Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

17 September 2015*

(Appeals — Competition — Agreements, decisions and concerted practices — Paraffin waxes market — Slack wax market — Infringement committed by a subsidiary wholly owned by the parent company — Presumption of decisive influence exercised by the parent company over its subsidiary — Liability of the parent company arising solely from the unlawful conduct of its subsidiary — Judgment reducing the fine imposed on the subsidiary — Effects on the legal situation of the parent company)

In Case C-597/13 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 22 November 2013,

Total SA, established in Courbevoie (France), represented by É. Morgan de Rivery and É. Lagathu, avocats,

appellant,

the other party to the proceedings being:

European Commission, represented by É. Gippini Fournier and P. Van Nuffel, acting as Agents,

defendant at first instance,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, A. Rosas, E. Juhász (Rapporteur), D. Šváby and A. Prechal, Judges,

Advocate General: N. Wahl,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 15 January 2015,

after hearing the Opinion of the Advocate General at the sitting on 26 March 2015,

gives the following

* Language of the case: French.

Judgment

1 By its appeal, Total SA ('Total') asks the Court to set aside the judgment of the General Court of the European Union in *Total* v *Commission* (T-548/08, EU:T:2013:434, 'the judgment under appeal') by which that court dismissed Total's application, primarily, for annulment in part of Commission Decision C(2008) 5476 final of 1 October 2008, relating to a proceeding under Article [81 EC] and Article 53 of the EEA Agreement (Case COMP/39.181 — Candle waxes) (summary published in OJ 2009 C 295, p. 17, 'the decision at issue'), and, in the alternative, for annulment or reduction of the fine imposed on Total.

Background to the case and the decision at issue

2 The judgment under appeal contains the following findings:

'1 By [the decision at issue], the [European] Commission … found that the applicant … and its subsidiary in which it holds almost 100% of the capital, Total France SA [("Total France")], had, with other undertakings, infringed Article 81(1) [EC] and Article 53(1) of the Agreement on the European Economic Area (EEA) [of 2 May 1992 (OJ 1994 L 1, p. 3)] by participating in a cartel concerning the EEA market for paraffin waxes and the German market for slack wax.

2 The addressees of the [decision at issue] are the following undertakings: …, as well as the applicant and its subsidiary ...

3 Paraffin waxes are manufactured in refineries from crude oil. They are used for the production of a variety of products such as candles, chemicals, tyres and automotive products as well as in the rubber, packaging, adhesive and chewing gum industries (recital 4 of the [decision at issue]).

4 Slack wax is the raw material required for the manufacture of paraffin waxes. It is produced in refineries as a by-product in the manufacture of base oils from crude oil. It is also sold to end-customers, to producers of particle boards for instance (recital 5 of the [decision at issue]).

5 The Commission began its investigation after [a company] informed it, by letter of 17 March 2005, of the existence of a cartel … (recital 72 of the [decision at issue]).

6 On 28 and 29 April 2005, the Commission carried out, pursuant to Article 20(4) 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), on-site inspections at the premises of … Total [France] (recital 75 of the [decision at issue]).

7 As far as Total France is concerned, the investigations were carried out on the basis of the Commission's decision of 18 April 2005 ordering the applicant and all of the undertakings directly or indirectly controlled by it, including Total France, to submit to an inspection in accordance with Article 20(4) Regulation No 1/2003 ...

8 Notice of the [Commission's] inspection decision [of 18 April 2005] was given to Total France on 28 April 2005. Notice was not given to the applicant.

9 Total France received requests for information from the Commission on 3 November 2005 and 27 November 2006 and responded to those requests on 23 December 2005 and 13 December 2006 respectively. On 30 January 2007, it received further questions from the Commission to which it responded on 4 April 2007.

10 On 29 May 2007, the Commission sent a statement of objections to [the addressees of the decision at issue] including the applicant and Total France (recital 85 of the [decision at issue]).

11 By letter of 13 August 2007, the applicant made observations in response to the statement of objections ...

12 On 10 and 11 December 2007, the Commission held a hearing in which the applicant took part.

13 After the hearing, the applicant received several requests for information from the Commission. The requests of 21 December 2007 and of 29 May 2008 concerned the applicant's turnover and that of Total France, in particular for the paraffin wax and slack wax markets. The request of 4 April 2008 concerned the substance of the infringement committed by Total France. The applicant answered on 20 February, 8 April and 10 June 2008 respectively, whilst stating in each answer that it had no knowledge of the infringement which Total France was alleged to have committed.

