, paragraphs 75 to 82, and Case T-53/03 *BPB v Commission* [2008] ECR II-1333, paragraphs 166 to 190. Unlike in those judgments, the hydrogen peroxide producers did not reach an agreement, in the present case, on any matter whatsoever before sharing information.
- 33 Second, Solvay complains that the General Court failed to take account of Solvay's observations that the exchange of information between May 1995 and August 1997 did not constitute a 'standalone' concerted practice since that information did not have the potential to have a negative impact on competition. In that regard, Solvay states that it

adduced before the General Court substantial evidence of a highly competitive market and that both the contested decision and the judgment under appeal refer to a steady decrease in prices and a price war.

34 In Solvay's submission, the General Court failed to consider whether the information exchanged was, in law and in the context of the case, capable of removing or reducing uncertainty, so as to influence the conduct of competitors and thereby lead to a concerted practice between them being knowingly substituted for the risks of competition. The General Court therefore committed an error of law, in taking the view, in paragraphs 158 to 163 of the judgment under appeal, that the effects of the agreement or concerted practice do not need to be taken into account if an infringement has an anti-competitive object. According to Solvay, the existence of strong, even brutal, competition is germane to the determination of whether there was in fact a concerted practice.

35 The Commission contests Solvay's line of argument.

– Findings of the Court

36 First, as regards Solvay's argument that the General Court incorrectly held that, in order to prove a concerted practice within the meaning of Article 81(1) EC, there must not necessarily be a pre-existing agreement, it should be recalled that, with regard to that concept of a concerted practice, the Court of Justice has held that such a practice is a form of coordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition (see Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 26 and the case-law cited).

37 The criteria of coordination and cooperation necessary for determining the existence of a concerted practice are to be understood in the light of the notion inherent in the Treaty provisions on competition, according to which each economic operator must determine independently the policy which he intends to adopt on the common market (*T-Mobile Netherlands and Others*, paragraph 32 and the case-law cited).

38 While it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, none the less, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market (*T-Mobile Netherlands and Others*, paragraph 33 and the case-law cited).

39 In the case of a highly concentrated oligopolistic market, such as the market in question in the present case, the exchange of commercial information between competitors is such as to enable operators to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists

between economic operators (see *T-Mobile Netherlands and Others*, paragraph 34 and the case-law cited).

- 40 In those circumstances, the exchange of commercial information between competitors in preparation for an anti-competitive agreement suffices to prove the existence of a concerted practice within the meaning of Article 81(1) EC. In that regard, it is not necessary to show that those competitors formally undertook to adopt a particular course of conduct or that the competitors colluded over their future conduct on the market.
- 41 It follows that the General Court cannot be criticised for having held, in paragraphs 148 and 149 of the judgment under appeal, first, that, even if the Commission does not succeed in showing that the undertakings concluded an agreement, in the strict sense of the term, it is sufficient, in order to find an infringement of Article 81(1) EC, that the competitors have made direct contact with a view to 'stabilising the market' and, next, for having rejected Solvay's contention that the disclosure of information to competitors may be deemed to be a concerted practice only where an anti-competitive agreement has already been concluded and negotiations take place only in order to effect its implementation.
- 42 Second, as regards Solvay's argument that the General Court failed to take account of its observations that the information exchanged was not sufficient to have negative effects on competition, it should be borne in mind that the Court of Justice has held that, subject to proof to the contrary, which the economic operators concerned must adduce, it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market. That is all the more the case where the undertakings concert together on a regular basis over a long period (see, *inter alia*, *T-Mobile Netherlands and Others*, paragraph 51 and the case-law cited).
- 43 In order to rebut that presumption, it is for the undertaking concerned to prove that the concerted action did not have any influence whatsoever on its own conduct on the market (see Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraph 167). The proof to the contrary must therefore be such as to rule out any link between the concerted action and the determination, by that undertaking, of its conduct on the market.
- 44 In that regard, it must be stated that probative data illustrating the competitive nature of the market and, in particular, the decrease of prices during the period concerned cannot suffice, of itself, to rebut that presumption. That data does not of itself make it possible to prove that that undertaking did not take account of the information exchanged with its competitors in determining its conduct on the market. It follows that that data does not of itself preclude the presumption that the concerted action enabled that undertaking to eliminate uncertainties regarding its conduct on the market, so that normal competition might as a result have been prevented, restricted or distorted.
- 45 The General Court cannot therefore be criticised for taking the view that the proof to the contrary, adduced by Solvay, resulting from probative data illustrating the highly competitive nature of the market and, in particular, the decrease in prices during the period concerned was not such as to rebut the rebuttable presumption in question, by

