Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

25 November 2020*

(Appeal – Agreements, decisions and concerted practices – European markets for tin-based heat stabilisers and for heat stabilisers with epoxised soybean oil and esters as their base – Price fixing, market allocation and exchange of commercially sensitive information – Application of the ceiling of 10% of turnover to one of the entities forming the undertaking – Annulment of the decision amending the fine imposed in the initial infringement decision – Fines – Concept of an 'undertaking' – Joint and several liability for payment of the fine – Principle of equal treatment – Date on which the fine is payable in the event of amendment)

In Case C-823/18 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 27 December 2018,

European Commission, represented initially by T. Christoforou, P. Rossi and V. Bottka, and subsequently by P. Rossi and V. Bottka, acting as Agents,

appellant,

the other party to the proceedings being:

GEA Group AG, established in Düsseldorf (Germany), represented by C. Wagner and I. du Mont, Rechtsanwälte,

applicant at first instance,

THE COURT (Second Chamber),

composed of A. Arabadjiev (Rapporteur), President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Second Chamber, A. Kumin, T. von Danwitz and P.G. Xuereb, Judges,

Advocate General: G. Pitruzzella,

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 5 February 2020,

after hearing the Opinion of the Advocate General at the sitting on 4 June 2020,

gives the following

* Language of the case: English.

Judgment

1 By its appeal, the European Commission asks the Court of Justice to set aside the judgment of the General Court of the European Union of 18 October 2018, *GEA Group* v *Commission* (T-640/16, EU:T:2018:700; 'the judgment under appeal'), by which the General Court annulled Commission Decision C(2016) 3920 final of 29 June 2016 amending Commission Decision C(2009) 8682 final of 11 November 2009 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38589 – Heat Stabilisers) ('the decision at issue').

I. Legal context

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

'2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article 81 or Article 82 [EC]; or

(b) they contravene a decision ordering interim measures under Article 8; or

(c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10% of the sum of the total turnover of each member active on the market affected by the infringement of the association.

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

3 Under Article 25(5) of that regulation:

'Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 6.'

II. Background to the dispute and the decision at issue

4 The background to the dispute was set out in paragraphs 1 to 23 of the judgment under appeal and may be summarised as follows.

5 GEA Group AG ('GEA') was created by the merger, in 2005, of Metallgesellschaft AG ('MG') and another company. MG was the ultimate parent company which owned, before 2000, directly or through subsidiaries, the companies Chemson Gesellschaft für Polymer-Additive mbH ('OCG') and Polymer-Additive Produktions- und Vertriebs GmbH ('OCA').

6 On 17 May 2000, MG sold OCG, which had been renamed Aachener Chemische Werke Gesellschaft für glastechnische Produkte und Verfahren mbH ('ACW').

7 Following the dissolution of OCA in May 2000, the business of that company was absorbed by a company named, from 30 August 2000, Chemson Polymer-Additive AG ('CPA'), which, at the date of delivery of the judgment under appeal, no longer belonged to the group in respect of which GEA was the ultimate parent company.

A. The 2009 decision

8 By Decision C(2009) 8682 final of 11 November 2009 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38589 – Heat stabilisers) ('the 2009 decision'), the Commission found that a number of undertakings had infringed Article 81 EC and Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3; 'the EEA Agreement') by participating in two sets of agreements and anticompetitive arrangements or concerted practices covering the territory of the European Economic Area and concerning, first, the sector covering tin-based heat stabilisers and, second, the sector covering heat stabilisers with epoxidised soybean oil and esters as their base ('the ESBO/esters sector').

9 Under Article 1(2)(k) of the 2009 decision, the Commission held GEA liable for infringements committed in the ESBO/esters sector from 11 September 1991 to 17 May 2000.

10 GEA was held liable for the entire period of infringement, as the successor of MG, for the infringements committed, from 11 September 1991 to 17 May 2000, by OCG and, from 13 March 1997 to 17 May 2000, by OCA.

11 In addition, as the successor of OCG, ACW was penalised, first, for the infringement committed by OCG throughout the period of infringement, namely from 11 September 1991 to 17 May 2000, and, second, for the infringement committed by OCA from 30 September 1999 to 17 May 2000, when the latter's shares were wholly owned by OCG.

12 As the successor of OCA, CPA was penalised, first, for the infringement committed by OCA from 13 March 1997 to 17 May 2000 and, second, for the infringement committed by OCG from 30 September 1995 to 30 September 1999, when the latter's shares were wholly owned by OCA.

