Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 26 March 2015 [1]

Case C-597/13 P

Total SA
v

European Commission

(Appeal — Competition — Agreements, decisions and concerted practices — Paraffin waxes market in the European Economic Area and German 'slack wax' market — Price-fixing and market-sharing — Decision finding an infringement of the competition rules — Infringement committed by a subsidiary wholly-owned by a 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 — Effects on the legal situation of the parent company of a judgment concerning the subsidiary)

I – Introduction

1. The present case concerns an appeal brought against the judgment of the General Court of 13 September 2013 in *Total* v *Commission*. [2]

2. In this case, the Court is asked, inter alia, to determine the effects of a judgment [3] concerning a subsidiary on the legal situation of the parent company, where the liability of the parent company arises solely from the unlawful conduct of its subsidiary. This case, in my view, provides the opportunity to point out that, pursuant to the first paragraph of Article 266 TFEU, [4] it is primarily for the European Commission to give due effect to judgments of the Court of Justice and the General Court. In addition to providing some clarification as to the scope of that obligation to comply where an action is brought by a legal entity ordered jointly and severally with other entities to pay a fine, the Court must, therefore, following on from the conclusions to be drawn from *Commission* v *Tomkins*, [5] provide some clarification as to the scope and limits of the courts' intervention where parallel actions are brought before them by entities held jointly and severally liable, and penalised as such, for an infringement of EU competition rules.

3. Furthermore, the Court is also called upon to rule on the scope of the review as to the legality of the reasons for rejecting the evidence and arguments submitted by a parent company for the purpose of rebutting the presumption that it exercises decisive influence over the conduct of its subsidiary.

1 — Original language: French.

2 — T-548/08, EU:T:2013:434, 'the judgment under appeal'.

3 — In the present case, the judgment given on the same day as the judgment under appeal in *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423).

4 — According to that provision, '[t]he institution whose act has been declared void ... shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union'.

5 — C-286/11 P, EU:C:2013:29.

II – Background to the proceedings

4. The background to the proceedings and the content of the contested decision were summarised by the General Court in paragraphs 1 to 16 of the judgment under appeal, to which the reader is referred for further details.

5. For the purposes of analysing the present appeal, I will confine myself to recalling the following.

6. By 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) ('the contested decision'), the Commission found that the appellant and its wholly-owned subsidiary, Total France SA ('Total France'), together with other undertakings, had infringed Article 81(1) EC and Article 53(1) of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) by participating in a cartel on the paraffin waxes market in the European Economic Area (EEA) and the German slack wax market. The appellant, Total SA ('Total'), and its subsidiary, Total France, were among the addressees of the contested decision.

7. According to the Commission, employees of Total France had participated directly in the infringement throughout its duration. The Commission therefore held Total France liable for its participation in the cartel (recitals 555 and 556 of the contested decision). In addition, between 1990 and the end of the infringement, Total directly or indirectly held more than 98% of the capital in Total France. The Commission considered that it could be presumed on that basis that Total exercised decisive influence over the conduct of Total France, as the two companies were part of the same undertaking (recitals 557 to 559 of the contested decision).

8. The amount of the fines imposed in the present case was calculated on the basis of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003,[6] which was in force when the statement of objections was notified.

9. Applying those guidelines, the Commission, in relation to the appellant and its subsidiary, arrived at a fine amounting in total to EUR 128 163 000 (recital 785 of the contested decision).

10. The operative part of the contested decision provides:

'*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 [in] 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:

...

6 — OJ 2006 C 210, p. 2 ('the 2006 Guidelines').

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

[Total]: from 30 October 1997 to 12 May 2004

Article 2

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

...

Total France ... jointly and severally with [Total]: EUR 128 163 000

...'

III – The judgment under appeal and the judgment in *Total Raffinage Marketing*v *Commission* (T-566/08)

11. By application lodged at the General Court Registry on 16 December 2008, the appellant brought an action, raising a total of nine pleas. The first seven pleas were raised in support of its application for annulment of the contested decision in so far as it concerns the appellant, and sought, in essence, to demonstrate that the unlawful conduct of its subsidiary, Total France, could not be imputed to it. The final two pleas were raised in support of the application, in the alternative, for annulment or reduction of the fine which had been imposed on the appellant.

12. By the judgment under appeal, the General Court rejected all the pleas raised and therefore dismissed the action in its entirety. As regards, in particular, the claim for an adjustment of the amount of the fine, the General Court drew the following conclusion in paragraph 224 of the judgment under appeal:

'In the exercise of its unlimited jurisdiction, the General Court holds that the appellant has not demonstrated that the [contested] decision 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 General 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 the appellant, the amount of the fine imposed on the latter is appropriate.'

13. In the judgment under appeal, which was given on the same day in *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423), the General Court rejected all of those pleas, with the exception of the eighth, alleging that the calculation method set out in point 24 of the 2006 Guidelines was unlawful. 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 a participation of a full year. Consequently, the General Court reduced the total amount of the fine imposed on the appellant from EUR 128 163 000 to EUR 125 459 842.

IV – Procedure before the Court and forms of order sought

14. In its appeal, Total claims that the Court should:

— principally:

  — set aside the judgment under appeal;

  — grant the forms of order which it sought at first instance before the General Court, and

  — consequently, annul the contested decision in so far as it concerns Total;

— in the alternative, exercise its power to amend in order to reduce the amount of the fine imposed on Total, and

— in any event, order the Commission to pay the costs in their entirety, including those incurred by Total before the General Court.

15. The Commission contends that the appeal should be dismissed and that the appellant should be ordered to pay the costs, including the cost of the proceedings before the General Court.

16. The parties set out their respective positions in writing and presented oral argument at the hearing on 15 January 2015.

V – Analysis of the appeal

17. The appeal is based, principally, on three pleas supporting the claim for annulment and, in the alternative, on three pleas supporting the claim for the adjustment of the amount of the fine imposed on Total.

18. The Commission is of the view that several of the pleas raised are inadmissible and that, in any event, none of those pleas is well founded.

19. It must be acknowledged that certain pleas overlap to a great extent and that it is necessary, therefore, to consider examining some of them together.

20. By the arguments put forward in the present appeal, the appellant seeks, in essence, to criticise the General Court, first of all — and, it seems to me, as its principal argument — for failing to reduce the amount of the fine imposed on it, even though such a reduction was agreed for its subsidiary and though its liability is, in this case, purely and exclusively derived from that of the aforementioned subsidiary, which alone participated directly in the infringement (see, inter alia, the first and third pleas), and, secondly, for failing to fulfil its obligations with regard to reviewing the examination of the evidence submitted in order to rebut the ‘presumption of the actual exercise of decisive influence’ which was relied on against the appellant.

21. In this case, it seems appropriate to begin the analysis of the present appeal by examining the first and third pleas together.

A – *The first and third pleas*

1. Arguments of the parties

22. By its first plea, Total submits that, despite its liability for the infringement in question being wholly derived from that of its subsidiary, the General Court, in paragraph 224 of the judgment under appeal, did not exercise its power to amend in order to take into account, in Total's favour, the error made in the determination of the duration of its subsidiary's participation in the aforementioned infringement. Failing any identified legal basis, the difference between the joint fine which was reduced by the judgment in *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423) and the initial fine, namely, an amount of EUR 2 704 158, constitutes an 'unnamed fine' which the appellant alone now has to bear. Total takes the view that there was a breach of the principle of *audi alteram partem* since that modification of the nature of its liability was imposed by the judgment in *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423) without it having had, at any time during the procedure, the opportunity to submit observations on that point.

23. By its third plea, Total claims that, in addition to imposing on it an unnamed fine for which it is solely liable, in breach of the principle of *audi alteram partem*, the General Court infringed EU law in several respects.

24. First, Total claims that the General Court erred in law as to the extent of its power to amend. Total claims that, in accordance with Article 31 of Regulation (EC) No 1/2003,[7] the General Court is authorised only to 'cancel, reduce or increase the amount of fine', and not to modify, as it did in the present case, the joint and several nature of the liability and of the resulting fine imposed on the entities which constitute one and the same undertaking, except in so far as it finds, in the context of the review of legality, that there has been a manifest error of assessment in that regard.

