Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 12 January 2012 [1]

Joined Cases C-628/10 P and C-14/11 P

Alliance One International Inc. and Others
v

European Commission and Others

(Appeals — Competition — Agreements, decisions and concerted practices — Article 81 EC — Article 23 of Regulation (EC) No 1/2003 — Spanish market in raw tobacco — Price-fixing and market-sharing — Liability of a parent company for cartel offences of its subsidiary — Criteria for the attribution of liability for infringements within a group of undertakings — Limits of the Commission's discretion in imposing fines — Principle of equal treatment — Prohibition of discrimination by the Commission against participants in a cartel — Obligation to state the reasons on which a decision is based — Prohibition of subsequently adding reasons for the decision on fines in the judicial proceedings)

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1 — Original language: German.

I – Introduction

1. 'Parents are responsible for their children' — this old saying seems to come true again and again in cartel cases. [2] In proceedings concerning fines imposed for cartel offences it is often not only the firms directly involved in the cartel but also their parent companies that are found to be liable. In this way it is possible, when calculating the amount of a fine, to take proper account of the financial strength of the entire group involved in the cartel. It also increases the likelihood of a solvent debtor being responsible for payment of the fine, regardless of any rearrangement of assets within the group.

2. The principle of personal liability, [3] which must always be observed in criminal and quasi-criminal proceedings, sets limits, however, to the attribution of cartel offences within groups of undertakings. Not least for that reason, the European Union judicature repeatedly has to decide whether and under what conditions it is permissible for parent companies to be held liable for the cartel offences of their subsidiaries. [4]

2 — Compare also Podszun, R., '"Haftung der Eltern für ihre Kinder" — auch im Konzern', *Gesellschafts- und Wirtschaftsrecht* (GWR) I (2009), p. 119.

3 — On the principle of personal liability, compare Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraphs 78 and 145; Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 39; Case C-97/08 P *Akzo Nobel and Others* v *Commission* ('*Akzo Nobel*') [2009] ECR I-8237, paragraphs 56 and 77; Case C-90/09 P *General Química and Others* v *Commission* ('*General Química*') [2011] ECR I-1, paragraph 36; and Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg* v *Commission* ('*ArcelorMittal*') [2011] ECR I-2239, paragraph 95.

4 — Compare, as only a few examples, Case 48/69 *Imperial Chemical Industries* v *Commission* ('*ICI*') [1972] ECR 619, paragraphs 132 to 141; Case 107/82 *AEG-Telefunken* v *Commission* ('*AEG*') [1983] ECR 3151, paragraphs 49 to 53; *Akzo Nobel*, cited in footnote 2, especially paragraphs 58 to 63 and 72 to 74; *General Química*, cited in footnote 2, especially paragraphs 34 to 42 and 50 to 52; *ArcelorMittal*, cited in footnote 2, especially paragraphs 96 to 99; Case C-520/09 P *Arkema* v *Commission* ('*Arkema*') [2011] ECR I-8901, paragraphs 37 to 41; and Case C-521/09 P *Elf Aquitaine* v *Commission* ('*Elf Aquitaine*') [2011] ECR I-8947, paragraphs 53 to 67.

3. The present appeal proceedings raise the question of the attribution within a group of undertakings of liability under antitrust law from an altogether novel point of view. The issue to be addressed is whether the European Commission applied different standards for holding liable the parent companies of various participants in one and the same cartel, and whether this was lawful.

4. Specifically, the case concerns a Spanish cartel between a number of firms active in the field of the processing of raw tobacco. The Commission fined some of them as being jointly and severally liable with their parent companies, while the parent companies of other participants in the same cartel were not proceeded against by the Commission.

5. Essentially, the Court will have to clarify what limits the general principle of equal treatment in European Union law sets to the Commission's discretion in imposing fines in accordance with Article 23 of Regulation (EC) No 1/2003.[5] The Court's decision will not only be of fundamental importance for the future administrative practice of the Commission; it is likely also to serve as guidance for the activity of national competition authorities and courts within the European Economic Area.

II – Legal context

6. The legal context of the present case is defined first by Article 81 EC and secondly by Article 23 of Regulation No 1/2003. The latter provision, in extract, reads 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 of the Treaty …

…'

7. Mention should be made, finally, of recital 37 in the preamble to Regulation No 1/2003, which relates to the protection of fundamental rights:

'This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.'

III – Background to the dispute and proceedings at first instance

8. In the Spanish raw tobacco market, four undertakings (known as 'processors') are engaged in the first processing of raw tobacco: World Wide Tobacco España SA ('WWTE'), Compañia española de tabaco en rama SA ('Cetarsa'), Agroexpansión SA and Tabacos Españoles SL ('Taes'). Three of them belong to multinational groups controlled by companies established in the United States of America.

9. In addition to the four Spanish processors, mention should be made of Deltafina SpA, an Italian company whose activities consist in the first processing of raw tobacco in Italy and the marketing of processed tobacco.

5 — Council Regulation (EC) No 1/2003 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). This regulation has been in force, as stated in Article 45(2), since 1 May 2004.

10. At issue in the present case is whether and under what conditions the Commission was entitled or obliged to attribute cartel offences of those firms to their various parent or grandparent companies and hold those companies jointly and severally liable for payment of the fines imposed.

A – *The companies involved in the present proceedings*

11. The companies Alliance One International Inc. ('AOI') (formerly Standard Commercial Corp. ('SCC')),[6] Standard Commercial Tobacco Company Inc. ('SCTC') and Trans-Continental Leaf Tobacco Corp. Ltd. ('TCLT'), involved in the present proceedings, are parent or grandparent companies of WWTE. They were all regarded as part of the 'Standard group'.

12. The shareholding arrangements linking all those companies from 1995 to 5 May 1998 were as follows: SCC owned 100% of the shares in SCTC, which in turn owned 100% of the shares in TCLT. TCLT for its part owned two-thirds of the capital of WWTE. The owners of the remaining third of WWTE's capital were the president of that corporation and two members of his family.

13. On 5 May 1998 TCLT increased its shareholding in WWTE to 86.94%, the remainder of the shares being held by WWTE in the form of own shares (9.73%) and by a natural person (3.33%). In October 1998 WWTE bought that person's shares and SCC acquired a direct holding of 0.04% in WWTE. In May 1999 TCLT and SCC increased their holdings in WWTE to 89.64% and 0.05% respectively, the remainder being held by WWTE in the form of own shares.

B – *The two cartels in the Spanish raw tobacco market and the contested decision of the Commission*

14. From 1996 to 2001 there were two connected horizontal cartels in the Spanish raw tobacco market, which were discovered by the European Commission in 2001.

15. The participants in the first cartel, designated 'the processors' cartel', were WWTE, Cetarsa, Agroexpansión, Taes and Deltafina. In the context of that cartel, the (maximum) average delivery price was fixed each year for each variety and grade of raw tobacco, and the quantities of each variety of raw tobacco that the individual processors could purchase from the producers were shared out. From 1999 to 2001 price brackets per quality grade for each raw tobacco variety and average minimum prices per producer and producer group were also agreed.

16. The second cartel, designated 'the cartel of the producers' representatives', involved three Spanish agricultural cooperatives. The object of that cartel was likewise the fixing each year of price brackets per quality grade for the various raw tobacco varieties.

17. By decision of 20 October 2004[7] (also referred to below as 'the contested decision') the Commission concluded that each of the two cartels constituted a single continuous infringement of Article 81(1) EC. The Commission held various companies and associations liable in this connection for an infringement of Article 81(1) EC,[8] required them to bring the infringement to an end,[9] and fined them various amounts.[10]

6 — According to the applicants at first instance, Alliance One International was formed on 13 May 2005 by a merger between SCC and Dimon Inc.

7 — Commission Decision 2007/236/EC of 20 October 2004 relating to a proceeding under Article 81(1) of the EC Treaty (Case COMP/C.38.238/B.2) — Raw tobacco — Spain (notified under document number C(2004) 4030), summarised in OJ 2007 L 102, p. 14; the full text of the decision is available from the internet only as a non-confidential version, inter alia in English (http://ec.europa.eu/competition/antitrust/cases/index.html).

8 — Article 1 of the contested decision.

9 — Article 2 of the contested decision.

10 — Article 3 of the contested decision.

18. The addressees of the contested decision were all the companies directly involved in the cartels, as well as some other companies belonging to the groups of undertakings concerned. The details were as follows:

— For the participation of WWTE in the cartel, both TCLT and SCC and SCTC were held jointly and severally liable.

— As regards the participation of Agroexpansión in the cartel, on the other hand, the Commission regarded as jointly and severally liable, in addition to that firm, only Dimon Inc. ('Dimon'), the company at the head of the group, and not the company interposed between Dimon and Agroexpansión, Intabex Netherlands BV ('Intabex'), a wholly-owned subsidiary of Dimon.

— For the participation in the cartel of Taes and Deltafina, both of which belong to the United States group of undertakings Universal, the Commission did not attribute liability under antitrust law to other undertakings in the group. That had the consequence that neither Universal Leaf Tobacco Co. Inc. ('Universal Leaf'), which held all the shares in Taes and Deltafina, nor the company above Universal Leaf, Universal Corp. ('Universal') was jointly and severally liable.

19. As reasons the Commission stated that, apart from the corporate link between the parent companies and their subsidiaries, there was no indication of any material involvement of Universal Corporation and Universal Leaf in the facts under consideration. It would therefore not be appropriate to address them a decision in the case. The same conclusion applied a fortiori to Intabex, as its 100% shareholding in Agroexpansión was purely financial. [11]

C – *The judicial proceedings at first instance*

20. Several of the addressees of the contested decision sought legal protection at first instance by way of actions for annulment before the General Court. The General Court decided the action brought jointly by AOI (formerly SCC), SCTC and TCLT by judgment of 27 October 2010 (also referred to below as 'the judgment of the General Court' or 'the judgment under appeal'). [12]

21. The claim brought by AOI, SCTC and TCLT was partially successful at first instance. While the General Court annulled the contested decision in so far as it concerned TCLT, it dismissed the action as to the remainder, in other words in so far as it concerned AOI and SCTC. The General Court's reasons for the annulment of the contested decision with respect to TCLT were essentially a breach of the principle of equal treatment. [13]

IV – Proceedings before the Court

22. By a pleading of 28 December 2010, AOI and SCTC together appealed against the judgment of the General Court. The Commission for its part brought a separate appeal against that judgment, by a pleading of 7 January 2011.

11 — Recital 376 of the contested decision.

12 — Judgment of the General Court of 27 October 2010 in Case T-24/05 *Alliance One International and Others* v *Commission* [2010] ECR II-5329.

13 — Paragraphs 195, 218 and 219 of the judgment under appeal.

23. In Case C-628/10 P AOI and SCTC together claim that the Court should:

— set aside the judgment of the General Court in so far as it rejects the complaints of manifest error of assessment in the application of Article 101(1) TFEU and Article 23(2) of Regulation 1/2003, failure to state sufficient reasons and breach of the principle of equal treatment in relation to the finding that Alliance One International, Inc., formerly Standard Commercial Corp., and Standard Commercial Tobacco Co. were jointly and severally liable;

— annul the Commission's decision in so far as it concerns the appellants, and reduce the fines imposed on the appellants;

— order the Commission to pay the costs.

24. The Commission contends in Case C-628/10 P that the Court should:

— dismiss the appeal and

— order the appellants to pay the costs, including the costs of the proceedings at first instance.

25. By its separate appeal in Case C-14/11 P, the Commission claims that the Court should:

— set aside point 1 of the operative part of the judgment of the General Court,

— dismiss the application to the General Court in its entirety, and

— order TCLT to pay the costs of the present proceedings and order the three appellants to pay the costs of the proceedings at first instance.