13 Under Article 2 of the 2009 decision:

'…

For the infringement(s) in the [ESBO/esters sector] … the following fines are imposed:

…

(31) [GEA], [ACW] and [CPA] are … jointly and severally liable for: EUR 1 913 971;

(32) [GEA] and [ACW] are … jointly and severally liable for: EUR 1 432 229;

The fines shall be paid in euro within three months of the date of the notification of this decision …'

14 By application lodged at the Registry of the General Court on 28 January 2010, GEA brought an action for annulment of the 2009 decision.

15 By judgment of 15 July 2015, *GEA Group* v *Commission* (T-45/10, not published, EU:T:2015:507) the General Court dismissed that action. No appeal has been brought against that judgment.

B. The 2010 decision

16 On 15 December 2009, ACW drew the Commission's attention to the fact that the fine imposed on it pursuant to the 2009 decision exceeded the ceiling of 10% of its total turnover laid down in Article 23(2) of Regulation No 1/2003.

17 In those circumstances, on 8 February 2010, the Commission adopted Decision C(2010) 727 final, amending the 2009 decision ('the 2010 decision').

18 In the 2010 decision, the Commission concluded that the fine for which ACW was jointly and severally liable with, in the first place, GEA and CPA and, in the second place, GEA, exceeded the ceiling of 10% of its total turnover, with the result that amendment of the 2009 decision was necessary.

19 The Commission also stated in that decision that the amount of the fine imposed on GEA and CPA remained unchanged, but that the amount of the fine imposed on ACW should be reduced and that the 2010 decision would have no consequences for the other addressees of the 2009 decision.

20 Article 1 of the 2010 decision amended the second paragraph of Article 2 of the 2009 decision as follows:

'Article 2, [second paragraph, point] 31 is replaced by the following text:

"(31) (a) [GEA], [ACW] and [CPA] are jointly and severally liable for EUR 1 086 129;

(31) (b) [GEA] and [CPA] are jointly and severally liable for EUR 827 842."

Article 2 [second paragraph, point] 32 is replaced by the following text:

"(32) [GEA] is liable for: EUR 1 432 229."'

21 By application lodged at the Registry of the General Court on 20 April 2010, GEA brought an action for annulment against the 2010 decision and requested, in the alternative, that the General Court vary the amount of the fine imposed on it.

22 By judgment of 15 July 2015, *GEA Group* v *Commission* (T-189/10, EU:T:2015:504), the General Court annulled the 2010 decision in so far as it concerned GEA. The General Court held that the Commission had infringed that company's rights of defence by adopting the 2010 decision without hearing that company first. No appeal has been brought against that judgment.

C. The decision at issue

23 On 29 June 2016 the Commission adopted the decision at issue.

24 Article 1 of that decision reproduced in identical terms, set out in paragraph 20 of this judgment, Article 1 of the 2010 decision, which amended the second paragraph of Article 2 of the 2009 decision.

25 Article 2 of the decision at issue set the date by which the fines were due at 10 May 2010.

III. The procedure before the General Court and the judgment under appeal

26 By document lodged at the Registry of the General Court on 8 September 2016, GEA brought an action for annulment of the decision at issue.

27 In support of that action, GEA relied on five pleas in law; in the first plea, it alleged a breach of the rules on limitation, in the second, infringement of Article 266 TFEU and the rights of the defence, in the third, infringement of Article 23(2) and (3) of Regulation No 1/2003, in the fourth, infringement of the principle of equal treatment, and, in the fifth, which was divided into two parts, misuse of power and failure to state reasons.

28 By the judgment under appeal, the General Court upheld the fourth plea in law and the first part of the fifth plea in law and, taking the view that it was not necessary to examine the other pleas in law in the action, annulled the decision at issue.

IV. Forms of order sought

29 The Commission claims that the Court should:

– set aside the judgment under appeal; and

– order GEA to pay the costs incurred before both the General Court and the Court of Justice.

30 GEA contends that the Court should:

– dismiss the appeal; and

– order the Commission to pay the costs.

V. The appeal

31 In support of its appeal, the Commission raises two grounds of appeal, in which it alleges, first, incorrect application of the principle of equal treatment, of the concept of an undertaking and of the rules on joint and several liability, as well as infringement of the obligation to state reasons, and, second, infringement of the rules on determining the date on which fines are payable in competition law matters and infringement of the obligation to state reasons.

A. Admissibility

1. Arguments of the parties

32 GEA argues that the Commission's appeal is inadmissible.

33 In that regard, GEA submits, in the first place, that the Commission has no interest in bringing the appeal because the 2009 decision no longer constitutes a legal basis for requesting payment of the fine.

34 In the second place, GEA claims that the Commission has no interest in bringing an appeal because the decision at issue is not valid. It argues that the limitation period for setting a fine had expired before the adoption of that decision, since more than 10 years, for the purposes of Article 25(5) of Regulation No 1/2003, had elapsed, irrespective of whether or not that period had been interrupted.