25. Secondly, the appellant claims that, assuming that it were held that the General Court was empowered to exercise its unlimited jurisdiction to 'modify' the fine imposed on the appellant, notwithstanding that the appellant had not participated directly and specifically in the infringement, it infringed a number of principles incumbent on it in the context of its power to amend.

26. First, Total submits that the question then arises as to whether the General Court complied with the case-law relating to the joint liability of a parent company arising from the unlawful conduct of its subsidiary company, in particular the judgment in *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29).

27. Secondly, the appellant claims that, by reducing the duration of the infringement taken into account for the purpose of calculating the fine only with regard to its subsidiary, the General Court created inequality of treatment between, on the one hand, the appellant and its subsidiary, and, on the other, between the appellant and the other undertakings found to have participated in the same infringement. According to the appellant, the fact that the General Court used different calculation parameters for one and the same infringement, without being able to provide objective justification for doing so, undermines the general requirement for consistency, arising from the principle of equal treatment, which must be fulfilled when calculating the fine.

28. Finally, the appellant submits that the breach of the principle of proportionality found by the General Court in the judgment in *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423) is just as evident in relation to Total. By not applying the same adjustment to the fine imposed on Total as was applied to the fine imposed on its subsidiary, the fine imposed on Total is disproportionate and not objectively justified.

7 — Council Regulation 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).

29. The Commission considers, in essence, that the first plea, which it regards as being based on the incorrect premiss that, in dismissing the appellant's action, the General Court modified the extent of its liability or rendered it more serious, should be rejected as unfounded.[8] Moreover, in so far as that plea seeks to challenge the judgment given in a related case in which the appellant could have sought to intervene, it should be declared ineffective. Furthermore, it submits that the claim that the principle of *audi alteram partem* was infringed in that the General Court did not invite the appellant to give its view on the proposed reduction of the fine imposed on its subsidiary is contradicted by the judgment given by the Court of Justice in *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29). Finally, it states that a possible infringement by the General Court of a procedural right, such as the principle of *audi alteram partem*, could not lead to the setting aside of a judgment of the General Court unless it were demonstrated that that infringement affected the outcome of the proceedings.

30. As regards the third plea, the Commission considers that all the complaints, which are based, inter alia, on a misreading of the judgment in *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29), which does not lay down an obligation for the General Court to act as the appellant wished, should be rejected.

2. Assessment

31. It seems beyond doubt that a single fine imposed by the Commission for an infringement of competition rules which has been paid in full by one of the companies held jointly liable for it cannot then be imposed on the other company or companies concerned. Joint and several liability implies, after all, that the discharge of the obligation by one of the joint debtors concerned extinguishes any legal payment obligation on the part of all the other joint debtors.

32. Similarly, where a fine is reduced following an action brought before the European Union Courts, it seems quite clear that there is no legal basis for imposing on one of the joint debtors a fine whose amount exceeds that set by those courts.

33. In practice, that conclusion must be drawn by the Commission pursuant to the first paragraph of Article 266 TFEU, which provides that an institution must give due effect to the partial or total annulment of a measure it has adopted.

34. Furthermore, although the undertakings held jointly and severally liable for the payment of a fine for infringing EU competition law are unquestionably obliged to pay that fine in full, they cannot be obliged to pay a greater amount than that which was ultimately set following an action and a reduction of the amount of the fine imposed by a Commission decision. Turning to the present case, where the liability of a parent company is wholly derived from that of its subsidiary, which alone infringed the prohibition of agreements laid down in Article 101(1) TFEU, and where, moreover, those two companies have been held jointly liable for the payment of a fine, the Commission may not order the parent company to pay a fine which is greater than that for which the subsidiary is ultimately liable.

35. However, that conclusion is not apparent from the Commission's practice.

36. The Commission's reluctance to give due effect to judgments reducing the amount of fines imposed on associated entities, as shown by the appeal brought in the case which gave rise to the judgment in *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29), seems, as the present case illustrates, to continue to exist. The Court is, once again, called upon to determine to what extent and in what circumstances a parent company which has been held liable for an infringement committed solely by

8 — It should be noted that, in its response, the Commission also made reference to the inadmissibility of the plea, but that it eventually reconsidered this in its rejoinder.

its subsidiary may benefit from the favourable outcome of the action brought by that subsidiary, in particular from the reduction of the amount of the fine set by the General Court. It is called upon, above all, to determine whether the European Union Courts merely have an opportunity, or whether they have an obligation in that regard.

37. That continuing reluctance probably stems from the different approaches taken by the Court.

38. In that regard, the Court confirmed, in the judgment in *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29), that there could be situations where the liability of a parent company could be considered as entirely derived from that of its subsidiary.[9] It seems that the Court, furthermore, implicitly confirmed the rule, established by the General Court in paragraph 38 of the judgment in *Tomkins* v *Commission*,[10] according to which, where a parent company has been held liable for an infringement solely on the basis of its subsidiary's participation in a cartel, its liability cannot exceed that of the subsidiary.[11]

39. In the case which gave rise to the judgment in *Areva and Others* v *Commission*,[12] the Court held, likewise, that, where the liability of the parent companies for an infringement of Article 101 TFEU is wholly derived from the liability of a subsidiary which belonged to those companies in succession, the total amount which the parent companies may be required to pay cannot be greater than the amount which that subsidiary is ordered to pay.

40. However, that finding appears to have been overlooked in other cases, particularly those relating to the 'industrial bags' cartel. Accordingly, in the case which gave rise to the judgment in *Kendrion* v *Commission*,[13] the Court was requested specifically to rule on the argument put before, and rejected by, the General Court, according to which the concept of joint and several liability, whose rationale is the need to ensure that the fine is actually recovered, implies therefore that the parent company may be liable only for payment of the fine imposed on the subsidiary[14] (see paragraph 53 of the judgment).

41. The Court rejected that argument as unfounded (see paragraph 58 of the judgment), since it was observed that the case seems to have focused more on the applicability in the circumstances of the 10% ceiling applicable to fines, in accordance with Regulation No 1/2003, where two separate legal persons, such as a parent company and its subsidiary, no longer constitute an undertaking within the meaning of Article 101 TFEU (see paragraph 57 of the judgment).

42. Likewise, in its judgment in *FLS Plast* v *Commission*,[15] the Court rejected the appellant's arguments according to which the Commission may not retrieve from the successive parent companies an amount exceeding the fine imposed on the subsidiary.[16] Accordingly, the Court held that 'as regards payment of a fine imposed for breach of the competition rules, the joint and several liability between two companies constituting an economic entity cannot be reduced to a type of security provided by the parent company in order to guarantee payment of the fine imposed on the subsidiary and that an argument that that parent company could not be ordered to pay a fine higher than the fine imposed on its subsidiary is therefore unfounded'.[17]

9 — Paragraph 43 of that judgment.

10 — Judgment in *Tomkins* v *Commission* (T-382/06, EU:T:2011:112, paragraph 38).

11 — That finding follows, in my view, from paragraph 37 of the judgment in *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29), according to which '[the] considerations [put forward by the Commission] are not sufficient to cast doubt on the General Court's finding at paragraph 38 of the judgment under appeal'.

12 — C-247/11 P and C-253/11 P, EU:C:2014:257, paragraphs 137 and 138.

13 — C-50/12 P, EU:C:2013:771, paragraph 58.

14 — In this case, the Commission had, in the contested decision, imposed a fine of EUR 34 million on the applicant and a fine of EUR 2.2 million on its subsidiary, Fardem Packaging BV.

15 — C-243/12 P, EU:C:2014:2006.

16 — See the summary of the arguments put forward by FLS Plast A/S before the Court in paragraphs 93 to 96 of the judgment.

17 — Judgment in *FLS Plast* v *Commission* (C-243/12 P, EU:C:2014:2006, paragraph 107).

43. It seems, therefore, that the case-law of the Court is not entirely consistent as regards the question of whether a parent company, which has been held liable for an infringement of Article 101 TFEU because of acts committed solely by its subsidiary and which, on that basis, has been found jointly liable for the payment of a fine, may be required to pay a fine of a greater amount than that for which its subsidiary is liable.