26. AOI, SCTC and TCLT for their part oppose this appeal. They contend jointly that the Court should:

— dismiss in its entirety the appeal brought by the European Commission in Case C-14/11 P, and

— order the Commission to pay the costs, including the costs at first instance.

27. After the closure of the written procedure in each case, Cases C-628/10 P and Case C-14/11 P were joined by order of the President of the Court of 14 September 2011 for the purpose of the oral procedure and the judgment. The hearing took place on 16 November 2011.

V – Preliminary issue of the *locus standi* of Alliance One International

28. Both in Case C-628/10 P and in Case C-14/11 P, AOI describes itself for the purposes of the appeal as the legal successor to SCTC and TCLT.[14]

29. The Commission doubts that this construction is possible. It has not, however, made a formal objection to AOI putting forward pleas in attack or defence not merely on its own behalf but also on behalf of SCTC (Case C-628/10 P) or of SCTC and TCLT (Case C-14/11 P).

30. Bringing proceedings in one's own name to establish the rights of another in such a way may be allowed where there is a statutory or contractual basis for doing so.

14 — It uses the expression 'successor of the rights to appeal'.

31. Whether those conditions are satisfied in the present case in the person of AOI need not, however, be discussed in detail. The appeal in Case C-628/10 P was brought by AOI and SCTC jointly, and the response to the appeal by AOI, SCTC and TCLT in Case C-14/11 P is also a joint one. Since at least one of the parties — in the present case AOI — thus undoubtedly has the required standing to bring proceedings, the submissions of the parties must in any event be addressed in detail. [15]

VI – Assessment of the grounds of appeal

32. Before discussing the various grounds of appeal, it seems appropriate to begin by explaining two concepts, highly technical in appearance, which the parties repeatedly refer to in connection both with the appeal by AOI and SCTC (Case C-628/10 P) and with the Commission's appeal (Case C-14/11 P): the '100% presumption' and the concept of the 'dual basis'.

33. The 100% presumption derives from the Court's case-law on the liability of parent companies for the cartel offences of their subsidiaries. If a parent company holds 100% (or nearly 100%) of the shares in its subsidiary, there is a rebuttable presumption that it exercises decisive influence over the conduct in the market of that subsidiary. That also applies where a parent company controls its subsidiary indirectly via an interposed company, with the parent company holding 100% (or nearly 100%) of the shares in the intermediate company and the intermediate company in turn holding 100% (or nearly 100%) of the shares in the subsidiary. [16] The 100% or almost 100% holdings then suffice, according to the case-law, for the parent company (or companies) to be held jointly and severally liable for the cartel offences of their subsidiary (or subsidiaries). [17]

34. Unlike the 100% presumption, the concept of dual basis has not yet been mentioned as such in the case-law. The General Court referred to this concept in the present case, however, in order to make it clear that in the contested decision the Commission did not rely solely on the 100% presumption but, for reasons of prudence, took account of additional evidence demonstrating the actual exercise of decisive influence of parent companies on the business policy of their subsidiaries. [18]

35. That the contested decision was founded on the concept of dual basis is a finding of fact by the General Court. That is not subject to review by the Court of Justice on appeal, [19] since the Commission has not claimed that the facts were distorted. It is therefore irrelevant that in the proceedings before the Court — particularly at the hearing — the Commission made occasional attempts to defend itself by stating that the contested decision did not apply the dual basis concept at all, but only the 100% presumption.

36. Since the contested decision was adopted before the entry into force of the Treaty of Lisbon, reference should still be made in the present case to the provisions of primary law as they were in accordance with the Treaty of Amsterdam, in particular Articles 81 EC and 253 EC, rather than to Articles 101 TFEU and 296 TFEU.

15 — See, to that effect, Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 30 and 31, and Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' and Others* v *Commission* [2011] ECR I-4727, paragraphs 36 to 40.

16 — See, to that effect, *General Química*, cited in footnote 2, paragraphs 85 to 90.

17 — Compare in particular *Akzo Nobel*, cited in footnote 2, paragraphs 58 to 61, especially paragraph 60; *General Química*, cited in footnote 2, paragraphs 39 and 40; *Arkema*, cited in footnote 3, paragraphs 38 to 41, especially paragraph 40; and *Elf Aquitaine*, cited in footnote 3, paragraphs 54 to 60, especially paragraph 56.

18 — Paragraph 147 of the judgment under appeal (see also paragraphs 118 and 155 of that judgment).

19 — Case C-340/00 P *Commission* v *Cwik* [2001] ECR I-10269, paragraph 27; Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515, paragraphs 96 and 97; Case C-352/09 P *ThyssenKrupp Nirosta* v *Commission* ('*ThyssenKrupp Nirosta*') [2011] ECR I-2359, paragraphs 179 and 180; and *Elf Aquitaine*, cited in footnote 3, paragraph 68..

A – *The pleas connected with the principle of equal treatment*

37. At the centre of interest in the present case are legal issues relating to the principle of equal treatment. The question whether and to what extent that principle plays a part in the application of Article 81 EC (now Article 101 TFEU) and Article 23 of Regulation No 1/2003 is raised by AOI and SCTC in their appeal in Case C-628/10 P and by the Commission in its appeal in Case C-14/11 P. I shall therefore discuss these pleas together before addressing any other points.

38. All the appellants complain that the General Court infringed the principle of equal treatment, but do so on different grounds.

39. In Case C-14/11 P the Commission argues that the General Court — in particular in paragraph 218 of the judgment under appeal — wrongly considered that there was discrimination against TCLT in relation to Intabex, Universal and Universal Leaf. The Commission's view is that TCLT, as an interposed company within the Standard group which after 5 May 1998 held nearly all the shares in WWTE, may be held liable alongside AOI and SCTC. It complains that the General Court incorrectly released TCLT from shared liability for the cartel offences of WWTE by relying on the principle of equal treatment.

40. In Case C-628/10 P, on the other hand, AOI and SCTC attempt to avoid shared liability for the cartel offences of WWTE by relying on the principle of equal treatment; they assert that they, as parent companies of WWTE, were treated worse than Universal and Universal Leaf, in their capacity as parent companies of Taes and Deltafina, participants in the cartel.

1. The interplay of the principle of equal treatment and the principle of legality in cartel proceedings (first and second grounds of appeal in Case C-14/11 P)

41. The first and second grounds of appeal in Case C-14/11 P are closely connected. They should be examined together.

a) The Commission's principal complaint: supposed incorrect application of the principle of equal treatment

42. The Commission essentially argues in its first two grounds of appeal in Case C-14/11 P that the General Court 'misapplied' the principle of equal treatment. It disregarded the fact that, in relation to the liability of parent companies for cartel offences of their subsidiaries, the principle of legality is decisive. If a parent company is liable in accordance with the criteria — especially the 100% presumption — developed in the case-law,[20] the principle of equal treatment cannot make any difference.

43. That argument does not work.

44. As the Commission itself conceded in the appeal proceedings, the criteria from the case-law which it relies on merely indicate whether a parent company and its subsidiary form part of the same undertaking for the purposes of competition law, in other words whether a cartel offence can be attributed to one of them only or to both of them.[21]

20 — The reference is to the case-law cited in footnotes 3 and 14 above.

21 — See, to that effect, *Akzo Nobel*, cited in footnote 2, paragraphs 56, 57, 59 and 77; *General Química*, cited in footnote 2, paragraphs 36 to 38; *Arkema*, cited in footnote 3, paragraph 39; and *Elf Aquitaine*, cited in footnote 3, paragraphs 55 and 88.

45. That case-law does not, on the other hand, contain any conclusive criteria regarding the decisive question whether a fine should be imposed for a cartel offence and, if so, to which legal persons the Commission's decision on a fine should be addressed.

46. It must be noted in this connection that the question of whether the parent and subsidiary companies belong to a single undertaking, and of their consequential liability for a cartel offence, is to be answered in accordance with legal criteria alone, whereas when fines are imposed for precisely that cartel offence, in addition to legal aspects, considerations of expediency play an important part: [22] in the context of Article 23(2)(a) of Regulation No 1/2003 the Commission enjoys a discretion — it *may* impose fines.

47. In the context of its discretion under Article 23(2)(a) of Regulation No 1/2003 the Commission can decide in each individual case whether it will impose a fine at all for the cartel offence of an undertaking, but also on which legal person (or persons) standing behind the undertaking concerned it will impose such a fine. [23]

48. However, when it exercises this discretion under Article 23(2)(a) of Directive 1/2003, the Commission does not have complete freedom but must observe the general legal principles of European Union law and the fundamental rights guaranteed at European Union level. [24] In particular, it is bound by the principle of equal treatment and the principle of proportionality. [25]

49. The General Court therefore rightly assessed the contested decision by reference to the principle of equal treatment [26] and did not, for example, confine itself to a comparatively superficial review of whether the decision was vitiated by a misuse of powers (in French: 'détournement de pouvoir') within the meaning of the second paragraph of Article 263 TFEU. [27]

50. The principle of equal treatment is a general principle of European Union law enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union. [28] It requires, according to settled case-law, 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. [29]

22 — In the present case the Commission gives expression, for example, in recital 376 of the contested decision, to its view that it would 'not be appropriate' to hold Universal, Universal Leaf and Intabex liable as parent companies solely because of the 100% presumption. That is a consideration of expediency.

23 — See, to that effect, Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraph 82, and *Elf Aquitaine*, cited in footnote 3, paragraph 121.

24 — See the second sentence of Article 51(1) of the Charter of Fundamental Rights of the European Union; in addition, see the declaratory statement in recital 37 in the preamble to Regulation No 1/2003 according to which that regulation is to be interpreted and applied in compliance with the rights and principles recognised by the Charter.

25 — See, to that effect, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 304 and 319, and — on the principle of equal treatment being binding on the European Union judicature — Case C-280/98 P *Weig* v *Commission* [2000] ECR I-9757, paragraphs 63 and 68.

26 — Compare in particular paragraphs 156, 157, 218 and 219 of the judgment under appeal.

27 — The criterion of misuse of powers was raised by the Commission at the hearing before the Court.

28 — Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* ('*Akzo and Akcros Chemicals*') [2010] ECR I-8301, paragraph 54.

29 — Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 95; Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2006] ECR I-9895, paragraph 23; and *Akzo and Akcros Chemicals*, cited in footnote 27, paragraph 55.

51. Two things follow for the Commission's treatment of a particular cartel offence:

— First, the Commission may not without an objective reason depart from its practice concerning fines as notified in its communications on competition policy;[30] the principle that the authorities are bound by their own commitments applies;[31]

— Secondly, the Commission may not discriminate against any of the undertakings taking part in a cartel compared to the other participants.

52. In the present case it is only the second aspect that need be considered further.

53. The principle of equal treatment prohibits the Commission, when imposing fines on the participants in one and the same cartel, from applying different standards. The General Court also took that premiss as its starting point in the present case.[32]

54. So if the Commission decides to hold liable for the infringing conduct of an undertaking taking part in a cartel both the subsidiary directly involved in the cartel and the parent company (or companies) behind it, it must proceed in the same way in relation to all the other participants in the cartel, provided that those other participants are in a comparable situation.

55. The Commission need not necessarily impose fines on all the parent companies of participants in a cartel to which — purely as a matter of law — the cartel offences of their subsidiaries could be attributed. Rather, in the exercise of its discretion under Article 23(2)(a) of Regulation No 1/2003, on the basis of objective criteria, it can make a selection from the parent companies concerned.

