Reports of Cases

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

Case C-634/13 P

Total Marketing Services, successor in law to Total Raffinage Marketing,
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 — Duration of the participation in an illegal cartel — Cessation of the participation — Interruption of the participation — Burden of proof — Public distancing — Perception of the other participants in the cartel of the company's intention to distance itself)

I – Introduction

1. By this appeal, Total Marketing Services, successor in law to Total Raffinage Marketing (formerly Total France SA, 'Total France'), is seeking to have set aside the judgment of the General Court of the European Union in *Total Raffinage Marketing* v *Commission*,[2] in which the latter, in essence, dismissed Total France's application, primarily, for the 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) ('the contested decision') and, in the alternative, for a reduction in the amount of the fine imposed on it.

2. Although this case is closely linked to the appeal lodged in *Total* v *Commission* (C-597/13 P), in which I am also delivering my Opinion today, the points of law raised by the present case are very different. They have to do, in essence, with whether the General Court's review of the appellant's participation in the alleged cartel during certain periods was inadequate or incorrect. This case thus offers the Court the opportunity to reiterate certain points concerning the establishment of evidence of an undertaking's participation in an illegal cartel and to clarify in particular the conditions under which use may be made of the criterion of public distancing by the undertaking in question.

II – Background to the proceedings

3. The background to the proceedings and the content of the contested decision were summarised by the General Court in paragraphs 1 to 17 of the judgment under appeal, to which the reader is referred for further details.

1 — Original language: French.

2 — T-566/08, EU:T:2013:423, 'the judgment under appeal'.

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

5. By the contested decision, the European Commission found that the appellant and its parent company, owning almost 100% of its capital, Total SA ('Total'), 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, 'the EEA Agreement') by participating in an agreement on the paraffin waxes market in the European Economic Area (EEA) and the German slack wax market. The appellant and its parent company, Total, were among the addressees of the contested decision.

6. The contested decision was adopted following an investigation opened in spring 2005 following information supplied by a company. On completion of that investigation, the Commission had concluded that the majority of paraffin wax and slack wax producers in the EEA, including the appellant, had participated in a single, complex and continuous infringement of Article 81 EC and Article 53 of the EEA Agreement, covering the EEA territory.

7. That infringement consisted principally in agreements or concerted practices relating to price-fixing and the exchange and disclosure of sensitive business information affecting paraffin waxes. In the case of certain companies, including the appellant, the infringement relating to paraffin waxes also concerned customer-sharing or market-sharing and also related to slack wax sold to end-customers on the German market (recitals 2, 95 and 328 and Article 1 of the contested decision).

8. The unlawful practices took form at anti-competitive meetings called 'technical meetings' or sometimes 'Blauer Salon' meetings by the participants and at 'slack wax' meetings devoted specifically to questions relating to slack wax.

9. According to the Commission, employees of Total France had participated directly in the infringement throughout its entire duration. The Commission therefore held Total France liable for its participation in the cartel (recitals 555 and 556 of the contested decision). In addition, Total France was, between 1990 and the end of the infringement, directly or indirectly owned as to more than 98% by Total. 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).

10. 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 No 1/2003,[3] which was in force when the statement of objections was notified.

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

12. 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 concerted practice in the paraffin waxes sector in the common market and, as of 1 January 1994, within the EEA:

…

3 — OJ 2006 C 210, p. 2, 'the 2006 Guidelines'.

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 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*v *Commission*(T-548/08)

13. By application lodged at the General Court Registry on 17 December 2008, the appellant brought an action against the contested decision, raising a total of 11 pleas. A 12th plea was raised at the hearing before the General Court.

14. The General Court rejected all of those pleas, with the exception of the eighth, alleging that the calculation method set out in paragraph 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 period of participation 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.

15. In the judgment delivered on the same day in *Total* v *Commission* (T-548/08, EU:T:2013:434), on the other hand, the General Court held that, in the light of the circumstances of the case, the amount of the fine imposed on the appellant's parent company was appropriate (paragraph 224 of the judgment) and did not therefore reduce the fine imposed on the parent company, Total, to the same extent. It also rejected all the pleas raised by Total in the latter case.

IV – Procedure before the Court and forms of order sought

16. The appellant claims that the Court should:

— set aside the judgment under appeal on the ground that the General Court incorrectly excluded the cessation of the appellant's participation in the infringement after 12 May 2004;

— set aside the judgment under appeal on the ground that the General Court incorrectly excluded any unjustified unequal treatment between the appellant and Repsol YPF Lubricantes y Especialidades SA, Repsol Petróleo SA and Repsol YPF SA ('Repsol') concerning the duration of their participation in the infringement;

— set aside the judgment under appeal on the ground that the General Court incorrectly excluded the interruption of the appellant's participation in the infringement between 26 May 2000 and 26 June 2001;

— set aside the judgment under appeal on the ground that the General Court did not respond to the plea alleging failure to examine evidence of the appellant's competitive behaviour on the market;

— rule definitively, in accordance with Article 61 of the Statute of the Court of Justice of the European Union and, on that basis, annul the contested decision in so far as it concerns the appellant and, in the exercise of its unlimited jurisdiction, reduce the fine imposed on the appellant;

— should the Court not rule definitively on the present case, reserve costs and refer the case back to the General Court for re-examination, in accordance with the Court's ruling;

— lastly, order the Commission to pay the costs of the proceedings before the General Court and the Court of Justice, pursuant to Article 69 of the Rules of Procedure.

17. 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.

18. 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

19. The appeal is based on four pleas in law, alleging respectively:

— infringement of Article 101 TFEU, of the rules on the adducing of evidence, of the principles of the presumption of innocence and legal certainty and of the obligation to state reasons, on the ground that the General Court held that the appellant had participated in the infringement after the meeting of 11 and 12 May 2004 and up until 28 April 2005;

— infringement of the principle of equal treatment, distortion of the evidence and failure to state reasons, in so far as the General Court excluded the appellant's withdrawal from the agreement after the meeting of 11 and 12 May 2004, but allowed Repsol's withdrawal after the meeting of 3 and 4 August 2004;

— infringement of Article 101 TFEU, of the principles of the presumption of innocence, legal certainty, equal treatment and of the obligation to state reasons, in so far as the General Court held that the appellant had not interrupted its participation in the infringement between 26 May 2000 and 26 June 2001;

— infringement of the principles of effective legal protection and that penalties must be specific to the infringing party and of the obligation to state reasons, in so far as the General Court rejected without examination the plea alleging failure to take account of the evidence of the appellant's competitive behaviour.