44. In the light of those introductory considerations, the present case offers the opportunity to recall some of the effects of a judgment concerning a subsidiary on the legal situation of its parent company where it has been established that the liability of that parent company derives *wholly* from the unlawful conduct of its subsidiary.

45. In addition, before embarking upon the actual examination of the arguments specifically put forward by the appellant, it is necessary to draw attention to some essential points in relation to the function of the courts, particularly as regards what they are able to do when parallel actions are brought before them by entities which have been ordered jointly and severally to pay a single fine.

46. It is also necessary, as a background to the analysis, to comment on the nature and scope of the liability of a parent company where it is established, as in this case, that only its subsidiary participated in an infringement. [18]

a) Preliminary observations

i) The imputability of the unlawful conduct and the nature of the liability of a parent company which has not directly participated in an infringement

47. It is now well established that the presumption of liability upon parent companies is based primarily on the fact that competition law refers to the concept of an *undertaking*, which covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. [19] That concept must be understood as designating an economic unit even if in law that unit consists of several natural or legal persons. It follows that, 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. [20]

48. Accordingly, the conduct of a subsidiary may be imputed to the parent company in particular where, despite 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, the parent company and its subsidiary are considered to form a single economic unit and therefore form a single undertaking which enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement. [21]

49. In other words, assuming that actual participation in the infringement were established only in respect of the subsidiary, it is still possible to call into question the liability of the parent company which can reasonably have been presumed to exercise decisive influence over its subsidiary.

18 — A clear distinction must be made between the situation referred to here and a situation where a fine is imposed on the parent company for its own conduct and the amount of that fine may, therefore, be different to the amount of the fine imposed on its subsidiary.

19 — See judgment in *Akzo Nobel and Others* v *Commission* (C-97/08 P, EU:C:2009:536, paragraph 54 and the case-law cited).

20 — See, inter alia, 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 45 and the case-law cited).

21 — See judgment in *Akzo Nobel and Others* v *Commission* (C-243/12 P, EU:C:2009:536, paragraphs 58 and 59 and the case-law cited).

50. Although the Court has, on several occasions, stated that, in such a situation, the parent company had so-called 'personal' liability,[22] this, in my view, is in order to point out that it was for the parent company to answer for the anti-competitive conduct of its subsidiary, irrespective of its actual involvement in that conduct and by reason of its shareholding and organisational links with its subsidiary, and to draw attention to the fact that they constitute a single economic entity.

51. In the case of an action for a declaration as to the liability of a company solely by reason of its vertical shareholder relationship with a subsidiary, that liability, however personal it may be, is none the less derived from that of the subsidiary.[23]

52. It follows, in my opinion, that any errors vitiating the findings in relation to the subsidiary's specific participation in the infringement — and, consequently, the calculation of any fine imposed on that basis — should also benefit the parent company.

53. That applies particularly when, in accordance with the most widespread practice, the Commission, in such a situation, makes a finding of *joint and several liability* of the two entities concerned. A finding of joint and several liability implies that the debtor entities are ordered to pay a single fine, and if the payment obligation on the part of one of the entities is partially or totally extinguished, this naturally has consequences for the payment obligation of the other entity.

54. It must be pointed out, therefore, that where there is a finding of joint and several liability, the reduction of the amount of the fine can hardly apply to just one of the entities concerned. The concept of *joint and several* liability has the consequence that the party to which the Commission has imputed liability for the infringement may not be subject, *on the basis of joint and several liability — as a consequence of the imputation of liability* –, to the payment of a fine which is greater than that imposed on the party which actually participated directly in the infringement.[24] To that effect, the General Court had held, in *Tomkins* v *Commission*, (T-382/06, EU:T:2011:112, paragraph 38), that the liability of a parent company could not, without that company having directly participated in the infringement, exceed that of its subsidiary, and the Court of Justice seems to have confirmed this approach.

55. In the light of all the foregoing considerations, I take the view that, in a situation where liability for an infringement is imputed to a parent company purely by reason of the acts committed by its subsidiary, ordering that parent company, held jointly and severally liable with its subsidiary, to pay a fine greater than that imposed on its subsidiary lacks any legal basis.

56. The fact nevertheless remains that it falls to the Commission, under the first paragraph of Article 266 TFEU, to give due effect to a judgment reducing the fine imposed on a subsidiary in such a situation. In order to comply fully and correctly with the judgment of the Court, the Commission must, in my opinion, take full account of the reduction applied in favour of the subsidiary and should not have any discretion in this matter.

57. As I will explain below, the intervention of the courts in the exercise of their unlimited jurisdiction to align those amounts, which is merely optional and is based on considerations of expediency, is no more than a possibility which is open to the courts in certain circumstances. Contrary to the position taken by the appellant, it cannot be regarded as an obligation.

22 — For recent use of that phrase, see, inter alia, judgments in *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin* (C-434/13 P, EU:C:2014:2456, paragraphs 39 and 51 and the case-law cited); *Schindler Holding and Others* v *Commission* (C-501/11 P, EU:C:2013:522, paragraph 101), and *Commission and Others* v *Siemens Österreich and Others* (C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 44 and the case-law cited).

23 — 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 47 and the case-law cited).

24 — Bernardeau, L., and Christienne, J.-P., *Les amendes en droit de la concurrence — Pratique décisionnelle et contrôle juridictionnel du droit de l'Union*, 1st edition, Larcier — Europe(s) series, Brussels, 2013, in particular section II.1231.

ii) The function of the court hearing parallel actions: the conclusions to be drawn from the line of case-law from the judgment in *Commission* v *AssiDomän Kraft Products and Others*[25] to the judgment in *Commission* v *Tomkins* (C-286/11 P)

58. It is well established that European Union Courts hearing actions for annulment may not rule *ultra petita*.[26] In accordance with the principle that the subject-matter of the proceedings is delimited by the parties, the courts may rule only on that which is specifically requested by the parties, with the obvious exception of pleas and questions which they may, where appropriate, raise of their own motion.

59. It is on the basis of that essential procedural rule that, in its judgment in *Commission* v *AssiDomän Kraft Products and Others*, the Court held that if an addressee of a Commission decision decides to bring an action for annulment, the matter to be tried by the European Union Courts relates only to those aspects of the decision which concern that addressee. Unchallenged aspects concerning other addressees, on the other hand, do not form part of the matter to be tried by the European Union Courts.[27] Similarly, in its judgment in *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*,[28] the Court pointed out that if an addressee of a Commission decision imposing a fine for an infringement of competition rules decides to bring an action for annulment, the matter to be tried by the European Union Courts relates only to those aspects of the decision which concern that addressee. Unchallenged aspects concerning other addressees, on the other hand, do not form part of the matter to be tried by the European Union Courts.

60. However, those cases concerned specific situations, the details of which were set out in paragraphs 47 and 48 of the judgment in *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29), where the annulment of the contested decision with regard to one company could not have any effect with regard to the other companies, since they were addressees of what was regarded as a separate decision. It cannot be too difficult to accept that the addressees at issue were independent entities referred to by different decisions or, at least, by a bundle of individual and clearly separate decisions.[29]

61. The situation which gave rise to the judgment in *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29) was completely different.

62. In that judgment, given by the Grand Chamber, the Court held that, where the parent company does not participate in an infringement, so that its *liability is wholly derived* from that of its subsidiary (first condition), and the parallel actions brought by the parent company and its subsidiary have *the same subject-matter* (second condition), the General Court could legitimately allow the parent company to benefit from the reduction in the duration of the infringement established in the proceedings initiated by its subsidiary and, accordingly, reduce the amount of the fine imposed also in respect of the parent company.

63. In this case, the question arises as to whether the General Court merely had the possibility, in certain circumstances, to apply the same reduction to the fine imposed on the appellant as had been applied in respect of its subsidiary, or whether it was under an obligation to do so in the exercise of its unlimited jurisdiction. It should be noted that, in the judgment in *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29), the question which arose was merely whether or not the General Court *could* align those amounts, and not whether or not it *was required* to do so.

25 — C-310/97 P, EU:C:1999:407.

