Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 16 July 2015 [1]

**Case C-603/13 P**

**Galp Energía España, SA,**
**Petróleos de Portugal (Petrogal), SA,**
**Galp Energia, SGPS, SA**
**v**

**European Commission**

(Appeal — Agreements, decisions and concerted practices — Spanish market for penetration bitumen — Market sharing and price coordination — Unlimited jurisdiction — Principle of ne ultra petita — Right to a fair trial — Rights of the defence — Rule that the parties should be heard — Single and continuous infringement — Alleged awareness of the monitoring system and the compensation mechanism implemented by the other participants in the cartel — Distortion of the clear sense of the evidence)

## I – **Introduction**

1. The case before the Court concerns an appeal brought by the group of companies Galp Energía España, SA, Petróleos de Portugal (Petrogal), SA and Galp Energia, SGPS, SA (together, 'the appellants') against the judgment in *Galp Energía España and Others* v *Commission* (T-462/07, 'the judgment under appeal'),[2] by which the General Court granted in part their application for the annulment of Commission Decision C(2007) 4441 final[3] ('the decision at issue'), as well as their claim in the alternative for a reduction of the amount of the fine imposed on them.

2. In accordance with the request made by the Court of Justice, my Opinion will be confined to an analysis of the second plea of the appeal, which lies at the heart of the present action and raises, in essence, the question of the extent of the unlimited jurisdiction which the General Court may exercise. In my view, for the reasons which I shall explain, the General Court exceeded its jurisdiction and the appeal should be upheld. In my view, the exercise of unlimited jurisdiction does not empower the General Court to find that an infringement has been committed where that infringement was not proved in the Commission decision.

## II – **Background to the dispute**

3. The background to the dispute was set out in paragraphs 1 to 85 of the judgment under appeal, to which I refer.

1 — Original language: French.

2 — EU:T:2013:459.

3 — Decision of 3 October 2007 relating to a proceeding under Article 81 EC (Case COMP/38.710 — Bitumen (Spain)).

4. To the extent necessary, it is sufficient to recall that, on 3 October 2007, the European Commission adopted the decision at issue, which finds that the appellants participated in a complex of agreements and concerted practices in the penetrating bitumen sector covering Spanish territory (with the exception of the Canary Islands) in the form of market-sharing and price-coordinating agreements. The Commission considered that each of the two restrictions established, namely the horizontal market-sharing and price-coordinating agreements, was by its very nature among the worst kinds of infringements of Article 81 EC, which, according to case-law, may warrant the classification of 'very serious' infringements solely on the basis of their nature, without it being necessary for such conduct to cover a particular geographical area or to have a particular impact. [4]

5. By application lodged with the General Court Registry on 19 December 2007, the appellants contested the content of the decision and sought its annulment in whole or in part.

6. By the judgment under appeal, the General Court upheld the third plea for annulment on the ground that the finding that the appellants had participated in the monitoring system and the compensation mechanism connected with the implementation of the market-sharing and customer allocation agreements by the cartel members was vitiated by illegality. The General Court therefore partially annulled the decision at issue in so far as that decision found, in Article 1 thereof, that the appellants had been involved in a complex of agreements and concerted practices on the Spanish market for bitumen and required them, in Article 3, to bring an end to the infringement as found in Article 1 of the decision at issue.

7. The General Court none the less took the view that the appellants could be held liable for the two aspects of the infringement referred to above (paragraph 626 of the judgment under appeal). It based that conclusion on a statement by Mr V.C., who was the bitumen sales director of Petrogal, and subsequently of Galp Energía España ('Mr V.C.'s statement'). [5] For that reason, the General Court considered that there was no need to vary the starting amount of the fine (paragraph 630 of the judgment under appeal). The General Court felt it necessary, however, to increase the reduction of the fine applied by the Commission for attenuating circumstances (paragraph 632 of the judgment under appeal). It therefore granted a further 4% reduction on top of the 10% reduction already granted in the decision at issue (paragraph 635 of the judgment under appeal). The General Court dismissed the other pleas for annulment raised by the parties, including the fifth plea, alleging that the finding that they had participated in price coordination was vitiated by illegality (paragraphs 450 to 456 of the judgment under appeal). [6]

4 — Recital 500 of the decision at issue. For their participation in that infringement, the Commission considered that Galp Energía España, SA, and Petróleos de Portugal, SA, were jointly and severally liable for the payment of EUR 8 662 500; Galp Energia, SGPS, SA, was jointly and severally liable for the payment of EUR 6 435 000. Galp Energía España, SA, and Petróleos de Portugal, SA, were found to have participated in the infringement during the period from 31 January 1995 to 1 October 2002, while Galp Energia, SGPS, SA, was considered to have participated in the infringement between 22 April 1999 and 1 October 2002.