20. For its part, the Commission considers that the pleas in law, which, in its opinion, simply ask the Court to give judgment a second time on matters on which the General Court has already given judgment, are, in essence, inadmissible. It argues that those pleas are in any event unfounded.

21. Before I address the substance of the questions raised, I should say a few words about the admissibility of the pleas raised.

22. It is indisputable, as the Commission has quite rightly pointed out, that it is not for the Court of Justice to re-examine an application made to the General Court, since the Court of Justice does not have jurisdiction to undertake such a re-examination on appeal. [4] In particular, the Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. That appraisal does not therefore constitute, save where the clear sense of that evidence has been distorted, a point of law which, as such, is open to review by the Court of Justice. [5]

23. As regards the determination of the duration of an infringement, the Court has already made it clear that the concepts of public distancing and continuity of an anti-competitive practice, to which the pleas raised in support of this appeal refer in particular, reflect factual situations the existence of which is established by the court of first instance, on a case-by-case basis, by reference to an assessment of 'a number of coincidences and indicia' which have been placed before it and, thereafter, in the light of 'an overall evaluation of all relevant evidence and indicia'. Provided that that evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced before it. That appraisal does not therefore constitute, save where the clear sense of the evidence has been distorted, a point of law which is subject, as such, to review by the Court of Justice. [6]

24. The fact remains, however, that pleas on appeal which are not confined to challenging the material accuracy and evaluation of the factual evidence used to establish the duration of the appellant's participation in the cartel, but which call into question the relevance and importance of that evidence and the probative value attached to it by the General Court, must be declared admissible. [7]

25. In this instance, the first and third pleas raised ask the Court, in substance, to examine whether or not the criteria applied by the Commission and endorsed by the General Court, in particular that relating to the appellant's failure to distance itself publicly and the other participants' perception, for the purposes of proving the appellant's participation during the two clearly defined periods, are vitiated by unlawfulness. Those pleas must, to that extent, be declared admissible.

26. Having made that — to my mind, important — point, I will begin by addressing the question of whether the General Court erred in law in reviewing the adducing of evidence of the appellant's participation in the cartel, on the one hand, after the meeting of 11 and 12 May 2004 and, on the other hand, between 26 May 2000 and 26 June 2001, in the light of the fact that the appellant did not publicly distance itself from that cartel during those periods and the perception which the members of that cartel may have formed of the appellant's participation.

27. I will therefore examine together the first and third pleas raised by the appellant.

4 — See, in particular, the judgments in *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 51), and *Quinn Barlo and Others* v *Commission* (C-70/12 P, EU:C:2013:351, paragraph 26).

5 — Judgment in *Comap* v *Commission* (C-290/11 P, EU:C:2012:271, paragraph 70 and the case-law cited).

6 — See the judgment in *Comap* v *Commission*, C-290/11 P, EU:C:2012:271, paragraphs 71 and 86 and the case-law cited.

7 — See to that effect the judgment in *Siemens and Others* v *Commission*, C-239/11 P, C-489/11 P and C-498/11 P, EU:C:2013:866, paragraphs 128 to 130 and the case-law cited.

A – *The first and third pleas, alleging infringement of Article 101 TFEU, of the rules on the adducing of evidence, of the principles of the presumption of innocence and legal certainty and of the obligation to state reasons, in so far as the General Court held that the appellant had participated in the infringement, on the one hand, after the meeting of 11 and 12 May 2004 and up until 28 April 2005 and, on the other hand, between 26 May 2000 and 26 June 2001*

1. Arguments of the parties

28. By its first plea, the appellant submits that the General Court committed several errors of law in endorsing the Commission's approach to its participation in the infringement up until 28 April 2005.

29. First, on the sole basis of the finding that the appellant had not adduced evidence that it had publicly distanced itself from the cartel, the General Court reversed the burden of proof as to the duration of the appellant's participation in the infringement, at a time when its duty was to ascertain whether the Commission had fulfilled its obligation to adduce evidence that the infringement had continued without interruption between 12 May 2004 and 28 April 2005, given that the appellant had not participated in any collusive contacts after the latter date.

30. Secondly, the General Court misinterpreted the case-law of the Court of Justice and its own case-law in adopting the general principle that an absence of public distancing rules out any cessation of the infringement. After all, the requirement of public distancing established by that case-law is explained by the fact that the undertaking in question participated in collusive meetings and by indications of uninterrupted concerted practices during the period at issue.

31. Thirdly, the General Court's position establishes a presumption that entails a risk of arbitrariness and legal uncertainty, since the Commission would thus be able to show that an undertaking had participated in a cartel throughout its duration if that undertaking had participated in only one anti-competitive meeting without publicly distancing itself from the cartel. In this instance, the evidence adduced by the General Court in paragraphs 375 and 376 of the judgment under appeal relates to purely unilateral initiatives on the part of the undertaking that organised the cartel, that evidence being capable at most of showing that that undertaking wanted the appellant to attend the last three technical meetings. However, the appellant did not act on any of those initiatives. Furthermore, the General Court's position (paragraph 380 of the judgment under appeal) that the mere fact that the appellant did not participate in the last technical meetings does not demonstrate that it did not use the information which it had received at the previous meetings which it attended and that it did not take advantage of the agreements put in place at those meetings, is also tantamount to a reversal of the burden of proof. What is more, that line of reasoning is refuted by the fact that the cartel took the form of a series of concerted practices which took place at very close intervals of every three to four months on average.