26 — Judgment in *Commission* v *AssiDomän Kraft Products and Others*, (C-310/97 P, EU:C:1999:407, paragraph 52 and the case-law cited).

27 — Ibid. (paragraph 53).

28 — C-201/09 P and C-216/09 P, EU:C:2011:190, paragraph 141.

29 — In the judgment in *Commission* v *AssiDomän Kraft Products and Others* (C-310/97 P, EU:C:1999:407 paragraph 56), the Court pointed out that Article 176 EC (now Article 266 TFEU) did not mean that the Commission must, at the request of interested parties, re-examine identical or similar decisions allegedly affected by the same irregularity, addressed to addressees other than the applicant.

64. It could, in some ways, be argued that the General Court must adopt the same approach as that taken in the case which gave rise to the judgment in *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29).

65. First, such a position is consistent with the unitary approach to the concept of an undertaking recommended by the Commission and confirmed by the case-law of the Court. In the event that the parent company is found liable purely due to the actions of its subsidiary, and the reduction of the fine imposed on the subsidiary is not applied to that imposed on the parent company, this would artificially divide the two entities even though they form part of the same undertaking. In such a context, there must be some consistency between the fine imposed on the parent company and that imposed on its subsidiary. After all, it might seem somewhat contradictory to support a unitary approach to the concept of an undertaking in the context of the imputability of unlawful conduct, while at the same time supporting a separatist approach when it comes to drawing the appropriate conclusions from that unitary approach.

66. Secondly, the obligation on the General Court to allow the parent company to benefit from any reduction in the fine established with regard to the subsidiary would operate to secure full compliance with the judgment given by the General Court concerning the subsidiary. That point seems all the more important since the Commission does not always appear to be willing [30] to draw the appropriate conclusions from the reduction established with regard to the subsidiary. I will return to that point below, as it seems to me to be a key parameter for the response which should be given in this case to the questions raised by the first and third pleas.

67. Thirdly, it should not be overlooked that the General Court exercises, with regard to fines, unlimited jurisdiction, in the context of which the principle of '*ne ultra petita*' plays a much more limited, even marginal, role than in relation to the review of legality. [31]

68. In the exercise of that jurisdiction, the General Court must, for the purposes of determining whether the amount of the fine to be imposed is appropriate, take into account all the legal and factual circumstances relevant at the date of its ruling.

69. Those circumstances may include the possibility of considering whether the liability of a parent company is wholly derived from that of its subsidiary in a given case, and the consequences which that necessarily entails in the event of a reduction in the amount of the fine imposed on the subsidiary. In that context, it could also be argued that drawing the appropriate conclusions from such a reduction as regards the parent company (whose liability is wholly derived from that of its subsidiary), which requires that the object of the parallel actions brought by the parent company and its subsidiary be identical, is, to some extent, automatic, and should not present any insurmountable difficulties for the General Court.

70. However, tempting as it may be to impose such an obligation on the General Court, that would only partially compensate for the problems caused by the conditions and uncertainties which inevitably surround the intervention of the courts. I am of the opinion that the intervention of the courts, in the manner suggested by the appellant, cannot be the only or the primary means of guaranteeing the effectiveness of the unitary approach to an undertaking and of the inevitable consequences on the amount of the fine imposed on a parent company where its liability is wholly derived from that of its subsidiary.

30 — That is so in the present case. The approach which the Commission adopted in this case is, however, contradicted by that taken in other cases, where the Commission seems, on the contrary, to submit that, by reducing the fine imposed on an undertaking, notwithstanding the absence of any such request in the action brought by the latter, the General Court had encroached on the Commission's responsibilities under the first paragraph of Article 266 TFEU (see, inter alia, judgment in *Alliance One International* v *Commission*, C-679/11 P, EU:C:2013:606, paragraphs 93 and 107).

31 — See, to that effect, the Opinions of Advocate General Mengozzi in *Commission* v *Tomkins* (C-286/11 P, EU:C:2012:499, point 37), and of Advocate General Poiares Maduro in *Groupe Danone* v *Commission* (C-3/06 P, EU:C:2006:720, point 49).

71. First, and at the risk of pointing out the obvious, the intervention of the courts can only be contingent, in the sense that it is always dependent on an action, or a number of parallel actions, having been brought beforehand. It cannot be ruled out that, in a situation such as that referred to in the present case, the parent company would not deem it appropriate or would not be able to bring an action against the decision holding it jointly liable, with its subsidiary, to pay a fine for infringing competition rules. In such a situation, and notwithstanding the fact that the parent company was referred to in the contested decision only by reason of the actions of its subsidiary, it would automatically be unable to benefit from any reduction of the fine which may be determined by the General Court with regard to that subsidiary.

72. Secondly, even if parallel actions have been brought by the parent company and its subsidiary, respectively, as in the present case, it is still necessary for the object of those actions to be identical, at least where the carrying out of the review of legality is at issue.

73. Thirdly — and it seems to me that this point highlights all the limitations of laying down an obligation for the courts to intervene –, even in the context of unlimited jurisdiction, in order for the General Court to be able to take into account, for the purposes of adjusting the fine imposed on the parent company, its own findings regarding the parent company's subsidiary, it is still necessary for the General Court to have actually ruled (or to be ruling concurrently) on the action brought by the subsidiary when it gives a judgment on the action brought by the parent company. It cannot be ruled out that, by reason of the procedural choices and material constraints specific to each case, the European Union Courts may already have ruled on the action brought by the parent company at the time that they are called upon to give a judgment on that brought by the subsidiary.

74. Consequently, I am firmly convinced that the consistency of the decisions adopted in respect of the parent company and its subsidiary, respectively, in a situation such as that referred to in the present case falls, primarily, to the Commission, which is required, under the first paragraph of Article 266 TFEU, to take the necessary measures to comply with judgments. Regardless of any other consideration, it is for that institution to take any measures with regard to a parent company that may be required as a result of a judgment concerning one of its subsidiaries.

75. It must be emphasised that the Commission must give due effect, in respect of a parent company, to the findings made and the decision finally taken in the context of an action brought by a subsidiary against a decision imposing a fine jointly and severally on the two companies. It cannot be based on considerations of expediency. In all cases where the subsidiary obtains the total or partial annulment of the fine, the Commission should, in particular, also allow the parent company to benefit from that. It should be noted that, in a case such as the present, namely, in a situation where the liability of the parent company is wholly derived from the actions of its subsidiary, applying, in respect of the parent company, a fine which exceeds that for which its subsidiary is ultimately liable is tantamount to imposing a portion of a fine for which there is no legal basis.

76. In the light of all the foregoing considerations, I will examine more specifically the first and third pleas raised in the present appeal.

b) The first plea

77. As regards the first plea, alleging an infringement of the principle of *audi alteram partem*, I take the view that, although there are inevitable comparisons to be drawn with the judgment in *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29), the response to be given must, in any event, be different.

78. In that case, the General Court was accused of having failed to give the Commission an opportunity to comment on its intention to reduce the fine imposed on Tomkins plc on the basis of pleas raised only by its subsidiary in the parallel case which gave rise to the judgment of the General Court in *Pegler* v *Commission*.[32] The plea was rejected by the Court of Justice, which held that the Commission's criticisms relating to the failure to observe both the principle of *audi alteram partem* and the right to a fair trial were based on that institution's firm conviction that it is absolutely impossible to allow the parent company, namely Tomkins plc, to benefit from a reduction in the period of infringement established in respect of its subsidiary, Pegler Ltd, where the actions brought by those companies are not wholly identical. However, as pointed out by the Court, 'that possibility does exist in certain circumstances' (C-286/11 P, EU:C:2013:29, paragraph 61).

79. In this case, however, it is impossible not to have some sympathy for the argument that reducing the amount of the fine imposed on the subsidiary, without reducing that of the fine imposed on the parent company, modified the nature[33] of the liability attributed to the parent company. Thus, either the liability of the parent company in this case can no longer be regarded as wholly derived from that of its subsidiary, or the difference between the fine imposed on the parent company and that imposed on its subsidiary has no foundation in law and no legal basis.