14 According to the [decision at issue], employees of Total France had participated in the infringement throughout its duration. The Commission therefore held Total France directly liable for the cartel (recitals 555 and 556 of the [decision at issue]). The Commission stated that at least 98% of Total France's capital was held by the applicant and that it could be presumed, on that basis, that the applicant exercised a decisive influence over the conduct of Total France, both companies being part of the same undertaking (recitals 557 to 559 of the [decision at issue]). In response to a written question of the [General] Court relating to the identity of the other shareholders of Total France, the applicant stated that it held the remaining capital indirectly. It was thus established in the course of that proceeding that Total France was a subsidiary wholly owned by the applicant during the period at issue.

15 The fines imposed in the present case have been calculated on the basis of 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) …, in force at the time the statement of objections was notified [to the addressees of the decision at issue].'

3 Articles 1 and 2 of the contested decision provide:

'*Article 1*

The following undertakings have infringed Article 81(1) [EC] and — from 1 January 1994 — Article 53 of the EEA Agreement by participating, for the periods indicated, in a continuing agreement and/or concerted practice in the paraffin waxes sector in the common market and, as of 1 January 1994, within the EEA:

…

Total France ...: from 3 September 1992 to 28 April 2005 and

Total …: from 3 September 1992 to 28 April 2005.

For the following undertakings, the infringement also includes slack wax sold to end-customers on the German market for the periods indicated:

…

Total France …: from 30 October 1997 to 12 May 2004 and

Total …: from 30 October 1997 to 12 May 2004.

Article 2

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

…

Total France ... jointly and severally with Total …: EUR 128 163 000.'

4 In recital 577 of the decision at issue, the Commission found that most of Total's arguments relied on the subsidiary's ability to act independently within its day-to-day management of its commercial activity. In recital 578 of the decision at issue, the Commission made several findings concerning the concept of a subsidiary 'acting independently', inter alia the conclusion that 'the exercise of a decisive influence over the commercial policy of a subsidiary does not require day-to-day management of the subsidiary's operations'.

5 In the same recital, the Commission added as follows:

'In fact, [Total] admits that it has a role of institutional coordination and control of strategic orientations, and that it has the power to approve, or disapprove, the most important investments or major changes of activities within the group. This shows that [Total], as a parent company, has an interest and role over its subsidiaries as a shareholder to protect its financial ownership and commercial strategy interests. [Total] also lists certain other matters such as human resources policy, keeping consolidated accounts, and determination of the fiscal policy for the group, and some other horizontal operational tasks, including industrial security, environment, ethics treasury, financing etc. which are in the hands of [Total] for the whole group.'

6 In recitals 579 to 582 of the decision at issue, the Commission examined Total's arguments based on the claim that the management responsibilities between the parent company and its subsidiary did not overlap, that the subsidiary never received instructions from the parent company concerning the policy to apply to the marketing of paraffin waxes, that the subsidiary never informed the parent company of its activities in the market at issue and, finally, that paraffin wax is of very limited importance to the subsidiary and to the parent company. In recital 585 of the decision at issue, the Commission found that the information presented by Total did not suffice to rebut the presumption of the exercise of a decisive influence resulting from its directly or indirectly holding almost all of the capital of its subsidiary, Total France.

The judgment under appeal

7 By application lodged at the General Court Registry on 16 December 2008, Total principally claimed that the decision at issue should be annulled in so far as it concerns Total, and relied on seven pleas in law in support of the form of order sought. In the alternative, it also claimed that the fine which had been jointly and severally imposed on it with Total France should be annulled or reduced and relied in that regard on two pleas in law. Total submitted in essence that it was not capable of exercising a decisive influence over the conduct of its subsidiary and that the subsidiary had therefore operated independently in the market. As a result, given that Total was not itself implicated in the cartel in question, the offending conduct of its subsidiary could not be attributed to it. Total also disputed the duration of the infringement committed by its subsidiary, as calculated by the Commission. In the judgment under appeal the General Court rejected all of those pleas in law.

8 In paragraph 73 of the judgment under appeal, the General Court adopted verbatim the Commission's findings in recital 578 of the decision at issue. In paragraphs 74 to 99 of the judgment under appeal, the General Court considered each of Total's arguments concerning the independence of its subsidiary's actions and found, in paragraph 102 of the judgment under appeal, that the Commission was fully entitled to find that the applicant had not rebutted the presumption that it had exercised a decisive influence over the commercial policy of its subsidiary.