32. The Commission argues that, even if the first plea is to be considered admissible, it is in any event unfounded.

33. In the Commission's view, the appellant's interpretation of the case-law is incorrect. The appellant refers largely to judgments of the General Court concerning, in each case, specific situations not necessarily transposable to the dispute at issue, particularly given that the duration of participation in an infringement is a question of fact, evidence of which must be adduced on a case-by-case basis in the light of the particular circumstances of the dispute in question. The Commission points out that, in this instance, evidence of the continuity of the infringement by the appellant is based on a combination of the fact that it continued to be invited to meetings, which means that the host must have perceived the invitee as a member of the cartel, and the fact that it did not distance itself from the cartel, those two components being inextricably linked.

34. In the Commission's opinion, the case-law of the Court supports its position and that of the General Court. Thus, in the judgment in *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6), it submits, the Court did not state that attendance at meetings was a necessary condition of the requirement of public distancing. The criterion based on the perception of the other members of the cartel, on the other hand, has already been clearly established. In short, the Commission submits that the case-law of both the Court of Justice and the General Court confirms that the absence of distancing is a very important factor where there is other evidence of continuous participation in a cartel and that, in any event, the perception of the other members of the cartel is essential. So it is that the case-law does not establish a hierarchy between forms of evidence and, in this case, neither the Commission nor the General Court relied solely on the appellant's failure to distance itself.

35. In any event, the Commission argues, this plea has no basis in fact. After all, in recital 602 of the contested decision, the Commission, far from relying exclusively on the appellant's failure to distance itself publicly, adduced evidence, which should be assessed in its entirety, confirming that the appellant's participation in the cartel was continuous and that the other participants perceived it as such. The General Court alone was entitled to assess the value to be attached to that evidence.

36. As regards the adducing of evidence, the Commission states that it relied, first of all, on the fact that the appellant was invited to the three meetings that took place before the inspections were carried out and, secondly, on its opinion that the e-mail of 3 November 2004 could not in itself constitute public distancing. The view that continuous participation in the cartel is established to the extent that there is no evidence to the contrary, such as, for example, an act of genuine public distancing, is consistent with the principles governing the law of evidence. In addition, the fact that an undertaking does not participate in meetings does not mean that it has withdrawn from the cartel. The appellant's submissions to the effect that the General Court did not establish facts of sufficient proximity in time to establish the continuity of the infringement are irrelevant because the present case is concerned not with a temporary interruption of participation in a cartel but with whether the undertaking at issue remained a member of that cartel until the end of its existence.

37. With regard to the third plea, the parties have put forward the following arguments.

38. The appellant submits that, as the statement made by one of the undertakings belonging to the cartel (statement forming part of the documents before the Court) shows, its representative stormed out of the meeting of 25 and 26 May 2000 in a state of exasperation and did not participate in any further meetings. It is not disputed that, after that altercation, the appellant did not participate in any of the three subsequent meetings, until its new representative attended the meeting of 26 and 27 June 2001. The appellant points out that it *had*, on the other hand, participated in 18 of the 21 meetings held over the previous five years, that is to say around 4 meetings per year.

39. In the appellant's view, the conclusion which the General Court reached on the ground that it had not adduced any evidence of having publicly distanced itself from the cartel, without ascertaining whether the Commission had fulfilled its obligation to adduce evidence to support the view that the appellant was still participating in the cartel, constitutes an infringement of the principle of the presumption of innocence. The appellant refers to the judgment in *Gosselin Group* v *Commission*,[8] according to which the resumption of participation in a cartel is inherent in the fact that the period in question is an interruption and the mere fact that the undertaking at issue had participated in the cartel both before and after the period concerned is therefore irrelevant.

8 — T-208/08 and T-209/08, EU:T:2011:287, paragraph 161.

40. As regards the criterion based on the perception of the participants in a cartel, the appellant argues that it has never been alleged or demonstrated that it was perceived as a member of the cartel between May 2000 and June 2001 and that, on the contrary, it is clear from the aforementioned statement by another undertaking belonging to the cartel that that undertaking was in no doubt about the interruption of the appellant's participation during that 13-month period. In any event, it submits, the General Court erred in law in finding that the appellant had not publicly distanced itself at the meeting of 25 and 26 May 2000, which finding is at odds with the view which it took with respect to the situation of Repsol (see the second plea), to the effect that the public distancing criterion is capable of being met provided that it is established that the other participants in a meeting are in doubt as to the participation of the undertaking at issue. Thus, the General Court accepted that Repsol had distanced itself solely on the basis of the finding that the undertaking organising the meetings had stopped sending it official invitations.

41. The Commission submits, primarily, that that plea is inadmissible. In the alternative, the Commission argues that that plea is unfounded because it had not based its assessment of the continuity of the appellant's participation during that period on the absence of distancing alone. Thus, in its contention, it follows from recital 603 of the contested decision that, taking into account the overall context, the fact that the appellant did not participate in three successive meetings, and afterwards returned to regular participation from June 2001, when the appellant's representative changed, cannot constitute an interruption of participation in the cartel itself. The General Court confirmed that analysis by relying not on the absence of distancing alone but on an examination of the circumstances in which the appellant's representative had left the meeting on 26 May 2000. On the basis of that analysis, the General Court concluded that this did not constitute public distancing. The Commission adds that the fact that the appellant's representative left that meeting did not imply that it had withdrawn from the cartel, but was the result rather of a disagreement over the cartel's rules of operation. Moreover, the incident at the meeting on 26 May 2000 is not described in the statements made by Sasol as the applicant's withdrawal from the cartel.

42. The Commission further submits that, in any event, it proved that the appellant had participated in the cartel throughout the period at issue, in accordance with the principles laid down by the case-law of the Court.[9] Moreover, evidence of the duration of an undertaking's participation in a cartel is a question of fact. In this instance, the lack of any evidence of anti-competitive contacts or of participation in such contacts during a period of one year is not in itself sufficient to establish that participation in the cartel was interrupted.[10] In this regard, the appellant's argument that that absence is, in terms of its duration and its continuity, exceptional, is untenable, given that the appellant was also absent from a number of subsequent collusive meetings. On the other hand, the General Court pointed out that, during the period at issue, the appellant was able to take advantage of information obtained during the previous meetings and the agreements which had been put in place. Consequently, in the Commission's view, the General Court was right to find that the appellant's absence from a number of meetings was merely an isolated incident involving a single person and had nothing to do with any interruption of its participation in the cartel.