holding, in paragraph 161 of the judgment under appeal, that, even if it were established that the exchange of information in question had no influence on prices during the period concerned, that would not call into question the legality of the Commission's findings.

- 46 Accordingly, Solvay's argument that the General Court failed to take account of its submissions that the information exchanged was not sufficient to have negative effects on competition cannot succeed.
- 47 It follows from all the foregoing that the General Court did not err in law in upholding the contested decision by holding, in paragraphs 146 to 163 of the judgment under appeal, that the contacts between the hydrogen peroxide producers during the period from May 1995 until August 1997 could, in any event, be categorised as a concerted practice falling within Article 81 EC.
- 48 Since none of the arguments put forward in support of the third part of the first ground of appeal have been successful, this part must be rejected.

The second part of the first ground of appeal, relating to the categorisation of an 'agreement'

– Arguments of the parties

- 49 Solvay submits that the General Court committed an error of law, by upholding, in paragraphs 143 to 145 of the judgment under appeal, the finding of the contested decision that the discussions and exchanges of information between the hydrogen peroxide producers from May 1995 to August 1997 constituted an agreement falling within Article 81 EC.
- 50 The General Court clearly wrongly equated the hydrogen peroxide producers' wish or desire to 'stabilise the market' with a 'joint intention' as that term is used in Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, paragraph 256, and Case T-9/99 *HFB and Others v Commission* [2002] ECR II-1487, paragraph 199. According to those judgments, for there to be an 'agreement', the undertakings concerned must have a 'joint intention to conduct themselves on the market in a particular way'. Solvay submits, in that regard, that it is not sufficient for the undertakings merely to have discussions which, if they were to be successful, would result in a concurrence of wills to act in an anti-competitive manner, so achieving their wish or desire to 'stabilise the market'.
- 51 Solvay states that, in the present case, neither the contested decision nor the judgment under appeal can identify any agreement whatsoever or any element of conduct on the market for hydrogen peroxide to which Solvay was a party. In that regard, Solvay observes that, in paragraph 138 of that judgment, the General Court misapplied the principles set out in paragraph 46 of Case T-21/99 *Dansk Rørindustri v Commission* [2002] ECR II-1681. In that judgment, the facts show that there was already an agreement to allocate market shares or an agreement on the principle of allocating market shares, which was not the situation in the present case.
- 52 The Commission contests Solvay's line of argument.

– Findings of the Court

- 53 According to settled case-law, the concepts of agreement and concerted practice within the meaning of Article 81(1) EC are intended, from a subjective point of view, to catch forms of collusion having the same nature and are distinguishable from each other only by their intensity and the forms in which they manifest themselves (see, *inter alia*, *T-Mobile Netherlands and Others*, paragraph 23 and the case-law cited). It is therefore sufficient that proof of the constituent elements of either of those forms of infringement referred to in that provision has been established in order in any event for Article 81(1) EC to apply.
- 54 It follows that, even on the assumption that the General Court erred in law in categorising the conduct in question as an 'agreement' within the meaning of Article 81 (1) EC, those alleged errors cannot, on their own, lead to the judgment under appeal's being set aside, since, as is apparent from the examination of the third part of the first ground of appeal and, in particular, from paragraph 47 of this judgment, it was correctly established, in paragraphs 146 to 163 of the judgment under appeal, that the contacts between the hydrogen peroxide producers during the period from May 1995 until August 1997 could, in any event, be categorised as a concerted practice falling within Article 81 EC.
- 55 Consequently, the second part of the first ground of the appeal must be rejected as ineffective.
- 56 Since none of the parts put forward in support of the first ground of appeal has been successful, this ground of appeal must be rejected in its entirety.