35 The Commission contends that it has an interest in bringing an appeal against the judgment under appeal since, in the first place, it was unsuccessful in its submissions before the General Court and, in the second place, by claiming that the Commission has no interest in bringing that appeal because it allegedly exceeded the limitation period for the imposition of a fine, GEA is disputing the validity of the decision at issue. According to the Commission, such an argument was neither raised before the General Court nor examined by it. The Commission claims that it follows that there is no need to examine that argument.

2. Findings of the Court

36 Pursuant to the third paragraph of Article 56 of the Statute of the Court of Justice of the European Union, with the exception of cases relating to disputes between the Union and its servants, an appeal may be brought by Member States and institutions of the Union even if they did not intervene in the proceedings before the General Court. Whether or not they were parties to the case at first instance, the institutions of the Union do not, therefore, have to show interest in order to bring an appeal against a judgment of the General Court (judgment of 8 July 1999, *Commission* v *Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 171).

37 It is open to the Commission to assess the expediency of bringing an appeal against a decision of the General Court, and it is not for the Court of Justice to review the choices made in this regard by the Commission (see, to that effect, judgment of 8 July 1999, *Commission* v *Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 172).

38 Therefore, suffice it to state that GEA's objections that the Commission has no interest are unfounded, which means that the appeal must be held to be admissible.

B. Substance

1. The first ground of appeal

39 The first ground of appeal is comprised of two parts. By the first part of that ground of appeal, the Commission complains that the General Court erred in its application of the principle of equal treatment, of the concept of an undertaking and of the rules of joint and several liability by holding that the Commission could have determined differently the part of the fine for which GEA and ACW remained jointly and severally liable. The second part of that ground, which it is appropriate to examine in the first place, alleges infringement of the obligation to state reasons.

(a) The second part of the first ground of appeal

(1) Arguments of the parties

40 By the second part of its first ground of appeal, the Commission submits that the finding, in paragraph 111 of the judgment under appeal, that it infringed the principle of equal treatment, is based on contradictory reasoning developed in paragraphs 108 to 110 of that judgment and, in particular, on the vague assertion, in paragraph 108 of that judgment, that 'the Commission could certainly have arrived at a different determination of the part of the fine for which ACW and [GEA] remained jointly and severally liable'.

41 GEA disputes that line of argument.

(2) Findings of the Court

42 According to the settled case-law of the Court of Justice, the obligation incumbent upon the General Court under Article 36 and the first paragraph of Article 53 of the Statute of the Court of Justice of the European Union to state reasons for its judgments does not require the General Court to provide an account that follows exhaustively and one by one all the arguments articulated by the parties to the case. The reasoning may therefore be implicit, on condition that it enables the persons concerned to understand the grounds of the General Court's judgment and provides the Court of Justice with sufficient information to exercise its powers of review on appeal (judgment of 14 September 2016, *Trafilerie Meridionali* v *Commission*, C-519/15 P, EU:C:2016:682, paragraph 41).

43 In the present case, suffice it to point out that the reasoning set out by the General Court in paragraphs 106 to 111 of the judgment under appeal allows both the Commission to know why the General Court upheld the fourth plea in law raised by GEA at first instance and the Court of Justice to have sufficient material to exercise its power of review.

44 It is clear from those paragraphs, in which there is no ambiguity, that the General Court found that the Commission should, first, have identified the proportion that the part of the fine for which ACW was jointly and severally liable with GEA and CPA together bore to the part of the fine for which it was jointly and severally liable with GEA in isolation, and should, second, have allocated the reduction in the amount of ACW's fine between both instances of joint and several liability by applying the same proportion.

45 In the light of the above, the second part of the first ground of appeal must be dismissed as being unfounded.

(b) The first part of the first ground of appeal

(1) Arguments of the parties

46 By the first part of its first ground of appeal, the Commission submits that the General Court wrongly held, in paragraph 108 of the judgment under appeal, that it could have arrived at a different determination of the part of the fine for which GEA and ACW remained jointly and severally liable, in order to limit the part of the fine for which GEA could be liable in isolation. According to the Commission, in paragraphs 106 to 111 of the judgment under appeal, the General Court erred in its application of the principle of equal treatment by disregarding the case-law of the Court of Justice on the concept of an undertaking, on joint and several liability and on the consequences of a reduction of the fine granted to a subsidiary within a single economic undertaking.

47 According to the Commission, joint and several liability is merely a manifestation of the concept of an undertaking and cannot be detached from it.