2. Assessment

43. Before I examine the parameters applied by the Commission and endorsed by the General Court for the purposes of establishing the appellant's participation in the cartel during the two periods at issue, that is to say between 12 May 2004 and 28 April 2006 (the period of cessation) and between 26 May 2000 and 26 June 2001 (the period of suspension/interruption) respectively, it seems

9 — Judgments in *Technische Unie* v *Commission* (C-113/04 P, EU:C:2006:593, paragraph 169) and in *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 260).

10 — Judgment in *Commission* v *Verhuizingen Coppens* (C-441/11 P, EU:C:2012:778, paragraph 75).

appropriate to remind ourselves of a number of points concerning the principles governing the adducing of evidence as to the duration of an undertaking's participation in a cartel and, in that context, to explain how the reference made in the Court's case-law to public distancing [11] by the undertaking in question is to be understood.

a) The conclusions to be drawn from the case-law concerning the burden of proof of an undertaking's participation in a cartel and the public distancing requirement

44. For the purposes of examining the complaints raised in this appeal, it is necessary to bear in mind certain key principles governing the adducing of evidence and the burden of proof of anti-competitive behaviour.

45. It should first of all be recalled that it is for the Commission to prove not only participation in a cartel but also the duration of that participation. In accordance with the presumption of innocence, the benefit of any doubt that exists regarding the duration or the continuity of an undertaking's participation in an infringement must be given to that undertaking. [12]

46. Next, with specific regard to the determination of the duration of a given undertaking's participation in an infringement, it would appear to be established that, if there is no evidence directly establishing the duration of an infringement, the Commission is to adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates. The Court has therefore accepted that the existence of an anti-competitive practice could be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules. [13]

47. Lastly, a distinction seems to have been made depending on whether the aim is to determine the date of cessation of participation in a cartel or any periods during which that participation was suspended. To my mind, this follows in particular from the judgment in *Commission* v *Verhuizingen Coppens*, [14] in which the Court accepted that the Commission was justified in taking the view that the company concerned could be held liable for having participated in the agreement in question without interruption throughout the period from 13 October 1992 to 29 July 2003, even though there was no evidence of its active participation in the agreement relating to cover quotes for 1994 and 1995.

48. The Court has thus pointed out that the fact that concrete evidence of the implementation of an anti-competitive agreement by an undertaking has not been adduced for certain specific periods does not preclude the infringement from being regarded as having been established during a more extensive overall period than those periods, provided that such a finding is based on objective and consistent indicia. In the context of an infringement extending over a number of years, the fact that the agreement is shown to have applied during different periods, which may be separated by longer or shorter periods, has no effect on the existence of the agreement, provided that the various actions which form part of the infringement pursue a single purpose and fall within the context of a single and continuous infringement. [15]

11 — See, in particular, the judgment in *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C :2004:6, paragraphs 81 and 82 and the case-law cited).

12 — See to that effect the judgment in *Sumitomo Metal Industries and Nippon Steel* v *Commission* (C-403/04 P and C-405/04 P, EU:C:2007:52, paragraph 52).

13 — Judgments in *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 57) and in *Sumitomo Metal Industry and Nippon Steel* v *Commission* (C-403/04 P and C-405/04 P, EU:C:2007:52, paragraph 51).

14 — C-441/11 P, EU:C:2012:778.

15 — See to that effect the judgments in *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 260) and *Technische Unie* v *Commission* (C-113/04 P, EU:C:2006:593, paragraph 169).

49. Taking into account the basic rules governing the burden of proof and the adducing of evidence in such matters, that case-law cannot, to my mind, have the effect of making it impossible to establish that an undertaking did suspend its participation in a cartel for a certain period. Depending on the regularity of the contacts at issue and whether or not the alleged period of interruption was significant by comparison with the overall duration of the cartel, which it is for the court of first instance alone to ascertain, it may well be concluded that the undertaking in question did not participate in the cartel at issue during one or more specific periods.

50. In other words, the answer to the question of whether or not the lack of any material evidence of an undertaking's participation during certain periods is significant depends on the circumstances specific to each individual case. To illustrate my argument, I refer to the example of a cartel extending over a period of some 10 years which has taken the form of several anti-competitive meetings per year between competitors. The fact, if that were the case, of an undertaking's representative being absent from two of those meetings would seem insignificant if there were other objective and consistent indicia establishing that undertaking's participation during the period in question.

51. How is the requirement that an undertaking must publicly distance itself to be understood in this context?

52. In order to answer that question, it is necessary to look back at the circumstances in which that requirement was framed and, more specifically, the circumstances that gave rise to the judgment in *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6).

53. Let us remind ourselves that, in that case, the defendant company called into question the fact that the Commission, supported in this regard by the General Court, had referred to the fact that that company had not publicly distanced itself from the agreement.

54. Faced with that question, the Court confirmed the approach advocated by the Commission and endorsed by the General Court. In that case, it held that it was sufficient for the Commission to show that the undertaking concerned had participated in meetings at which anti-competitive agreements were concluded without manifestly opposing them, to prove to the requisite standard that the undertaking in question participated in the cartel. The Court thus held that, *where participation in such meetings has been established*,[16] it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (see paragraph 81 of the judgment).

55. It is in this way that the public distancing requirement, which is based on the essential premiss that the undertaking has participated in a meeting or that it has engaged in anti-competitive contacts, is to be understood. The Court was therefore careful to make it clear that '[t]he reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants reason to believe that it subscribed to what was decided there and would comply with it' (see paragraph 82 of the judgment).

56. In other words, the no public distancing criterion lends support to the presumption, based on specific indicia, that an undertaking which has participated in anti-competitive meetings is presumed to have participated in a cartel caught by the prohibition contained in Article 101(1) TFEU. To my mind, the reference to no public distancing does not make up for the lack of evidence of participation, albeit passive, in an anti-competitive meeting. As Advocate General Ruiz-Jarabo

16 — Emphasis added.