80. However, I am not convinced that the principle of *audi alteram partem*, which implies inter alia that the parties be apprised of, and able to debate and be heard on, the matters of fact and of law which will determine the outcome of the proceedings[34] — whether or not those matters have been raised by the courts of their own motion –, was infringed by the General Court in the context of the contentious proceedings which gave rise to the judgment under appeal.

81. Even if the argument according to which the judgment under appeal, read in conjunction with the judgment given on the same day in *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423), modified the nature of the liability attributed to the appellant were accepted, the judgment under appeal cannot, in my view, be held to be problematic as regards respect for the rights of the defence.

82. Furthermore, I am of the opinion that the plea alleging an infringement of the principle of *audi alteram partem* is, if not ineffective, clearly unfounded.

83. The plea is ineffective in that it is not the judgment under appeal which may have modified the nature of the liability, but the combined effect of that judgment and the judgment given the same day in *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423).

84. The plea is, in any event, unfounded in that it has by no means been established that, in giving its judgment, the General Court neglected to include a matter of law or fact in the exchange of argument and evidence between the parties. To decide otherwise would impose on the courts the obligation systematically to invite a legal entity to take a view on the possible impact of the positions adopted in related or parallel cases.

85. Finally, it has been well established that a possible infringement by the General Court of a procedural right, such as the principle of *audi alteram partem*, cannot lead to the setting aside of a judgment it has given unless it has been demonstrated that that infringement affected the outcome of the proceedings.[35]

32 — T-386/06, EU:T:2011:115.

33 — Although the wording of the plea can, in some respects, cause confusion, the appellant is referring to a modification of the nature of the liability, and not only to the liability being rendered more serious.

34 — For a recent reminder of that requirement, see judgment in *OHIM* v *National Lottery Commission* (C-530/12 P, EU:C:2014:186, paragraph 54 and the case-law cited).

35 — See, inter alia, judgment in *Gascogne Sack Deutschland* v *Commission* (C-40/12 P, EU:C:2013:768, paragraph 81 and the case-law cited).

86. That does not seem to have been demonstrated in the present case. After all, it has not been established that inviting the appellant in the manner suggested by the latter was necessarily capable of altering the outcome of the proceedings.

c) The third plea

87. The third plea is also unconvincing.

88. As I explained previously, it cannot be inferred from the judgment in *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29) that the General Court erred in law or improperly exercised its unlimited jurisdiction by failing, in the present case, to align the amount of the fine imposed on the appellant with that which was finally imposed on its subsidiary in the case which gave rise to the judgment in *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423).

89. As regards the first part of this plea, the appellant's argument, according to which, in essence, the General Court exceeded its powers in the exercise of unlimited jurisdiction by modifying, in this context, the nature of the appellant's liability, is unconvincing.

90. Following on from that which I have stated in relation to the first plea, it is sufficient to note that what may be problematic, from the point of view of the modification of the extent of the liability, is the reduction which was applied in parallel case *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423), and not the judgment under appeal taken in isolation.

91. The second part of the third plea relates largely to the conclusions to be drawn from the judgment in *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29).

92. Again, I consider it essential to note that the Court of Justice referred merely to the possibility that the General Court could, where a parent company and its subsidiary challenge their fines by means of parallel actions with the same object, allow the parent company to benefit from the same reduction in its fine as that granted to its subsidiary. Furthermore, this appears fairly clearly from the wording used by the Court of Justice, in particular its use of the term 'possibility' twice in paragraph 61 of that judgment. Although the Court of Justice held that the General Court's unlimited jurisdiction allowed it to align the amount of the fine imposed on the parent company with that set for its subsidiary in the context of the parallel action brought by that subsidiary, it did not establish that there was any obligation to do so.

93. For the above reasons, laying down such an obligation would compensate only partly for the problems caused by a failure to align the amounts of the fines imposed, respectively, on the parent company and its subsidiary.

94. In any event, even if the Court of Justice decides to lay down such an obligation for the General Court, which seems to me not to be appropriate given that the Commission is required to comply with judgments under the first paragraph of Article 266 TFEU, that obligation for the courts to intervene could be imposed only in certain circumstances.

95. The actions brought by the subsidiary and its parent company must not only be parallel actions but, as is clear from the judgment in *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29), they should also have the *same object*.

96. Although the Court did not clearly define the concept of 'object' in that judgment, there are two key factors which make it possible to comprehend its meaning.

97. First, the Court does not require that the pleas raised or the arguments put forward in support of those pleas be identical. Such an approach would be too restrictive and would carry the risk that any attempt at aligning the amounts of the fines, decided by the General Court in the exercise of its unlimited jurisdiction, would be condemned to failure.

98. Secondly, it cannot be sufficient to require that the forms of order sought by the subsidiary and the parent company, respectively, have the same aim in order to determine that the object is the same. Similarly, disputing, in a general manner, that the fine is appropriate or proportionate based on the criteria of the duration and seriousness of the infringement cannot lead to the finding that the object is the same.

99. In that connection, it seems to me that the Court of Justice endorsed the approach that the General Court had taken in *Tomkins* v *Commission* (T-382/06, EU:T:2011:112) by drawing a distinction between the complaints regarding the duration of the infringement based on whether or not they related to the same aspect. The General Court had aligned the amounts of the fines only to that extent. In paragraph 56 of its judgment, the Court of Justice seems to have endorsed the distinction drawn by the General Court, holding that the General Court could not be criticised for refusing to take into account, in the action brought by Tomkins plc, an error made by the Commission in the application of a deterrence factor with regard to Pegler Ltd. The Court of Justice pointed out, in that context, that the General Court, in paragraphs 56 to 58 of the same judgment, had drawn the appropriate conclusion from the fact that the action brought by Tomkins plc was not directed at an error on the part of the Commission in the application of the deterrence factor.

100. Turning to the present case, although it is true that, in addition to raising numerous pleas alleging the imputability of the infringement to the appellant, the Commission also called into question the determination of the infringement period, it did not do so in exactly the same way as Total France. In addition to criticising the findings relating to its actual participation during certain periods, Total France had also criticised the method used, when calculating the fine, to determine the multiplier to be applied to reflect the duration of the infringement.

101. It is precisely the complaint alleging an infringement of the principles of equal treatment and proportionality in the application of the methodology set out in the Guidelines which led the General Court to reduce the amount of the fine imposed on the appellant's subsidiary.

102. Furthermore, I am of the opinion that, even if the General Court was required to take account of the reduction in the fine that it decided in respect of Total France, it could not apply the same reduction to the fine imposed on the appellant. The action brought by the appellant did not relate to the methodology applied to reflect the duration and, therefore, in that regard, it did not have the same object as the action brought by its subsidiary Total France.

103. As regards the complaint alleging an infringement of the principle of equal treatment, here again the question arises as to whether the General Court should have granted of its own motion the same reduction in the fine as that which was granted to Total France.

104. In this connection, it is sufficient to note that the exercise of unlimited jurisdiction does not amount to a review of the court's own motion and that, with the exception of pleas involving matters of public policy which the courts are required to raise of their own motion, such as the failure to state reasons for a contested decision, it is for the appellant to raise pleas in law against that decision and to adduce evidence in support of those pleas. [36]

36 — See, inter alia, judgments in *KME Germany and Others* v *Commission* (C-272/09 P, EU:C:2011:810, paragraph 104); *Chalkor* v *Commission* (C-386/10 P, EU:C:2011:815, paragraph 64); and *KME Germany and Others* v *Commission* (C-389/10 P, EU:C:2011:816, paragraph 131).

105. Since the appellant did not call into question, at first instance, the methodology used to determine the factor to be applied to reflect the duration of the infringement for the purposes of determining the amount of the fine, it cannot, in my view, submit, at the appeal stage, that the General Court treated it less favourably than its subsidiary.

106. Moreover, since the principle of equal treatment is not a plea involving a matter of public policy,[37] the General Court was not legally obliged to raise the question whether the application of the multiplication factor was unlawful, even if that matter came to light in the context of the parallel action brought by Total France.

107. Those considerations also apply to the complaint alleging infringement of the principle of proportionality. The fact that the General Court must exercise its unlimited jurisdiction with due regard for that principle does not imply that it is required to advance any lines of argument relating to a possible breach of that principle.