48 In that regard, the Commission submits that, contrary to what the General Court held in paragraph 55 of the judgment under appeal, GEA, ACW and CPA formed, for the entire duration of the infringement at issue, one and the same undertaking on which it imposed a single fine and that, in that context, points 31 and 32 of the second paragraph of Article 2 of the 2009 decision and points 31(a), 31(b) and 32 of the second paragraph of Article 2 of the 2009 decision, as amended by the decision at issue, show the different maximum amounts of the fine for which each of the legal entities comprising that undertaking could be held to be jointly and severally liable.

49 The Commission states that, since GEA, ACW and CPA formed one and the same undertaking, there was no need to assess whether those three companies were treated equally.

50 The Commission argues that, in spite of the fact that the companies concerned were part of the same undertaking, the General Court, in paragraphs 106 to 111 of the judgment under appeal, artificially split two groups of entities that were jointly and severally liable, with the result that that court applied a theory analogous to the theory of the internal allocation of joint and several liability, an approach which, according to the Commission, is prohibited in accordance with the guidance given in the judgment of 10 April 2014, *Commission* v *Siemens Österreich and Others* and *Siemens Transmission & Distribution and Others* v *Commission* (C-231/11 P to C-233/11 P, EU:C:2014:256)

51 In those circumstances, the Commission submits that there is nothing to justify excluding one or other of the companies belonging to one and the same undertaking from joint and several liability for the payment of any part of a fine imposed on them and that those companies normally divide the shared portions of a fine imposed up to the individual limits of each of them.

52 The Commission claims that the maximum amount of the fine for which each company making up the undertaking within the meaning of Article 81 EC was held jointly and severally liable does not correspond to a specific period of participation in the infringement at issue.

53 Last, as regards the fact that the fine imposed on ACW was reduced to the ceiling of 10% of its turnover, applicable to that company, it is apparent from the judgment of 26 November 2013, *Kendrion* v *Commission* (C-50/12 P, EU:C:2013:771), that GEA's liability must not be affected by the reduction granted to its former subsidiary ACW since, on the date on which the 2009 decision was adopted, ACW and GEA no longer formed one and the same undertaking.

54 GEA contends, first of all, that the General Court was fully entitled to find that the Commission infringed the principle of equal treatment without any objective justification. Contrary to the Commission's claims, GEA contends that that principle applies not only to different undertakings, but also to relations between companies that form part of the same undertaking.

55 GEA goes on to submit that the Commission did not set a single fine, but two separate fines for two separate groups of entities, which were jointly and severally liable as between themselves within each group, and for two different infringement periods. First, point 31 of the second paragraph of Article 2 of the 2009 decision refers to the period from 30 September 1995 to 17 May 2000 and, second, point 32 of the second paragraph of Article 2 of that decision refers to the period from 11 September 1991 to 29 September 1995. That allocation is supposedly due to the fact that CPA did not participate in the infringement at issue during the latter period.

56 Furthermore, GEA submits that the General Court did not apply by analogy the theory of the internal allocation of joint and several liability, contrary to what is claimed by the Commission. The judgment under appeal did not concern liability from an internal perspective, but rather the degree to which the companies in the 'GEA group' are 'externally' liable vis-à-vis the Commission.

57 Lastly, as regards the effects of the application of the ceiling of 10% of turnover in favour of ACW, GEA submits that, contrary to what is claimed by the Commission, the judgment of 26 November 2013, *Kendrion* v *Commission* (C-50/12 P, EU:C:2013:771), cannot be interpreted as meaning that a former parent company must not be affected by the application to its former subsidiary of the ceiling of 10% of its turnover.

(2) Findings of the Court

58 As a preliminary point, it must be recalled that the principle of equal treatment is a general principle of EU law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union. That principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (judgment

of 24 September 2020, *Prysmian and Prysmian Cavi e Sistemi* v *Commission*, C-601/18 P, EU:C:2020:751, paragraph 101 and the case-law cited). The Commission is required to observe that principle when exercising its power under Article 23(2) of Regulation No 1/2003 to impose a fine on undertakings which have infringed the EU competition rules and determines the amount of the fine (see, to that effect, judgment of 26 November 2013, *Kendrion* v *Commission*, C-50/12 P, EU:C:2013:771, paragraph 63 and the case-law cited).

59 That being said, where a number of legal persons may be held personally liable for participation in an infringement of the EU competition rules because they form part of a single undertaking responsible for the infringement, the Commission has the power, under that provision, to impose a fine for which those persons are jointly and severally liable (judgment of 10 April 2014, *Areva and Others* v *Commission*, C-247/11 P and C-253/11 P, EU:C:2014:257, paragraph 120).

60 However, when it decides to exercise that power to impose penalties, the Commission is not free to determine how joint and several liability is to be imposed from an external perspective or, in particular, the amount of the fine in respect of which it may demand full payment by each of those held jointly and severally liable (judgment of 10 April 2014, *Areva and Others* v *Commission*, C-247/11 P and C-253/11 P, EU:C:2014:257, paragraph 121).