The second ground of appeal, relating to the application of the Leniency Notice

- 57 By its second ground of appeal, Solvay requests the Court to set aside paragraphs 394, 395 and 402 to 427 of the judgment under appeal in so far as, in upholding the contested decision, the General Court wrongly found that Arkema had complied on 3 April 2003 with the requirements referred to in the Leniency Notice, before Solvay did so on 4 April 2003.
- 58 This ground of appeal is subdivided into two parts. The first part concerns the alleged incorrect assessment of the information provided by an undertaking concerned by the cartel in question and the second part relates to the different assessment of the conditions for granting a leniency measure carried out in a subsequent Commission decision.

The first part of the second ground of appeal, relating to the alleged incorrect assessment of the information provided by an undertaking concerned by the cartel in question

– Arguments of the parties

- 59 Solvay submits that the General Court committed, in paragraphs 402 to 415 of the judgment under appeal, errors of law, infringed the principles of legal certainty and legitimate expectations and manifestly distorted the evidence, in its application of point 21 of the Leniency Notice, with regard to a letter sent by Arkema to the Commission, by fax of 3 April 2003, in which that company indicated that it wished to cooperate and applied for leniency under that notice.

- 60 Solvay submits that, in accordance with the General Court's judgments in Case T-132/07 *Fuji Electric v Commission* [2011] ECR II-4091, paragraphs 263 to 265, and Case T-151/07 *Kone and Others v Commission* [2011] ECR II-5313, paragraphs 98 to 105 and 160 to 180, the documents faxed by Arkema on 3 April 2003 had, at that time, no intrinsic evidential value and only did so once Arkema explained their contents to the Commission in its subsequent fax of 26 May 2003. Thus, on 3 April 2003, Arkema did not provide sufficiently precise information to enable the Commission to understand and prove how the cartel in question functioned. Consequently, Solvay takes the view that, in the absence of those subsequent explanations, the Commission could not have relied upon the documents faxed on 3 April 2003 to prove an infringement of Article 81 EC.
- 61 Moreover, Solvay states that, although the documents faxed on 3 April 2003 are referred to in the contested decision, the judgment in *Kone and Others v Commission* confirms that this is not sufficient in law to demonstrate that they enabled the Commission to prove an infringement. Solvay further observes that, in every case in which the Commission cited the documents dated 3 April 2003, it also cited the explanations provided on 26 May 2003 by Arkema, upon which the Commission relied to establish the 'essential facts' in order to prove the existence of collusion at the meetings concerned, namely, inter alia, the dates and locations of the meetings, their participants, the matters discussed and any agreements or understandings reached.
- 62 Thus, Solvay submits that the General Court was incorrect to uphold, in paragraph 415 of the judgment under appeal, the contested decision's conclusion that Arkema provided, on 3 April 2003, evidence of 'significant added value' within the meaning of point 21 of the Leniency Notice, and, thereby, to hold that Solvay, which first provided its information at a meeting organised on 4 April 2003, was not entitled to be ranked above Arkema under point 23 of that notice.
- 63 The Commission contests Solvay's line of argument.
- Findings of the Court
- 64 It is to be recalled that, when the European Union judicature reviews the legality of a decision imposing fines for infringement of the competition rules, it cannot use the Commission's margin of discretion, neither as regards the choice of factors taken into account in the application of the criteria mentioned in the Commission's notice, entitled 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty' (OJ 1998 C 9, p. 3) nor as regards the assessment of those factors as regards waiving an in-depth review of the law and of the facts (Case C-386/10 P *Chalkor v Commission* [2011] ECR I-0000, paragraph 62).
- 65 Such a rule also applies where the judicature determines whether the Commission applied the Leniency Notice correctly (Case C-501/11 P *Schindler Holding and Others v Commission* [2013] ECR I-0000, paragraph 155). The value of evidence provided by undertakings under the 2002 Leniency Notice in order to cooperate with the Commission in the administrative procedure is assessed in connection with the calculation of the amount of the fine. This therefore falls within the scope of the unlimited jurisdiction of the General Court, referred to in Article 261 TFEU in conjunction with Article 31 of Regulation No 1/2003, under which the General Court is

empowered, in addition to carrying out a straightforward review of the lawfulness of the penalty, to substitute its own appraisal for the Commission's.