56. Thus the Commission can for instance — as it did in the present case — determine the group of addressees of its decision on fines, for the sake of prudence, on a dual basis: it may confine itself to holding those parent companies liable in whose case, over and above the 100% presumption, there is specific evidence of the actual exercise of decisive influence on the conduct of their wholly-owned subsidiary or subsidiaries. Such evidence may derive from quite different facts depending on the parent company. The Commission is right to observe that the principle of equal treatment does not require it always to produce the same kind of evidence — such as documents, witness statements, etc — or the same number of items of evidence against all parent companies.[33]

57. There will, however, be a breach of the principle of equal treatment if the Commission applies two different standards *qualitatively* in relation to a single cartel offence, that is, if it makes the liability of some parent companies dependent on a stricter *standard of proof* than the liability of other companies, for example by applying the dual basis concept against certain parent companies while basing itself solely on the 100% presumption with regard to other parent companies.

30 — Those currently applicable, in particular, are the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C-210, p. 2) and the Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 L 298, p. 17).

31 — *Dansk Rørindustri*, cited in footnote 24, paragraphs 209 to 211 and 213; Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraphs 207 to 209; and *Arkema*, cited in footnote 3, paragraph 88; see, for an earlier case to the same effect — in relation to a different area of law — Case 190/82 *Blomefield* v *Commission* [1983] ECR 3981, paragraph 20.

32 — Paragraphs 156 and 157 of the judgment under appeal.

33 — See, to that effect, *Elf Aquitaine*, cited in footnote 3, paragraph 97.

58. That is precisely what happened in the present case, according to the General Court's findings of fact: TCLT was found jointly and severally liable on the basis of the 100% presumption for the cartel offence of its subsidiary WWTE,[34] whereas the Commission refrained from imposing fines on Intabex, Universal and Universal Leaf because in their case it applied the dual basis concept, so that it did not regard the mere shareholdings of those companies in their subsidiaries as sufficient without specific evidence of the actual exercise of decisive influence.[35]

59. In those circumstances the General Court was entitled to find, without erring in law, that TCLT had been discriminated against as compared with Intabex, Universal and Universal Leaf.[36]

60. The principle of legality, on which the Commission bases argument, makes no difference to that conclusion.

61. The principle of equal treatment must indeed be reconciled with the requirement to act lawfully, according to which a person may not rely to his own advantage on an incorrect application of the law in favour of a third party.[37] In other words, European Union law does not give any entitlement to 'equality in illegality'.[38] The Commission, in its written submissions, put it in a nutshell: 'two wrongs do not make a right'.

62. In the present case, however, there was no risk of a conflict with the requirement to act lawfully. Rather, in the administrative procedure the Commission, within the framework of its discretion under Article 23(2)(a) of Regulation No 1/2003, had to choose between two options for action, both of which were equally lawful: it was open to the Commission either to find all the parent companies to which the 100% presumption applied jointly and severally liable (first option) or to limit the class of addressees of the contested decision by applying the dual basis concept (second option).

63. Seen in this light, it was not legally objectionable for the Commission to adopt the second option for action with respect to Intabex, Universal and Universal Leaf. By applying the dual basis concept, the Commission merely decided not to hold the companies in question jointly and severally liable for the cartel offences committed by their subsidiaries on the sole basis of the 100% presumption.

64. Since the Commission's conduct towards Intabex, Universal and Universal Leaf was thus not an 'illegality', it could not be 'equality in illegality' for TCLT to be treated in the same way in the judgment under appeal.

65. That is not contradicted by the *Wood pulp* judgment.[39] The Court of Justice did indeed state in that judgment that an undertaking 'cannot escape being penalised altogether on the ground that another trader has not been fined, when that trader's circumstances are not even the subject of proceedings before the Court'.[40] The point at issue in the present case of the Commission's exercise of its discretion when imposing fines was not, however, as far as can be seen, addressed in any detail in the *Wood pulp* judgment.

34 — Paragraph 218 of the judgment under appeal.

35 — Paragraphs 142 and 143 on the judgment under appeal and recitals 18 and 376 of the contested decision.

36 — Paragraphs 218 and 219 of the judgment under appeal.

37 — Case 188/83 *Witte* v *Parliament* [1984] ECR 3465, paragraph 15; Case 134/84 *Williams* v *Court of Auditors* [1985] ECR 2225, paragraph 14; and order of 20 January 2009 in Case C-38/08 P *Sack* v *Commission*, paragraph 32.

38 — See my Opinion in Case C-309/06 *Marks & Spencer* [2008] ECR I-2283, points 76 and 77.

39 — Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström and Others* v *Commission* ('*Wood pulp*') [1993] ECR I-1307.

40 — *Wood pulp*, cited in footnote 38, paragraph 197, and similarly paragraph 146; see, to the same effect, with respect to anti-dumping law, Case 301/85 *Sharp* v *Council* [1988] ECR 5813, paragraph 22; Joined Cases 260/85 and 106/86 *TEC and Others* v *Council* [1988] ECR 5855, paragraph 18; and Joined Cases 273/85 and 107/86 *Silver Seiko and Others* v *Council* [1988] ECR 5927, paragraph 55; and, with respect to public service law, Case C-326/91 P *De Compte* v *Parliament* [1994] ECR I-2091, paragraph 52.

66. Moreover, I would find it unconvincing to conclude from the *Wood pulp* judgment that the Commission was entirely free in the exercise of its discretion as regards the imposition of fines and did not have to justify itself in any way before the European Union judicature with respect to observance of the principle of equal treatment. Case-law to that effect would not do justice to the requirements of the effective protection of fundamental rights before the European Union judicature (compare also Article 47(1) of the Charter of Fundamental Rights).

67. If the General Court, in accordance with its judicial mandate, ensures that the Commission exercises its discretion under Article 23(2)(a) of Regulation No 1/2003 by applying the same lawful standards to all the participants in a cartel, it is not according any 'equality in illegality' but granting protection against arbitrary administrative action.

68. Since the General Court did not therefore err in law with respect to TCLT in applying the principle of equal treatment, the Commission's principal criticism in connection with its first and second grounds of appeal in Case C-14/11 P must be rejected as unfounded.

b) The complaints of inadequate reasons for the judgment and distortion of the facts

69. At the margin of its first ground of appeal in Case C-14/11 P the Commission additionally criticises the General Court for not giving adequate reasons for its judgment and distorting the facts.

i) Alleged failure to state adequate reasons

70. The Commission first complains that its legal arguments at first instance on the principle of legality and the principle of 'no equality in illegality' were ignored by the General Court. It regards that as a 'clear lack of motivation'.

71. The obligation to give a proper statement of reasons for a judgment at first instance follows from Article 36 in conjunction with Article 53(1) of the Statute of the Court of Justice.

72. In my view, the Commission is making exaggerated demands as to the extent of this obligation to state reasons. According to settled case-law, the obligation to state reasons does not require the General Court to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case, and the reasoning may therefore be implicit, on condition that it enables the persons concerned to know why the General Court has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review. [41]

73. In the present case the General Court certainly did take account of the Commission's arguments. [42] Furthermore, it clearly and unambiguously set out its own view of the applicability and extent of the principle of equal treatment. [43] From that it follows, at least implicitly, that it did not regard the Commission's objection as to the significance of the principle of legality as being pertinent. There can therefore be no question of a failure to state reasons.

41 — Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others* v *Council and Commission* [2008] ECR I-6513, paragraph 96; Case C-440/07 P *Commission* v *Schneider Electric* [2009] ECR I-6413, paragraph 135; and Case C-480/09 P *AceaElectrabel Produzione* v *Commission* ('*AceaElectrabel*') [2010] ECR I-13355, paragraph 77.

42 — Paragraph 113 of the judgment under appeal.

43 — Paragraphs 218 and 219 of the judgment under appeal; compare also paragraphs 156 and 157 of the judgment.

ii) Alleged distortion of the facts

74. The Commission further submits that in paragraph 158 of the judgment under appeal the General Court 'manifestly distorted' the contested decision and the Commission's arguments expressed in it. The alleged distortion is said to lie in the fact that the General Court manifestly misinterpreted recital 384 of the contested decision. It wrongly assumed that the Commission shared its point of view on the principle of equal treatment.

75. It is settled case-law that there is a distortion where, without recourse to new evidence, the assessment of the existing evidence appears to be clearly incorrect. [44]

76. In recital 384 of the contested decision it is stated — so far as material here — that 'the specific circumstances which may lead the Commission to hold a parent company liable for the behaviour of its subsidiary may vary from one instance to the other'. The Commission then says, in that recital, that that fact 'cannot constitute as such a breach of the principle of non-discrimination, as long as the principles of liability are consistently applied'.

77. It follows directly from that comment that the Commission regards the principle of equal treatment as relevant. That is the only explanation for the fact that, in that recital of its decision, the Commission discusses at all whether or not there was a breach of that principle (which the Commission describes there as 'the principle of non-discrimination').

78. That was exactly the conclusion that the General Court drew in the disputed passage of the judgment under appeal. It first set out its own point of view ('The Commission is bound by the principle of equal treatment…') [45] and then added that the Commission shared that point of view, citing as proof recital 384 of the contested decision. [46]

79. The General Court thereby adopted an obvious interpretation of the contested decision which does not disclose any distortion of the Commission's arguments. Even the Commission's observation that 'the specific circumstances … may vary from one instance to the other' [47] is taken up by the General Court when it points out that 'comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified'. [48]

80. In those circumstances, I can see nothing to indicate that the General Court made a manifestly incorrect assessment of the content of recital 384 of the contested decision. The complaint of distortion of facts is therefore untenable.

c) Interim conclusion

81. All in all, therefore, the first and second grounds of appeal in Case C-14/11 P must be rejected in their entirety.

44 — Case C-229/05 P *PKK and KNK* v *Council* [2007] ECR I-439, paragraph 37; Case C-260/05 P *Sniace* v *Commission* [2007] ECR I-10005, paragraph 37; and Case C-413/08 P *Lafarge* v *Commission* [2010] ECR I-5361, paragraph 17.

45 — Paragraph 157 of the judgment under appeal.

46 — Paragraph 158 of the judgment under appeal.

47 — Recital 384 of the contested decision.

48 — Paragraph 157 of the judgment under appeal.

2. Alleged discrimination against SCC and SCTC as a result of the application of the dual basis concept (third ground of appeal in Case C-628/10 P).

82. The third ground of appeal in Case C-628/10 P is divided into several sections, which, however, largely overlap in content. In essence, AOI and SCTC make two submissions. First, the application of the dual basis concept was discriminatory against them (see section (a) below). Secondly, the General Court did not compare the situation of AOI (formerly SCC) and SCTC precisely enough with that of Universal and Universal Leaf (see section (b) below).

a) The allegedly discriminatory character with respect to SCC and SCTC of the dual basis concept (first main point in connection with the third ground of appeal in Case C-628/10 P)

83. As far as the concept of dual basis is concerned, the appellants argue essentially as follows. If the 100% presumption alone had been applied, Universal and Universal Leaf too would have had to share liability for the cartel offences of their subsidiaries Taes and Deltafina. The application of the more restrictive dual basis concept had the consequence that in the end only AOI (formerly SCC) and SCTC, but not Universal and Universal Leaf, were held liable together with their subsidiaries.

84. The Commission counters that criticism essentially by arguing that the principle of equal treatment gives no entitlement to 'equality of illegality'. [49] I have already shown that this argument fails in the present case: [50] the question here is not whether administrative conduct that is already unlawful in any case ('illegality') should be extended even further. The point is rather to clarify whether treatment which the Commission, entirely lawfully, has applied to one of the participants in a cartel must also be enjoyed by all other participants in the cartel.