61 As the EU law concept of joint and several liability for payment of a fine is merely the manifestation of an *ipso jure* legal effect of the concept of an 'undertaking', the determination of the amount of the fine in respect of which the Commission may demand payment in full by each of those held jointly and severally liable derives, in any individual case, from the application of that concept of an undertaking (judgment of 10 April 2014, *Areva and Others* v *Commission*, C-247/11 P and C-253/11 P, EU:C:2014:257, paragraph 122).

62 In that regard, the authors of the Treaties chose to use the concept of an undertaking to designate the perpetrator of an infringement of competition law, who is liable to be punished pursuant to Articles 81 and 82 EC, not other concepts such as the concept of a company or firm or of a legal person (judgment of 10 April 2014, *Areva and Others* v *Commission*, C-247/11 P and C-253/11 P, EU:C:2014:257, paragraph 123).

63 Moreover, the European Union legislature used that concept of an undertaking in Article 23(2) of Regulation No 1/2003 to define the entity on which the Commission may impose a fine in order to penalise an infringement of the European Union's rules on competition (judgment of 10 April 2014, *Areva and Others* v *Commission*, C-247/11 P and C-253/11 P, EU:C:2014:257, paragraph 124).

64 The Court of Justice has consistently held that, for the purposes of EU competition law, the concept of an 'undertaking' covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed. That concept must be understood as covering an economic unit, even if, from a legal perspective, that unit is made up of a number of natural or legal persons (judgments of 10 April 2014, *Areva and Others* v *Commission*, C-247/11 P and C-253/11 P, EU:C:2014:257, paragraph 125, and of 27 April 2017, *Akzo Nobel and Akzo Nobel Chemicals* v *Commission*, C-516/15 P, EU:C:2017:314, paragraphs 47 and 48).

65 Where, in accordance with Article 23(2) of Regulation No 1/2003, the Commission has the possibility of holding jointly and severally liable for payment of a fine a number of legal persons forming part of one and the same undertaking that is responsible for the infringement, the Commission's determination of the amount of that fine – in so far as it is based, in any particular case, on the concept of an undertaking, which is a concept of EU law – is subject to certain limitations, which require due account to be taken of the characteristics of the undertaking concerned, as constituted during the period in which the infringement was committed (judgment of 10 April 2014, *Commission* v *Siemens Österreich and Others* and *Siemens Transmission & Distribution and Others* v *Commission*, C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 51).

66 In that regard, as the Advocate General observed, in essence, in point 49 of his Opinion, the composition of the undertaking concerned may take various configurations during that undertaking's participation in an infringement. Such changes are liable to occur particularly where, as in the present case, the infringement continues for a long period.

67 In so far as such changes do not call into question the fact that there is a single undertaking to which an infringement is imputable, they do not affect the Commission's power, referred to in paragraph 59 of the present judgment, to impose a fine jointly and severally on several legal persons belonging to one and the same undertaking.

68 In the present case, as is made clear in paragraphs 1 to 3 and 6 to 8 of the judgment under appeal, the structure of the GEA group, during the period in which the infringement was committed, was as follows. Between 1991 and 17 May 2000, OCG, which after the latter date was called ACW, was a wholly owned subsidiary of MG, which, in turn, became GEA from 2005. During the same period, OCA, which from 30 August 2000 was called CPA, was wholly owned by MG and, for various periods, was either the subsidiary or OCG's direct parent company. OCA was the parent company which wholly owned and had direct control over OCG from 30 September 1995 to 30 September 1999. From 30 September 1999 to 17 May 2000, OCG was the parent company which wholly owned and had direct control over OCA.

69 In the light of the guidance provided in the judgment of 10 September 2009, *Akzo Nobel and Others* v *Commission* (C-97/08 P, EU:C:2009:536), the Commission was entitled to find in the 2009 decision that, in view of the economic, organisational and legal links between the companies concerned, by exercising decisive influence over its subsidiaries, MG, now GEA, formed part, with OCG and OCA, which became ACW and CPA respectively, of a single undertaking for the purposes of EU competition law.

70 It follows from the findings above that the Commission was entitled to conclude that GEA, ACW and CPA formed one and the same undertaking which, in its various successive configurations, committed the infringement at issue.

71 Thus, it must be held that, by holding, in paragraph 55 of the judgment under appeal, that there was, first, an undertaking, within the meaning of EU competition law, composed of GEA, ACW and CPA from 30 September 1995 to 17 May 2000, and, second, an undertaking, within the meaning of that law, composed of GEA and ACW from 11 September 1991 to 29 September 1995, the General Court established that there were two undertakings within the meaning of EU competition law and, in doing so, erred in law in misinterpreting the concept of an 'undertaking' within the meaning of Article 81 EC.