Colomer pointed out in that case,[17] if a company participates with its competitors in the market in one or more meetings from which an anti-competitive agreement emerges, the technique of presumptions makes it possible to infer, unless the contrary is expressly shown, that that company forms part of the cartel, especially if it subsequently takes part in measures to implement the anti-competitive agreement. To demonstrate that such a presumption is well founded, he states that it is necessary 'to proceed from certain *proven events*[18] which … make it possible to consider that certain facts are proven'.[19]

57. That solution, which is of a logical piece with that already established in several cases concerning the use of certain presumptions,[20] means that, in the absence of any evidence of collusive contacts or activities between an undertaking and other participants in a cartel, the Commission cannot conclude that an undertaking's participation has continued solely on the basis of the finding that that undertaking was required to distance itself from the cartel.

58. The public distancing requirement makes sense only if the undertaking has actually participated in collusive meetings or, at the very least, if there is evidence of concerted practices over a certain period. It should thus come into play only in circumstances where it is reasonable to presume, in the light of evidence specifically gathered during the investigation, that the defendant undertaking has continued to participate in a cartel. The fact that an undertaking does not publicly distance itself from a cartel is not in itself such as to constitute evidence of its participation in it.

59. The Court has had the opportunity to recall those principles on a number of occasions.[21]

60. It follows from all the foregoing considerations that the public distancing requirement must be understood as an obligation incumbent on the undertaking concerned in order to enable it to establish that it ceased to be a part of a cartel for a certain period despite appearing to have participated in it. I would reiterate that the public distancing requirement thus makes sense only if the undertaking has actually participated in collusive meetings or, at the very least, if there is evidence of concerted practices over a certain period.

61. That principle must be firmly reiterated in order to avert the risk of any slippage that would be detrimental to a proper reading of the principles governing the burden of proof and the adducing of evidence of anti-competitive behaviour.

17 — Opinion of Advocate General Ruiz-Jarabo Colomer in *Aalborg Portland and Others* v *Commission* (C-204/00 P, EU:C:2003:85, points 127 to 131).

18 — Emphasis added.

19 — Opinion of Advocate General Ruiz-Jarabo Colomer in *Aalborg Portland and Others* v *Commission* (C-204/00 P, EU:C:2003:85, point 128).

20 — See to the same effect the judgments in *Hüls* v *Commission* (C-199/92 P, EU:C:1999:358, paragraph 155) and *Montecatini* v *Commission* (C-235/92 P, EU:C:1999:362, paragraph 181).

21 — See, in particular, the judgment in *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 142 to 145); the order in *Adriatica di Navigazione* v *Commission* (C-111/04 P, EU:C:2006:105, paragraphs 48 to 54) and the judgment in *Comap* v *Commission* (C-290/11 P, EU:C:2012:271, paragraphs 73 to 76), concerning undertakings which were shown to have participated in anti-competitive meetings.

b) Application to the case at issue: the need for a distinction between evidence of final cessation of membership of the cartel and evidence of interruption/suspension of participation

i) Evidence of the appellant's participation during the period of cessation (first plea in law)

62. As the Commission pointed out in its written pleadings, it had concluded in the contested decision that the appellant had participated in the infringement up to the time of the inspections carried out by the Commission on 28 April 2005, since, despite the fact that it was not established that the appellant had attended the meetings held after that of 11 and 12 May 2004, it had not provided any evidence to show that it had formally withdrawn from the cartel on that date. On the basis of an assessment of the facts set out in recital 602 of the contested decision, the General Court concluded that, in the perception of the other participants, the appellant had not distanced itself from the cartel.

63. It should be recalled that, in recital 602 of the contested decision, the Commission stated as follows:

'[The applicant] states that it did not participate in any technical meeting after 11 and 12 May 2004 and that its representative cancelled his journey for the meeting of 3 and 4 November, internally communicating that he did so because of advice from his superior. The Commission notes that there is no evidence of any withdrawal from the cartel. In cases of complex infringements, the fact that an undertaking is not present in a meeting, or does not agree with what is discussed in a meeting, does not mean that the undertaking has stopped its participation in an on-going infringement. In order to terminate the infringement, the undertaking must clearly distance itself from the cartel. … [The applicant] has not put forward clear evidence that it adopted a fully autonomous and unilateral strategy on the market nor that it clearly and openly distanced itself from the activities of the cartel. On the contrary, evidence in the Commission's possession shows that [the applicant] received formal invitations to all three of the subsequent technical meetings (namely the last three technical meetings before the inspections were carried out). The Commission observes that [the applicant's] representative confirmed that he would attend the meeting of 3 and 4 November 2004, although he appears to have cancelled his journey later. Also for the 23 and 24 February 2005 meeting, a room was already booked by [Sasol Wax International AG, Sasol Holding in Germany GmbH and Sasol Limited, the organiser of the meeting, "Sasol"] for [the applicant's] representative at the hotel where the meeting took place, which appears to have been cancelled later. The Commission therefore concludes that for Sasol and the other participants, it was clear that [the applicant] had been a member of the cartel until the end. The Commission also observes that the discussions in the meetings were not fundamentally different from the previous meetings, but that the participants continued to discuss price increases without mentioning any move by [the applicant] to leave the cartel (see recitals 175, 176 and 177) and that it was not unusual during the cartel that companies did not attend some meetings. Both of these factors show that [the applicant] was not perceived as having dropped out of the cartel after the meeting of May 2004. The internal communication of [the applicant's] representative as to his reasons for not attending a meeting cannot, in any event, be seen as public distancing. As there is nothing else to suggest that [the applicant] distanced itself from the cartel, the Commission considers that [the applicant's] involvement in the cartel did not end prior to the inspections.'

64. In the judgment under appeal, the General Court endorsed the Commission's position concerning the public distancing criterion and the perception of public distancing formed by the other members of the cartel and held that the applicant had not publicly distanced itself from the cartel in the perception of the other participants. [22]

22 — See paragraphs 372 to 375 of the judgment under appeal.