85. The attacks by AOI and SCTC on the judgment under appeal are, however, groundless for other reasons.

86. As already explained above, [51] the Commission enjoys a discretion in connection with Article 23(2)(a) of Regulation No 1/2003. Consequently, it need not necessarily impose fines on all the parent companies of participants in a cartel to which — purely as a matter of law — the cartel offences of their subsidiaries could be attributed. Rather, in the exercise of its discretion, on the basis of objective criteria, it can make a selection from the parent companies concerned.

87. It is the nature of things that the criteria for such a selection may act in favour of some parties and to the detriment of others. The mere circumstance that the Commission has made a selection from among them does not yet allow the concluision that there has been discrimination. As long as the criteria used by the Commission are based on objective considerations, there is no reason to presume that certain parties to the procedure have been unlawfully disadvantaged.

88. It would be otherwise if in the exercise of its discretion under Article 23(2)(a) of Regulation No 1/2003 the Commission let itself be guided not by objective factors but by irrelevant considerations, in other words if it displayed conduct that at least came close to a misuse of powers within the meaning of the second paragraph of Article 263 TFEU.

89. In the present case AOI and SCTC have not, however, submitted any specific evidence to the General Court to suggest irrelevant considerations underlay the Commission's reliance on the concept of the dual basis.

49 — The Commission also argues that the appellants, by their criticism of the dual basis concept, contradict their own arguments put forward elsewhere in Case C-628/10 P. This criticism does not in itself, however, allow any conclusions to be drawn as to the admissibility or correctness of the submissions of AOI and SCTC on the present ground of appeal.

50 — Compare my remarks on the first and second grounds of appeal in Case C-14/11 P (see in particular points 60 to 68 above).

51 — See above, in particular points 46 to 55.

90. Quite to the contrary, there was an objective reason for choosing between the parent companies concerned by reference to the concept of the dual basis. As the Commission rightly observed in the proceedings at first instance,[52] at the time of the adoption of the contested decision there was considerable uncertainty with regard to the criteria for allocating, as between a parent company and its subsidiaries, liability for cartel offences.[53] Only at a later date did the Court's judgment in *Akzo Nobel* clarify matters.[54]

91. In the climate of legal uncertainty that existed before the Court's clarification it was objectively justified for the Commission, in the interests of caution, to address the decision at issue only to those parent companies for which it did not have to rely solely on the 100% presumption but also had specific evidence of the actual exercise of decisive influence over the conduct of the subsidiary companies in question.

92. The complaint of AOI and STC alleging discrimination in the use of the concept of the dual basis is therefore unfounded.

b) The comparison of AOI's and SCTC's situation with that of Universal and Universal Leaf (second main point in connection with the third ground of appeal in Case C-628/10 P)

93. The appellants also complain that the General Court did not make a sufficiently detailed comparison of the situation of AOI (formerly SCC) and of SCTC with that of Universal and Universal Leaf. They maintain that in order to rule on AOI's and SCTC's claim of discrimination the Court should have examined, by reference to the actual circumstances, whether Universal and Universal Leaf formed an economic unit with their subsidiaries Taes and Deltafina. The appellants submit that the situation of SCC and SCTC was 'very similar' to that of Universal and Universal Leaf.

94. At first sight one might assume that by this ground of appeal AOI and SCTC are merely querying the General Court's assessment of the facts and evidence and requesting the Court of Justice to substitute its own appraisal for that of the General Court. That would be inadmissible in an appeal.[55]

95. When considered more closely, however, the submissions of AOI and SCTC raise — at least in addition — a genuine point of law which may undoubtedly be raised in appeal proceedings. It concerns the scope of the legal requirements for an examination by the General Court of a plea of discrimination and in particular the intensity of review which the General Court should assume in that respect towards the Commission. This concerns an issue which is time and again the subject of discussion and currently — not least in light of the Charter of Fundamental Rights — of increasing attention.

96. Article 47 of the Charter of Fundamental Rights, which pursuant to the first subparagraph of Article 6(1) TEU has the same legal value as the Treaties and is thus binding primary law, guarantees the fundamental right to effective legal protection, which is also recognised as a general principle of EU law.[56] This fundamental right entitles a person, inter alia, to have decisions of administrative authorities reviewed by an independent court under a fair procedure.

52 — See paragraphs 118, 147 and 155 of the judgment under appeal.

53 — With regard to discussion of the 100% presumption, which has continued until very recently, see my Opinion in *Akzo Nobel* (cited in footnote 2, in particular points 49 to 76) with further references.

54 — Cited in footnote 2.

55 — Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, paragraph 137; see also Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 29, '*Impala*') *ThyssenKrupp Nirosta*, cited in footnote 18, paragraph 180; and *Elf Aquitaine*, cited in footnote 3, paragraph 68.

56 — Case C-279/09 *DEB* [2010] ECR I-13849, paragraphs 30 and 31; Case C-69/10 *Samba Diouf* [2011] ECR I-7151, paragraph 49; and Case C-272/09 P *KME Germany* v *Commission* [2011] ECR I-12789, paragraph 92.

97. The particular demands which flow from that right are to be determined on the basis of the requirement of homogeneity (Article 6(1), third subparagraph, TEU and Article 52(3), first sentence, of the Charter of Fundamental Rights) and taking account of Article 6(1) of the ECHR.[57] [58] The latter provision requires, according to the case-law of the European Court of Human Rights (ECtHR) in particular that the court proceedings enable all the questions of fact and law relevant to the dispute to be reviewed.[59]

98. It is undisputed that in the present case the General Court was empowered to carry out such a review of all the questions of fact and law in connection with compliance with the principle of equal treatment by the Commission.

99. The intensity of that review by the General Court depends, however, not least on which grounds of annulment the applicants at first instance relied upon and in particular how substantiated their submissions were, that is, with what facts and arguments they supported their individual complaints. For, in a direct action before the Courts of the European Union, the applicable principle is that the parties determine the facts and evidence forming the basis for a decision. Only in exceptional cases is there a reversal of the burden of presenting the facts and adducing the evidence or a requirement for the Court to take evidence of its own motion. In the present proceedings none of the parties have referred to such a need.

100. In the present case the submissions of SCC (now AOI), SCTC and TCLT at first instance in connection with the principle of equal treatment were restricted to two points, by which they each asserted that the parent companies of other cartel participants had been better treated than they had.[60]

101. Only one of those points from the application at first instance is of significance in connection with the present ground of appeal.[61] In it SCC submitted that its situation as parent company is from all relevant aspects comparable to that of Universal, Universal Leaf and SEPI. What the Commission established with regard to the latter companies is claimed by SCC also for itself. There is, it submits, no specific evidence of actual participation of SCC in the infringements found to have been committed by WWTE or of direct communication between the parent company and its subsidiary.

102. In its rejoinder at first instance SCC (AOI) added that the Commission had discriminated between the applicants and Universal, because it had applied different criteria to their respective subsidiaries when attributing liability for the infringement.[62]

103. In so doing SCC ultimately merely repeated what it had already submitted in connection with the criteria for attribution to the parent companies of liability for the infringement of the subsidiary company WWTE. In those circumstances there can be no objection that in the judgment under appeal[63] the General Court did not undertake a separate, more intensive examination of their submissions with regard to discrimination but considered all the pleas in law — including the pleas of discrimination — together.

57 — European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR', signed in Rome on 4 November 1950).

58 — *DEB*, cited in footnote 55, paragraph 32.

59 — ECtHR judgments of 13 February 2003 in *Chevrol v. France* (application No 49636/99, § 77, ECHR 2003-III), of 4 March 2004 in *Silvester's Horeca Service v. Belgium* (application No 47650/99, § 27) and of 27 September 2011 in *Menari Diagnostics v. Italy* (application No 43509/08, § 59).

60 — Paragraphs 68 to 74 of the application at first instance.

61 — The other point concerns the comparison of TCLT's situation as intermediate parent company of WWTE within the Standard group with the situation of Intabex as intermediate parent company of Agroexpansión within the Dimon group. TCLT complained that the Commission had treated it worse than Intabex. As the General Court upheld TCLT's argument on that point and annulled the contested decision to that extent, there was no need for the appellants to reiterate it in their appeal.

62 — Paragraphs 141 to 150, in particular paragraph 146 of the rejoinder.

63 — Paragraph 52, last sentence, of the judgment under appeal; with regard to consideration of the issue of discrimination see in particular paragraphs 157 to 159, 195 to 197 and 218 of the judgment under appeal.

104. All things considered, the complaint of an inadequate examination of the comparability of the situation of AOI (SCC) and SCTC with that of Universal and Universal Leaf is unfounded in the present case.

c) Interim conclusion

105. The third ground of appeal in Case C-628/10 P should therefore be rejected.

3. The irrelevance of the Commission's arguments at first instance disputing the allegation of discrimination (third ground of appeal in Case C-14/11 P)

106. By its third ground of appeal in Case C-14/11 P the Commission complains that the General Court did not allow it to provide evidence at first instance of facts that would have shown that TCLT was not in the same situation as Universal or Intabex.

107. This ground of appeal is directed in particular at the first sentence of paragraph 196 of the judgment under appeal. There the General Court deals with the question whether the fact, put forward by the Commission, that from 1996 to 1999 TCLT was the main customer of WWTE should be taken into account. The Court found that it should not, inter alia because it was a submission made for the first time in the proceeding before the Court, more precisely in the Commission's defence.

108. The Commission submits that in so doing the General Court breached its right to an adversarial hearing and wrongly interpreted the duty to state reasons for Commission decisions. Both points are closely connected.

109. It is correct that in court proceedings the Commission, like any other party, has a right to an adversarial hearing.[64] It must therefore be able to defend itself effectively against a plea of annulment raised before the Court, as for instance against allegations of discrimination such as those raised at first instance by AOI, SCTC and TCLT.

110. The Commission's right to an adversarial procedure must, however, be balanced appropriately against the right of the undertakings concerned to a fair procedure and effective legal protection (Article 47 of the Charter of Fundamental Rights).

111. Accordingly, although the Commission may, in the proceeding before the General Court, explain in more detail in its defence the reasons for the decision at issue,[65] the Commission may not introduce completely new grounds for the decision at issue in those proceedings. For the original lack of reasons cannot be cured by enabling the person concerned to learn of those reasons during proceedings before the European Union judicature.[66] This prohibition of adding grounds 'after the event' before a court is particularly strict in criminal proceedings and in quasi-criminal proceedings such as cartel proceedings.[67]

64 — Case C-89/08 P *Commission* v *Ireland and Others* [2009] ECR I-11245, paragraph 53, and Case C-197/09 RX-II *Review M* v *EMEA* [2009] I-12033, paragraph 42.

65 — Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraph 61; see, as earlier judgments to the same effect, Joined Cases 36/59 to 38/59 and 40/59 *Präsident Ruhrkohlen-Verkaufsgesellschaft and Others* v *High Authority* [1960] ECR 423, in particular 439 and 440, and Case 111/83 *Picciolo* v *Parliament* [1984] 2323, paragraph 22.

66 — Case 195/80 *Michel* v *Parliament* [1981] ECR 2861, paragraph 22; *Dansk Rørindustri*, cited in footnote 24, paragraph 463; and *Elf Aquitaine*, cited in footnote 3, paragraph 149.

67 — For criminal law in the strict sense see Case C-550/09 *E and F* [2010] ECR I-6213; for the quasi-criminal field — in this case antitrust law — see *Dansk Rørindustri*, cited in footnote 24, paragraph 463, and *Elf Aquitaine*, cited in footnote 3, paragraph 149.

