JUDGMENT OF THE GENERAL COURT (Ninth Chamber, Extended Composition)

29 September 2021 (*) (1)

(Competition – Agreements, decisions and concerted practices – Market for aluminium electrolytic capacitors and tantalum electrolytic capacitors – Decision finding an infringement of Article 101 TFEU and Article 53 of the EEA Agreement – Price coordination throughout the EEA – Attribution to the parent company of the infringement committed by its subsidiary – 2006 Guidelines on the method of setting fines – Gravity of the infringement – Increase in the amount of the fine for repeated infringement – Proportionality – Unlimited jurisdiction)

In Case T−341/18,

Nec Corp., established in Tokyo (Japan), represented by O. Brouwer and A. Pliego Selie, lawyers, and by R. Bachour, Solicitor,

applicant,

v

European Commission, represented by A. Cleenewerck de Crayencour, L. Wildpanner and F. van Schaik, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for, primarily, annulment of Commission Decision C(2018) 1768 final of 21 March 2018 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.40136 – Capacitors), in so far as that decision finds that the applicant personally participated in the infringement, and, in the alternative, annulment of the fines imposed on the applicant or a reduction in the amount of those fines,

THE GENERAL COURT (Ninth Chamber, Extended Composition),

composed of M.J. Costeira (Rapporteur), President, D. Gratsias, M. Kancheva, B. Berke and T. Perišin, Judges,

Registrar: E. Artemiou, Administrator,

having regard to the written part of the procedure and further to the hearing on 12 October 2020,

gives the following

Judgment

Background to the dispute

The applicant and the sector concerned

1 The applicant, Nec Corp., is a company established in Japan which manufactures and sells tantalum electrolytic capacitors.

2 From 1 August 2009 to 31 January 2013, the applicant held 100% of the capital of Nec Tokin Corporation, which became Tokin Corp.

3 The infringement at issue concerns aluminium electrolytic capacitors and tantalum electrolytic capacitors. Capacitors are electrical components that store energy electrostatically in an electric field. Electrolytic capacitors are used in almost all electronic products, such as personal computers, tablets, telephones, air conditioners, refrigerators, washing machines, automotive products and industrial appliances. The customer base is therefore very diverse. Electrolytic capacitors, and more specifically aluminium electrolytic capacitors and tantalum electrolytic capacitors, are products in respect of which price is an important parameter of competition.

The administrative procedure

4 On 4 October 2013, Panasonic and its subsidiaries submitted an application for a marker to the European Commission under points 14 and 15 of the Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17; 'the 2006 Leniency Notice'), providing information regarding the existence of an alleged infringement in the electrolytic capacitors sector.

5 On 28 March 2014, under Article 18 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1), the Commission sent requests for information to a number of undertakings operating in the electrolytic capacitors sector, including the applicant.

6 On 21 May 2014, the applicant, together with Tokin, applied to the Commission for a reduction in the amount of the fine under the 2006 Leniency Notice.

7 On 4 November 2015, the Commission adopted a statement of objections which was addressed to, inter alia, the applicant.

8 The addressees of the statement of objections, including the applicant, were heard by the Commission at the hearing which took place from 12 to 14 September 2016.

The contested decision

9 On 21 March 2018, the Commission adopted Decision C(2018) 1768 final relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.40136 – Capacitors) ('the contested decision').

The infringement

10 By the contested decision, the Commission found that there had been a single and continuous infringement of Article 101 TFEU and Article 53 of the Agreement on the European Economic Area (EEA) in the electrolytic capacitors sector, in which nine undertakings or groups of undertakings, namely Elna, Hitachi AIC, Holy Stone, Matsuo, Nichicon, Nippon Chemi-Con, Rubycon, Sanyo (designating Sanyo and Panasonic), and Tokin and the applicant, jointly referred to as 'NEC Tokin' (collectively, 'the cartel participants'), participated (recital 1 of the contested decision, as well as Article 1 thereof).

11 The Commission stated, in essence, that the infringement at issue, covering the whole EEA, had taken place between 26 June 1998 and 23 April 2012 and had consisted of agreements and/or concerted practices that had as their object the coordination of pricing behaviour in relation to the supply of aluminium electrolytic capacitors and tantalum electrolytic capacitors (recital 1 of the contested decision).

12 The cartel was, in essence, organised through multilateral meetings, generally held in Japan every one or two months at senior sales manager level, and every six months at higher management level, including the presidents (recitals 63, 68 and 738 of the contested decision).

13 Initially, between 1998 and 2003, the multilateral meetings were held under the name ‘Electrolytic Capacitor(s) Circle’, ‘Electrolytic Capacitor Conference’, or ‘ECC meetings’. Subsequently, between 2003 and 2005, they were held under the name ‘Aluminium Tantalum Conference’, ‘Aluminium Tantalum Capacitors group’, or ‘ATC meetings’. Lastly, between 2005 and 2012, they were held under the name ‘Market Study Group’, ‘Marketing Group’ or ‘MK meetings’. In parallel with the MK meetings, and complementing those meetings, ‘Cost Up’ or ‘Condenser Up’ meetings (‘CUP meetings’) were held between 2006 and 2008 (recital 69 of the contested decision).

14 In addition to those multilateral meetings, the cartel participants also engaged in ad hoc bilateral and trilateral contacts when necessary (recitals 63, 75 and 739 of the contested decision).

15 In the context of the anticompetitive exchanges, the cartel participants, in essence, exchanged information regarding pricing and future pricing, information regarding future price reductions and the ranges for those reductions, and information regarding supply and demand, including information in relation to future supply and demand, and, in some instances, concluded, implemented and monitored price agreements (recitals 62, 715, 732 and 741 of the contested decision).

16 The Commission considered that the cartel participants’ conduct constituted a form of agreement and/or concerted practice which pursued a common objective, namely avoiding price competition and coordinating their future conduct with regard to the sale of electrolytic capacitors, thereby reducing uncertainty on the market (recitals 726 and 731 of the contested decision).

17 The Commission concluded that that conduct had a single anticompetitive aim (recital 743 of the contested decision).

The liability of Tokin and the applicant

18 The Commission held Tokin liable on account of its direct participation in the cartel from 29 January 2003 to 23 April 2012, except with regard to the CUP meetings (recitals 944 and 1022 of the contested decision, as well as Article 1(e) thereof).

19 In addition, the Commission held the applicant liable in its capacity as a parent company, holding the entirety of the capital of Tokin, for the period from 1 August 2009 to 23 April 2012, except with regard to the CUP meetings (recitals 945 and 1022 of the contested decision, as well as Article 1(e) thereof).

The fines imposed on the applicant

20 Article 2(f) and (h) of the contested decision imposes, first, a fine of EUR 5 036 000 on Tokin ‘jointly and severally’ with the applicant and, second, a fine of EUR 2 595 000 on the applicant.

The calculation of the amount of the fines

21 In order to calculate the amount of the fines, the Commission applied the methodology set out in the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2) (‘the 2006 Guidelines’) (recital 980 of the contested decision).

22 In the first place, in order to determine the basic amount of the fines imposed on the applicant, the Commission took into account the value of sales during the last full business year of participation in the infringement, in accordance with point 13 of the 2006 Guidelines (recital 989 of the contested decision).

23 The Commission calculated the value of sales using sales of aluminium electrolytic capacitors and tantalum electrolytic capacitors invoiced to customers established in the EEA as a basis (recital 990 of the contested decision).

24 In addition, the Commission calculated the relevant value of sales separately for the two categories of products, namely aluminium electrolytic capacitors and tantalum electrolytic capacitors, and applied

separate duration multipliers to each (recital 991 of the contested decision).