65. In addition, the General Court referred to the internal e-mail of 3 November 2004, sent by a representative of the appellant, which read as follows: 'In view of the objective of the meeting in Austria, I am going along with Thibault's recommendation. I am cancelling my trip to Vienna (departure initially scheduled for this afternoon)' and concluded that such an internal e-mail not communicated to the other participants cannot constitute public distancing. [23]

66. Furthermore, the General Court pointed out, for the sake of completeness, that the mere fact that the appellant did not participate in the last technical meetings does not demonstrate that it did not use the information on prices charged by its competitors which it received at the tens of earlier technical meetings which it attended, and that it did not take advantage of the market-sharing and customer-sharing agreements put in place at the earlier technical meetings. The General Court concluded from this that the appellant had adduced no evidence showing that it had ceased to implement the cartel on 12 May 2004. [24]

67. The question, therefore, is whether, despite those findings, the Commission was entitled to reach the conclusion, endorsed by the General Court in the judgment under appeal, that the appellant had participated in the cartel even after the meeting of 11 and 12 May 2004. More specifically, it is necessary to comment on whether, in order to do so, it was reasonable to take into account the fact that the appellant had not formally withdrawn from the cartel and that, in so doing, it had not adduced evidence to show that it had publicly distanced itself from the cartel.

68. I take the view that, if we are not to disregard the principles, set out above, that must govern the burden of proof and the adducing of evidence of anti-competitive behaviour, that question should be answered in the negative.

69. In this instance, it is not disputed that the appellant did not participate in the last technical meetings of the cartel held between 12 May 2004 (date of its last participation in those meetings) and 29 April 2005 (the date on which the Commission carried out its inspections). It is also common ground that there is nothing to indicate that the appellant engaged in any form of contact with the members of the cartel at issue during that same period.

70. In those circumstances, there is not the slightest prima facie evidence that, after the meeting of 11 and 12 May 2004, the appellant continued to participate in the cartel at issue, whether by participating in those meetings or engaging in any other collusive actions.

71. To my mind, any perception that the other members of the cartel may have formed of the appellant's continued participation in the cartel beyond those dates is in no way a decisive criterion. Apart from the fact that such participation, deemed to have taken the form of invitations and hotel reservations, has not, as far as I can see, been clearly established, it does not in any way constitute an indication of active or tacit participation in the cartel.

72. The fact, referred to in particular at the hearing, that the Commission may have been firmly convinced that, unlike other undertakings, [25] the appellant continued to belong to the cartel, must be based on concrete evidence and not on a subjective feeling or impression which may or may not be supported by the assumed perceptions of the other members of the cartel.

23 — See paragraphs 378 and 379 of the judgment under appeal.

24 — See paragraph 380 of the judgment under appeal.

25 — This refers in particular to the specific situation of Repsol and the comparability of its situation with that of the appellant. The General Court thus pointed out that, unlike in the case of Repsol, there was no evidence that the appellant had ceased to receive official invitations to technical meetings after 4 August 2004, and that hotel rooms had even been reserved for its representative (see in particular paragraphs 385 to 388 of the judgment under appeal).

73. It follows from all of the foregoing considerations that the judgment under appeal is open to censure in this regard. To my mind, the General Court was wrong to endorse the conclusion that the appellant participated in the cartel after the meeting of 11 and 12 May 2004 and did so up until the inspections in April 2005.

74. The judgment under appeal must therefore be set aside to that extent. The specific consequences of its being set aside with respect to the amount of fine imposed on the appellant will be examined at length.

ii) Evidence of the appellant's participation in the cartel between 26 May 2000 and 26 June 2001 (third plea in law)

75. Although the foregoing considerations apply *mutatis mutandis* to evidence of the appellant's participation between 26 May 2000 and 26 June 2001, there is a difference of scale inasmuch as the issue here is not whether the appellant fully ceased its participation but whether, if it did, it interrupted its participation for a certain period.

76. In other words, the principles governing the burden of proof and the adducing of evidence of anti-competitive behaviour are the same. The difference lies in their application to the facts to be demonstrated, that is to say a temporary interruption or a permanent cessation of membership of a cartel, respectively.

77. After all, as I mentioned previously, it must be accepted that the evidence on the basis of which the Commission concludes that an undertaking has or has not suspended participation in a cartel must be interpreted differently, since it is largely predicated on all of the circumstances that surrounded the presumed interruption and the intrinsic characteristics of the alleged collusive activities, such as their frequency and their complexity.

78. In this instance, it is my view that both the Commission (see recital 603 of the contested decision) and the General Court (paragraphs 394 to 403 of the judgment under appeal) carried out a detailed examination of the circumstances in which the appellant's representative left the meeting of 25 and 26 May 2000 and the anti-competitive contacts in question.

79. Apart from the fact that, in the absence of any established distortion of the facts, that examination cannot be called into question in the context of the present appeal, the approach adopted seems to me to be largely consistent with the case-law to the effect that the fact that such evidence has not been produced in relation to certain specific periods does not preclude the infringement from being regarded as established during a longer overall period than those periods, provided that such a finding is supported by objective and consistent indicia. In the context of an infringement extending over a number of years, the fact that the agreement is shown to have applied during different periods, which may be separated by longer or shorter periods, has no effect on the existence of the agreement, provided that the various actions which form part of the infringement pursue a single purpose and fall within the framework of a single and continuous infringement.[26]

80. Furthermore, the assessment of whether the various actions forming part of the cartel at issue here pursue a single purpose and form part of a single and continuous infringement has not in any way been called into question in this case and, in any event, falls within the scope of an examination which the Court does not have jurisdiction to carry out in the context of the present appeal.

26 — Judgment in *Commission* v *Verhuizingen Coppens* (C-441/11 P, EU:C:2012:778, paragraph 72).

81. An analogy can thus be drawn between the question referred in the present case and that examined by the Court in the judgment in *Commission* v *Coppens Verhuizingen*, in which it was held that the lack of any evidence of anti-competitive contacts or participation in such contacts during a period of one year is not in itself sufficient to establish that there has been any interruption of the cartel. [27]

82. I therefore take the view that the third plea in law should be rejected.

B – *The second plea in law, alleging infringement of the principle of equal treatment, distortion of evidence and failure to state reasons, in so far as the General Court excluded the appellant's withdrawal after the meeting of 11 and 12 May 2004, but approved Repsol's withdrawal after that meeting*

1. Arguments of the parties

83. The second plea in law put forward by the appellant consists of two limbs.

84. In the first limb, the appellant argues in essence that the General Court's conclusion, which is based on the factually erroneous premiss that Repsol no longer received any 'official' invitations after the meeting of 11 and 12 May 2004, rests on a distortion of the evidence and is vitiated in several respects by a failure to state reasons.