112. In the present case too the Commission should not therefore be able to refer in proceedings before the General Court to matters that in fact should have already been included in the contested decision but were not.

113. It remains to consider whether the specific characteristic of TCLT as the 'main customer' of WWTE was a matter of that kind which should have been mentioned in the statement of reasons for the contested decision.

114. It should be noted in that respect that a Commission decision imposing fines must contain an adequate statement of reasons with regard to each addressee, but in particular to those to whom the infringement is attributed in the decision. Consequently such a decision must contain, with regard to the parent company which is being held liable for the infringement of its subsidiary, a detailed statement of the reasons justifying the attribution of the infringement to the parent company. [68]

115. The precise requirements in the individual case must be determined by reference to the spirit and purpose of the requirement to state reasons under Article 253 EC (now Article 296(2) TFEU). The statement of reasons for a legal measure must enable the person concerned to ascertain the reasons for the measure, so that he may establish whether they are well founded, and enable the competent court to exercise its power of review. [69]

116. If, as in the present case, the Commission decides to hold only some parent companies of the firms involved in a cartel jointly and severally liable, but not others, it must provide reasons for this in the decision imposing fines. From the statement of reasons for the decision, it must be comprehensible to those parent companies which are addressees of that decision why specifically they are being held liable, although the parent companies of other participants in the cartel are not being fined. Only in that way can the persons concerned and the European Union judicature review the Commission's decision for any errors in the exercise of its discretion, in particular for any infringements of the principle of equal treatment. [70]

117. Exactly such a statement of reasons was missing in the present case, however, according to the General Court's findings, which are not disputed in this respect. In the contested decision the Commission explained — extremely briefly — why some other undertakings, including Intabex, had *not* been held liable, [71] but there was no clear statement as to why it was including TCLT, but not Intabex, in the class of addressees of the decision on fines.

118. It was only in the judicial proceedings that the Commission cited the sale to TCLT of a large proportion of the tobacco processed by WWTE as an important indication that the position of TCLT was not comparable with that of Intabex. According to the Commission's submissions in the judicial proceedings, this is a decisive factor which specifically shows that the choice of TCLT as an addressee of the contested decision was compatible with the principle of equal treatment.

119. But if TCLT's position as the 'main customer' of WWTE was of so great importance with respect to its being made an addressee of the contested decision, then that circumstance ought already to have been mentioned in the statement of reasons for the contested decision. Only that explanation makes it possible to understand why the contested decision was addressed specifically to TCLT. It was not permissible for the Commission subsequently to insert at the stage of the judicial proceedings a reason which it regarded as being of such decisive importance. In particular, that reason cannot be

68 — *Elf Aquitaine*, cited in footnote 3, paragraph 152.

69 — Case C-333/07 *Régie Networks* [2008] ECR I-10807, paragraph 63; *E and F*, cited in footnote 66, paragraph 54; and *Elf Aquitaine*, cited in footnote 3, paragraph 147.

70 — With regard to the Commission's obligation to observe the principle of equal treatment when exercising its discretion under Article 23(2)(a) of Regulation No 1/2003, see above, in particular points 48 to 53.

71 — Recital 376 of the contested decision, reproduced in paragraph 29 of the judgment under appeal.

regarded as a mere explanation of the contested decision, since that decision, according to the findings of the General Court, did not contain any (other) reasons at all relating to this issue. The General Court was therefore right to regard the mention of TCLT's position as the 'main customer' of WWTE, made for the first time in the judicial proceedings,[72] as inadmissible.[73]

120. The Commission replies that it is not obliged to give reasons as to why it did *not* make certain companies — in this case Universal Leaf and Intabex — addressees of the contested decision.[74]

121. This argument fails, however. The point here is not whether Universal, Universal Leaf and Intabex should also have been addressees of the contested decision,[75] but whether TCLT was correctly — in particular, without infringing the principle of equal treatment — included in the class of addressees of the decision.

122. The Commission further objects that there was no reason in the administrative procedure for it to compare the situation of TCLT with that of the other parent companies, since it was not until the stage of the judicial proceedings that TCLT claimed that the principle of equal treatment had been infringed. The Commission is not obliged to set out in its decisions, as it were *ex abundantia cautelae*, all the reasons which it might later rely on to rebut criticisms of its measures.[76]

123. This objection does not hold water however, in the circumstances of the present case. For TCLT it was not yet foreseeable during the administrative proceedings that it would have to defend itself against any discrimination in comparison with Universal, Universal Leaf or Intabex. The statement of objections had also been directed to Universal, Universal Leaf and Intabex. That the Commission would subsequently not make those particular companies addressees of the contested decision could not yet be anticipated by TCLT in the administrative proceedings. The Commission, on the other hand, must have known that the choice it made, when adopting the contested decision, of parent companies of participants in the cartels would throw up questions relating to the principle of equal treatment.[77]

124. At the hearing before the Court the Commission submitted, finally, that the 100% presumption would be devalued if the competition authorities were required, in the statement of reasons for their decisions on imposing fines, to consider the equal treatment of the various parties to the proceedings.

125. This argument too is unconvincing, however. Of course it is still open to the Commission, when selecting the addressees of a decision imposing fines, to rely on the 100% presumption and to confine itself in the reasons for its decision solely to setting out the conditions for the application of the presumption.[78] But if the Commission — as in this case — voluntarily decides, in the exercise of its discretion, to apply stricter standards for holding parent companies liable, then it must also adapt its statement of reasons for its decision to those stricter standards. Who himself raises the bar cannot be surprised if it becomes more difficult to leap over it.

72 — The General Court's finding that the Commission first put forward its arguments on the position of TCLT as 'main customer' of WWTE in the judicial proceedings has not been challenged as such in any way by any of the parties to the appeal proceedings.

73 — First sentence of paragraph 196 of the judgment under appeal.

74 — The Commission relies on the case-law of the General Court, particularly Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering* v *Commission* [2004] ECR II-2501, paragraph 414.

75 — The applicants already pointed out in the first-instance proceedings that they were not submitting that the Commission had unlawfully omitted to regard Universal, Universal Leaf, Sepi or Intabex as liable or to address the contested decision to them (paragraph 86 of the judgment under appeal). They also confirmed this in the present appeal proceedings.

76 — The Commission relies in this respect on *ICI*, cited in footnote 3, paragraph 145.

77 — As follows from recital 384 of the contested decision, the Commission was very well aware of this problem. In that recital it considers whether Dimon was discriminated against in comparison to the parent companies of other cartel participants.

78 — *Elf Aquitaine*, cited in footnote 3, paragraph 96.

126. All in all, then, the General Court did not misunderstand the requirements for the reasons to be given by the Commission for the contested decision, and it also did not infringe the Commission's right to an adversarial hearing. The third ground of appeal in Case C-14/11 P must therefore be rejected.

4. The comparability of the situation of TCLT with that of Intabex and Universal (fourth ground of appeal in Case C-14/11 P)

127. By its fourth ground of appeal in Case C-14/11 P, which — like the third ground of appeal — is directed against paragraph 196 of the judgment under appeal, the Commission submits that the General Court 'misapplied' the principle of equal treatment, since TCLT was in an objectively different situation to that of Intabex and Universal.

128. The essential point here is again the question whether the interposition of TCLT within the Standard Group was of a purely financial character, so that its situation was comparable with that of Intabex. The Commission claims, as it previously did at first instance,[79] that TCLT's role within the Standard Group went beyond a purely financial participation. To support its arguments, the Commission points to the circumstance already mentioned that TCLT acted as the main purchaser of the tobacco processed by its subsidiary WWTE. In this respect its situation differs from that of Intabex.

129. In the judgment under appeal, however, the General Court stated that precisely this circumstance — the purchase by TCLT of large quantities of the tobacco processed by WWTE — was of no significance because the purchases in question were allocated to TCLT purely for accounting and tax reasons and in actual fact no tobacco was delivered by WWTE to TCLT.[80]

130. The Commission counters in its appeal that the reasons why TCLT appeared as the purchaser of the tobacco processed by WWTE are irrelevant. It may in any event be concluded from those purchases that TCLT was more than a mere interposed financial holding company.

131. This submission by the Commission is inadmissible. What evidential weight is to be attached to TCLT's purchases from WWTE is a matter of the free assessment of the facts by the General Court. Subject to any distortion of the facts, which has not been asserted by the Commission, this point is not open to review by the Court on appeal.[81]

132. What is concerned here is not the point of law of whether the General Court classified the facts correctly and applied the correct legal criteria when assessing the facts. Rather, the Commission merely finds the General Court's assessment unconvincing. But it is not the purpose of the appeal procedure to call that assessment into question and to substitute a different assessment.[82]

133. Finally, the Commission complains, quite incidentally, that the General Court did not give adequate reasons for its judgment. It did not explain why it regarded the situations of TCLT and Universal as comparable, and did not address the arguments put forward by the Commission in this respect.

79 — Paragraphs 120 and 121 of the judgment under appeal.

80 — Paragraph 196 of the judgment under appeal.

81 — *Commission* v *Cwik*, cited in footnote 18, paragraph 27; *British Aggregates* v *Commission*, cited in footnote 18, paragraphs 179 and 180; and Case C-47/10 P *Austria* v *Scheucher-Fleisch and Others* [2011] ECR I-10707, paragraphs 57, 58 and 99.

82 — Compare the case-law cited in footnote 54.

134. This submission too fails. It is ineffective ('*inopérant*' in French) and hence unfounded. [83] If, as in this case, the General Court has found, without erring in law, that TCLT was in a comparable situation to Intabex, then it no longer matters whether TCLT's situation was also similar, in addition, to that of Universal and Universal Leaf. The General Court could base its annulment of the contested decision solely on the discrimination it had found to exist with regard to TCLT as opposed to Intabex.

135. The fourth ground of appeal in Case C-14/11 P must therefore be rejected as inadmissible in part and unfounded in part.

5. Interim conclusion

136. Consequently, the appellants' complaints in connection with the principle of equal treatment must be rejected in their entirety both in Case C-628/10 P and in Case C-14/11 P.

B – *Some further criticisms made by AOI and SCTC (first and second grounds of appeal in Case C-628/10 P)*

137. I shall conclude by addressing some further criticisms of the judgment under appeal made by AOI and SCTC in their first and second grounds of appeal in Case C-628/10 P.

1. First ground of appeal in Case C-628/10 P

138. By their first ground of appeal in Case C-628/10 P the appellants complain that the General Court infringed Article 81(1) EC, Article 23(2) of Regulation No 1/2003 and Article 253 EC. [84] In their view, the General Court wrongly considered that the liability of AOI (formerly SCC) and SCTC for the cartel offences of WWTE had been proved, both before 5 May 1998 and afterwards.

139. I shall address these pleas in sections (a) and (b) below. I shall not discuss Article 253 EC any further, since the appellants give no explanation of how the General Court is said to have disregarded the requirements for statements of reasons of legal acts of the European Union. Their complaint of an infringement of that provision must therefore be regarded as inadmissible.

a) Alleged lack of decisive influence of SCC and SCTC over WWTE before 5 May 1998 (first part of the first ground of appeal in Case C-628/10 P)

140. The first part of the first ground of appeal in Case C-628/10 P concerns only the period before 5 May 1998. AOI (formerly SCC) and SCTC allege that at that time they were simply not in a position to exercise decisive influence over WWTE. At the very least, they should not have been held liable on their own but at most together with the other shareholders of WWTE.

141. On a superficial view, it might be supposed that with this complaint AOI and SCTC are merely challenging the General Court's assessment of the facts and the evidence and asking the Court to substitute its own assessment for that of the General Court. That would be inadmissible in appeal proceedings. [85]

83 — Case C-76/01 P *Eurocoton and Others* v *Council* [2003] ECR I-10091, paragraph 52; Case C-203/07 P *Greece* v *Commission* [2008] ECR I-8161, paragraphs 42 and 43; and *Arkema*, cited in footnote 3, paragraph 31.