25 As regards the applicant, the Commission applied a duration multiplier of 2.72, corresponding to the period from 1 August 2009 to 23 April 2012 (recital 1007, Table 1, of the contested decision).

26 The Commission set the proportion of the value of sales to be taken into account in order to reflect the gravity of the infringement at 16%. In that regard, it considered that horizontal price coordination 'arrangements' were, by their very nature, among the most serious infringements of Article 101 TFEU and Article 53 of the EEA Agreement and that the cartel covered the whole EEA (recitals 1001 to 1003 of the contested decision).

27 The Commission applied an additional amount of 16% under point 25 of the 2006 Guidelines in order to ensure that the fine imposed would have a sufficiently deterrent effect (recital 1009 of the contested decision).

28 The Commission therefore set the basic amount of the fine to be imposed on Tokin jointly and severally with the applicant at EUR 6 108 000 (recital 1010, Table 2, of the contested decision).

29 In the second place, as regards the adjustments to the basic amount of the fines, first, the Commission granted Tokin and the applicant, on account of mitigating circumstances, a 3% reduction in the basic amount of the fine, on the ground that their participation in the CUP meetings was not established and there was no proof that they had been aware of those meetings (recital 1022 of the contested decision).

30 Second, the Commission found that, at the time the infringement at issue was committed, the applicant had already been held liable for anticompetitive conduct amounting to price coordination in respect of 'major PC/server [original equipment manufacturers (OEMs)]' during the period from 1 July 1998 to 15 June 2002. That first infringement had been established by Commission Decision C(2011) 180/09 final of 19 May 2010 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case COMP/38.511 – DRAMs) ('the DRAMs decision'). The Commission therefore concluded that, for the applicant, the basic amount of the fine should be increased by 50% on account of the aggravating circumstance of repeated infringement (recitals 1011 to 1013 of the contested decision).

31 In the third place, the Commission granted Tokin and the applicant, for their cooperation under the 2006 Leniency Notice, a 15% reduction in the amount of any fine which would otherwise have been imposed on them for the infringement (recitals 1104 and 1105 of the contested decision).

32 Accordingly, the Commission set the total amount of the fines to be imposed on Tokin and the applicant at EUR 16 445 000 (recital 1139, Table 3, of the contested decision).

The operative part of the contested decision

33 The contested decision provides as follows with regard to Tokin and the applicant:

'Article 1

The following undertakings infringed Article 101 [TFEU] and Article 53 of the EEA Agreement by participating, during the periods indicated, in a single and continuous infringement in the electrolytic capacitors sector covering the whole EEA, which consisted of agreements and/or concerted practices that had as their object the coordination of pricing behaviour:

…

(e) [Tokin] from 29 January 2003 to 23 April 2012, [the applicant] from 1 August 2009 to 23 April 2012, but whose liability does not extend to the CUP meetings;

…

Article 2

For the infringement referred to in Article 1, the following fines are imposed:

…

(f) [Tokin] and [the applicant], jointly and severally: EUR 5 036 000;

(g) [Tokin]: EUR 8 814 000;

(h) [the applicant]: EUR 2 595 000;

…’

Procedure and forms of order sought

34 By application lodged at the Court Registry on 31 May 2018, the applicant brought the present action.

35 On 26 September 2018, the Commission’s defence was lodged at the Court Registry.

36 The reply and the rejoinder were lodged at the Court Registry on 22 November 2018 and 29 January 2019 respectively.

37 On a proposal from the Second Chamber, the General Court decided, pursuant to Article 28 of its Rules of Procedure, to assign the case to a Chamber sitting in extended composition.

38 Following a change in the composition of the Chambers of the General Court, pursuant to Article 27(5) of the Rules of Procedure, the Judge-Rapporteur was assigned to the Ninth Chamber (Extended Composition), to which the present case was consequently allocated.

39 On a proposal from the Judge-Rapporteur, the General Court (Ninth Chamber, Extended Composition) decided to open the oral part of the procedure and, by way of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, put written questions to the parties. The parties replied to those questions within the prescribed periods and presented oral argument and answered the questions put to them by the Court at the hearing on 12 October 2020.

40 Following the death of Judge Berke on 1 August 2021, the three Judges whose signatures are affixed to the present judgment continued the deliberations, in accordance with Article 22 and Article 24(1) of the Rules of Procedure.

41 The applicant claims that the Court should:

– primarily, annul Article 1(e) of the contested decision, in so far as it finds that the applicant personally participated in the infringement referred to in the contested decision;

– in the alternative, annul Article 2(h) of the contested decision, in so far as it imposes on the applicant alone a fine corresponding to the increase for repeated infringement;

– in the further alternative, reduce the amount of the fines imposed on the applicant by Article 2(f) and (h) of the contested decision;

– order the Commission to pay the costs.

42 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

43 The applicant puts forward three pleas in law in support of both its primary head of claim, seeking partial annulment of the contested decision, and its alternative head of claim, seeking annulment of the fines imposed on it or a reduction in the amount of those fines. Those pleas allege various errors and infringements on the Commission's part relating, as regards the first plea, to the increase in the amount of the fine for repeated infringement, as regards the second plea, to the classification of the applicant's liability for the infringement, and, as regards the third plea, to the calculation of the amount of the fines imposed on the applicant.

The head of claim seeking annulment of the contested decision

44 As a preliminary point, it should be borne in mind that the system of judicial review of Commission decisions relating to proceedings under Articles 101 and 102 TFEU consists in a review of the legality of the acts of the institutions for which provision is made in Article 263 TFEU, which may be supplemented, pursuant to Article 261 TFEU and at the request of applicants, by the General Court's exercise of unlimited jurisdiction with regard to the penalties imposed in that regard by the Commission (see judgment of 26 September 2018, *Philips and Philips France* v *Commission*, C−98/17 P, not published, EU:C:2018:774, paragraph 49 and the case-law cited).

45 As regards the judicial review provided for in Article 263 TFEU, it should be borne in mind that it extends to all the elements of Commission decisions relating to proceedings under Articles 101 and 102 TFEU, which are subject to in-depth review by the EU judicature, in law and in fact, in the light of the pleas raised by the applicant at first instance and taking into account all the relevant elements submitted by the latter. However, in the context of that review, the Courts of the European Union may in no circumstances substitute their own reasoning for that of the author of the contested act (see judgment of 25 July 2018, *Orange Polska* v *Commission*, C−123/16 P, EU:C:2018:590, paragraph 105 and the case-law cited).

46 It is in the light of those considerations that it is appropriate to examine, first, the second plea, then the first plea and, lastly, the third plea in so far as they seek partial annulment of the contested decision.

The second plea in law, relating to the classification of the applicant's liability for the infringement

47 By the second plea, the applicant disputes the fact that, by Article 1(e) of the contested decision, the Commission held the applicant personally liable for participation in the infringement. According to the applicant, that finding, first, is vitiated by an error of fact and of law, second, stems from contradictory reasoning, and, third, infringes the applicant's rights of defence.

48 The Commission disputes those arguments.

49 As a preliminary point, it should be borne in mind, in the first place, that, according to settled case-law, EU competition law, in particular Article 101 TFEU, refers to the activities of undertakings and the concept of 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see judgments of 10 September 2009, *Akzo Nobel and Others* v *Commission*, C−97/08 P, EU:C:2009:536, paragraph 54 and the case-law cited, and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C−286/13 P, EU:C:2015:184, paragraph 140 and the case-law cited).