9 In paragraphs 215 to 219 of the judgment under appeal, the General Court considered Total's arguments concerning the duration of its subsidiary's participation in the infringement and, in paragraph 224 of the judgment under appeal, it held:

'In the exercise of its unlimited jurisdiction, the Court finds that [Total] has not demonstrated that the [decision at issue] contained any errors or irregularities which would justify the annulment of the fine imposed on it or the reduction of the amount of that fine. The Court also finds that, in the light of all the circumstances of the case, in particular the gravity and duration of the infringement committed by [Total], the amount of the fine imposed on the latter is appropriate.'

Judgment in *Total Raffinage Marketing* v *Commission* (T-566/08)

10 In the judgment in *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423), given on the same day as the judgment under appeal in the present case, the General Court reduced the total amount of the fine imposed on the subsidiary, Total France, of which Total Raffinage Marketing SA is the successor in law, to EUR 125 459 842 whilst dismissing the remainder of the application that Total Raffinage Marketing SA had brought in parallel to the application brought by Total, its parent company. The General Court held that, when determining the multiplier reflecting the duration of Total France's participation in the infringement, the Commission had breached the principles of proportionality and equal treatment by assimilating a period of participation of 7 months and 28 days for paraffin waxes and a participation period of 6 months and 12 days for slack wax to participation for a full year. Nevertheless, in the judgment under appeal, the General Court did not reduce the fine imposed on Total to the same extent.

The appeal

11 The appeal is based on six grounds. In the first and third grounds of appeal, Total claims that, although its liability is entirely derived from that of its subsidiary, the General Court did not give it the same reduction of the amount of the fine imposed on its subsidiary as that from which the latter had benefited. The General Court thus increased, without any legal basis, the fine imposed on Total. In the second ground of appeal, Total maintains that the General Court erred in law by failing to annul the decision at issue on the ground that the Commission infringed its obligation to state reasons. In the fourth to sixth grounds of appeal, put forward in the alternative, the applicant claims that the Court should, by exercising its power to amend and having regard to all the circumstances of the case, set, in so far as Total is concerned, the fine at the same amount as set for its subsidiary.

12 It is appropriate to begin by considering the second ground of appeal followed by the first and third.

The second ground of appeal

Arguments of the parties

13 Total complains that, in its review of legality, the General Court erred in law by failing to annul the decision at issue on the ground that the Commission infringed its obligation to state reasons. The Commission thus failed to consider the arguments submitted by Total in order to rebut the presumption of its decisive influence on the commercial policy of its subsidiary.

14 According to Total, the facts of the present case are analogous to those giving rise to the judgment in *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:620, paragraph 167) and therefore called for a higher standard to be applied, on the part of the Commission, to the reasons why it considered that the evidence submitted by Total was not sufficient to rebut that presumption. Total relied on several pieces of evidence for that purpose, such as the independence of its subsidiary, the fact that the subsidiary did not inform the parent company of its activity in the market and the absence of instructions from the parent company to its subsidiary concerning the management of the latter's activities. The Commission did not address that evidence, which amounts to a failure to state reasons, namely infringement of an essential procedural requirement that the General Court should have raised of its own motion since that plea is a matter of public policy (see judgment in *Siemens and Others* v *Commission*, C-239/11 P, C-489/11 P and C-498/11 P, EU:C:2013:866, paragraph 321).

15 As it was not able to identify the paragraphs of the decision at issue addressing the evidence adduced by the applicant in detail, the General Court should have raised the plea based upon the failure to state reasons for the decision at issue of its own motion and have ordered it to be annulled. Rather than considering such a plea, the General Court substituted, in paragraphs 75 to 102 of the judgment under appeal, its own assessment of each of those elements, thus assuming the role of the Commission.

16 The Commission considers that this ground of appeal is inadmissible on the ground that the applicant thereby seeks to modify the subject-matter of the case as it was pleaded before the General Court by raising, before the Court of Justice for the first time, a ground of appeal on the failure to state reasons for the decision at issue. According to the Commission, the fact that a ground of appeal based on the failure to state reasons is a matter of public policy allows the General Court to raise it of its own motion, but does not mean that the General Court is bound, on pain of its judgment being annulled, to review, of its own motion, all of the aspects of the reasoning of a decision which are not raised before it.