84 — The appellants refer to Articles 101 TFEU and 296 TFEU.

85 — See the case-law cited in footnote 54.

142. In reality, however, the question is whether the General Court applied the correct criteria and standards in its assessment of the facts and the evidence. This is a point of law which is open to review by the Court in its appellate jurisdiction.[86] In this respect, the — not very clearly expressed — complaint by AOI and SCTC discloses essentially two legal points of criticism of the judgment under appeal. Those points of criticism offer the Court an opportunity to clarify the legal position from certain aspects that are of importance for future cases too.

i) Criterion for attribution: exercise of decisive influence

143. First, the appellants complain that the General Court disregarded the fact that the attribution of liability in antitrust law between parent companies and subsidiaries is possible, according to the judgment in *AEG*, only under two cumulative conditions: the parent company must have been in a position to exercise decisive influence over its subsidiary and it must actually have made use of that possibility.[87]

144. This complaint is not valid. According to settled case-law, whether a parent company can be held liable for its subsidiary's cartel offences in fact depends on a single condition only: the parent company must have exercised decisive influence on the conduct of the subsidiary, so that the subsidiary was unable to make independent decisions as to its conduct in the market.[88]

145. In most cases no separate discussion is required for this purpose of whether the parent company concerned was *in a position* to exercise decisive influence on the conduct of its subsidiary. For liability under antitrust law to be attributed, it suffices that it is shown *that* such influence *was actually exercised*. As the General Court rightly emphasises, a finding that a parent company has actually exercised decisive influence on the conduct of its subsidiary necessarily also means that it was in a position to do so.[89]

146. The case is different only where the exercise of decisive influence is, exceptionally, not positively proved but only rebuttably presumed. Such a presumption can only be applied if it is shown that the parent company was in a position in the first place to exercise decisive influence over the conduct of its subsidiary, and if in view of the economic, organisational and legal links between the two companies it appeared likely that it actually exercised that influence. According to the case-law, that is the case in particular where at the time of the infringement the parent company held all or nearly all the shares in its subsidiary (the 100% presumption).[90]

147. Since, however, in the period in question here (before 5 May 1998) such a presumption was not applied, there was no need for a separate finding by the General Court that the parent companies of WWTE were in a position to exercise decisive influence on its conduct in the market.

86 — Case C-109/10 P *Solvay* v *Commission* [2011] ECR I-10329, paragraph 51, and Case C-110/10 P *Solvay* v *Commission* [2011] ECR I-10439, paragraph 46; see, to the same effect, the earlier judgments in Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industrie and Nippon Steel* v *Commission* ('*Sumitomo*') [2007] ECR I-729, paragraph 40; *Impala*, cited in footnote 54, paragraph 117; and Case C-47/07 P *Masdar (UK)* v *Commission* [2008] ECR I-9761, paragraph 77.

87 — The appellants rely in this connection on *AEG*, cited in footnote 3, especially paragraph 50.

88 — See, to that effect, *ICI*, cited in footnote 3, paragraph 133; *Akzo Nobel*, cited in footnote 2, paragraph 58; *General Química*, cited in footnote 2, paragraph 37; *Arkema*, cited in footnote 3, paragraph 38; and *Elf Aquitaine*, cited in footnote 3, paragraph 54.

89 — Paragraph 166 of the judgment under appeal.

90 — *Akzo Nobel*, cited in footnote 2, paragraph 60, relating to a 100% subsidiary; *General Química*, cited in footnote 2, paragraph 39, relating to a 100% subsidiary; *Arkema*, cited in footnote 3, paragraphs 40 and 42, relating to a 98% subsidiary; and *Elf Aquitaine*, cited in footnote 3, paragraphs 56, 63 and 95, also relating to a 98% subsidiary.

ii) Joint control: no mandatory reason for excluding the attribution of liability in antitrust law to one of the parent companies alone

148. Secondly, the appellants argue that in the case of the joint control [91] of a subsidiary by several persons or companies, liability under antitrust law for infringements of competition rules committed by the subsidiary cannot be attributed to only one of those persons or companies.

149. The background to this submission is the fact that in the period concerned here (that is, before 5 May 1998) WWTE, a participant in the Spanish processors' cartel, was not yet from the legal point of view under the exclusive control of the Standard Group, which was at that time headed by SCC (now AOI). [92] AOI and SCTC therefore take the view that they should not have been held liable on their own for WWTE's infringements, but only together with the other shareholders who at the time exercised control over WWTE jointly with them.

150. Contrary to the Commission's view, this argument is not an inadmissible extension of the subject-matter of the dispute compared to the proceedings at first instance. Rather, it adds detail to the appellants' submissions in the first-instance proceedings, [93] which is admissible at the appeal stage. [94]

151. However, I find the argument put forward by AOI and SCTC unconvincing on its merits.

152. It is indeed correct that frequently, in a situation of joint control of a subsidiary company, none of the shareholders will on its own be in a position to exercise decisive influence over the conduct of the subsidiary. The General Court took this as the starting-point of its considerations in the judgment under appeal. [95]

153. Ultimately, however, it is not only the legal but also the factual relationships of dependency between the companies in a group that matter. As the Court has held, the legal structure of a group of companies which is characterised by the presence of several persons at the apex of the group is not decisive if the structure does not reflect the effective functioning and actual organisation of the group. [96]

154. Accordingly, a subsidiary company which *de jure* is under the joint control of several of its shareholders may be exposed *de facto* to the decisive influence of a single parent company with regard to its business policy and conduct in the market. There is then an economic unity (only) between that parent company and the subsidiary, which makes the two companies appear as a single undertaking within the meaning of competition law and makes them both jointly liable for any cartel offences.

155. Where, then, the Commission demonstrates that in the particular case one only of several shareholders *de facto* exercises decisive influence over the subsidiary's conduct in the market, it may hold that shareholder jointly and severally liable for any cartel offences committed by the subsidiary.

91 — To elucidate the concept of joint control, AOI and SCTC refer to Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1).

92 — See especially paragraph 163 of the judgment under appeal, supplemented by point 12 above.

93 — The applicants had already submitted at first instance that in the period before May 1998 they had not been able to exercise decisive influence over WWTE (paragraph 55 of the judgment under appeal). They relied in particular on the circumstance that 'WWTE was jointly controlled by (i) TCLT and (ii) the chairman of WWTE and his family' (paragraph 56 of the judgment under appeal) and stressed that '"joint control" … does not mean the power to exercise decisive influence' (paragraph 57 of the judgment under appeal).

94 — See, to that effect, *PKK and KNK* v *Council*, cited in footnote 43, paragraphs 64 and 66; Case C-295/07 P *Commission* v *Département du Loiret* [2008] ECR I-9363, paragraph 99; *Akzo Nobel*, cited in footnote 2, paragraphs 38 and 39; and *Elf Aquitaine*, cited in footnote 3, paragraph 36.

95 — First and second sentences of paragraph 165 of the judgment under appeal.

96 — See, to that effect, Case C-407/08 P *Knauf Gips* v *Commission* [2010] ECR I-6375, paragraph 108.

156. That was precisely the viewpoint adopted by the General Court in the judgment under appeal. It first acknowledged that there may be cases in which, despite joint control by several undertakings or persons, only one of those undertakings or persons 'in fact exercises decisive influence over the conduct of their subsidiary'.[97] It then examined individually and found convincing the items of evidence adduced by the Commission to show that SCC and SCTC had a decisive influence over WWTE.[98] The evidence examined included instructions given to WWTE, obligations for WWTE to consult SCTC, and the flow of information between WWTE and SCTC concerning the activities of the processors' cartel.

157. The approach adopted by the General Court cannot be criticised from a legal point of view.

158. Contrary to what the appellants appear to think, it was in particular not necessary that the parent companies SCC and SCTC gave WWTE specific instructions as regards its participation in the Spanish processors' cartel. The crucial factor for the attribution of liability in antitrust law is not a relationship between the parent and subsidiary company or companies in instigating the infringement or a fortiori the parent company's involvement in the infringement. It suffices that it is shown that the subsidiary does not independently determine its conduct in the market but essentially follows the parent company's instructions, primarily because of the economic, organisational and legal links between the two legal persons.[99]

159. Overall, then, the General Court was able to conclude, on the basis of the examination it conducted without any error of law, that from 13 March 1996 up to and including 4 May 1998 SCC and SCTC 'in fact exercised decisive influence over WWTE's conduct',[100] even though during that period, from a purely legal point of view, they did not yet have exclusive control of WWTE.

160. The first part of the first ground of appeal in Case C-628/10 P is thus unfounded.

b) Alleged infringement of fundamental rights of AOI and SCTC (second part of the first ground of appeal in Case C-628/10 P)

161. By the second part of their first ground of appeal in Case C-628/10 P, AOI and SCTC allege that their fundamental rights under Articles 48 and 49 of the Charter of Fundamental Rights were infringed. They consider that the General Court infringed the presumption of innocence and the principle of the legality of penalties by accepting that for the purposes of attributing liability the actual exercise of decisive control by a parent company over its 100% subsidiary is presumed (100% presumption). It may be concluded from the overall context that this relates only to the period after 5 May 1998, when the companies in the Standard Group directly or indirectly assumed sole control over WWTE.

i) Admissibility

162. As the Commission rightly submits, there are serious doubts as to the admissibility of this complaint.

97 — Paragraph 164 and last sentence of paragraph 165 of the judgment under appeal.

98 — Paragraphs 167 to 193 of the judgment under appeal.

99 — *Akzo Nobel*, cited in footnote 2, paragraph 58; *General Química*, cited in footnote 2, paragraphs 37 and 38; and *Elf Aquitaine*, cited in footnote 3, paragraphs 54 and 55.

100 — Paragraph 194 of the judgment under appeal.

163. It can admittedly be understood sufficiently precisely what the appellants are complaining that the General Court did and which aspects of the judgment under appeal their attack is directed against: the complaint is of infringement of the two fundamental rights mentioned above, and the infringement is said to lie in the application of the 100% presumption to AOI (formerly SCC) and SCTC for the period from 5 May 1998.

164. With this complaint, however, AOI and SCTC go beyond the grounds of annulment they submitted at first instance. In their application at first instance there was no mention of an infringement of fundamental rights. If such a complaint were to be admitted at the present stage, that would amount to extending the subject-mater of the dispute, which is not permitted in appeal proceedings. [101]

165. The fact that AOI and SCTC have not raised their complaint of infringement of fundamental rights until now is not a permissible development of their arguments at first instance but a totally new aspect which was not hitherto the subject of the proceedings and cannot therefore be debated in the appellate proceedings before the Court. [102]

166. Nor may the complaint of infringement of fundamental rights be justified at the appeal stage by the entry into force in the meantime of the Treaty of Lisbon on 1 December 2009. Admittedly, the Charter of Fundamental Rights now has the status of binding primary law and ranks equally with the Treaties (Article 6(1) TEU). The fundamental rights relied on by AOI and SCTC were, however, already recognised before then as general legal principles of European Union law, [103] and in their form as codified by the Charter they also had to be observed by the Commission in cartel proceedings from 1 May 2004 at the latest. [104] Any breach of those fundamental rights could consequently already have been the subject of complaint by AOI and SCTC in the judicial proceedings at first instance.