50 On that point, the Court has stated, first, that the concept of an undertaking, in that context, must be understood as designating an economic unit even if in law that economic unit consists of several natural or

legal persons, and, second, that when such an economic entity infringes the competition rules, it is for that entity, consistently with the principle of personal liability, to answer for that infringement (see judgment of 26 October 2017, *Global Steel Wire and Others* v *Commission*, C−457/16 P and C−459/16 P to C−461/16 P, not published, EU:C:2017:819, paragraph 82 and the case-law cited).

51 In the second place, the infringement of EU competition law must be imputed unequivocally to a legal person on whom fines may be imposed and to whom the statement of objections must be addressed (see judgments of 5 March 2015, *Commission and Others* v *Versalis and Others*, C−93/13 P and C−123/13 P, EU:C:2015:150, paragraph 89 and the case-law cited, and of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C−516/15 P, EU:C:2017:314, paragraph 50 and the case-law cited).

52 In that regard, neither Article 23(2)(a) of Regulation No 1/2003 nor the case-law lays down which legal or natural person the Commission is obliged to hold responsible for the infringement or to punish by the imposition of a fine (see judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C−516/15 P, EU:C:2017:314, paragraph 51 and the case-law cited).

53 By contrast, it is settled case-law that the unlawful conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities. In such a situation, since the parent company and its subsidiary form a single economic unit and thus form a single undertaking for the purposes of Article 101 TFEU, the Commission may address a decision imposing fines to the parent company without being required to establish the personal involvement of the latter in the infringement (see judgment of 26 October 2017, *Global Steel Wire and Others* v *Commission*, C−457/16 P and C−459/16 P to C−461/16 P, not published, EU:C:2017:819, paragraph 83 and the case-law cited; see also, to that effect, judgment of 10 September 2009, *Akzo Nobel and Others* v *Commission*, C−97/08 P, EU:C:2009:536, paragraphs 58 and 59 and the case-law cited).

54 In this connection, in the specific case where a parent company holds all or almost all of the capital in a subsidiary which has infringed the EU competition rules, there is a rebuttable presumption that that parent company actually exercises a decisive influence over its subsidiary (see judgments of 10 September 2009, *Akzo Nobel and Others* v *Commission*, C−97/08 P, EU:C:2009:536, paragraph 60 and the case-law cited, and of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C−516/15 P, EU:C:2017:314, paragraph 54 and the case-law cited).

55 Such a presumption implies, unless it is rebutted, that the actual exercise of decisive influence by the parent company over its subsidiary is established and gives grounds for the Commission to hold the former responsible for the conduct of the latter, without having to produce any further evidence (see judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C−516/15 P, EU:C:2017:314, paragraph 55 and the case-law cited).

56 In the third place, it must be noted that, according to well-established case-law, the parent company to which the unlawful conduct of its subsidiary is attributed is held individually liable for an infringement of the EU competition rules which it is itself deemed to have infringed, because of the decisive influence which it exercised over the subsidiary and by which it was able to determine the subsidiary's conduct on the market (see judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C−516/15 P, EU:C:2017:314, paragraph 56 and the case-law cited).

57 As has been observed in paragraph 50 above, EU competition law is based on the principle of the personal responsibility of the economic unit which has committed the infringement. Thus, if the parent company is part of that economic unit, it is regarded as personally jointly and severally liable with the other legal persons making up that unit for the infringement committed (see judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C−516/15 P, EU:C:2017:314, paragraph 57 and the case-law cited).

58 In the present case, it should be noted at the outset that the applicant does not dispute the contested decision in so far as that decision held that the applicant was liable as the parent company of Tokin and in so far as the applicant and its subsidiary formed a single economic unit and thus formed a single undertaking for the purposes of Article 101 TFEU during the infringement period. Consequently, the line of argument put forward in support of the present plea cannot overturn the resulting rebuttable presumption that the applicant did in fact exercise decisive influence over its subsidiary during that period.

59 As is apparent from paragraph 47 above, the applicant's line of argument seeks only to dispute the fact that, by Article 1(e) of the contested decision, the Commission held the applicant personally liable for participation in the infringement.

60 As the Commission contends, that line of argument is based on a misunderstanding, first, of the case-law referred to in paragraphs 49 to 57 above and, second, of the wording of Article 1(e) of the contested decision.

61 It is apparent from the case-law referred to in, inter alia, paragraphs 50, 53, and 56 above that, even if, from a legal point of view, an economic unit which has committed an infringement consists of various legal persons, when such an economic unit infringes the competition rules, it falls, according to the principle of personal liability, to that entity to answer for that infringement.

62 In the present case, it is apparent from the contested decision that, first, the Commission found that Tokin had participated directly in the cartel from 29 January 2003 to 23 April 2012. Second, the Commission found that the applicant, in so far as it held all of the capital of Tokin during the period from 1 August 2009 to 23 April 2012, was presumed to exercise decisive influence over it. Thus, the Commission considered that those two companies constituted, during the latter infringement period, one and the same undertaking for the purposes of EU competition law (see recitals 944 and 945 of the contested decision).

63 It follows that the Commission imputed liability for the infringement to the applicant in its capacity as a parent company holding all of the capital of its subsidiary, namely Tokin, so that those two companies formed a single undertaking for the purposes of Article 101 TFEU, which is not disputed by the applicant. Accordingly, it is on that basis that Article 1(e) of the contested decision provides that the applicant infringed Article 101 TFEU and Article 53 of the EEA Agreement by participating, from 1 August 2009 to 23 April 2012, in a single and continuous infringement in the electrolytic capacitors sector covering the whole EEA (see paragraph 33 above).

64 Consequently, the applicant's arguments alleging an error of law and of fact and a contradiction in the statement of reasons must be rejected. Those arguments are based on the erroneous assumption that the Commission, in the contested decision, also held the applicant liable for direct participation in the cartel, whereas the contested decision holds the applicant liable only in its capacity as Tokin's parent company.

65 Similarly, the applicant's argument alleging an infringement of the rights of the defence, inasmuch as the statement of objections does not mention the applicant's personal participation in the infringement, is based on a misunderstanding of the contested decision.

66 In that regard, it should be borne in mind that observance of the rights of the defence requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the FEU Treaty (see judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 66 and the case-law cited).

67 In the present case, contrary to the applicant's assertions, the Commission did not depart in the contested decision from its preliminary conclusion as set out in the statement of objections. It is apparent from paragraphs 311 to 313 of the statement of objections referred to in paragraph 7 above that the Commission

concluded, as a preliminary point, that, since the applicant held all of the capital of Tokin during the period from 1 August 2009 to 23 April 2012, it was presumed to exercise decisive influence over Tokin and that, consequently, the Commission intended to hold the applicant liable for the conduct of its subsidiary during that period. It is precisely on the basis of those factors that, in the contested decision, the Commission imputed liability for the infringement to the applicant (see paragraph 63 above).

68 Furthermore, it should be noted that the case-law relied on by the applicant, in particular the judgments of 3 September 2009, *Papierfabrik August Koehler and Others* v *Commission* (C−322/07 P, C−327/07 P and C−338/07 P, EU:C:2009:500), and of 26 April 2007, *Bolloré and Others* v *Commission* (T−109/02, T−118/02, T−122/02, T−125/02, T−126/02, T−128/02, T−129/02, T−132/02 and T−136/02, EU:T:2007:115), cannot be applied to the present case. In the cases which gave rise to those judgments, the Commission had imputed the infringement to the applicants/appellants not only because of their liability as parent companies, but also because of their personal and direct involvement in the cartel's activities. As is clear from the foregoing, that is not the case here.