72 Since joint and several liability is merely a manifestation of an *ipso jure* effect of the concept of an undertaking and since, in the present case, there was one single undertaking, the Commission was entitled to determine, initially in points 31 and 32 of the second paragraph of Article 2 of the 2009 decision, and then in points 31(a), 31(b) and 32 of the second paragraph of Article 2 of the 2009 decision, as amended by the decision at issue, the maximum amounts of the fine which GEA, ACW and CPA could be held jointly and severally liable for payment of a single fine as entities forming part of one and the same undertaking to which the infringement at issue is imputable. As the Commission has pointed out, in a situation such as the one at issue, the determination of such maximum amounts does not reflect the specific periods during which the entities comprising the single undertaking participated in the infringement at issue.

73 In those circumstances, the General Court erred in law in finding, in paragraphs 106 and 109 of the judgment under appeal, that, in the present case, there were two relationships of joint and several liability between GEA, ACW and CPA, even though they formed part of one and the same

undertaking, and two fines imposed in respect of two specific periods reflecting the participation of those three companies in the infringement at issue and, therefore, it infringed the rules on the determination of joint and several liability as set out in Article 23(2) of Regulation No 1/2003.

74 As regards the fact that, according to the decision at issue, GEA remains solely liable for the amount of EUR 1 432 229, that fact is, as the Advocate General observed in point 53 of his Opinion, purely an automatic result of the reduction applied to the fine imposed on ACW.

75 In that regard, where two separate legal persons, such as a parent company and its subsidiary, no longer constitute an undertaking within the meaning of Article 81 EC on the date on which a decision imposing a fine on them is adopted, they are entitled to have the 10% ceiling applied individually (see, to that effect, judgment of 26 November 2013, *Kendrion* v *Commission*, C-50/12 P, EU:C:2013:771, paragraph 57).

76 In the present case, as is clear from paragraphs 2 and 3 of the judgment under appeal, it is common ground that, when the 2009 decision was adopted, GEA no longer constituted an economic entity with ACW and CPA for the purpose of Article 81 EC.

77 Those particular circumstances led the Commission to calculate separately the ceiling on the basis of the turnover obtained in the business year preceding the adoption of the decision at issue (see, by analogy, judgment of 26 November 2013, *Kendrion* v *Commission*, C-50/12 P, EU:C:2013:771, paragraph 67).

78 Furthermore, as is apparent from paragraph 8 of the judgment under appeal, the amount which the Commission initially considered appropriate in respect of ACW's joint and several liability for its participation in the cartel corresponded to EUR 3 346 200, that is to say exactly the same amount as that imposed on GEA.

79 It must be held that the fact that, in the decision at issue, the Commission held GEA jointly and severally liable for the total amount of the fine, which amounted to EUR 3 346 200, and ACW jointly and severally liable for payment of the sum of EUR 1 086 129, results from the application to ACW of the ceiling of 10% of turnover laid down in Article 23(2) of Regulation No 1/2003.

80 Thus, the fact that GEA remains solely liable for the amount of EUR 1 432 229 results from the specific circumstances that, when the 2009 decision was adopted, that company no longer constituted a single undertaking with ACW and CPA within the meaning of Article 81 EC.

81 In that context, GEA cannot reasonably claim that there was an infringement of the principle of equal treatment which was to its detriment. In that regard, it is sufficient to note that a breach of that principle cannot be identified in a situation such as that at issue where a subsidiary which, on the date of adoption of a decision imposing a fine on the single undertaking to which it belonged, no longer forms part of that single undertaking, is entitled to have the ceiling of 10% of turnover applied to it individually. Those specific circumstances do not allow it to be concluded that the companies concerned were in comparable situations (see, to that effect, judgment of 26 November 2013, *Kendrion* v *Commission*, C-50/12 P, EU:C:2013:771, paragraph 68).

82 In any event, a breach of the principle of equal treatment cannot reasonably be pleaded since, in the present case, as is apparent from paragraph 73 of the present judgment, there are not two relationships of joint and several liability relating to specific periods and, therefore, it is not possible to divide the joint and several liability.

83 Accordingly, point 32 of the second paragraph of Article 2 of the 2009 decision, as amended by the decision at issue, which imposes on GEA an amount of the fine totalling EUR 1 432 229, is not addressed to CPA, not because that point concerns a specific infringement period during which it did

not participate in the single infringement found by the Commission, which is not the case, but simply because the amount of the fine for which CPA is liable, due to its individual participation in that infringement by reason of its membership of the undertaking which did commit that infringement, is entirely covered by the amounts of the fine referred to in points 31(a) and 31(b) of the second paragraph of Article 2.