5 — See paragraphs 87 and 215 of the judgment under appeal. In his statement, Mr V.C. confirmed in the following terms that the appellants had never been involved in a monitoring system: 'I noted the European Commission's accusation that Galp Energía España … would have participated in a monitoring system and in a compensation scheme of the asphalt table. This is incorrect. Simply because we were never compensated, regardless of Galp Energía España's sales volume … It is true that at a moment in time I realised that there was some sort of a compensation system between the members of the asphalt table, however I never knew what these companies did with this system. Therefore, Galp Energía España … was never involved in any compensation mechanism'.

6 — Consequently, the amount of the fine imposed on Galp Energía España, SA, and Petróleos de Portugal (Petrogal), SA, was reduced to EUR 8 277 500, while the amount of the fine imposed on Galp Energia, SGPS, SA, was reduced to EUR 6 149 000.

## III – **Procedure before the Court of Justice and forms of order sought**

8. By application lodged at the Registry of the Court of Justice on 22 November 2013, the appellants brought an appeal by which they claim that the Court should:

— principally, set aside the judgment under appeal and annul Articles 1, 2 and 3 of the decision at issue in so far as it relates to the appellants, and/or reduce the fine that has been imposed on the appellants;

— in the alternative, set aside the judgment under appeal and refer the case back to the General Court for a ruling on the merits;

— order the Commission to pay the costs.

9. The Commission contends that the appeal should be dismissed and the appellants ordered to pay the costs.

10. The parties set out their positions in writing before the Court and presented oral argument at the hearing on 15 April 2015.

## IV – **The General Court's establishment of the appellants' liability, as the starting point for analysing the second plea of the appeal**

### A – *Brief reminder of unlimited jurisdiction*

11. By their second plea, which is divided into three parts, the appellants criticise the General Court for having committed an error of law in paragraphs 626 and 630 of the judgment under appeal. While citing a multitude of principles and rules of procedure, the appellants criticise the General Court for a specific act, namely that it took account of a document drawn up after the decision at issue had been adopted, that is to say Mr V.C.'s statement, for the purposes of establishing the appellants' liability for two aspects of the anticompetitive mechanism. [7]

12. I would point out here that the Court took account of Mr V.C.'s statement on the basis of its unlimited jurisdiction.

13. It is therefore worth reminding ourselves that the unlimited jurisdiction conferred upon the General Court supplements the review of legality provided for in Article 263 TFEU. As the Court of Justice has held, 'the review of legality is supplemented by the unlimited jurisdiction which the Courts of the European Union were afforded by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU. That jurisdiction empowers the [competent court], in addition to carrying out a mere review of the lawfulness of the penalty, to substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty imposed'. [8] The Court of Justice has stated in its case-law that the power to vary a measure applies even where there has been no error on the part of the Commission. [9] It permits the General Court, in particular in competition cases, not only to cancel or confirm a fine and its amount, but also to increase or reduce it.

7 — When analysing the third plea in law, the General Court criticised the Commission for having failed to establish to the requisite legal standard that the appellants had participated in the two aspects of the infringement. This prompted it to annul the decision at issue to that extent.

8 — Judgment in *KME Germany and Others* v *Commission* (C-272/09 P, EU:C:2011:810, paragraph 103).

9 — Judgments in *Groupe Danone* v *Commission* (C-3/06 P, EU:C:2007:88, paragraph 61) and *Prym and Prym Consumer* v *Commission* (C-534/07 P, EU:C:2009:505, paragraph 86).

14. Thus, the unlimited jurisdiction conferred on the General Court authorises it to vary the contested measure, even without annulling it, by taking into account all of the factual circumstances, so as to amend, for example, the amount of the fine.[10] Nevertheless, the ways in which that power may be exercised have not been fully defined.[11]

15. I would point out that, in the judgments in *Chalkor* v *Commission*[12] and *KME Germany and Others* v *Commission*,[13] the Court clearly held that a review by the General Court exercising unlimited jurisdiction involves review of both the law and the facts and the power to assess the evidence, to annul the decision at issue and to alter the amount of fines.[14]

16. Moreover, the Court has also held that the review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation No 1/2003,[15] is not therefore contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').[16]

B – *The General Court's reasoning and the finding of liability*

17. Since an understanding of the General Court's reasoning is, to my mind, crucial to the analysis of the second plea of the appeal, I propose to analyse the reasoning followed by the General Court in its examination of the third plea in the action at first instance and the ninth plea in the same action with a view to addressing the complaints specifically raised on appeal.

18. By their third plea before the General Court, the appellants contested the assertion that they had been involved in the monitoring system and the compensation mechanism.