69 It follows that the second plea in law must be rejected.

The first plea in law, relating to the increase in the amount of the fine for repeated infringement

70 In connection with the first plea, the applicant maintains that Article 2(h) of the contested decision, in so far as it imposes on the applicant an increase in the amount of the fine for repeated infringement, is vitiated by errors of law and assessment, as well as a failure to state reasons, and infringes the principle of proportionality. That plea consists, in essence, of three parts.

71 By the first part of the present plea, the applicant maintains that, first, the contested decision is vitiated by a failure to state reasons when it imposes on the applicant an increase in the amount of the fine for repeated infringement and, second, that increase in the amount of the fine for repeated infringement is at odds with the derivative nature of the applicant's liability, since, according to the case-law, the liability of a parent company cannot exceed that of its subsidiary. Thus, if the subsidiary is not a repeat offender, no such increase for repeated infringement can be imposed on either the subsidiary or the parent company, whose liability is derived from that of its subsidiary. Moreover, that increase is contrary to the Commission's practice under the 2006 Guidelines. Nor can the fact that Tokin was no longer a subsidiary of the applicant at the time of the contested decision justify the increase in the amount of the fine for repeated infringement.

72 By the second part of the present plea, the applicant claims, in essence, that, in so far as the increase in the amount of the fine for repeated infringement covered the entirety of the infringement period from 1 August 2009 to 23 April 2012 and, consequently, covered a period prior to the DRAMs decision, that increase is vitiated by an error of law inasmuch as it is contrary to the deterrent purpose of the concept of repeated infringement. In the present case, the applicant did not have the opportunity to change its conduct before the DRAMs decision was delivered. Moreover, it did not show a tendency to infringe competition rules and, on the contrary, applied to the Commission for leniency.

73 By the third part of the present plea, the applicant maintains that, in so far as the increase in the amount of the fine for repeated infringement covered a period prior to the DRAMs decision, that increase infringed the principle of proportionality. The applicant was 'involved' in the infringement at issue only for a short period of two years and nine months and was held liable for the infringement solely because of the acquisition of a subsidiary, whereas that subsidiary was involved in a cartel which had existed for many years before that acquisition. Moreover, the applicant has already been penalised for the infringement at issue, since it is jointly and severally liable with its subsidiary for the fine imposed on them. Furthermore, since the DRAMs decision was adopted only nine months after Tokin became a subsidiary of the applicant, the applicant was not in a position to prevent its subsidiary from participating in the cartel.

74 The Commission disputes those arguments.

75 As a preliminary point, it should be noted that the concept of repeated infringement, as understood in a number of national legal orders, implies that a person has committed new infringements after being punished for similar infringements (see judgment of 12 December 2014, *Eni* v *Commission*, T−558/08, EU:T:2014:1080, paragraph 275 and the case-law cited).

76 In the context of infringements of EU competition law, the basic amount of the fine may be increased where the Commission finds that there are aggravating circumstances. One of the aggravating circumstances is repeated infringement, defined in the first indent of point 28 of the 2006 Guidelines as continuation or repetition of the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking in question infringed Article 101 TFEU or Article 102 TFEU. In such a case, the basic amount of the fine may be increased by up to 100% for each such infringement established.

77 The purpose of taking repeated infringement into account is to induce undertakings which have demonstrated a tendency towards infringing the competition rules to change their conduct. The Commission may therefore, in each individual case, take into consideration the indicia which confirm such a tendency, including, for example, the time that has elapsed between the infringements in question (see judgment of 7 June 2011, *Arkema France and Others* v *Commission*, T−217/06, EU:T:2011:251, paragraph 294 and the case-law cited).

78 In the present case, as is apparent from Article 2(h) of the contested decision, the Commission imposed on the applicant an increase in the amount of the fine for repeated infringement. In that regard, it is apparent from recitals 1011 to 1013 of the contested decision that the Commission found that, at the time when the infringement at issue was committed, the applicant had already been held liable for anticompetitive conduct in the DRAMs decision. Consequently, the Commission found that, for the applicant, the basic amount of the fine should be increased by 50% on account of repeated infringement (see paragraph 30 above).

79 The applicant's arguments must be examined in the light of those considerations.

– *The first part of the first plea, alleging an error of law, in that the increase in the amount of the fine for repeated infringement is at odds with the derivative nature of the applicant's liability*

80 The applicant claims that the increase in the amount of the fine for repeated infringement is at odds with the derivative nature of its liability as Tokin's parent company.

81 In that regard, it should be borne in mind that the liability of the parent company is purely derivative where it is incurred solely by reason of its subsidiary's direct participation in the infringement. In that situation, that liability arises from the unlawful conduct of the subsidiary, which is attributed to the parent company in view of the economic unit formed by those companies. Consequently, the parent company's liability necessarily depends on the facts constituting the infringement committed by its subsidiary and to which its liability is inextricably linked (judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C−516/15 P, EU:C:2017:314, paragraph 61).

82 It is for that reason that the Court has clarified that, in a situation where the liability of a parent company is purely derivative of that of its subsidiary and in which no other factor individually reflects the conduct for which the parent company is held liable, the liability of that parent company cannot exceed that of its subsidiary (see judgment of 19 January 2017, *Commission* v *Total and Elf Aquitaine*, C−351/15 P, EU:C:2017:27, paragraph 44 and the case-law cited).

83 For the same reasons, the Court has specified that, in a situation where no factor individually reflects the conduct for which the parent company is held liable, the reduction in the amount of the fine imposed on the subsidiary jointly and severally with its parent company must, in principle, where the necessary procedural requirements are satisfied, be extended to the parent company (see judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C−516/15 P, EU:C:2017:314, paragraph 62 and the case-law cited).

84 However, it also follows from that case-law that factors specific to the parent company may justify its liability being assessed differently to that of the subsidiary, even if the liability of the former is based exclusively on the unlawful conduct of the latter (see, to that effect, judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C−516/15 P, EU:C:2017:314, paragraph 74).

85 In this respect, in a case involving the liability of the parent company of a group of companies, some of which had participated directly in cartels, the Court held that the fact that penalties could no longer be imposed on certain companies because the limitation period had expired did not preclude another company, which was considered personally liable and jointly and severally liable with those companies for the same anticompetitive behaviour, and in respect of which the limitation period had not expired, from having proceedings instituted against it (judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C−516/15 P, EU:C:2017:314, paragraphs 71, 75 and 76).

86 As regards, more specifically, the increase in the amount of the fine for repeated infringement, the Court has already held that, although the unity of the conduct of an undertaking on the market justifies, in the case of an infringement of the competition rules, the different companies that formed part of the undertaking throughout the infringement period being, in principle, all held jointly and severally liable for payment of the same amount of the fine, an exception must be made where there are aggravating or mitigating circumstances and, more generally, circumstances that justify a variation in the basic amount of the fine which apply in respect of only some of those companies and not others. The Court thus inferred that an entity in respect of which the aggravating circumstance of repeated infringement has not been found cannot be held jointly and severally liable, with another entity in respect of which that circumstance has been found, for the part of the fine corresponding to the increase for repeated infringement (see, to that effect, judgment of 23 January 2014, *Evonik Degussa and AlzChem* v *Commission*, T−391/09, not published, EU:T:2014:22, paragraph 271).

87 The Court has also held that circumstances specific to the situation of the parent company or the subsidiary could lead to different amounts, such as where the aggravating circumstance of repeated infringement is taken into account in respect of a parent company and not its subsidiary (see, to that effect, judgment of 29 February 2016, *UTi Worldwide and Others* v *Commission*, T−264/12, not published, EU:T:2016:112, paragraph 332).