85. The second limb consists of an allegation of infringement of the principle of non-discrimination. The appellant submits that the General Court examined the duration of its participation in the cartel on the basis of criteria that were different from and stricter than those applied to Repsol. Thus, the General Court subjected the appellant to a public distancing requirement which it did not apply to Repsol, whose withdrawal was accepted even though it had not distanced itself.

86. The Commission argues, primarily, that that plea is ineffective, since none of the arguments put forward concern Total but relate to the specific situation of Repsol. The Commission submits that the plea is in any event unfounded.

2. Assessment

87. Assuming that the first plea in law is not to be upheld, the question arises as to whether the appellant was treated differently from Repsol.

88. It should be noted in this regard that, according to recital 604 of the contested decision, the Commission had taken the view in particular that Repsol's case was different from that of Total, since the hotel room reservations made for the two meetings on 3 and 4 November 2004 and 23 and 24 February 2005 show that Sasol was convinced that Total would attend the meeting, whereas it was not so certain about Repsol.

89. In paragraphs 385 to 389 of the judgment under appeal, the General Court held, in substance, that there was a difference between the situations of those two undertakings, taking into account the perception, which was shown in the form of official invitations and hotel reservations, which the other participants in the cartel formed of their distancing from it.

27 — Judgment in *Commission* v *Verhuizingen Coppens* (C-441/11 P, EU:C:2012:778, paragraph 75).

90. For my part, I take the view that, if the first plea in law were to be rejected, the present plea would have to be declared ineffective.

91. As the Commission has quite rightly commented, the appellant's line of argument relates not to its specific situation but to that of Repsol. Even if the General Court made some error of assessment in this regard, the appellant could not rely on that error for its own benefit in order, in particular, to reduce the duration of its participation in the cartel at issue.

92. It is after all well established that the principle of equal treatment must be reconciled with the principle of legality. No person may, in support of his claim, rely on an unlawful act committed in favour of a third party. [28]

93. I therefore take the view that, even if the view were to be taken that the General Court's reasoning in paragraphs 385 to 389 of the judgment under appeal is vitiated by an error of some kind, the second plea in law raised by the appellant should be rejected.

C – *The fourth plea in law, alleging infringement of the principles of effective legal protection and that penalties must be specific to the infringing party and of the obligation to state reasons, in so far as the General Court rejected without examination the plea alleging failure to take account of economic evidence of the appellant's competitive behaviour*

1. Arguments of the parties

94. The appellant points out that, in accordance with Article 31 of Regulation No 1/2003, [29] the General Court has unlimited jurisdiction in competition cases and that, notwithstanding the fact that the Commission has a margin of discretion in areas giving rise to complex economic assessments, this does not mean that the General Court must refrain from reviewing the Commission's interpretation of information of an economic nature. [30] Furthermore, the principle that penalties must be specific to the infringing party requires that the non-implementation of a cartel must be assessed individually for each of the undertakings in question, not least for the purposes of calculating the fine to be imposed on them.

95. The appellant submits that the General Court refrained from responding to its plea alleging failure to take account of the economic evidence showing that it had behaved in accordance with the competition rules, and from examining the relevance and content of that evidence. Thus, the appellant submitted to the Commission, and then to the General Court, an in-depth economic analysis covering the entire period of the alleged infringement and demonstrating that it had never implemented the agreements said to have been concluded at the technical meetings. That analysis went unmentioned in the contested decision, and in the judgment under appeal, in so far as, in paragraphs 406 and 407, the General Court did not provide any response to the appellant's arguments concerning the absence of any examination of its economic analysis for the purposes of the individual assessment of its competitive behaviour when reviewing the penalties and, in particular, the mitigating circumstances. The appellant points out in this regard that the analysis carried out by the General Court when examining the second plea in law raised in its application, to which paragraph 407 of the judgment under appeal refers (see, inter alia, paragraphs 186 and 237), concerns the implementation of the cartel as a whole and not the individual behaviour of each of the undertakings concerned.

28 — See the judgment in *The Rank Group* (C-259/10 and C-260/10, EU:C:2011:719, paragraph 62 and the case-law cited).

29 — Council Regulation (EC) of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

30 — Judgment in *Kone and Others* v *Commission* (C-510/11 P, EU:C:2013:696, paragraph 28).

96. The Commission submits, primarily, that this plea is inadmissible and that it is in any event unfounded.

2. Assessment

97. In my opinion, this plea should be rejected.

98. After all, the General Court clearly devoted much of its analysis to responding to the arguments and documents submitted by the appellant with a view to demonstrating that it had not implemented the cartel.

99. Thus, in paragraphs 163 to 190 of the judgment under appeal, which form part of the examination of the second plea, the General Court rejected the appellant's argument to the effect that it had not implemented the price cartel. In particular, the General Court relied on evidence *in tempore non suspecto*, such as pricing letters from the appellant informing customers of price increases (see in particular paragraph 189 of the judgment).

100. Moreover, in paragraphs 243 to 259 of the judgment under appeal, which also relate to the examination of the second plea in law raised in the application at first instance, the General Court reiterated precisely the reasoning it had employed to demonstrate that the appellant had not adduced any evidence to show that it had adopted competitive behaviour on the market, contrary to its claims in the economic study submitted to the General Court.

101. It thus seems to me that the General Court fulfilled its role of verifying and reviewing the Commission's analysis of the evidence adduced by the appellant with respect to its behaviour on the market.

102. Consequently, I take the view that the appellant's complaint that the General Court conducted only an 'overall' economic analysis, without considering its individual situation, is unfounded.

VI – Interim conclusion

103. As I stated previously, it is my view that the first plea in law raised in the appeal is well founded and that the judgment under appeal must therefore be set aside in so far as the General Court incorrectly excluded the cessation of the appellant's participation in the infringement after 12 May 2004.