84 In those circumstances, it must be held that the General Court erred in law when it held, in paragraph 111 of the judgment under appeal, that the Commission had not complied with its obligations under the principle of equal treatment.

85 In the light of all the foregoing considerations, the first part of the first ground of appeal must be upheld.

2. The second ground of appeal

86 The second ground of appeal comprises two parts. By the first part of that ground of appeal, the Commission complains, in essence, that the General Court erred in holding that the date on which the fine at issue was payable could be determined only from the date of receipt of notification of the decision at issue. The second part of that ground, which it is appropriate to examine in the first place, alleges infringement of the obligation to state reasons.

(a) Second part of the second ground of appeal

(1) Arguments of the parties

87 By the second part of the second ground of appeal, the Commission complains that the General Court failed sufficiently to substantiate its finding in paragraph 126 of the judgment under appeal that it must be held that the obligation to pay the fines arises only from Article 1 of the decision at issue and that the time limit for payment of those fines could be determined only from the date of receipt of notification of that decision.

88 GEA contends that the statement of reasons in the judgment under appeal is sufficient.

(2) Findings of the Court

89 As was recalled in paragraph 42 of the present judgment, the obligation on the General Court to state reasons for its judgments means that it must express in a clear and unequivocal manner the reasoning that it has followed, in a way that allows the interested parties to understand its justification for the decision taken and permits the Court of Justice to exercise its powers of review.

90 In the present case, suffice it to point out that the reasoning set out by the General Court in paragraphs 122 to 125 of the judgment under appeal allows both the Commission to know why the General Court upheld the first part of the fifth plea in law raised by GEA at first instance and the Court of Justice to have sufficient material to exercise its power of review.

91 It is clear from those paragraphs, essentially, that it is because the initial wording of points 31 and 32 of the second paragraph of Article 2 of the 2009 decision was replaced by the wording resulting from Article 1 of the decision at issue that the General Court arrived at the finding, in paragraph 126 of the judgment under appeal, that the obligation to pay the fines arises only from Article 1 of the decision at issue and that the date on which those fines became payable could be determined only from the date of receipt of notification of that decision.

92 Consequently, the second part of the second ground of appeal must be rejected as being unfounded.

(b) The first part of the second ground of appeal

(1) Arguments of the parties

93 By the first part of its second ground of appeal, the Commission complains that the General Court erred in law in finding, in paragraph 126 of the judgment under appeal, that the date on which the fine was payable in the present case could be determined only from the date of receipt of notification of the decision at issue.

94 The Commission states that the annulment of the 2010 decision had the effect of reactivating not only points 31 and 32 of the second paragraph of Article 2 of the 2009 decision but also the initial date for payment set in the last paragraph of Article 2 of that decision.

95 In that context, the Commission claims that it was entitled to amend the amount of the fine imposed and joint and several liability without necessarily having to set a new date by which that fine is payable. Thus, the Commission argues that, even though, by the decision at issue, it amended the parts of the operative part of the 2009 decision which determined the amount of the fine and joint and several liability, it was not obliged to set a date by which the fine imposed was payable which was later than the date of notification of the decision at issue.

96 According to the Commission, if the Court of Justice were to confirm that that institution must set a date by which the fines are payable which is after the date of notification of an amending decision, such as the decision at issue, that would lead to the loss of interest accrued on the remaining part of the fine from the date for payment initially set, which would limit its discretion and reduce the effectiveness of the fines imposed by it.

97 In those circumstances, the Commission maintains that, in the present case, in order not to place GEA in a more disadvantageous position vis-à-vis ACW and CPA, it was entitled to set the date by which the fines were payable at 10 May 2010.

98 GEA contends that, while it is true that the Commission has the power to determine the date on which fines are payable and the date from which default interest starts to run, that power does not extend to setting the date on which default interest is payable which is prior to the date on which the fines are set. A due date for payment of a fine which falls before the notification of the decision forming the basis of that fine cannot be justified by reference to the effectiveness of EU law.

99 Consequently, according to GEA, since the date on which the fine is payable cannot be set at a date prior to notification of the decision at issue, the interest relating to payment of the fine can begin to run only from the date of notification of that decision, in line with the principle *accessorium sequitur principale*.

(2) Findings of the Court

100 The Commission's decisions imposing fines for infringements of EU competition law determine, inter alia, the amount of the fines in question and default interest and set out the details of the Commission's bank account to which the undertakings concerned must pay those fines. Those decisions also set the period for payment of the fines imposed. In order to avoid enforced recovery, payment must be made before the expiry of that period.

101 In that regard, under Article 299 TFEU, Commission decisions which impose a pecuniary obligation on persons other than Member States are enforceable.