88 In the present case, it should be noted that, first, the Commission held the applicant liable solely as the parent company for the infringement of competition law committed by its subsidiary, with which it formed a single undertaking for the purposes of Article 101 TFEU (see paragraph 63 above). Second, in Article 2(h) of the contested decision, the Commission applied an increase for repeated infringement to the applicant alone, on the ground that, by the DRAMs decision, it had already been held liable for similar anticompetitive conduct (see paragraphs 30 and 78 above).

89 It follows that the aggravating circumstance found by the Commission in respect of repeated infringement corresponds to a circumstance specific to the applicant's situation which does not apply to its subsidiary. It was therefore justified for the Commission to assess the applicant's liability and that of the subsidiary differently, since that assessment could lead to the amount of the fine differing from that imposed on the subsidiary.

90 It is apparent from the case-law referred to in paragraphs 83 to 87 above that repeated infringement may constitute a factor that individually characterises the conduct of a parent company and justifies the extent of its liability exceeding that of its subsidiary, from which its liability is wholly derived (see, to that effect and by analogy, judgment of 13 December 2018, *Deutsche Telekom* v *Commission*, T−827/14, EU:T:2018:930, paragraph 506).

91 Accordingly, it must be concluded that the increase in the amount of the fine for repeated infringement is not at odds with the derivative nature of the applicant's liability.

92 That conclusion is not called into question by the applicant's other arguments.

93 First, it is necessary to reject the applicant's argument that the fine at issue is contrary to the Commission's practice under the 2006 Guidelines, since the applicant does not put forward any specific argument capable of substantiating such an assertion. In any event, it is settled case-law that the Commission's practice in previous decisions does not serve as a legal framework for fines imposed in competition matters, since the Commission enjoys a wide discretion in the area of setting fines and is not bound by assessments which it has made in the past (see judgments of 19 March 2009, *Archer Daniels Midland* v *Commission*, C−510/06 P, EU:C:2009:166, paragraph 82 and the case-law cited, and of 28 June 2016, *Telefónica* v *Commission*, T−216/13, EU:T:2016:369, paragraph 264 and the case-law cited).

94 Second, it must be observed, as the Commission contends, that the applicant's argument that Tokin was no longer a subsidiary of the applicant at the time of the contested decision and that that fact cannot justify the increase in the amount of the fine for repeated infringement is irrelevant. That fact does not form part of the statement of reasons for the contested decision, in particular as regards the increase in the amount of the fine for repeated infringement.

95 Third, it must be noted that the applicant does not put forward any detailed argument in support of an alleged failure to state reasons. In any event, the reasons why the Commission found that, for the applicant, the basic amount of the fine should be increased by 50% on account of repeated infringement are clearly set out in recitals 1011 to 1013 of the contested decision (see paragraph 30 above).

96 It follows that the first part of the first plea must be rejected.

– *The second part of the first plea, alleging an error of law inasmuch as the increase in the amount of the fine for repeated infringement, which covers a period prior to the DRAMs decision, is contrary to the deterrent purpose of the concept of repeated infringement*

97 A number of preliminary points must be made with regard to the claim that the increase in the amount of the fine for repeated infringement 'covers' a period prior to the DRAMs decision.

98 Thus, it should be noted that, first of all, the Commission held the applicant liable in its capacity as Tokin's parent company for the period from 1 August 2009 to 23 April 2012, except with regard to the CUP meetings (see paragraph 19 above). Consequently, in order to calculate the basic amount of the fine to be imposed on Tokin jointly and severally with the applicant, the Commission set the infringement duration multiplier at 2.72, corresponding to that infringement period (see paragraph 25 above).

99 Next, the Commission found that the aggravating circumstance of repeated infringement applied in relation to the applicant on the ground that it had been held liable by the DRAMs decision, dated 19 May 2010, which concerned an infringement committed between 1 July 1998 and 15 June 2002, and subsequently decided that the basic amount of the fine to be imposed on the applicant should be increased by 50% on account of repeated infringement (see paragraph 30 above).

100 Lastly, in order to calculate the increase for repeated infringement, the Commission applied that percentage of 50% to the basic amount of the fine, in accordance with point 28 of the 2006 Guidelines. In that regard, the Commission found that repeated infringement was among the factors to be taken into consideration in the analysis of the gravity of the infringement at issue and that, as such, repeated infringement was not associated with the duration of the infringement. Consequently, the Commission found that the increase in the amount of the fine for repeated infringement should not be calculated solely on the basis of the period during which that aggravating circumstance continued, but that the percentage increase resulting from repeated infringement had to be applied to the entire period of the applicant's liability for the infringement (see recitals 1013 and 1021 of the contested decision).

101 It follows from the foregoing that the applicant's first infringement, committed prior to the infringement in the present case, was penalised when the latter infringement was ongoing. In addition, in so far as the percentage increase in the amount of the fine for repeated infringement was applied to the basic amount of the fine, that increase takes account of the infringement period used to calculate that basic amount. It

follows that repeated infringement, as an increase in the basic amount of the fine, covers the infringement period imputed to the applicant in its entirety, which includes a period of almost nine months preceding the adoption of the DRAMs decision, which took place on 19 May 2010.

102 However, contrary to the applicant's assertions, the increase in the amount of the fine for repeated infringement is not, in the circumstances of the present case, contrary to the logic underlying the concept of repeated infringement.

103 In that regard, it should be borne in mind that the Commission has a particularly wide discretion as regards the choice of factors to be taken into account for the purpose of determining the amount of fines, such as, inter alia, the particular circumstances of the case, its context and the dissuasive effect of fines, without the need to refer to a binding or exhaustive list of the criteria which must be taken into account (see judgment of 8 February 2007, *Groupe Danone* v *Commission*, C−3/06 P, EU:C:2007:88, paragraph 37 and the case-law cited).

104 The finding and the appraisal of the specific characteristics of a repeated infringement come within the Commission's discretion (see, to that effect and by analogy, judgment of 8 February 2007, *Groupe Danone* v *Commission*, C−3/06 P, EU:C:2007:88, paragraph 38). As has been recalled in paragraph 77 above, the purpose of taking repeated infringement into account is to induce undertakings which have demonstrated a tendency towards infringing the competition rules to change their conduct. The Commission may therefore, in each individual case, take into consideration the indicia which confirm such a tendency, including, for example, the time that has elapsed between the infringements in question.

105 As regards the maximum period of time that must have elapsed for there to be a finding of repeated infringement on the part of an undertaking, it has already been held that, where a period of less than 10 years has elapsed between the findings of two infringements, this shows a tendency on the part of an undertaking not to draw the appropriate conclusions from a finding that it has infringed the competition rules (see, to that effect, judgment of 8 February 2007, *Groupe Danone* v *Commission*, C−3/06 P, EU:C:2007:88, paragraph 40).

106 As regards, moreover, the minimum period of time that must have elapsed for there to be a finding of repeated infringement, the Court has considered that the case-law referred to in paragraph 105 above applies a fortiori in a situation where the decision finding the first infringement is contemporaneous with the second infringement. Thus, in the cases which gave rise to the judgments of 8 July 2008, *BPB* v *Commission* (T−53/03, EU:T:2008:254), and of 8 July 2008, *Lafarge* v *Commission* (T−54/03, not published, EU:T:2008:255), the Court held that the history of the infringements found against the applicants showed a tendency on their part not to draw the appropriate conclusions from a finding that they had infringed the competition rules, given that, having already been the subject of Commission measures imposed previously by the decisions finding the first infringement, the applicants had continued for more than four years to participate actively in the cartel at issue after those decisions were notified to them (judgments of 8 July 2008, *BPB* v *Commission*, T−53/03, EU:T:2008:254, paragraph 385, and of 8 July 2008, *Lafarge* v *Commission*, T−54/03, not published, EU:T:2008:255, paragraph 727).