167. The second part of the first ground of appeal in Case C-628/10 P is thus inadmissible. I shall discuss briefly below whether it is well founded, purely for the sake of completeness.

ii) Substance

168. In essence AOI and SCTS base their complaint of an infringement of fundamental rights on two arguments. First, they argue that the 100% presumption operates as a presumption of guilt, [105] which is contrary to the fundamental principle of the presumption of innocence enshrined in Article 48(1) of the Charter of Fundamental Rights; secondly, the 100% presumption is contrary to the principle of personal responsibility and leads to the punishment of parent companies, which infringes the principle of the legality of penalties in Article 49 of the Charter of Fundamental Rights.

169. Neither argument convinces me.

101 — Case C-136/92 P *Commission* v *Brazzelli Luardi and Others* [1994] ECR I-1981, paragraph 59; *AceaElectrabel*, cited in footnote 40, paragraph 113; and *Elf Aquitaine*, cited in footnote 3, paragraph 35.

102 — *Dansk Rørindustri*, cited in footnote 24, paragraph 165; *PKK and KNK* v *Council*, cited in footnote 43, paragraph 61; and *Akzo Nobel*, cited in footnote 2, paragraph 38.

103 — It is settled case-law that the principle of the legality of penalties applies in European Union law in connection with offences and penalties (*nullum crimen, nulla poena sine lege*) (Case C-60/02 *X* [2004] ECR I-651, paragraph 63; Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 49; and *ThyssenKrupp Nirosta*, cited in footnote 18, paragraph 80). The principle of the presumption of innocence has likewise long been recognised at European Union level (Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraphs 149 and 150; Case C-344/08 *Rubach* [2009] ECR I-7033, paragraph 30; and Case C-45/08 *Spector Photo Group and Van Raemdonck* [2009] ECR I-12073, paragraph 39), even if the Court did at first leave the question of its applicability open (Joined Cases 97/87 to 99/87 *Dow Chemical Ibérica and Others* v *Commission* [1989] ECR 3165, paragraph 56).

104 — Recital 37 in the preamble to Regulation No 1/2003.

105 — [Footnote not relevant to the English version of this Opinion]

170. With regard, first, to the *presumption of innocence*, the recourse to a presumption in the form discussed here does not lead to a reversal of the objective burden of proof. Instead it merely constitutes a rule for the appraisal of evidence in connection with the allocation between parent and subsidiary of responsibility for a cartel. As the 100% (or virtually 100%) shareholding of a parent in its subsidiary supports prima facie the conclusion that decisive influence is actually being exercised, it is for the parent company to rebut precisely that conclusion, adducing cogent evidence to the contrary; failing this, that conclusion satisfies the legal requirements in terms of proof. In other words, there is an interplay between the respective burdens of adducing proof, prior to consideration of the objective burden of proof. [106]

171. The legitimate interests of the parent company are not impaired by a presumption in the form of the rule discussed here. It is open to the parent company to rebut the presumption, based on general experience, of decisive influence in the particular case by showing that it exercised restraint and did not influence its subsidiary's conduct on the market. The facts and information that are necessary for that purpose are in any event from within the internal sphere of parent and subsidiary. It is therefore entirely justified to place on them the burden of proof in that regard. [107]

172. Also the principles of personal liability and the legality of penalties are not undermined by the 100% presumption.

173. The fact that the parent company of a group which exercises decisive influence over its subsidiaries may be held liable jointly and severally for their cartel offences does not in any way represent an exception to the principle of personal responsibility but is the expression of that very principle. This is because the parent company and the subsidiaries under its decisive influence are collectively a single undertaking for the purposes of competition law and responsible for that undertaking. If that undertaking intentionally or negligently infringes the competition rules, in particular Article 81 EC (now Article 102 TFEU) and Article 53 of the EEA Agreement, that gives rise to the collective personal responsibility of all the principals in the group structure, regardless of whether they are the parent company or a subsidiary. [108]

174. This form of liability of the parent company under antitrust law also has nothing to do with strict liability. On the contrary, as mentioned, the parent company is one of the principals of the undertaking which intentionally or negligently committed the infringement. In simplified terms it could be said that it is (together with all the subsidiaries under its decisive influence) the legal embodiment of the undertaking that intentionally or negligently infringed the competition rules. [109]

175. Lastly, with regard to the proportionality of the fines (Article 49(3) of the Charter of Fundamental Rights), the amount of the fine imposed for a cartel offence must undoubtedly be in a reasonable proportion to the nature, gravity and duration of the infringement. Whether, however, only the company directly participating in the infringement should be responsible for the fine or the parent

106 — See my Opinion in *Akzo Nobel*, cited in footnote 2, point 74 with further references, and the judgment in *Elf Aquitaine*, cited in footnote 3, paragraph 65, and the Opinion of Advocate General Mengozzi in that case, points 58 to 64; similarly too Joined Cases 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 *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 132.

107 — See my Opinion in *Akzo Nobel*, cited in footnote 2, point 75; *Elf Aquitaine*, cited in footnote 3, point 60 in fine and point 70 in fine, also emphasises that the facts and information that are capable of rebutting the presumption are from within the sphere of the undertakings concerned.

108 — See in that regard my Opinion in *Akzo Nobel*, cited in footnote 2, point 97; to the same effect, *ICI*, cited in footnote 3, paragraphs 132 to 141; *Akzo Nobel*, cited in footnote 2, paragraph 77; *General Química*, cited in footnote 2, paragraphs 34 to 38; *Arkema*, cited in footnote 3, paragraphs 37 to 39; and *Elf Aquitaine*, cited in footnote 3, paragraphs 53 to 55 and 88.

109 — *Akzo Nobel*, cited in footnote 2, paragraph 77, and my Opinion in that case (point 98); see moreover *General Química*, cited in footnote 2, paragraph 38.

company too, jointly and severally, is of no significance for the principle of the proportionality of the fine. Particularly in the present case, there are no indications that the joint and several liability of AOI and SCTC for the cartel offence of WWTE was disproportionate; AOI and SCTC itself have not submitted anything in that regard.

176. Consequently the second part of the first ground of appeal in Case C-628/10 P is not only inadmissible but also unfounded.

c) Interim conclusion

177. The first ground of appeal in Case C-628/10 P should therefore be rejected.

2. Second ground of appeal in Case C-628/10 P

178. By their second ground of appeal in Case C-628/10 P, AOI and SCTC complain that the General Court wrongly allowed the Commission, first, to amend its arguments during the proceedings at first instance and, second, subsequently to alter the reasons for the contested decision. In the appellants' view, the Court thereby infringed Article 48(2) of its Rules of Procedure, Article 296 TFEU and the rights of the defence.

179. In essence the issue in this second ground of appeal is the point in time at which the concept of the dual basis for the attribution of cartel offences by wholly owned subsidiaries to their respective parent companies arose in the present case. The General Court proceeds on the basis that the Commission had relied on such a dual basis already in the administrative proceedings.[110] AOI and SCTC, on the other hand, are firmly of the view that the concept of the dual basis arose only in the proceedings before the General Court in response to a written question from the Court and should therefore have been disregarded by the Court.

a) Preliminary question: Is the second ground of appeal ineffective ('*inopérant*')?

180. In the Commission's view, this second ground of appeal is 'wholly ineffectual'. Its reasoning is, first, that the judgment under appeal is in no way dependent on the concept of the dual basis. Second, it maintains that 'it is not possible that the Appellants can draw any benefit from it'; their responsibility for the cartel offence of their subsidiary WWTE is proven even if the — comparatively strict — dual basis for the attribution of liability to parent companies is applied.

181. Neither argument convinces me.

182. With regard to the first of the Commission's arguments, it should be noted that the Court of Justice rejects a ground of appeal as ineffective (French: *inopérant*) if that ground, even with legally correct arguments, would not be capable of leading to the setting aside of the judgment under appeal.[111] This is the case in particular where the appellant directs his appeal at inessential grounds for the judgment at first instance (*obiter dicta*).[112]

183. However, this is not such a case.

110 — See in particular paragraphs 147 and 155 of the judgment under appeal.

111 — See, to that effect, Case C-35/92 *Parliament* v *Frederiksen* [1993] ECR I-991, paragraph 31, and *FIAMM and Others* v *Council and Commission*, cited in footnote 40, paragraph 189.

112 — Case C-244/91 P *Pincherle* v *Commisson* [1993] ECR I-6965, paragraphs 25 and 31; *Dansk Rørindustri*, cited in footnote 24, paragraph 148; and Case C-96/09 P *Anheuser-Busch* v *Budějovický Budvar* [2011] ECR I-2131, paragraph 211.

184. Contrary to the Commission's view, the statements at issue by the General Court with regard to the dual basis for the attribution of liability under antitrust law are not *obiter dicta*. In fact the reference to that dual basis in the judgment at issue constitutes an essential ground in connection with the examination of the principle of equal treatment. [113]

185. Only because the General Court approved [114] the application of the dual basis in the sense of 'a raising of the standard of proof' by the Commission could it reach the conclusion that the Commission had rightly attributed to some parent companies — particularly AOI and SCTC — the cartel offences of their subsidiaries but it had not done so for others — for example Universal and Universal Leaf. [115] If the General Court had held the dual basis to be unlawful and only the 100% presumption to be relevant, it would have to have found an infringement of the principle of equal treatment. [116]

186. Nor is the Commission's second argument valid. For the objection that AOI and SCTC could not 'draw any benefit' from their complaint relates in reality to the *admissibility* of their second ground of appeal, more precisely the interest in bringing proceedings. [117] That aspect does not, however, play any role with regard to the question whether a complaint is 'ineffective'. According to the case-law the question of the ineffectiveness of a ground of appeal concerns the merits of the ground of appeal and not its admissibility. [118]

187. In any event it must be assumed that the complaints raised in the context of this second ground of appeal — if valid — would very probably be of benefit to AOI and SCTC. For if it should turn out that the General Court, in referring to the concept of the dual basis, had relied on a factor which had been introduced into the proceedings late and on which the appellants had been unable to comment properly, the judgment under appeal would have to be set aside in any event because of an infringement of the principle of adversarial proceedings. [119] That would undoubtedly represent an advantage for AOI and SCTC in procedural terms.

188. The Commission seeks to construct a link between the second and third grounds of appeal in Case C-628/10 P. It argues essentially that the second ground of appeal under discussion here, concerning the alleged procedural errors of the General Court, can be successful only if the third ground of appeal, devoted to the principle of equal treatment, is also successful. But in so doing the Commission fails to recognise that each ground of appeal is independent. If the Court of Justice were to confirm the procedural errors alleged by AOI and SCTC the second ground of appeal would have to be upheld, regardless of the validity of the complaint of discrimination raised by the appellants in their third ground of appeal.

189. All in all therefore, the second ground of appeal in Case C-628/10 P cannot be rejected as ineffective ('*inopérant*').

113 — Paragraphs 153 to 160 of the judgment under appeal; see there in particular paragraph 155 where the Court states that the Commission 'in the interests of caution — did not rely solely on the presumption affirmed by the case-law … but also took into account other factual elements tending to confirm that such influence was actually exercised'.

114 — See paragraph 155 of the judgment under appeal.

115 — Paragraphs 159 and 160 of the judgment under appeal.

116 — See my comments on the principle of equal treatment in points 37 to 68 of this Opinion.

117 — Case C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-3319, paragraph 13; Case C-97/08 P *Akzo Nobel*, cited in footnote 2, paragraph 33; and Case C-550/07 P *Akzo and Akcros Chemicals*, cited in footnote 27, paragraph 22.

118 — See in that respect the case-law cited in footnote 82 above.