104. The partial setting aside of the judgment under appeal which I am proposing necessarily entails a re-evaluation of the amount of the fine imposed on the appellant with a view to ensuring that it correctly reflects the duration of its participation in the infringement at issue. In my view, this is permitted by the state of the proceedings in the present case, for the purposes of the second sentence of Article 61(1) of the Statute of the Court of Justice.

105. Since, in the context of its right to review decisions, the Court enjoys unlimited jurisdiction, as provided for in Article 261 TFEU read in conjunction with Article 31 of Regulation No 1/2003, it may freely determine the new amount of the fine.[31]

31 — Judgment in *Commission* v *Verhuizingen Coppens* (C-441/11 P, EU:C:2012:778, paragraph 79 and the case-law cited).

106. Although that jurisdiction entitles the European Union judicature not only to carry out a review of the lawfulness of the fine but also to substitute its own appraisal for that of the Commission, it should also be pointed out that the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion and that proceedings are *inter partes*.[32]

107. I therefore propose that the Court should confine itself to a downward re-evaluation of the fine in order to correct the error of law identified in the examination of the third plea in law.

108. Rather than proposing an arbitrary figure, I would also suggest, for the sake of consistency and foreseeability, that the Court adhere to the methodology set out in the 2006 Guidelines, as refined and adjusted by the General Court with respect to the multiplier to be applied,[33] and, thus, recalculate the amount of the fine taking into account the reduced duration of the infringement.

109. As the General Court pointed out in paragraph 565 of the judgment under appeal, in order to calculate the amount of the fine imposed on the applicant, the Commission took into account, to reflect the gravity of the infringement, 18% of the annual value of sales of paraffin waxes and 15% of the annual value of sales of slack wax. The amounts thus obtained[34] were multiplied, to reflect the duration of the infringement, by a coefficient of 13 for paraffin waxes and 7 for slack wax. In total, including the 'entrance fee', the Commission used multipliers of 14 for paraffin waxes and 7 for slack wax.

110. In order to redress the unlawful acts found to have been committed in paragraph 561 of the judgment under appeal, by adjusting the amount of the fine imposed on the appellant to take into account the precise duration of its participation in the infringement, the General Court set the multiplier used to reflect the duration of its participation in the infringement at 12.64 (to which one point was added to reflect the entrance fee) for paraffin waxes (12 years, 7 months and 28 days)[35] and at 6.53 for slack wax (6 years, 6 months and 12 days).[36] Lastly, following the application of the coefficient of 1.7[37] for deterrence, the amount of the fine was set at EUR 121 626 710 for paraffin waxes and EUR 3 833 132 for slack wax, so that the total amount of the fine imposed on the appellant was EUR 125 459 842.

111. In this case, I suggest that the Court repeat the steps for calculating the fine taking into account the illegality in the determination of the duration of the appellant's participation in the cartel on the paraffin waxes market. Since the duration of the appellant's participation is to be reduced to 11 years, 7 months and 15 days, the coefficient applied to the amount fixed for the infringement (that is to say the multiplier reflecting both the duration of the infringement and the entry fee) on that market should be reduced from 13.64 to 12.62, which gives an intermediate amount of approximately EUR 66 194 974. Following application of the coefficient of 1.7 for deterrence, the amount of the fine should, according to my calculations, be reduced to approximately EUR 112 531 456 for paraffin waxes. Increased by the final amount fixed for slack wax, that is to say EUR 3 833 132, the total amount of the fine imposed on the appellant should be fixed at an amount of approximately EUR 116 364 588.

112. I therefore suggest that the amount of the fine imposed on the appellant be set at a rounded-up figure of EUR 116 364 588.

32 — See in particular the judgment in *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin* (C-434/13 P, EU:C:2014:2456, paragraphs 74 and 76 and the case-law cited).

33 — See paragraphs 561, 566 and 567 of the judgment under appeal.

34 — Taking into account the annual value of sales on the markets concerned, that is to say EUR 31 133 865 (of which EUR 1 993 620 for slack wax) (see recital 640 and paragraph 13 of the judgment under appeal: those sums amount to EUR 5 245 244 (for the paraffin waxes market) and EUR 299 043 (for the slack wax market) respectively).

35 — That is to say, an amount of EUR 71 545 123.

36 — That is to say, an amount of EUR 1 952 750.79.

37 — When applied to each of those amounts, that coefficient gives sums of approximately EUR 121 626 717.87 and EUR 3 319 676.34. Those amounts were, however, set at EUR 121 626 710 and EUR 3 833 132 respectively.

VII – Costs

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

114. Under Article 138(1) of the Rules of Procedure of the Court, read in conjunction with Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Article 138(3) of those rules states that, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, under that same provision, if it appears justified in the circumstances of the case, the Court may order one party, in addition to bearing its own costs, to pay a proportion of the other party's costs.

115. In this case, I take the view that, in the light of the circumstances of the case, it is appropriate to find, with respect to the costs incurred at first instance, that Total Raffinage Marketing should pay four fifths of its own costs and four fifths of the Commission's costs. The Commission should pay one fifth of its own costs and one fifth of the costs incurred by Total Raffinage Marketing.

116. As regards the present proceedings, I propose that each of the parties be ordered to pay their own costs connected with the appeal proceedings.

VIII – Conclusion

117. In the light of the foregoing considerations, I propose that the Court rule as follows:

(1) The judgment in *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423) is to be set aside, in so far as the General Court incorrectly excluded the cessation of the appellant's participation in the infringement after 12 May 2004.

(2) Article 1 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) is to be annulled, in so far as it finds that the appellant participated in a continuous agreement and/or concerted practice in the paraffin waxes sector in the common market during the period from 12 May 2004 to 28 April 2005.

(3) The amount of the fine imposed on Total Raffinage Marketing in Article 2 of Decision C(2008) 5476 final is to be set at EUR 116 364 588.

(4) With regard to the costs of the proceedings at first instance, Total Raffinage Marketing is to be ordered to pay four fifths of its own costs and four fifths of the European Commission's costs. The Commission is to pay one fifth of its own costs and one fifth of the costs incurred by Total Raffinage Marketing.

(5) Each of the parties is to pay the costs incurred by it in connection with the present appeal proceedings.