19. At the end of its analysis, the General Court upheld the third plea in so far as the Commission had held the appellants liable for the entire infringement even though it had not proved to the requisite legal standard that they had participated in two aspects of that infringement. Furthermore, it held that the Commission had not established that the appellants were aware or, at the very least, that they could not have been unaware of the existence of the aforementioned two aspects so as to be able to apply correctly the concept of a single and continuous infringement. The General Court therefore annulled Article 1 of the decision at issue in so far as it finds that the appellants were involved in a complex of agreements and concerted practices on the Spanish bitumen market.

20. In so far as the General Court relied on the concept of a single and continuous infringement,[17] it is important to recall that an undertaking which has participated in a single and complex infringement by means of anticompetitive conduct which sought to contribute to the realisation of the infringement as a whole may also be responsible for conduct which was in fact implemented by other participating

10 — Judgments in *Limburgse Vinyl Maatschappij and Others* v *Commission* (C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 692); *Prym and Prym Consumer* v *Commission* (C-534/07 P, EU:C:2009:505, paragraph 86); and *JFE Engineering and Others* v *Commission* (T-67/00, T-68/00, T-71/00 and T-78/00, EU:T:2004:221, paragraph 577).

11 — For a detailed analysis, see the Opinion of Advocate General Wathelet in *Telefónica and Telefónica de España* v *Commission* (C-295/12 P, EU:C:2013:619).

12 — C-386/10 P, EU:C:2011:815.

13 — C-272/09 P, EU:C:2011:810.

14 — That aspect is crucial to the present case given the basis of the General Court's reasoning as set out in point 12 of this Opinion.

15 — Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [81 EC] and [82 EC] (OJ 2003 L 1, p. 1).

16 — Judgment in *KME Germany and Others* v *Commission* (C-272/09 P, EU:C:2011:810, paragraph 106).

17 — Judgment in *Commission* v *Anic Partecipazione* (C-49/92 P, EU:C:1999:356, paragraph 82).

undertakings. Such is the case where it is established that that undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the unlawful conduct planned or put into effect by other undertakings in pursuit of those same objectives, or that it could reasonably have foreseen it, and that it was prepared to take the risk. [18]

21. If, however, the General Court finds that the Commission has not proved to the requisite legal standard that, when participating in one of the forms of anticompetitive conduct comprising a single and continuous infringement, the undertaking was aware of other anticompetitive conduct adopted by the other participants in the cartel in pursuit of the same objectives or could reasonably have foreseen that conduct and was prepared to take the risk, the only inference which the court must draw is that the undertaking may not be attributed liability for that other conduct and, in consequence, may not be attributed liability for the single and continuous infringement as a whole, and, to that extent alone, the decision at issue must be held to be unfounded. [19] It should be pointed out in this regard that, in its judgment in *Soliver* v *Commission*, the General Court recently proved to be relatively demanding with respect to proof of participation in a single and continuous infringement. [20]

22. In the present case, the General Court held, in paragraphs 273 and 279 of the judgment under appeal, that the Commission had held the appellants liable for all aspects of the infringement, including participation in the monitoring system and the compensation mechanism. Furthermore, in paragraph 286 of the judgment under appeal, the General Court stated that the Commission had not claimed that it had relied on *a ground other than that based on the appellants' participation* in those two aspects of the infringement in order to hold them liable in that regard. In paragraphs 272 and 280 of the judgment under appeal, the General Court held that the appellants' participation in respect of those two aspects of the infringement was not established.

23. It is true that, on the basis of the aforementioned case-law concerning a single and continuous infringement, an undertaking could have been held liable for all aspects of the infringement if it had been aware or could not have been unaware of the anticompetitive conduct.

24. Nevertheless, the General Court expressly held in paragraph 289 of the judgment under appeal that the Commission had not relied either on the appellants' awareness of the monitoring system and the compensation mechanism or on the fact that they could not have been unaware of those aspects. As the General Court stated in paragraph 290 of that same judgment, such awareness or the fact that it was not possible to be unaware of the existence of those aspects is not established in the decision at issue.

25. Lastly, in paragraph 291 of the judgment under appeal, the General Court held that *any awareness that the appellants may have had cannot be presumed* in view of their role in the cartel. Consequently, in paragraph 292 of the judgment under appeal, the General Court held that the appellants' liability in respect of the monitoring system and the compensation mechanism was not established.

18 — Judgments in *Commission* v *Verhuizingen Coppens* (C-441/11 P, EU:C:2012:778, paragraphs 41 and 42); and *Commission* v *Aalberts Industries and Others* (C-287/11 P, EU:C:2013:445, paragraph 63); and *Siemens and Others* v *Commission* (C-239/11 P, C-489/11 P and C-498/11 P, EU:C:2013:866, paragraph 242).