107 In the present case, it is true that the applicant's first infringement was penalised after the beginning of the infringement at issue in the present case. However, it must also be noted that the applicant continued, during the period from 19 May 2010 to 23 April 2012, to participate in the cartel after it had been notified of the decision finding the first infringement.

108 Accordingly, it must be observed that the Commission did not make an error of assessment in concluding that the applicant's continued unlawful conduct after a first penalty had been imposed on it showed a tendency on its part not to draw the appropriate conclusions from a finding that it had infringed the competition rules. Having already been the subject of Commission measures imposed previously by the DRAMs decision, the applicant continued to participate in the cartel at issue for almost two years after that decision was notified to it. That conclusion is not contradicted by the mere fact that the applicant, together

with Tokin, submitted an application to the Commission for a reduction in the amount of the fine under the 2006 Leniency Notice, in so far as that fact does not obviate the fact that the applicant, after a first penalty was imposed on it, became involved in a second infringement.

109 Furthermore, that conclusion cannot be invalidated by the fact that the contested decision held the applicant liable solely as a parent company for the participation of its subsidiary in the cartel, as is apparent from paragraph 91 above. The objective of suppressing conduct that infringes the competition rules and preventing its reoccurrence by means of deterrent penalties would be jeopardised if an undertaking concerned by a first infringement were able, by altering its legal structure through the acquisition of a subsidiary against which proceedings cannot be brought on the basis of that first infringement, but which is involved in the commission of the new infringement, to make impossible or particularly difficult, and therefore avoid, a penalty for repeated infringement (see, to that effect, judgment of 5 March 2015, *Commission and Others* v *Versalis and Others*, C−93/13 P and C−123/13 P, EU:C:2015:150, paragraph 92).

110 Furthermore, the judgment of 11 March 1999, *Thyssen Stahl* v *Commission* (T−141/94, EU:T:1999:48), relied on by the applicant, in no way supports its position. In that judgment, the Court held that the Commission's decision was vitiated by an error of law in so far as the greater part of the infringement period taken into account against the applicant pre-dated the decision that had penalised it for similar infringements (judgment of 11 March 1999, *Thyssen Stahl* v *Commission*, T−141/94, EU:T:1999:48, paragraphs 617 and 618).

111 Unlike the case that gave rise to the judgment of 11 March 1999, *Thyssen Stahl* v *Commission* (T−141/94, EU:T:1999:48), in the present case, in so far as the applicant participated in the infringement at issue between 1 August 2009 and 23 April 2012 and the DRAMs decision was adopted on 19 May 2010, it must be stated that the greater part of the infringement at issue took place after the adoption of that decision, the applicant having continued to participate in the infringement for almost two years after that decision was notified to it (see paragraphs 107 and 108 above).

112 Accordingly, the Commission did not err in law in finding that the fact that the applicant had already been found to have committed an infringement and that, despite that finding and the penalty imposed, it had continued to participate for almost two years in another similar infringement of the same provision of the FEU Treaty constituted a repeat infringement.

113 It follows that the second part of the first plea must be rejected.

– *The third part of the first plea, alleging an infringement of the principle of proportionality, on the ground that the increase in the amount of the fine for repeated infringement covered a period prior to the DRAMs decision*

114 As regards the calculation of the increase for repeated infringement, it should be noted that the Commission's application of the increase for repeated infringement to the basic amount of the fine imposed on the applicant is consistent with the 2006 Guidelines. As is unequivocally apparent from points 28 and 29 of those guidelines, both aggravating circumstances, such as repeated infringement, and mitigating circumstances are circumstances justifying adjustment of the basic amount of the fine, namely an increase or a reduction in that amount. Repeated infringement therefore constitutes an aggravating circumstance justifying the increase in the basic amount of the fine, which is reflected in a percentage increase in that basic amount.

115 As regards the proportionality of that increase, it should be borne in mind that, according to settled case-law, when fixing the amount of each fine, the Commission has a discretion and cannot be considered obliged to apply a precise mathematical formula for that purpose (see judgment of 13 September 2010, *Trioplast Wittenheim* v *Commission*, T−26/06, not published, EU:T:2010:387, paragraph 142 and the case-law cited).

116 In addition, repeated infringement justifies a significant increase in the basic amount of the fine. It is evidence that the sanction previously imposed was not sufficiently deterrent (see judgment of 8 July 2008, *BPB* v *Commission*, T−53/03, EU:T:2008:254, paragraph 398 and the case-law cited).

117 Moreover, it should be noted that the principle of proportionality requires that the time elapsed between the infringement in question and a previous breach of the competition rules be taken into account in assessing the undertaking's tendency to infringe those rules. For the purposes of judicial review of the Commission's measures in matters of competition law, the General Court and, where appropriate, the Court of Justice may therefore be called upon to scrutinise whether the Commission has complied with that principle when it increased, for repeated infringement, the fine imposed, and, in particular, whether such increase was imposed in the light of, among other things, the time elapsed between the infringement in question and the previous breach of the competition rules (judgment of 17 June 2010, *Lafarge* v *Commission*, C−413/08 P, EU:C:2010:346, paragraph 70).

118 In the present case, the applicant's line of argument seeking to show that the increase in the amount of the fine for repeated infringement was not proportionate is based, in the first place, on the fact that the applicant has already been penalised for the infringement at issue.

119 That argument must be rejected at the outset. As has been recalled in paragraphs 75 and 77 above, the increase in the amount of the fine for repeated infringement, first, implies that a person has committed new infringements after being punished for similar infringements and, second, is intended precisely to ensure the deterrent effect of the Commission's action. Consequently, the increase in the amount of the fine for repeated infringement is added to the amount of the fine imposed for the infringement.

120 The applicant's line of argument is based, in the second place, on the short period of time that elapsed between the time when the applicant became Tokin's parent company and the adoption of the DRAMs decision, that is to say nine months, so that the applicant was not in a position to prevent its subsidiary from participating in the cartel. Similarly, the applicant submits that it is liable for the cartel only by virtue of the acquisition of its subsidiary and that it participated in that infringement only for a short period, whereas its subsidiary had been involved in it for several years.

121 In that regard, it must be borne in mind that, since the applicant owned all the shares in Tokin from 1 August 2009 to 31 January 2013, it was presumed to exercise decisive influence over that subsidiary during that period, so that the applicant and its subsidiary formed a single undertaking for the purposes of Article 101 TFEU (see paragraph 62 above). In the present case, the applicant does not dispute the presumption that it actually exercised decisive influence over its subsidiary during the infringement period at issue (see paragraph 58 above). Thus, the applicant was in a position to prevent Tokin's continued participation in the cartel after the DRAMs decision.

122 In addition, as noted in paragraph 108 above, the applicant's continuation of the unlawful conduct at issue shows a tendency on its part not to draw the appropriate conclusions from a finding that it had infringed the competition rules, given that it had already been the subject of Commission measures imposed previously by the DRAMs decision and that it nevertheless continued to participate in the cartel at issue for almost two years after that decision was notified to it.

123 Moreover, as was recalled in paragraph 109 above, the objective of suppressing conduct that infringes the competition rules would be jeopardised if an undertaking concerned by a first infringement were able, by altering its legal structure through the acquisition of a subsidiary against which proceedings cannot be brought on the basis of that first infringement, but which is involved in the commission of the new infringement, to make impossible or particularly difficult, and therefore avoid, a penalty for repeated infringement.

124 Accordingly, since the Commission found, in particular, a tendency on the part of the applicant to infringe the competition rules and the increase for repeated infringement may result in an increase of up to 100% of the basic amount of the fine, in accordance with the first indent of point 28 of the 2006 Guidelines, it must

be concluded that the Commission did not infringe the principle of proportionality by setting the increase in the basic amount of the fine to be imposed on the applicant at 50%.