- 66 Whilst the principles set out by the General Court in paragraphs 393 to 396 of the judgment under appeal do not correspond to that case-law, it is necessary, however, to examine the manner in which the General Court conducted its review in the present case in order to determine whether it infringed those principles. What matters is the criterion that the General Court in fact applied in the specific examination of the added value offered by the cooperation of the undertaking in question with the Commission (*Schindler Holding and Others v Commission*, paragraph 156).
- 67 In the present case, the General Court examined, in paragraphs 402 to 415 of the judgment under appeal, the evidence in question submitted by Arkema to the Commission on 3 April 2003 in order to determine whether that evidence had provided significant added value within the meaning of point 21 of the Leniency Notice.
- 68 In that regard, it must be held that the General Court carried out an in-depth review in which it itself assessed that evidence without referring to the Commission's margin of discretion, stating detailed grounds for its own decision.
- 69 However, that examination involves findings which it is not for the Court of Justice to review in an appeal. Indeed, at this stage of the procedure, the Court of Justice cannot substitute its own appraisal of the significant added value of the evidence in question submitted by Arkema on 3 April 2003 for the appraisal of the Commission and of the General Court.
- 70 In so far as Solvay claims that the General Court distorted that evidence, it is sufficient to note that this is not obvious from the documents on the Court's file. That claim necessarily requires a new assessment of the facts and the evidence to be carried out, so that that company has failed to satisfy the requirements incumbent on it under the settled case-law referred to in paragraph 26 of this judgment. Accordingly, that claim must be rejected.
- 71 With respect to Solvay's claim alleging infringements of the principles of legal certainty and legitimate expectations, it must be rejected, as it is too imprecise. That company does not explain how the General Court's assessment relating to the significant added value of the evidence in question, submitted by Arkema on 3 April 2003, is vitiated by such alleged infringements.
- 72 Consequently, the first part of the second ground of appeal must be rejected.

The second part of the second ground of appeal, relating to the different assessment of the conditions for granting a leniency measure carried out in a subsequent Commission decision

– Arguments of the parties

- 73 Solvay alleges that the General Court committed, in paragraphs 416 to 426 of the judgment under appeal, errors of law and of procedure, and a manifest distortion of the evidence in its assessment of Commission Decision C(2006) 2098 final of 31 May 2006 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F/38.645 – Methacrylates) ('the "Methacrylates" decision').

- 74 In that regard, recalling that Arkema's faxed letter of 3 April 2003 concerned Commission investigations in connection with several cartels, including those concerning the hydrogen peroxide and methacrylates sectors, Solvay observes that, in the "Methacrylates" decision, the Commission concluded that the documents annexed to that fax concerning methacrylates did not meet the requirements of point 21 of the Leniency Notice but that those requirements were subsequently met when Arkema submitted further information to the Commission at a later date.
- 75 Solvay thus complains that the General Court held, in paragraphs 423 to 425 of the judgment under appeal, that the Commission was entitled to reach different conclusions in the contested decision and the 'Methacrylates' decision in applying point 21 of the Leniency Notice. In particular, the General Court committed two manifest errors of procedure. First, the General Court both misunderstood and misapplied Solvay's argument, made at the oral procedure before that court, in relation to the 'Methacrylates' decision. Second, it manifestly misinterpreted the 'Methacrylates' decision by incorrectly holding that the Commission's assessment in that decision concerned not the ranking under the Leniency Notice but only the percentage reduction in the fine given to Arkema.
- 76 The Commission contests Solvay's line of argument.
- Findings of the Court
- 77 It should be borne in mind that, according to settled case-law, the principle of equal treatment is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference of treatment is objectively justified (see, *inter alia*, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 95).
- 78 It should also be noted that decisions in other cases can give only an indication for the purpose of determining whether there might be discrimination, since the facts of those cases, such as markets, products, the undertakings and periods concerned, are not likely to be the same (see, *inter alia*, Case C-167/04 P *JCB Service v Commission* [2006] ECR I-8935, paragraph 201, and Case C-76/06 P *Britannia Alloys & Chemicals v Commission* [2007] ECR I-4405, paragraph 60).
- 79 However, in this case, as the General Court observed without any distortion, *inter alia*, in paragraph 424 of the judgment under appeal, it is sufficient to note that the assessment made in the Methacrylates decision, concerning the documents appended to Annexes A 14 and A 15 to Arkema's fax of 3 April 2003, did not relate to the same evidence as that at issue in the present case, which was attached in Annexes A 1 to A 13 of the same fax. The individual circumstances of that decision thus clearly differ from those of the contested decision.
- 80 It follows that Solvay cannot rely on the assessment made in the 'Methacrylates' decision in order to call in question the legality of the assessment made in the context of the present case.
- 81 Consequently, the second part of the second ground of appeal must be rejected.