17 The Commission contends that the evidence adduced by Total, namely that its subsidiary was financially independent of the parent company, that the subsidiary has its own local management, that the subsidiary did not inform the parent company of its activities and that the activities concerned by the cartel at issue were of limited importance for the turnover of the parent company, were arguments that were presented in the context of the fourth plea in law of the application for annulment brought before the General Court and related to a manifest error of assessment by the Commission in the decision at issue and not to a failure to state reasons for its decision. The General Court addressed those pleas, which were directed at rebutting the presumption of the exercise of a decisive influence. In considering that plea of the application, the General Court was seised of a question of substance and not of the issue of the failure to state reasons.

Findings of the Court

18 According to the Court's case-law, the obligation laid down in the second paragraph of Article 296 TFEU to state 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 judgments in *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 146 and the case-law cited, and *Gascogne Sack Deutschland* v *Commission*, C-40/12 P, EU:C:2013:768, paragraph 46).

19 In the present case, Total challenged before the General Court the assessment, in paragraph 578 of the decision at issue, of the evidence on which Total had relied in order to rebut the presumption of a decisive influence. It maintained that the Commission had erred in rejecting the information presented in order to show that it had not exercised a decisive influence over the commercial conduct of its subsidiary. The applicant did not, however, claim that the Commission had failed to state reasons in the decision at issue in that respect.

20 It should be noted, as is clear from paragraph 8 of the present judgment, that, having adopted verbatim the Commission's findings given in recital 578 of the decision at issue, the General Court examined, in paragraphs 74 to 99 of the judgment under appeal, each of Total's arguments concerning the independence of its subsidiary's actions and came to the conclusion, in paragraph 102 of the judgment under appeal, that the Commission was fully entitled to find that Total had not rebutted that presumption.

21 The first limb of the second ground of appeal is based, in essence, on the same arguments as those on which Total relied before the General Court in order to challenge, not a potential infringement of the obligation to state reasons, but the alleged incorrect application of the presumption of decisive influence. On appeal, Total no longer, however, challenges the correctness of the General Court's reasoning in the relevant paragraphs of the judgment under appeal but disputes solely the General Court's alleged error in law in failing to penalise the alleged insufficiency of the reasons for the decision at issue with regard to the rejection of the information presented by Total in order to rebut the presumption of a decisive influence.

22 That limb thus introduces, on appeal, a new argument challenging the adequacy of the reasoning in the decision at issue relating to the application of the presumption of decisive influence. It follows that that limb must be considered inadmissible, since in an appeal the jurisdiction of the Court of Justice is in principle confined to a review of the findings of law on the pleas argued at first instance (see, to that effect, judgment in *Gascogne Sack Deutschland* v *Commission*, C-40/12 P, EU:C:2013:768, paragraph 52).

23 Since the first limb of the second ground of appeal is inadmissible, the second limb of that ground of appeal by which Total alleges that the General Court substituted its own reasoning for the reasoning of the decision at issue must also be rejected because it would necessarily involve a consideration of the reasoning of that decision.

24 This ground of appeal must therefore be rejected in its entirety.

The first and third grounds of appeal

Arguments of the parties

25 Total maintains that, since its liability and the order that it pay the fine jointly and severally are based solely on the liability of its subsidiary, the General Court, having reduced the fine imposed on the subsidiary without reducing the fine imposed on the subsidiary's parent company by the same amount, increased the fine imposed on the parent company. Given the entirely derivative nature of that liability, the difference between the fines imposed on the parent company and its subsidiary, namely EUR 2 704 158, is a fine without any legal basis. Moreover, that modification of the nature of its

liability derives from the judgment under appeal and at no point in the proceeding was it given an opportunity to make observations on that point, which amounts to an infringement of its right of defence.

26 According to Total, the situation at issue is the same as that which gave rise to the judgment in *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29), in which, having found that the liability of the parent company was purely derivative and secondary to the liability of its subsidiary and thus depended on that of its subsidiary, the Court brought the fine imposed on the parent company into line with the reduced amount of the fine imposed on its subsidiary. Total's situation in the present case is that of a parent company whose liability is entirely derived from the liability of its subsidiary. Total observes that, since the duration of its participation in the infringement can be nothing other than identical to that of its subsidiary and the reduction of the fine imposed on its subsidiary results solely from the reduction of that duration in so far as concerns just that company, the General Court ought to have exercised its power to amend, as was the case in the judgment in *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29), and to adjust the fine imposed on the parent company to correspond to that which was ultimately imposed on its subsidiary.