125 In the light of all of the foregoing, the third part of the first plea must be rejected and, accordingly, the first plea in law must be rejected in its entirety.

The third plea in law, relating to the calculation of the amount of the fines imposed on the applicant

126 In connection with the third plea, the applicant puts forward, in essence, two complaints. The first complaint relates to the failure to apply a 3% reduction to the fine imposed on the applicant for repeated infringement. The second complaint relates to the value of sales relevant to the calculation of the amount of the fine imposed on the applicant jointly and severally with Tokin.

127 As a preliminary point, as regards the calculation of the amount of the fines, it should be borne in mind that Article 23(3) of Regulation No 1/2003 provides that, in fixing the amount of the fine, regard is to be had both to the gravity and to the duration of the infringement.

128 The Commission enjoys a broad discretion as regards the method for calculating fines. That method, set out in the 2006 Guidelines, displays flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with Article 23 of Regulation No 1/2003 (see judgments of 5 December 2013, *Solvay Solexis* v *Commission*, C−449/11 P, not published, EU:C:2013:802, paragraph 100 and the case-law cited, and of 9 September 2015, *LG Electronics* v *Commission*, T−91/13, not published, EU:T:2015:609, paragraph 158 and the case-law cited).

129 In accordance with settled case-law, in adopting rules of conduct such as the 2006 Guidelines and announcing, by publishing them, that it will henceforth apply them to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules at the risk of being found, where appropriate, to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (see judgments of 21 September 2006, *JCB Service* v *Commission*, C−167/04 P, EU:C:2006:594, paragraph 208 and the case-law cited, and of 12 December 2012, *Ecka Granulate and non ferrum Metallpulver* v *Commission*, T−400/09, not published, EU:T:2012:675, paragraph 40 and the case-law cited).

– *The first complaint in the third plea, relating to the failure to apply a 3% reduction to the fine imposed on the applicant for repeated infringement*

130 In connection with the first complaint in the third plea, the applicant submits, in essence, that the Commission erred in refusing to apply a 3% reduction to the amount of the fine imposed on it for repeated infringement, when such a reduction was applied to the basic amount of the fine imposed on Tokin jointly and severally with the applicant. The failure to apply that reduction, first, is at odds with the derivative nature of the applicant's liability as the parent company, next, gave rise to an excessively high fine, corresponding to more than half of the amount of the fine imposed on the applicant jointly and severally with Tokin, and, lastly, is not sufficiently reasoned.

131 The Commission disputes those arguments.

132 In the present case, it should be noted that, first, the increase in the amount of the fine for repeated infringement by 50% of the basic amount of the fine imposed on Tokin jointly and severally with the applicant, decreased by the 15% reduction which the Commission granted them for their cooperation under the 2006 Leniency Notice, corresponds to an aggravating circumstance within the meaning of point 28 of the 2006 Guidelines (see paragraph 31 above).

133 Second, the 3% reduction in the basic amount of the fine imposed on Tokin jointly and severally with the applicant, given that their participation in the CUP meetings was not established and there was no proof

that they were aware of those meetings, corresponds to a mitigating circumstance under point 29 of the 2006 Guidelines (see paragraph 29 above).

134 As has been recalled in paragraph 114 above, both aggravating and mitigating circumstances are circumstances justifying adjustment of the basic amount of the fine, namely an increase or a reduction in that amount, respectively. Those adjustments cannot therefore apply to each other.

135 In the present case, repeated infringement, as an aggravating circumstance, therefore justifies the increase in the basic amount of the fine. Accordingly, the Commission was fully entitled to calculate the 50% increase in the amount of the fine for repeated infringement by applying it to the basic amount of the fine imposed on Tokin jointly and severally with the applicant, without taking into account any reductions in that basic amount on account of mitigating circumstances, in this case the 3% reduction on the ground that it had not been established that the applicant and its subsidiary had participated in the CUP meetings.

136 That conclusion is not invalidated by the applicant's argument based on the derivative nature of its liability as the parent company. As is apparent from paragraphs 86 and 87 above, repeated infringement is a factor which individually characterises the applicant's conduct and may justify a heavier penalty being imposed on the applicant than the penalty resulting from the fact that the infringement committed by its subsidiary has been imputed to it.

137 In addition, the applicant's claim that the amount of the fine imposed on it for repeated infringement is excessively high in so far as it corresponds to more than half of the basic amount of the fine imposed on it jointly and severally with Tokin also cannot be accepted. The applicant's argument is based on the incorrect assumption that the 3% reduction in the basic amount of the fine is applicable to the 50% increase in the basic amount of the fine (see paragraphs 134 and 135 above).

138 Moreover, the applicant does not put forward any specific argument in support of its complaint alleging a failure to fulfil the obligation to state reasons. In any event, the calculation of the fine imposed on the applicant alone, corresponding to the increase for repeated infringement, follows unequivocally from recitals 1011 to 1013 of the contested decision, read in conjunction with point 28 of the 2006 Guidelines, to which those recitals refer.

139 The first complaint in the third plea must therefore be rejected.

– *The second complaint in the third plea, relating to the value of sales relevant to the calculation of the amount of the fine imposed on the applicant jointly and severally with Tokin*

140 In connection with the second complaint in the third plea, the applicant submits, concurring with the arguments put forward in that regard by Tokin in Case T−343/18, *Tokin* v *Commission*, that the Commission should have applied, for the purpose of calculating the amount of the fine, the average value of sales rather than using the last full business year of the infringement at issue as the reference year for the value of sales. In response to a question put to it at the hearing, the applicant stated that, by the present complaint, it was seeking to benefit from any partial annulment of the contested decision or, at the very least, any reduction in the amount of the fine provided for in Article 2(f) of that decision that Tokin might be granted following the action against that decision in Case T−343/18, *Tokin* v *Commission*.

141 The Commission disputes those arguments.

142 In that regard, it must be borne in mind that the applicant was not held liable for the cartel at issue on the basis of its direct participation in the cartel's activities. It was held liable for the infringement solely as Tokin's parent company (see paragraph 63 above).

143 In a situation where the parent company's liability results exclusively from the direct participation of its subsidiary in the infringement and the two companies have brought parallel actions having the same object, the General Court may take account of the annulment of the finding that the subsidiary committed an

infringement for a certain period and reduce the amount of the fine imposed on the parent company jointly and severally with its subsidiary accordingly (see, to that effect, judgment of 22 January 2013, *Commission* v *Tomkins*, C−286/11 P, EU:C:2013:29, paragraph 49).

144 In the present case, it should be noted that both the applicant and Tokin have brought actions against the contested decision and those actions have, in part, the same object, namely, primarily, to annul the fine provided for in Article 2(f) of that decision so far as it concerns them, and, in the alternative, to reduce the amount of the fine which was jointly and severally imposed on them.

145 Accordingly, since the Commission held the applicant liable in its capacity as Tokin's parent company, the applicant should be allowed to benefit from any annulment of the contested decision or any reduction in the amount of the fine granted with regard to Tokin in the action brought in Case T−343/18, *Tokin* v *Commission*.

146 However, it should be pointed out that, by today's judgment in *Tokin* v *Commission* (T−343/18), the General Court dismissed the action, namely both Tokin's head of claim seeking annulment and its head of claim seeking a reduction in the amount of the fines imposed on it (judgment of today's date, *Tokin* v *Commission*, T−343/18, paragraphs 155 and 182).