- 82 Since none of the grounds of appeal raised by Solvay in support of its appeal can be upheld, the appeal must be dismissed in its entirety.

The cross-appeal

The single ground of appeal, alleging errors of law committed by the General Court as regards the reduction granted to Solvay in respect of its cooperation

The first part of the single ground of appeal, relating to an alleged infringement of the obligation to state reasons

– Arguments of the parties

- 83 By the first part of its single ground of appeal, the Commission contends, first, that, in paragraphs 428 to 437 of the judgment under appeal, the General Court failed to respond to a sufficient legal standard to the Commission's arguments on the value of Solvay's leniency submission. It complains, in particular, that the General Court held, in paragraph 431 of that judgment, that '[i]t is common ground that the evidence adduced by [Solvay] was widely used in the contested decision to establish the infringement, in particular with respect to the period between 1997 and 2000'.
- 84 In that regard, the General Court does not explain on what basis this would be 'common ground', especially since the Commission's reply of 15 September 2009 to a written question of the General Court made clear that for the majority of the meetings for the period between August 1997 and February 1998 Solvay was not the first to submit evidence. In the Commission's submission, it would seem that the General Court in paragraph 431 understood, recital 523 of the contested decision as meaning that Solvay's evidence was widely used, whereas that recital actually meant the wide use of the evidence provided by Degussa and Arkema.
- 85 Second, the Commission submits that the obligation to state reasons was breached by the fact that there are inconsistencies within the judgment under appeal on the value given to the time of the cooperation and the value given to documentary evidence as opposed to other types of evidence.
- 86 To that effect, the Commission states that the General Court, in paragraph 435 of the judgment under appeal, mentions a contrast between the small reduction granted to Solvay and the maximum reduction of 30% granted to Arkema within the band applicable to it, despite the fact that Arkema had submitted additional evidence several weeks after its initial leniency application. In that regard, the Commission does not understand why that factor should be relevant in the context of the comparison with Solvay. The General Court does not explain coherently its position.
- 87 Similarly, with respect to paragraph 436 of the judgment under appeal, the Commission raises the question of the value of contemporaneous documentary evidence and additional explanations submitted by Arkema as opposed to the oral statement submitted by Solvay. The General Court also fails to explain why the oral statement of Arkema should be of great value and as detailed as that of Solvay, when in fact Arkema's evidence consisted primarily of contemporaneous documents. In any event, paragraphs 435 and 436 contradict paragraph 415 of that judgment.