27 Total adds that both the judgment under appeal and the judgment in *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423) were given on the same day by the same Chamber, from which it follows that, having taken the decision not to modify the fine that was imposed on Total, the General Court infringed the principle of treating equally two cases concerning the same facts and the same companies of a single undertaking. Moreover, in exercising its power to amend, the EU judicature is entitled to modify a fine. However, it is not entitled to change the single, joint and several nature of the liability and of the resulting fine imposed on entities which constitute one and the same undertaking where the liability of the parent company is entirely dependent on that of its subsidiary. Therefore Total submits that, having changed the single, joint and several nature of the liability of Total and its subsidiary and, thus, that of the fine imposed on them, the General Court erred in law.

28 The Commission considers that the applicant's argument is unfounded as it is based on the incorrect premiss that, in dismissing Total's application, the General Court increased its fine. However, in dismissing its application, the General Court left intact both Total's liability and the amount of the fine in its entirety. The General Court's reduction of the fine imposed on the subsidiary had no effect on the extent of the applicant's liability, which continued to be bound to pay the fine in its entirety.

29 The Commission notes that the mere fact that, for a part of the fine, Total became the sole debtor vis-à-vis the Commission does not amount to a modification of the fine which was imposed on it and is only the unavoidable consequence of the decision taken by the General Court, in the judgment in *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423), to reduce the fine imposed on the other debtor. In general, the situation of a parent company held jointly and severally liable with its subsidiary is indistinguishable from that of other legal entities which are held jointly and severally liable and find themselves co-debtors of the fine imposed. In the event of joint and several liability for a fine, the reduction of the fine for the benefit of one of the co-debtors inevitably leads to the other debtor being solely liable for the amount of that reduction.

30 According to the Commission, it is always open to a parent company and its subsidiary to bring a single application together against a decision which imposes a fine on them. If a parent company seeks to have its fine annulled and reduced by bringing its own application, the fate of that application depends on the arguments relied on for that purpose and not on any arguments presented by its subsidiary in a parallel application. In any event, the requirements laid down by the Court in the judgment in *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29) that parallel applications of parent companies and their subsidiaries must have the 'same object' is not satisfied in the present case. Although it is true that both Total and its subsidiary challenged before the General Court the

Commission's finding as to the duration of participation in the infringement, the General Court nevertheless reduced the fine imposed on the subsidiary on the basis of arguments that the subsidiary had presented, not on the basis of arguments presented by the parent company.

Findings of the Court

31 In its first and third grounds of appeal, Total challenges the fact that, in the judgment under appeal, the General Court did not take into account the judgment in *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423) that reduced the fine imposed on Total France to EUR 125 459 842. Total submits that, in accordance with the Court's case-law arising from the judgment in *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29), the General Court was bound to reduce that fine also in relation to Total.

32 EU competition law refers to the activities of undertakings. The authors of the Treaties chose to use the concept of an 'undertaking' to designate the perpetrator of an infringement of competition law, who is liable to be penalised pursuant to Articles 101 TFEU and 102 TFEU, and not other concepts such as that of 'companies or firms' or 'legal persons', used in particular in Article 54 TFEU (see judgment in *Commission and Others* v *Siemens Österreich and Others*, C-231/11 P to C-233/11 P, EU:C:2014:256, paragraphs 41 and 42 and the case-law cited).

33 The concept of an undertaking covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed. That concept must be understood as designating an economic entity, even if, from a legal perspective, that unit is made up of a number of natural or legal persons. When such an economic entity infringes the competition rules, it is for that entity, according to the principle of personal responsibility, to answer for that infringement (see judgment in *Commission and Others* v *Siemens Österreich and Others*, C-231/11 P to C-233/11 P, EU:C:2014:256, paragraphs 43 and 44 and the case-law cited).

34 In that connection, in certain circumstances, a legal person who is not the perpetrator of an infringement of the competition rules may nevertheless be penalised for the unlawful conduct of another legal person, if both those persons form part of the same economic entity and thus constitute the undertaking that infringed Article 101 TFEU (see judgment in *Commission and Others* v *Siemens Österreich and Others*, C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 45).

35 Thus, the conduct of a subsidiary can be imputed to the parent company where the latter does in fact exercise a decisive influence over the conduct of its subsidiary (see, to that effect, judgment in *Akzo Nobel and Others* v *Commission*, C-97/08 P, EU:C:2009:536, paragraphs 58 and 59 and the case-law cited).

36 In the case where a parent company holds 100% of its subsidiary's capital, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary (see judgment in *Akzo Nobel and Others* v *Commission*, C-97/08 P, EU:C:2009:536, paragraph 60 and the case-law cited).