147 Accordingly, the applicant's request to benefit from any partial annulment of the contested decision or any reduction that Tokin might be granted following the action brought against the contested decision in Case T−343/18, *Tokin* v *Commission*, cannot succeed and, therefore, the second complaint in the third plea must be rejected and, accordingly, the third plea in law must be rejected in its entirety.

The head of claim seeking a reduction in the amount of the fines imposed on the applicant

148 In the alternative, the applicant asks the Court to exercise its unlimited jurisdiction and to reduce the amount of the fines imposed on it, in essence, for the reasons put forward in the context of the first and third pleas in law. Thus, according to the applicant, the increase in the amount of the fine for repeated infringement is neither proportionate nor reasonable and should be reduced by at least 3% on account of its non-participation in the CUP meetings. Without that reduction, the increase in the amount of the fine for repeated infringement amounts to a value which exceeds 50%, that is to say half, of the amount of the fine imposed on Tokin jointly and severally with the applicant. Furthermore, the Commission should have used an average value of sales when calculating the amount of the fine, for the reasons given by Tokin in Case T−343/18, *Tokin* v *Commission*.

149 The Commission disputes those arguments.

150 As a preliminary point, it should be noted that unlimited jurisdiction empowers the EU judicature, in addition to merely reviewing the legality of the penalty, to substitute its own assessment in relation to the determination of the amount of that penalty for that of the Commission, the author of the act in which that amount was initially fixed. Consequently, the EU judicature may vary the contested act, even without annulling it, in order to cancel, reduce or increase the amount of the fine imposed, that jurisdiction being exercised by taking into account all the factual circumstances (see judgment of 25 July 2018, *Orange Polska* v *Commission*, C−123/16 P, EU:C:2018:590, paragraph 106 and the case-law cited).

151 In order to satisfy the requirements of Article 47 of the Charter of Fundamental Rights of the European Union when conducting a review in the exercise of its unlimited jurisdiction with regard to the fine, the EU judicature is bound, in the exercise of the powers conferred by Articles 261 and 263 TFEU, to examine all complaints based on issues of fact and law which seek to show that the amount of the fine is not commensurate with the gravity or the duration of the infringement (see judgment of 26 January 2017, *Villeroy & Boch* v *Commission*, C−625/13 P, EU:C:2017:52, paragraph 180 and the case-law cited).

152 It must however be noted that the exercise of powers of unlimited jurisdiction does not amount to a review of the Court's own motion and that proceedings before the Courts of the European Union are *inter partes*.

Thus, with the exception of pleas involving matters of public policy, which the Courts are required to raise of their own motion, such as a lack of reasoning in the contested decision, it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas (see judgment of 9 June 2016, *Repsol Lubricantes y Especialidades and Others* v *Commission*, C−617/13 P, EU:C:2016:416, paragraph 85 and the case-law cited).

153 In addition, it should be borne in mind that, when exercising its unlimited jurisdiction, the General Court is not bound by the 2006 Guidelines, which do not prejudge the assessment of the fine by the EU judicature. Indeed, although the Commission must observe the principle of the protection of legitimate expectations when it applies its self-imposed rules, such as the 2006 Guidelines, that principle cannot bind the Courts of the European Union in the same way, in so far as they do not propose to apply a specific method of setting fines in the exercise of their unlimited jurisdiction, but consider case by case the situations before them, taking account of all the matters of fact and of law relating to those situations (see judgment of 14 May 2014, *Donau Chemie* v *Commission*, T−406/09, EU:T:2014:254, paragraph 59 and the case-law cited).

154 Nevertheless, the case-law of the Court of Justice also makes clear that the exercise of unlimited jurisdiction with regard to the determination of fines cannot result in discrimination between undertakings which have participated in an agreement contrary to the competition rules of EU law. If the General Court intends, in the case of one of those undertakings, to depart specifically from the method of calculation followed by the Commission, which it has not called into question, it must give reasons for doing so in its judgment (see judgment of 14 May 2014, *Donau Chemie* v *Commission*, T−406/09, EU:T:2014:254, paragraph 60 and the case-law cited). The General Court may therefore reduce a fine to a level below that which results from the application of the 2006 Guidelines where the circumstances of the case before it justify such action. Nevertheless, the applicant must cite grounds which are relevant and capable of justifying such a reduction and substantiate those grounds with evidence (see judgment of 14 May 2014, *Donau Chemie* v *Commission*, T−406/09, EU:T:2014:254, paragraph 310 and the case-law cited).

155 It is in the light of those considerations that it is necessary to examine, in the present case, whether the circumstances relied on by the applicant may, even in the absence of an error of law or an error of assessment on the part of the Commission, justify the Court reducing the amount of the fines imposed on the applicant by the contested decision.

156 In the first place, since the action brought by Tokin against the contested decision has been dismissed, the applicant's request to benefit from any reduction that Tokin might be granted in Case T−343/18, *Tokin* v *Commission*, must be rejected. In any event, there is nothing to support the conclusion that the fine imposed on Tokin jointly and severally with the applicant is not commensurate with the gravity and duration of the applicant's infringement, since the applicant has not put forward any specific evidence in that regard.

157 In the second place, it is necessary to examine whether the 50% increase in the basic amount of the fine for repeated infringement is justified, in particular in the light of the principle of proportionality.

158 In that regard, the applicant's argument that the increase in the amount of the fine for repeated infringement amounts to a value exceeding half of the basic amount of the fine is irrelevant. That argument is based on the fact that the 3% reduction in the basic amount of the fine to be imposed on Tokin jointly and severally with the applicant on account of mitigating circumstances was not applied to the increase in that basic amount on account of repeated infringement. As is apparent from paragraphs 134 and 135 above, the mitigating circumstance justifying the 3% reduction in the basic amount of the fine and the repeated infringement justifying the 50% increase in that basic amount are two different adjustments to the basic amount of the fine and, therefore, are both applied to the basic amount.

159 Thus, contrary to what the applicant appears to claim, notwithstanding the failure to take into account the 3% reduction also applied to the basic amount, the increase in the amount of the fine for repeated infringement does not exceed 50% of that basic amount, decreased by the 15% reduction which the

Commission granted the applicant and its subsidiary for their cooperation under the 2006 Leniency Notice (see paragraphs 28, 31 and 33 above).

160 Moreover, as is apparent from paragraphs 118 to 124 above, the applicant has failed to demonstrate that the 50% increase in the basic amount of the fine for repeated infringement was not commensurate with the gravity of the infringement. In particular, it should be noted that, in the light of, first, the applicant's tendency to infringe the competition rules and, second, the need to ensure the deterrent effect of the fine imposed, a considerable increase in the basic amount of the fine was justified.

161 Consequently, the Court considers, first, in the exercise of its unlimited jurisdiction, that none of the arguments relied on by the applicant in the present case and no ground of public policy justifies it making use of that power to reduce the amount of the fines set by the Commission. Second, the Court considers, taking account of all the evidence put forward before it, that the fines applied by the Commission constitute, in the light of the duration and the gravity of the infringement in which the applicant participated as Tokin's parent company and in the light of the finding of repeated infringement, a penalty which makes it possible to penalise the applicant's anticompetitive conduct in a manner which is both proportionate and dissuasive.

162 The head of claim seeking a reduction in the amount of the fines imposed on the applicant must therefore be rejected and, consequently, the action must be dismissed in its entirety.

Costs

163 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

164 Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Ninth Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders Nec Corp. to bear its own costs and to pay the costs incurred by the European Commission.

Costeira Gratsias Kancheva

Delivered in open court in Luxembourg on 29 September 2021.

E. Coulon S. Papasavvas

Registrar President

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* Language of the case: English.

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1 This judgment is published in extract form.