119 — See in that regard again the judgments cited in footnote 63 *Commission* v *Ireland and Others*, paragraph 87, and Review *M* v *EMEA*, paragraphs 59 and 69.

b) Substance of the second ground of appeal

190. It remains to be considered whether the two parts of this second ground of appeal are valid in terms of their substance.

i) The complaint that the Commission amended its arguments during the proceedings before the General Court (first part of the second ground of appeal in Case C-628/10 P)

191. The subject matter of the first part of the second ground of appeal in Case C-628/10 P is an alleged infringement by the General Court of Article 48(2) of its Rules of Procedure, which contains a rule precluding the submission of pleas in law at a late stage in the proceedings. AOI and SCTC argue that, as the Commission put forward in the proceedings the concept of the dual basis only in its reply to a written question from the Court, it constituted a late submission which the Court should have rejected as inadmissible.

192. The Commission doubts whether Article 48(2) of the Rules of Procedure of the General Court is applicable at all. It seems to take the view that this rule applies only against the applicant but not the defendant at first instance.

193. However, there is nothing in that provision to suggest such a restrictive view. This is particularly clear in the German language version of Article 48(2) of the Rules of Procedure of the General Court, according to which both pleas in attack and in defence may be precluded. Moreover, the second subparagraph of Article 48(2) speaks quite generally of 'a party', which can refer to both an applicant and a defendant. The relationship to Article 48(1) also confirms that it is not just the applicant's submissions concerned here, as Article 48(1) again refers quite generally to 'the parties' and reference is moreover made expressly to both the (applicant's) reply and the (defendant's) rejoinder. Overall Article 48(2) of the Rules of Procedure of the General Court aims at the efficient conduct of the proceedings, which is to be protected from delaying tactics by either of the parties.

194. To little effect in this connection is also the Commission's argument that the General Court must examine the validity of the submissions in the application irrespective of whether a defence is lodged or not.

195. It is indeed basically for the General Court alone to assess the validity of the parties' submissions. The Court is not the 'mouthpiece of the parties'.[120] Accordingly, it cannot be obliged to take into account solely the arguments on which the parties have based their submissions because its decision might otherwise be based on incorrect legal considerations.[121] Late submissions are however inadmissible. They are not therefore to be the subject of any appraisal of their validity, regardless of whether they concern a plea by the applicant or a plea by the defendant.

196. All in all therefore Article 48(2) of the Rules of Procedure is applicable to the defence submissions of the Commission at first instance.

197. However, that provision is not infringed in the present case.

120 — The expression used by Advocate General Léger in his Opinion in Case C-252/96 P *Parliament* v *Gutierrez de Qijano y Llorens* [1998] ECR I-7421, point 36.

121 — See, to that effect, the order of 27 September 2004 in Case C-470/02 P *UIER* v *M6*, not published in the ECR, paragraph 69, and Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden* v *API and Commission* [2010] I-8533, paragraph 65.

198. The concept of the dual basis was in reality not new but already contained in the contested decision. Even if the concept of the dual basis was not used as such in that decision, it is nevertheless apparent from the overall context that, in so far as concerns the joint responsibility of parent companies for the cartel offences of their wholly-owned subsidiaries, the Commission did not just rely on a presumption — the 100% presumption — but also took into account considerations which pointed to the actual exercise of decisive influence by the particular parent company. [122]

199. Moreover, AOI and SCTC had an opportunity at the oral hearing at first instance to comment on the Commission's answer to the Court's written question, also with regard to the concept of the dual basis. There can therefore be no question of an infringement of the principles of the adversarial procedure or — in the terms used by the appellants — of a breach of their rights of defence. [123]

200. The first part of the second ground of appeal in Case C-628/10 P is therefore unfounded.

ii) The complaint that there was a subsequent amendment of the statement of reasons for the contested decision (second part of the second ground of appeal in Case C-628/10 P)

201. The second part of the second ground of appeal also concerns the problem of the dual basis for the liability of parent companies for the cartel offences of their wholly-owned subsidiaries. AOI and SCTC submit that through the concept of the dual basis the General Court unlawfully allowed the Commission to make a subsequent amendment to the statement of reasons for the contested decision so that gaps in the Commission's arguments could be closed. The Court thereby disregarded the requirements for the statement of reasons for legal acts of the organs of the European Union.

202. Under Article 253 EC (now Article 296(2) TFEU), the legal acts of the Commission, including decisions in antitrust proceedings imposing fines, must contain a statement of reasons.

203. A Commission decision imposing fines must, as already noted, [124] contain an adequate statement of reasons with regard to each addressee, but in particular with regard to the addressees to whom the decision attributes the infringement. Consequently, such a decision with regard to the parent company which is being held responsible for the infringement of its subsidiary must contain a detailed statement of the reasons that justify the attribution of the infringement to the parent company. [125] Those reasons may not be added after the event. [126]

204. However, a distinction must be drawn between a prohibited addition of reasons after the event and a simple elucidation of what is in itself already a sufficient reason. The latter is always admissible in proceedings before the Court and may be of use for the substantive review of the decision in question by the European Union judicature. [127]

122 — Paragraph 155 of the judgment under appeal; see also recital 373 of the contested decision.

123 — Case C-64/98 P *Petrides* v *Commission* [1999] ECR I-5187, paragraphs 31 and 32; see, to the same effect, Case C-259/96 P *Council* v *Nil and Impens* [1998] ECR I-2915, paragraph 31 in fine. The present case is fundamentally different from *Impala* (cited in footnote 54, paragraphs 100 to 102), in which the General Court relied on parts of documents in the procedure which had not been accessible to the appellants in that case and which the Commission also could not have made the subject-matter of its decision in the administrative procedure.

124 — Compare point 111 above of this Opinion.

125 — *Elf Aquitaine*, cited in footnote 3, paragraph 152.

126 — *Elf Aquitaine*, cited in footnote 3, paragraph 152 in conjunction with paragraph 149.

127 — Compare in that regard the case-law referred to in footnote 64.

205. In the present case the statements regarding the dual basis which the Commission made in the proceedings at first instance in answer to a written question of the Court served simply to elucidate the already existing statement of reasons for the contested decision.[128] Even without such an elucidation it could be discerned from the contested decision with sufficient clarity that in the present case the Commission was not only guided by the 100% presumption but also applied additional considerations, in the sense of a dual basis, from which it was possible to conclude that decisive influence had actually been exercised by the parent company over the respective subsidiary.[129]

206. Under those circumstances the statements concerning the dual basis made by the Commission in the proceedings at first instance are not a case of the prohibited addition of reasons after the event.

207. Accordingly the second part of the second ground of appeal in Case C-628/10 P is unfounded. This ground of appeal should therefore be rejected in its entirety.

C – *Summary with regard to the grounds of appeal raised by the parties*

208. As neither the criticisms of AOI and SCTC in Case C-628/10 P nor those of the Commission in Case C-14/11 P can be upheld, both appeals should be rejected in their entirety.

D – *The separate application by AOI and SCTC for a reduction in the fine*

209. In their appeal in Case C-628/10 P AOI and SCTC make a further separate application for a reduction in the amount of the fine in the event that the judgment under appeal is set aside.

210. If, as I suggest, the Court of Justice should conclude that the appellants' criticisms are unsuccessful, then there is from the outset no cause to reduce the fine. The application by AOI and SCTC in that respect will then not need to be discussed.

211. This applies a fortiori as the nature of the calculation of the fine as such was not the subject-matter of the judgment under appeal. The jurisdiction of the Court of Justice in an appeal is limited to review of the findings of law on the pleas argued before the General Court.[130] The Court of Justice would go beyond the subject-matter of the present dispute if it wanted to address the calculation of the fine without previously having upheld one of the grounds of appeal.

212. If the application of AOI and SCTC were ultimately, as the Commission surmises, aimed at a reduction of the fine imposed *on the subsidiary company WWTE*, it would also be inadmissible, since WWTE was neither a party to the proceedings before the General Court nor a party to the present proceedings.

VII – Costs

213. If, as I propose in this case, the appeal is dismissed, the Court will make a decision as to costs (first paragraph of Article 122 of the Rules of Procedure) the details of which are set out in Article 69 in conjunction with Article 118 of the Rules of Procedure.

128 — It was otherwise, as I have already mentioned, in the case of the Commission's statements regarding the characteristic of TCLT as 'main customer' of tobacco processed by WWTE, which are the subject-matter of the third and fourth grounds of appeal in Case C-14/11 P (see in particular points 116 to 123 of this Opinion).

129 — Paragraph 155 of the judgment under appeal; compare also recital 373 and 376 of the contested decision.

130 — *Commission* v *Brazzelli Lualdi and Others*, cited in footnote 100, paragraph 59; Case C-348/06 P *Commission* v *Girardot* [2008] ECR I-833, paragraph 49; and Case C-548/09 P *Bank Melli Iran* v *Council* [2011] ECR I-11381, paragraph 122.

214. It follows from the first subparagraph of Article 69(2) in conjunction with Article 118 of the Rules of Procedure that the unsuccessful party is to be ordered to pay the costs if they have been applied for. In the present case all the appellants have failed in their grounds of appeal in their entirety and each party has sought an order for costs against the other party.

215. Strictly speaking, therefore, AOI and SCTC should be ordered to bear all the costs in connection with their appeal in Case C-628/10 P whereas the Commission would have to bear all the costs in connection with its appeal in Case C-14/11 P. [131]

216. Such an approach in the present case would, however, be unfair, because there were numerous substantive overlaps between both appeals, which resulted in the parties being confronted in their pleadings in Case C-628/10 P and C-14/11 P with essentially the same arguments. [132] Moreover, after the cases were joined, a joint hearing took place in which the Court called on the parties to concentrate their arguments on a series of questions of law that were common to both cases. Under those circumstances it will be hardly possible to distinguish in a sensible manner which party has incurred which costs in relation to which case.

217. Against that background it would seem more just, and also more conducive to the efficient settlement of costs between the parties, to decide on the question of costs together in both cases [133] and thereby to apply Article 69(3) in conjunction with Article 118 of the Rules of Procedure and hold that each party has succeeded on some heads and failed on others in relation to the dispute as a whole. In so doing, the costs should be shared in such a way that each party bears its own costs.

VIII – Conclusion

218. On the basis of the foregoing considerations I suggest that the Court should:

(1) dismiss the appeals;

(2) order each party to bear its own costs.

131 — See, to that effect, Case C-362/05 P *Wunenburger* v *Commission* [2007] ECR I-4333, paragraph 98; similarly *ArcelorMittal*, cited in footnote 2, paragraphs 153 and 154.

132 — Compare, for instance, the Commission's submissions on the principle of equal treatment in its appeal in Case C-14/11 P which it largely 'recycled' in large parts in its response in Case C-628/10 P. Similarly AOI and SCTC applied several arguments in their response in Case C-14/11 P that they had already raised in their own appeal in Case C-628/10 P.

133 — Case C-282/95 P *Guérin automobiles* v *Commission* [1997] ECR I-1503, paragraph 45; Case C-338/00 P *Volkswagen* v *Commission* [2003] ECR I-9189, paragraph 181; and Joined Cases C-65/02 P and C-73/02 P *ThyssenKrupp* v *Commission* [2005] I-6773, paragraph 99; to the same effect see also Joined Cases C-122/99 P and C-125/99 P *D and Sweden* v *Council* [2001] ECR I-4319, paragraphs 63 to 65; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others* v *Commission and Others* [2009] ECR I-9291, paragraphs 169 and 170; Case C-279/08 P *Commission* v *Netherlands* [2011] ECR I-7671, paragraph 137; and also — with regard to two joined direct actions — Joined Cases C-63/90 and C-67/90 *Portugal and Spain* v *Council* [1992] ECR I-5073, paragraph 56.