108. In the light of all the foregoing considerations, I am of the opinion that the first and third grounds of appeal should be rejected.

B – *The second plea, alleging errors of law relating to the grounds for the judgment under appeal*

109. The appellant submits that the General Court made several 'errors relating to the grounds' in the course of the review of legality and in the exercise of its unlimited jurisdiction, respectively.

1. The first part: the General Court erred in law in the context of its review of legality by failing to censure the Commission's infringement of the duty to state reasons

a) Arguments of the parties

110. The appellant puts forward two complaints.

111. First, it considers that the General Court made errors in its review of the statement of reasons for the contested decision in relation to the arguments put forward to rebut the presumption of decisive influence.

112. According to Total, several factors in this case made it necessary, in accordance with the findings made in the judgment in *Elf Aquitaine* v *Commission*,[38] for a higher standard to be applied to the reasons why the Commission considered that the evidence submitted was not sufficient to rebut that presumption.

113. First, the contested decision was not in line with established decision-making practice, but marked a change in approach, as highlighted in the case which gave rise to the judgment in *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:620), as regards the application of the presumption of exercise of decisive influence of parent companies over their subsidiaries. Secondly, that change in approach brought about a considerable difference in the treatment of the appellant, which required

37 — This is demonstrated by the fact that it was rejected as a new plea before the Court (see judgments in *Langnese-Iglo* v *Commission*, C-279/95 P, EU:C:1998:447, paragraphs 53 to 56, and *The Dow Chemical Company* v *Commission*, C-179/12 P, EU:C:2013:605, paragraphs 80 to 83).

38 — C-521/09 P, EU:C:2011:620, paragraphs 150 to 165.

particular attention from the Commission. Thirdly, it should be noted that, in the present case, the liability of the appellant is wholly derived from that of its subsidiary, which alone participated directly in the infringement. Fourthly, Total did not receive a formal notification until the statement of objections was sent, which could potentially affect the rights of the defence.

114. With reference to the judgment in *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:620) (in particular, paragraphs 160 and 167), Total submits that, contrary to what the General Court holds in paragraph 123 of the judgment under appeal, the Commission did not examine all the evidence that Total had adduced. The General Court failed to censure the fact that there was no statement of reasons in the contested decision on that point, which constitutes an infringement of an essential procedural requirement. The appellant takes the view that the judgment under appeal reveals some confusion (see, inter alia, paragraphs 74 and 146 of the judgment under appeal) between, on the one hand, the possibility for the Commission, where the subsidiary is wholly owned by the parent company, to presume that those two entities form an economic unit and, on the other, the legitimate possibility for a company wishing to rebut such a presumption to adduce any evidence capable of demonstrating that the two companies concerned do not constitute such a unit.

115. Secondly, Total submits that, by substituting its own reasoning for that of the Commission instead of declaring the contested decision unlawful on the grounds of failure to state reasons, the General Court exceeded the limits of its power of judicial review, which should have led to the setting aside of the judgment under appeal. That is particularly so with regard to the reasons given in the response to the arguments concerning, respectively, the financial independence of Total Raffinage Marketing (T-566/08, EU:T:2013:423) (in particular, paragraphs 89 and 90 of the judgment under appeal), the fact that the subsidiary did not inform the parent company of its activity on the market (paragraph 95 of the judgment under appeal), the absence of instructions from the parent company to the subsidiary (paragraph 99 of the judgment under appeal) and, finally, the absence of personnel overlaps within the management structure of the parent company and that of its subsidiary (paragraphs 75 to 80 of the judgment under appeal).

116. The Commission submits that those complaints, which it considers inadmissible and, in any event, unfounded, must be rejected.

b) Assessment

i) Admissibility

117. First of all, it is necessary to comment on the admissibility of that part of the plea.

118. As the Commission pointed out, it is legitimate to consider whether, by raising for the first time the question concerning the statement of reasons in the contested decision, as an essential procedural requirement, the appellant is effectively modifying the subject-matter of the proceedings before the General Court.

119. It appears that the points made in the judgment under appeal which were called into question in the context of the second ground of the appeal,[39] and which sought to respond to the arguments set out in the second part of the fourth plea raised before the General Court, essentially concerned the question of whether the Commission had committed a manifest error in its assessment of the evidence submitted with a view to rebutting the presumption of decisive influence.

39 — Paragraphs 88 to 93 and 94 to 96 of the judgment under appeal.

120. The appellant pointed out, furthermore, that the criticisms it made in the context of the present plea relate to 'a total failure to state reasons' for the contested decision, which the General Court should have raised of its own motion.

121. In that regard, it is well established that the infringement of the obligation, laid down in Article 296 TFEU, for the institutions to state reasons for measures they adopt, which is regarded as an essential procedural requirement, *can* be raised by the courts of their own motion. That possibility obviously stems from the fact that the court deciding the case needs to know the reasoning followed by the authority which adopted the measure in question in order actually to exercise its powers of review. It is also well established that the fundamental purpose of the obligation to state the reasons on which an individual decision is based is to enable the courts to review the legality of that decision. [40]

122. The question of whether the failure to state reasons *must* be raised by the courts of their own motion in all cases is a much more complex one and, in the specific circumstances of the present case, must be answered in the negative.

123. In my view, where the courts are called upon to rule on the validity of an assessment contained in the contested measure — in this case, the assessment relating to the examination of the evidence submitted with a view to rebutting the presumption that the appellant exercises decisive influence over its subsidiary –, the courts must, in order to conduct their review, be able to understand the content of the decision and the reasoning followed by the authority which adopted the measure in question. In other words, in order to examine whether the Commission's assessments are valid, it is necessary to verify, even by implication, the adequacy of the statement of reasons in the contested decision.

124. Moreover, I fully agree with the Commission's view that the General Court cannot be required to review of its own motion those aspects of the reasoning in the contested decision which relate to matters which have not been raised before it. The Court of Justice has indeed recently ruled to that effect, rejecting, in the context of an appeal, two pleas concerning the reasoning in the contested decision which, as in the case currently under consideration, had not specifically been raised at first instance. [41]

125. The situation referred to in the present case is, therefore, different from that which was at issue in the judgment in *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:620), a case in which the issue of the reasons for rejecting the arguments put forward by the appellant in order to rebut the presumption that it exercised decisive influence had been specifically raised at first instance. [42]

126. It must be pointed out in this case that the appellant focused its line of argument on the very fact that it had been presumed to exercise a decisive influence over its subsidiary Total France, and on the evidence which should have led the Commission to rebut that presumption. The contested elements of the judgment under appeal concerned, therefore, the validity of the Commission's assessments and the possible inadequacy, in terms of the fulfilment of essential procedural requirements, of the statement of reasons in the contested decision.

127. In addition, I am of the opinion that the first part of the plea must be rejected, in its entirety, as inadmissible.

40 — See, inter alia, judgment in *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:620, paragraph 148 and the case-law cited).

41 — See judgment in *Gascogne Sack Deutschland* v *Commission* (C-40/12 P, EU:C:2013:768, paragraphs 46 to 55 and 61 to 64).

42 — See paragraph 9 of that judgment, which refers to the General Court's examination of the second plea raised before it, alleging inadequate reasoning.

128. It seems hardly conceivable to me that the General Court should be criticised for failing to raise a matter which was not directly put before it. Any other conclusion would, in my opinion, be tantamount to disregarding the guiding principles of judicial proceedings by imposing a disproportionate obligation on the courts. This will be discussed below.

129. In the event that the Court of Justice does not support that conclusion, it is necessary to address the substantive question of whether the General Court disregarded the conclusions to be drawn from the aforementioned judgment in *Elf Aquitaine* v *Commission*.

ii) The scope of the duty to state reasons according to the same judgment in *Elf Aquitaine* v *Commission* (C-521/09 P)

130. The appellant appears to suggest that Commission decisions that rely on the presumption of decisive influence cast new light on and throw into sharp relief the matter of the General Court's raising of its own motion the reasons given for measures adopted by the institutions. Indeed, according to the conclusions to be drawn from the judgment in *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:620), the Court of Justice held, in particular, that, alongside the Commission's obligation to include in the contested decision 'a detailed statement' of the reasons why it found that the evidence submitted by the appellant parent company was not sufficient to rebut the presumption applied in that decision, there was an obligation on the part of the General Court to *pay particular attention* to the question whether the Commission fulfilled that obligation (paragraph 167 of the judgment).