102 It should also be noted that, under Article 278 TFEU, actions brought before the Court of Justice of the European Union against such types of decision do not have suspensory effect.

103 It follows that Commission decisions are enforceable under the conditions laid down in Article 299 TFEU and that the fines which they impose are, in principle, payable on the expiry of the period laid down in those decisions.

104 In those circumstances and taking into account the objective of ensuring effective compliance with EU competition law rules, it must be held that, in principle, the debtor must make the payment owed by him or her before the date by which the fine is payable as set by the Commission in its decision.

105 In the present case, the Commission initially laid down, in the last paragraph of Article 2 of the 2009 decision, a date by which the fines imposed were payable, which was set at the end of a three-month period which started on the date of notification of that decision and which applied to all the undertakings to which the decision was addressed.

106 As is apparent from paragraph 124 of the judgment under appeal, the 2010 decision, in which the Commission decided that it was necessary to amend the 2009 decision since, first, the fine imposed on ACW exceeded the ceiling of 10% of turnover and, second, the amount of the fine for which ACW was held jointly and severally liable with GEA and CPA had to be reduced, was annulled by the General Court in its judgment of 15 July 2015, *GEA Group* v *Commission* (T-189/10, EU:T:2015:504), in so far as it concerned GEA. The effect of that annulment was to reactivate the initial wording of Article 2 of the 2009 decision, as the General Court pointed out in paragraph 125 of the judgment under appeal.

107 However, that wording was again replaced by the wording resulting from the decision at issue. Article 2 of the decision at issue set a new date by which the fines were payable, namely 10 May 2010.

108 That date is, first, before the date of receipt of the notification of the decision at issue and, second, after the date on which the fines set in the 2009 decision were payable. It corresponds to the date by which the fines were payable indicated in a Commission letter of 9 February 2010 accompanying the 2010 decision.

109 In that context, it must be found that the Commission's powers include the power to determine the date on which the fines that it imposes are payable and that on which default interest begins to accrue, to set the rate of such interest and to determine the detailed arrangements for implementing its decision by requiring, where appropriate, the provision of a bank guarantee covering the principal amount of the fines imposed plus interest. If the Commission had no such power, the advantage which undertakings might be able to derive from late payment of fines would weaken the penalties imposed by the Commission when carrying out its task of ensuring that the EU competition law rules are applied.

110 In the present case, as the Advocate General observed in point 62 of his Opinion, the amendment made to points 31 and 32 of the second paragraph of Article 2 of the 2009 decision, first by the 2010 decision, which has since been annulled, and then by the decision at issue, concerned only the amount of the fine imposed on ACW and the reapportionment of joint and several liability, but did not affect the imposition of the fine as such or the total amount of that fine. Therefore, contrary to what the General Court held in paragraph 126 of the judgment under appeal, it is Article 2 of the 2009 decision which is the legal basis for the obligation to pay the fine which is incumbent on GEA, ACW and CPA, and not Article 1 of the decision at issue.

111 In those circumstances, it must be held that the General Court erred in law in holding, in paragraph 126 of the judgment under appeal, that the time limit for payment of the fines could be determined only from the date of receipt of notification of the decision at issue.

112 In the light of all the considerations above, the first part of the second ground of appeal must be upheld.

113 Consequently, the judgment under appeal should be set aside.

Referral of the case back to the General Court

114 According to Article 61 of the Statute of the Court of Justice of the European Union, the Court of Justice is to quash the decision of the General Court if the appeal is well founded. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

115 In that regard, it must be held that, in the present case, the Court of Justice does not have the necessary information to give final judgment on all the pleas put forward at first instance.

116 The aspects of the dispute raised by those pleas involve the examination of questions of fact on the basis of evidence which, first, was not assessed by the General Court in the judgment under appeal, the latter having held, in paragraph 128 of that judgment, that such an examination was superfluous, since it upheld the fourth plea and the first part of the fifth plea raised by GEA and, second, has not been debated before the Court of Justice, from which it follows that, on that basis, the state of the proceedings does not permit final judgment to be given.

117 Consequently, the case must be referred back to the General Court and the costs must be reserved.

Costs

118 Since the case is being referred back to the General Court, it is appropriate to reserve the costs.

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

1. **Sets aside the judgment of the General Court of the European Union of 18 October 2018, *GEA Group* v *Commission* (T-640/16, EU:T:2018:700);**

2. **Refers Case T-640/16 back to the General Court of the European Union;**

3. **Reserves the costs.**

Arabadjiev Lenaerts Kumin

von Danwitz Xuereb

Delivered in open court in Luxembourg on 25 November 2020.

A. Calot Escobar
Registrar

A. Arabadjiev
President of the Second Chamber