88 Solvay contests the Commission's line of argument.

– Findings of the Court

- 89 It should be borne in mind at the outset that it is settled case-law that the obligation laid down in Article 296 TFEU to state adequate reasons is an essential procedural requirement that must be distinguished from the question whether the reasoning is well founded, which goes to the substantive legality of the measure at issue (see, inter alia, Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67, and Case C-521/09 P *Elf Aquitaine v Commission* [2011] ECR I-8947, paragraph 146).
- 90 In that vein, the statement of reasons required under 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 that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Court of the European Union to exercise its jurisdiction to review legality (see, inter alia, Case C-17/99 *France v Commission* [2001] ECR I-2481, paragraph 35, and *Elf Aquitaine v Commission*, paragraph 147).
- 91 It is also settled case-law that the requirement to state reasons must be assessed by reference to the circumstances of the case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to specify all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, inter alia, *Commission v Sytraval and Brink's France*, paragraph 63, and *Elf Aquitaine v Commission*, paragraph 150 and the case-law cited).
- 92 In this case, it is clear merely from reading paragraphs 430 to 439 of the judgment under appeal that the General Court cannot be accused of having failed to fulfil those requirements correctly, and therefore the statement of reasons set out in those paragraphs enabled the persons concerned and, in particular, the Commission to ascertain why the General Court did not uphold its arguments and provided the Court of Justice with sufficient material to exercise its jurisdiction to review legality.
- 93 It must be stated that, by relying on its assessment, carried out in paragraphs 430 to 437 of the judgment under appeal, of the material provided by Solvay in the context of its leniency application in order to conclude, in paragraph 439 of that judgment, that it was appropriate to reduce Solvay's fine by 20% on the basis of its cooperation, the General Court necessarily answered, to the sufficient legal standard, the Commission's arguments on the value of that application. With respect to the criticism directed particularly against paragraph 431 of that judgment inasmuch as it is allegedly based on an incorrect reading of recital 523 of the contested decision, it is sufficient, in any event, to observe that it is rather that criticism itself which results from an incorrect reading of the judgment under appeal, paragraph 431 of which is based not on recital 523 as the Commission claims, but on recital 515 of that decision.

- 94 Moreover, it must be stated that paragraphs 435 and 436 of the judgment under appeal do not disclose any incoherence.
- 95 First, it is clearly apparent from paragraph 435, in conjunction with paragraph 431 of that judgment, that the contrast observed by the General Court between the small reduction granted to Solvay and the maximum reduction of 30% granted to Arkema concerns the time at which the submission was made as well as the extent and continuity of the cooperation provided by those undertakings following the date of their submissions, within the meaning of the second paragraph of point 23(b) of the Leniency Notice. The General Court unequivocally regarded as relevant in the context of the comparison with Solvay, which intervened at an early stage in the administrative procedure and provided material on the infringement in question in a continuous manner in particular during April 2003, the fact that the Commission found that Arkema submitted additional evidence only on 26 May 2003, several weeks after its initial application, whilst granting it the maximum reduction within the applicable band, namely that provided for in the first paragraph of point 23(b) of the Leniency Notice.
- 96 Second, it is unambiguously clear from paragraph 436 of the judgment under appeal that the General Court held as, *inter alia*, relevant in the context of the comparison between Arkema's and Solvay's statements, the fact that Solvay had adduced witness evidence by individuals participating directly in the cartel in question.
- 97 Moreover, paragraphs 435 and 436 of the judgment under appeal do not contradict paragraph 415 of that judgment.
- 98 It is sufficient to observe that paragraphs 435 and 436 of the judgment under appeal concern the assessment of the level of the reduction of the fine granted to Solvay within the band applicable to the third undertaking, in the light of the criteria referred to in the second paragraph of point 23(b) of the Leniency Notice, whereas paragraph 415 relates to the determination of the band applicable in itself, pursuant to the first paragraph of point 23(b). Thus, the fact that the General Court held in paragraph 415 that Arkema had submitted, by fax of 3 April 2003, evidence of significant added value for the purposes of point 21 of that notice, and, accordingly, confirmed that the band reserved for the second undertaking would be applied to Arkema, cannot mean that the General Court made the alleged contradiction and prevent that court from carrying out the assessment made in paragraphs 435 and 436.
- 99 It follows from all those considerations that the General Court did not commit, in paragraphs 430 to 439 of the judgment under appeal, a breach of the obligation to state reasons. Accordingly, the first part of the single ground of appeal must be rejected.

The second part of the single ground of appeal, relating to the alleged incorrect application of the principle of equal treatment

– Arguments of the parties

- 100 The Commission submits that the General Court erred in law, in paragraphs 435 and 436 of the judgment under appeal, by comparing the cooperation of Arkema and Solvay and almost putting them on an equal footing as regards the maximum reduction within their respective bands.