131. In the judgment in *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:620), the Court noted in particular that, as regards a Commission decision which relies exclusively, with respect to certain addressees, on the presumption that they actually exercised decisive influence, the Commission is in any event required — if it is not to render that presumption in reality irrebuttable — to explain adequately to those addressees the reasons why the elements of fact and of law put forward did not suffice to rebut that presumption. The Commission's duty to state reasons for its findings on that point flows primarily from the fact that that presumption is open to rebuttal, for the purposes of which it is necessary for those concerned to produce evidence relating to the economic, organisational and legal links between the companies concerned (paragraph 153 of the same judgment).

132. The Court stated, in that context, that, although the Commission is not necessarily required to adopt a position on all the arguments raised before it by interested parties, it was for the General Court, *in the light of all the circumstances of the case*, to pay particular attention to the question whether the latter decision contains a detailed statement of the reasons why the Commission found that the evidence submitted by the appellant was not sufficient to rebut the presumption applied in that decision (paragraphs 161 and 167 of the judgment).

133. In addition to the fact, mentioned above, that the issue of the reasoning for the part of the Commission decision relating to the presumption of decisive influence and to the arguments in rebuttal of that presumption had been raised before the General Court, it seems to me that the Court of Justice was seeking to highlight particular circumstances, and not, in my view, to lay down an obligation of a higher standard of reasoning and, at the same time, to require the General Court to be particularly vigilant in that regard.

134. This seems fairly clear from the wording used by the Court of Justice, which, after recalling the settled case-law regarding the reasons on which individual decisions are based [43] and, in particular, the rule that the requirement to state reasons must be adapted to suit each case, sets out the particular circumstances of the case at issue.

43 — See judgment in *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:620, paragraphs 144 to 155).

135. First of all, the Court had pointed out that only one recital of the contested decision in that case actually set out the reasons why the Commission rejected the appellant's arguments relating to the supposed autonomy of its subsidiary. [44]

136. Secondly, the Court held that the case in question reflected a change in approach — not disputed in the appeal proceedings — with respect to the appellant between the 'Organic peroxides' decision [45] and the contested decision in that case. [46]

137. According to the judgment, it was in fact only by reason of 'particular circumstances' that the Court of Justice had finally concluded that the General Court had erred in law in finding that the contested decision complied with Article 253 EC and in not finding fault with the failure to state reasons that vitiated the contested decision in so far as the fine imposed on the appellant was concerned. [47]

138. In this case, there does not appear to have been a failure to take into account the conclusions to be drawn from that judgment.

139. First, as the Commission quite rightly pointed out, both the terms in which the Commission decision is couched and the specific circumstances which led to the adoption of that decision must be distinguished from those which gave rise to the judgment in *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:620). The Commission decision at issue in the present case unquestionably contains a fuller, [48] and certainly less ambiguous, statement of reasons than the statement of reasons in the decision at issue in that case.

140. Secondly, it is doubtful that the Commission departed from its decision-making practice in adopting the contested decision in the case at issue. The decision is, after all, fairly orthodox in terms of the application of the presumption of actual exercise of decisive influence in relationships between parent companies and their wholly owned subsidiaries. It seems to me that that presumption had been relied on by the Commission and endorsed by the Court in its case-law [49] long before the contested decision was adopted.

141. It follows from all the foregoing considerations that the arguments based on the alleged failure to fulfil the duty to state reasons, as was pointed out in the judgment in *Elf Aquitaine* v *Commission*, cannot, in my view, be accepted.

142. In any event, I am not convinced that the General Court made any error in its 'review of the statement of reasons' in the contested decision. Indeed, it seems to me that the General Court duly took into account all the evidence submitted by the appellant with a view to calling into question and rebutting the presumption of decisive influence in that context [50] and satisfied itself that the Commission had examined the evidence submitted in response to the statement of objections. Evidence of this includes the General Court's extensive examination in relation to the examination of the appellant's arguments in that regard which were based on, respectively, the absence of any overlaps between the appellant's management structure and that of Total France (paragraphs 75

44 — Ibid. (paragraph 168).

45 — Commission Decision C(2003) 4570 final of 10 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 — Organic peroxides) (OJ 2005 L 110, p. 44).

46 — Namely, Commission Decision C(2004) 4876 final of 19 January 2005 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/37.773 — AMCA) (see judgment in *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraphs 163 to 167).

47 — See judgment in *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:620, paragraph 170).

48 — The assessment of the company held liable for the infringement, namely, the appellant, is set out in about 20 recitals (recitals 574 to 586 of the contested decision).

49 — See, inter alia, judgment in *Akzo Nobel and Others* v *Commission* (C-243/12 P, EU:C:2009:536, paragraphs 58 to 63 and the case-law cited).

50 — See the examination of the fourth plea in paragraphs 67 to 102 of the judgment under appeal.

to 81), the supposedly autonomous commercial strategy adopted by Total France (paragraphs 82 to 87), the supposed financial independence of Total France and the small proportion that sales of paraffin waxes represent in the Total France's turnover (paragraphs 88 to 93), the claims that Total France had not informed the appellant of its activity on the market (paragraphs 94 to 96) and the claims that Total France was not subject to instructions from the appellant and acted in its own name and on its own behalf (paragraphs 97 to 100).

143. Contrary to what the appellant suggests, I take the view that those findings do not indicate any confusion between the possibility of applying the presumption of decisive influence, as set out in the case-law, and the legitimate possibility for any company to submit evidence for the rebuttal of that presumption.

144. Finally, the complaint that the General Court, in particular in paragraphs 89, 90, 95, 98 and 99, had substituted its own assessment for the Commission's defective assessment is also unconvincing.

145. In addition to the fact that some passages of the judgment relate to arguments set out merely for the sake of completeness,[51] and the rejection of those arguments could not lead to the setting aside of the judgment,[52] the fact that the General Court adopted on its own, in the passages of the judgment relating to the second part of the fourth plea, some of the arguments set out by the Commission, while at the same time subjecting them to the critical analysis following on from the exchange of argument and evidence between the parties, cannot be regarded as an attempt to substitute its reasoning for that of the Commission.

146. Consequently, I propose that the first part of the second plea be rejected as inadmissible and, in any event, as unfounded.

2. The second part: the General Court's failure to state reasons acting in the context of its power to amend

a) Arguments of the parties

147. The appellant criticises the General Court for having failed to determine, of its own motion, whether the reasons given for the amount of the fine were appropriate, both in terms of the seriousness and the duration of the infringement, whereas it did take that step in the judgment in *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423). Total takes the view that the General Court errs in law in two respects: first, it fails to determine independently and of its own motion whether the fine imposed on Total is appropriate and, secondly, it fails to state adequate reasons for its assessment, confining itself, in paragraph 224 of the judgment under appeal, to stating that the amount of the fine is appropriate 'in the light of all the circumstances of the case'.

148. The Commission submits that this part of the plea must be rejected.

b) Assessment

149. In my view, there are two aspects to the second part of the second plea. The first is closely related to the matters raised in the context of the first plea, since a comparison is made with the amount of the fine established in the judgment in *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423). The second is aimed, more generally, at alleging a failure to state the reasons for which the fine imposed on it is considered to be appropriate.

51 — That is the case in paragraphs 80 and 99 of the judgment under appeal.

52 — See, inter alia, judgment in *Commission* v *Deutsche Post* (C-399/08 P, EU:C:2010:481, paragraph 75 and the case-law cited).

150. As regards the first aspect, reference is made to the considerations set out above. Not only was there no obligation for the General Court to align the amount of the fine imposed on the appellant with the amount finally set for its subsidiary, but also the criticisms regarding the duration of the infringement raised by the appellant before the General Court did not relate to the same aspect as that which was censured by the General Court and, therefore, did not have the 'same object'.