37 In the present case, the Commission imputed Total France's liability to Total and imposed a fine of EUR 128 163 000 jointly and severally on both. Thus, as set out in paragraph 10 of the present judgment, the General Court reduced, in the judgment in *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423), the amount of the fine imposed on the subsidiary, Total France, to EUR 125 459 842.

38 The Court has held 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, to that effect, judgment in *Commission* v *Tomkins*, C-286/11 P, EU:C:2013:29, paragraphs 37, 39, 43 and 49).

39 The application of the principles derived from that case-law of the courts of the European Union requires certain procedural requirements to be satisfied, inter alia the bringing of parallel applications having the same object by the subsidiary and its parent company (see judgment in *Commission* v *Tomkins*, C-286/11 P, EU:C:2013:29, point 49). The Court specified that the notion of the 'same object' does not require that the scope of the applications of those companies, and the arguments on which they relied, must be identical (see judgment in *Commission* v *Tomkins*, C-286/11 P, EU:C:2013:29, paragraph 43).

40 In the present case, those requirements were satisfied. Like the parent company and the subsidiary at issue in the case giving rise to the judgment in *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29), both Total and Total France brought an application against the decision at issue and those applications had the same object in so far as they concerned, in particular, the duration of the infringement.

41 Although the Court ruled, in the judgment in *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29), only on the possibility, in connection with an application brought by a parent company whose liability is derived entirely from that of its subsidiary, of having regard to the outcome of the subsidiary's application, it nevertheless follows from the case-law of the Court, in particular from the judgment in *Areva and Others* v *Commission* (C-247/11 P and C-253/11 P, EU:C:2014:257, paragraphs 136 to 138), that where the procedural requirements set out in the previous paragraphs are satisfied, a parent company whose liability is entirely derivative from that of its subsidiary must, in principle, benefit from any reduction in the liability of its subsidiary which had been imputed to it.

42 Consequently, the General Court erred in law in not having regard to the outcome of the judgment in *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423).

43 It follows from the foregoing that the first and third grounds of appeal are well founded.

44 Consequently, the judgment under appeal must be set aside in so far as the General Court did not bring the fine imposed on Total into line with the fine imposed on Total France.

45 In those circumstances, and also following the judgment given on the same day in the case of *Total Marketing Services* v *Commission* (C-634/13 P, EU:C:2015), it is not necessary to consider the fourth, fifth and sixth alternative grounds of appeal.

46 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, where the appeal is well founded, the Court may, if the decision of the General Court is set aside, give final judgment in the matter where the state of the proceedings so permits. That is so in the present case.

47 On the basis of the considerations in paragraphs 38 to 44 of the present judgment, the fine imposed on Total must be reduced to the level of that imposed on its subsidiary, Total France, as set in paragraph 1 of the operative part of the judgment in *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423).

48 It is therefore necessary to set the fine imposed on Total jointly and severally with Total France in Article 2 of the decision at issue at EUR 125 459 842.

Costs

49 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

50 Under Article 138(1) of Rules of Procedure, which apply to the procedure on appeal by virtue of Article 184(1) of those rules, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. Furthermore, Article 138(3) of those rules provides that where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

51 In that regard, it is appropriate to decide, having regard to all of the facts of the case, that Total should bear three quarters of the Commission's costs and of its own costs incurred in the appeal and the proceedings before the General Court and that the Commission should bear one quarter of its own costs and of those of Total which are related to both proceedings.

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

1. **Sets aside the judgment of the General Court of the European Union in *Total* v *Commission* (T-548/08, EU:T:2013:434) in so far as it did not bring the fine imposed on Total SA into line with the fine imposed on Total Raffinage Marketing SA by the judgment in *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423);**

2. **Dismisses the appeal as to the remainder;**

3. **Sets the fine imposed on Total SA jointly and severally with Total Raffinage Marketing SA in Article 2 of Commission Decision C(2008) 5476 final of 1 October 2008, relating to a proceeding under Article [81 EC] and Article 53 of the EEA Agreement (Case COMP/39.181 — Candle waxes) at EUR 125 459 842;**

4. **Orders Total SA to bear three quarters of the costs of the European Commission and of its own costs relating to the present appeal and the proceedings at first instance;**

5. **Orders the European Commission to bear one quarter of its own costs and of the costs of Total SA relating to the present appeal and the proceedings at first instance.**

[Signatures]