- 101 The Commission states that those two companies produced very different submissions qualitatively and in terms of their timing. Thus, the General Court erred in law in treating equally two different situations and aligning Solvay's reduction within its band to the maximum provided for on the basis that Arkema was also granted the maximum reduction within its own band.
- 102 The Commission recognises that, in exercising its discretion in determining fines, it must act in accordance with the principle of equal treatment. However, it is the Commission's submission that the situations of Solvay and Arkema were not comparable and that that difference justified the fact that the maximum reduction of the fine was not granted to Solvay but was granted to Arkema.
- 103 Solvay contests the Commission's line of argument.

– Findings of the Court

- 104 In the context of its assessment of the cooperation provided by the members of a cartel, the General Court is not entitled to disregard the principle of equal treatment which, as was recalled in paragraph 77 of this judgment, is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference of treatment is objectively justified.
- 105 As regards the determination of the level of the reduction of the fine from which undertakings that have submitted a leniency application may benefit under the Leniency Notice, it should be observed that, irrespective of the level of the reduction granted under the first to third indents of the first paragraph of point 23(b) of that notice, which establishes the applicable band according to the chronological order in which those undertakings fulfilled the condition set out at point 21 of that notice, the situations of those undertakings must be regarded as comparable for the purposes of the application of the criteria referred to in the second paragraph of point 23(b). Those criteria are, *inter alia*, the time at which the submission was made, the extent of the added value of the evidence provided, as well as the extent and continuity of the cooperation, criteria which may be taken into account in order to determine the level of the reduction within that band itself. Those situations must therefore be treated in the same manner within the limits of the applicable band.
- 106 It follows that, although it was not required to do so on account of the findings set out in paragraphs 431 to 434 of the judgment under appeal, the General Court was right and did not err, in the context of the assessment of the level of the reduction of the fine granted to Solvay within the band applicable to it, for the purposes of the first paragraph of point 23(b) of the Leniency Notice, in carrying out, in paragraphs 435 and 436 of that judgment, a comparison of Solvay's cooperation with Arkema's in the light of the criteria referred to in the second paragraph of point 23(b).
- 107 Similarly, the General Court was right and did not infringe the principle of equal treatment, in the context of that assessment, in deciding in a coherent and objective manner, in paragraph 439 of that judgment, to grant Solvay a 20% reduction of the fine amount, corresponding to the maximum reduction within the band applicable to the third undertaking, for the purposes of the first paragraph of point 23(b), in the same way that the Commission had granted Arkema the maximum reduction within the band that was applicable to it.

- 108 In so far as the Commission's line of argument seeks to contest the General Court's examination, in paragraphs 435 and 436 of the judgment under appeal, of the evidence provided by the undertakings in question in terms of both its quality and the time at which it was submitted, that line of argument must be rejected, since it calls into question findings of a factual nature which it is not for the Court of Justice to review on appeal, as was stated in paragraph 25 of this judgment.
- 109 By granting a reduction of 20% of the amount of Solvay's fine, which also corresponds to the maximum reduction within the band that was applicable to Solvay, the General Court thus reconciled respect for the principle of equal treatment with respect for the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (see Joined Cases C-259/10 and C-260/10 *The Rank Group* [2011] ECR I-10947, paragraph 62 and the case-law cited).
- 110 It follows from all those considerations that, in paragraphs 435 to 439 of the judgment under appeal, the General Court did not err in law in applying the principle of equal treatment. Therefore, the second part of the single ground of appeal must be rejected.