151. As regards the second aspect, I do not think that the paragraphs of the judgment under appeal specifically referred to by the appellant (paragraphs 214 to 219 and 224) are vitiated by any error of assessment or any failure to state reasons, however general or brief the findings of the General Court may seem.

152. In this case, it should be recalled that the General Court stated the following with regard to the pleas raised in support of the claim for amendment. [53]

153. First of all, it rejected the eighth plea seeking the annulment of the fine that had been imposed on the appellant and alleging that the 2006 Guidelines had been infringed and that the amount of the fine was disproportionate. The reasoning set out by the General Court in response to that plea [54] does not display any ambiguity and has not, moreover, been challenged in the context of the present appeal.

154. Secondly, it is on the basis of, in my view, adequate reasoning [55] that the General Court rejected all the arguments put forward by the appellant in the context of the ninth plea seeking a significant reduction in the amount of the fine and relating to the supposedly incorrect determination of the seriousness and duration of the practices alleged, and to an infringement of the rights of the defence.

155. Moreover, although the General Court indicated, with regard to the complaint relating to the inadequate statement of reasons and the failure to take into account that the practices in question had no effect on the relevant market, that the examination of the statement of reasons formed part of the review as to the legality of the contested decision which it conducts pursuant to Article 230 EC, [56] it did not, however, refuse to respond to the appellant's arguments as set out in the application at first instance. [57]

156. It seems to me that those considerations are equally applicable as regards the arguments put forward with a view to invalidating the Commission's findings in relation to the duration of the infringement (see paragraphs 215 to 219 of the judgment under appeal).

157. Finally, I cannot concur with the line of argument that the finding made in paragraph 224 of the judgment under appeal, according to which the amount of the fine imposed on the appellant was appropriate 'in the light of all the circumstances of the case', which was particularly vague and general, demonstrates that the General Court failed to fulfil its obligation to exercise its powers of unlimited jurisdiction.

158. In addition to the fact that the appellant fails to point out that the finding made by the General Court in paragraph 224 of the judgment under appeal follows an examination of all the pleas raised in support of the application for amendment, it does not indicate which aspects of the reasoning followed by the General Court, raised specifically in the course of the proceedings, were vitiated by a failure to state reasons.

53 — See paragraphs 191 to 224 of the judgment under appeal.

54 — Ibid. (paragraphs 193 to 204).

55 — Ibid. (paragraphs 208 to 220 and 222 to 223).

56 — See the first sentence of paragraph 212 of the judgment under appeal.

57 — See the third sentence of paragraph 212 of the judgment under appeal.

159. Even if it is, in reality, the General Court's review of the appropriate nature of its fine that the appellant seeks to criticise, it fails to mention which factors, in its view, should have been taken into consideration in the exercise of the Court's unlimited jurisdiction. The General Court cannot be required to substitute, in exercising those powers, its own assessment for that of the Commission by examining, of its own motion, other complaints which may be raised against the contested elements of the decision at issue. [58]

160. For all those reasons, the second plea should be rejected in its entirety.

C – *The fourth to sixth pleas supporting the claim for the annulment or adjustment of the amount of the fine*

161. By its fourth plea, the appellant requests, in the alternative, that the Court, having regard to the considerations set out, in particular, in the context of the third plea, fully exercises its power to amend in order to annul or reduce the amount of the fine imposed on Total, taking all the circumstances of the case into account.

162. By its fifth plea, the appellant requests the Court, in the further alternative, even if the judgment under appeal is not set aside, to find that the General Court misused its power to amend, and to reduce the fine imposed on Total to the level of the fine imposed on its subsidiary by the judgment in *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423), in other words, to reduce the fine by EUR 2 704 158.

163. By its sixth and final plea, the appellant requests the Court, in the final alternative, and in any event, to align the basic amount of the fine imposed on it with that imposed on its subsidiary Total France either, in the event of an appeal by its subsidiary, in the judgment of the Court of Justice given on that appeal where the latter considers that the case has reached a stage permitting a final decision, or in the judgment given by the General Court on referral from the Court of Justice. For the same reasons, Total considers that if the fine imposed on its subsidiary is annulled, then its own fine must also be annulled.

164. Since the first three grounds of the appeal must be rejected, the fourth ground, which is subject to one of the others being upheld, and above all, to the third ground being upheld, must, in my view, be rejected.

165. In addition, it is sufficient to note that 'it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the General Court exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of EU law'. [59]

166. It should be noted that an application for the reduction of the fine imposed on the appellant has already been brought before the General Court, which found, after examining the arguments and exercising its unlimited jurisdiction, that those arguments did not justify such a reduction.

167. It is yet to be determined whether it is, in this case, appropriate for the Court of Justice to align the amount of the fine imposed on the appellant with the reduced amount of the fine imposed on the subsidiary in the parallel case *Total Marketing Services* v *Commission* (C-634/13 P) pending before the Court (see my Opinion delivered on the same day, points 103 to 112).

58 — See, to that effect, 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 340).
59 — See, inter alia, judgment in *E.ON Energie* v *Commission* (C-89/11 P, EU:C:2012:738, paragraph 125 and the case-law cited).

168. In the abovementioned case, I suggest that the judgment of the General Court be partially set aside and the amount of the fine imposed on that subsidiary be reduced to EUR 116 364 588 to take into account that the General Court incorrectly endorsed the finding that Total France had continued to participate in the cartel on the paraffin waxes market after the technical meeting of 11 and 12 May 2004.

169. The question arises, therefore, whether it is appropriate, in the present case, to take that reduction into account with regard to the appellant, in accordance with the possibility provided for in the judgment in *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29).

170. On that specific point, it should be noted that, at first instance, the appellant, like its subsidiary Total France, had stated, in the context of the first part of its ninth plea, that, as regards Total France, the Commission had incorrectly maintained that the participation in the infringement relating to paraffin waxes continued until 28 April 2005. [60]

171. In this regard, the actions brought before the General Court in the cases which gave rise to the judgments in *Total* v *Commission* (T-548/08, EU:T:2013:434) and *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423) by the appellant and its subsidiary Total France, respectively, have the same object within the meaning of the judgment in *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29).

172. In those circumstances, according to the case-law arising from that judgment, the European Union Courts are entitled to draw inferences directly from the proposed further reduction of the fine imposed on the appellant's subsidiary in the parallel case *Total Marketing Services* v *Commission* (C-634/13 P) pending before the Court.

173. However, the European Union Courts are not authorised to bring into line the amount of the fine imposed on the appellant following the first reduction of the fine applied by the General Court, namely that applied in order to censure an infringement of the principles of proportionality and of equal treatment when taking into account the duration of Total France's participation in the infringement (see point 13 of the present Opinion).

174. In summary, although the Court is, in the circumstances of the present case, entitled to take into account directly the reduction which I suggest should be applied in the aforementioned parallel case *Total Marketing Services* v *Commission* in respect of the subsidiary Total France, it cannot, however, directly take into account the reduction applied by the General Court in the case which gave rise to the judgment in *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423).

175. Therefore, it could seem very contrived that the Court should align the fines in those circumstances. The Court is, after all, not entitled to take into account the first reduction of the fine (namely, that decided by the General Court), but only, in the event that it should agree with the proposals I made in *Total Marketing Services* v *Commission* (C-634/13 P) pending before the Court, the second reduction. This situation seems to illustrate the limits of the courts' intervention.

176. Nevertheless, as mentioned previously, it must be emphasised that it is, above all, for the Commission to give due effect to the judgment to be delivered, pursuant to the first paragraph of Article 266 TFEU. That implies that the Commission may not, in any event, require that the appellant pay a higher fine than that for which its subsidiary, Total France, will ultimately be liable in accordance with the final judgment in the parallel case *Total Marketing Services* v *Commission* (C-634/13 P), pending before the Court.

60 — See, in that regard, paragraph 215 of the judgment under appeal.

177. With that sole reservation, I am of the opinion that the last three pleas cannot be upheld.

VI – Conclusion

178. In the light of the foregoing considerations, I propose that the Court should:

(1) dismiss the appeal;

(2) order Total SA to pay the costs.