The third part of the single ground of appeal, relating to the alleged incorrect application of the Leniency Notice and Regulation No 1/2003

– Arguments of the parties

- 111 The Commission submits that the General Court applied incorrectly, in paragraphs 428 to 439 of the judgment under appeal, the Leniency Notice and Article 23 of Regulation No 1/2003 in holding that the Commission had not properly taken account of the time at which Solvay's submission was made, the extent of the added value of the evidence that it had provided, and the extent and continuity of its cooperation within the meaning of the second paragraph of point 23(b) of that notice, and in therefore reaching the conclusion that it was appropriate to grant Solvay a higher level of reduction.
- 112 First, the Commission maintains that the fact that the evidence adduced by Solvay concerned the Europe-wide cartel for both products concerned does not constitute a sufficient basis for suggesting that a higher level of reduction ought to have been granted.
- 113 Second, the Commission contends that the General Court asserts without any basis, in paragraph 432 of the judgment under appeal, that the information submitted by Solvay enabled the Commission to establish certain key aspects of the cartel in question, namely the existence of firm agreements on coordinated hydrogen peroxide price rises as well as collusion initiatives relating to sodium perborate. The Commission submits that the General Court did not give adequate value under the Leniency Notice to the evidence provided by Solvay in order to reach this unfounded conclusion, which is at odds both with the reliance placed by the Commission on Solvay's evidence in the contested decision and with the analysis of the value of that evidence carried out by the Commission in that decision.
- 114 The Commission claims that the adduction of proof or the corroboration of evidence must be assessed overall as a whole and that it was perfectly justified in finding that

the evidence adduced by Solvay effectively amounted to a corroboration of what it already knew about the overall infringement. In that regard, the General Court exceeded its jurisdiction by failing to accord the Commission the wide discretion which it is afforded in assessing the relative value of evidence submitted by undertakings under the Leniency Notice.

115 Solvay contests the Commission's line of argument.

– Findings of the Court

116 As was observed in paragraphs 64 and 65 of this judgment, when the European Union judicature reviews the legality of a decision imposing fines for infringement of the competition rules, it cannot use the Commission's margin of discretion – either as regards the choice of factors taken into account in the application of the criteria mentioned in the Leniency Notice or as regards the assessment of those factors – as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.

117 It is therefore necessary to examine the manner in which the General Court conducted its review in the present case in order to determine whether it infringed those principles. What matters are the criteria that the General Court in fact applied in the specific examination of the time at which the submission of the undertaking concerned was made, the extent of the added value of the evidence provided, as well as the extent and continuity of its cooperation, for the purposes of the second paragraph of point 23(b) of the Leniency Notice.

118 In the present case, the General Court examined, in paragraphs 431 to 437 of the judgment under appeal, the evidence in question submitted by Solvay to the Commission in the context of its cooperation in order to determine the level of the reduction of the fine within the band applicable to the third undertaking, for the purposes of the first paragraph of point 23(b) of the Leniency Notice.

119 In that regard, it must be held that the General Court carried out an in-depth review in which it itself assessed that evidence without referring to the Commission's margin of discretion, stating detailed grounds for its own decision.

120 However, that examination involves findings of fact which it is not for the Court of Justice to review on appeal. Indeed, at that stage of the procedure, the Court of Justice cannot substitute its own appraisal of the evidence in question submitted by Solvay in the context of its cooperation for the appraisal of the Commission and of the General Court.

121 In so far as the Commission's line of argument seeks a review of the reduction of the fine granted to Solvay by the General Court, in paragraph 439 of the judgment under appeal, that line of argument cannot succeed since, as far as the extent of the reduction of the fine is concerned, it is not for the Court of Justice to substitute its own assessment for that of the General Court exercising its unlimited jurisdiction (*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, paragraph 255 and the case-law cited).

122 Consequently, the third part of the single ground of appeal must be rejected.

- 123 Since none of the parts of the single ground of appeal put forward by the Commission in support of its cross-appeal can be upheld, that cross-appeal must be dismissed in its entirety.

Costs

- 124 Under Article 184(2) of its Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those Rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 125 As regards the main appeal, since the Commission has applied for costs and Solvay has been unsuccessful, the latter must be ordered to pay the costs.
- 126 As regards the cross-appeal, since Solvay has applied for costs against the Commission and since the Commission's single ground of appeal has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby

- 1. Dismisses the main appeal and the cross-appeal;**
- 2. Orders Solvay SA to pay the costs of the main appeal;**
- 3. Orders the European Commission to pay the costs of the cross-appeal.**

[Signatures]

* Language of the case: English.