19 — Judgment in *Commission* v *Verhuizingen Coppens* (C-441/11 P, EU:C:2012:778, paragraph 47).

20 — T-68/09, EU:T:2014:867. In that case, the General Court considered that the Commission had not provided evidence of Soliver NV's participation. Partial annulment of the decision was inconceivable, since the Commission had not specifically categorised the applicant's participation in the anticompetitive conduct, with the result that the General Court annulled the Commission's decision in its entirety.

26. In order to remedy the deficiency which, in the General Court's opinion, vitiated the decision at issue, the Commission relied on Mr V.C.'s statement. The General Court dismissed that factor in paragraphs 294 and 295 of the judgment under appeal. In its opinion, while the statement revealed a posteriori that the appellants were indeed aware of the compensation mechanism, the fact remained that *it is not for the General Court, when reviewing legality, to substitute an entirely new statement of reasons for the statement used by the Commission*. It also held that that statement did not in any event make it possible to cure the decision at issue of the defect of illegality.

27. That reasoning must be viewed in relation to the finding of liability on the part of the appellants, arrived at by the General Court in the context of the ninth plea at first instance.

28. In the context of the ninth plea raised before the General Court, the appellants challenged the fact that the fine had not been reduced despite their very limited involvement in the infringement. In that regard, the General Court stated, in paragraph 606 of the judgment under appeal, that, as was found in the context of the third plea at first instance, the Commission had not only failed to establish the appellants' participation in the two aspects of the infringement consisting of the monitoring and compensation systems, but had also failed to adduce sufficient evidence to hold them liable in respect of those aspects.

29. However, notwithstanding the findings reproduced above, the General Court inferred from Mr V.C.'s statement that the appellants *were aware* of the compensation mechanism, which, the General Court reasons, implies that the appellants were aware of the monitoring system, since the compensation mechanism could not exist without a monitoring system. It is clear from paragraph 624 of the judgment under appeal that, in that regard, the General Court acted in the exercise of its unlimited jurisdiction.

30. It follows from paragraphs 610 to 626 of the judgment under appeal that the General Court relied on Mr V.C.'s statement in order to hold the appellants liable for those two aspects of the infringement. Lastly, it follows from paragraph 627 of the judgment under appeal that the General Court's examination of the amounts of the fines imposed on the appellants was conducted in the light of those aspects.

31. It is those contested components of the General Court's reasoning that are the subject of the second plea in this appeal.

## V – **Unlimited jurisdiction and the principle of *ne ultra petita***

### A – *Arguments of the parties*

32. In the first part of the second plea, the appellants argue that the General Court committed an error of law by exceeding its powers and ruling *ultra petita*, in so far as, by raising of its own motion a plea not raised either by the appellants or by the Commission,[21] it held them liable in respect of two aspects of the infringement of Article 81(1) EC, namely the compensation mechanism and the foreseeability of the monitoring system.[22]

21 — The appellants point out that proceedings before the European Union judicature are *inter partes*. It is therefore for the parties to the dispute and for them alone (with the exception of pleas involving matters of public policy) to raise the pleas for annulment (see the judgment in *KME Germany and Others* v *Commission*, C-389/10 P, EU:C:2011:816, paragraph 131). Similarly, in the judgment in *ThyssenKrupp Nirosta* v *Commission* (C-352/09 P, EU:C:2011:191), the Court held that the role of the General Court is confined to ruling on the arguments raised before it.

22 — Paragraph 626 of the judgment under appeal.

33. In their submission, the General Court ruled *ultra petita* in the present case, since the Commission had not relied on those grounds in its decision, those grounds were not relied on by the appellants as pleas for annulment and were not the subject of any exchange of argument and evidence other than from the point of view of the admissibility of Mr V.C.'s statement.

34. For its part, the Commission submits that the General Court was entitled to take account of the appellants' awareness of the monitoring and compensation mechanisms in exercising its unlimited jurisdiction and ruling on the level of the fine, since this is a matter of fact. With regard to Mr V.C.'s statement, the Commission considers that the General Court was entitled to take it into consideration in ruling on the level of the fine,[23] in particular in so far as the case-law endorses the possibility of including 'the production and taking into account of additional information which is not as such required to be set out in the decision'.[24] Lastly, the Commission takes the view that the plea in question is ineffective in so far as the General Court has already reduced the amount of the fine.[25]

B – *Assessment*

35. It is common ground that, where the EU judicature is called upon to rule on an action for annulment, it is bound by the principle of '*ne ultra petita*', an abbreviation of the adage '*ne eat iudex ultra petita partium*', which prohibits a court from ruling on matters going beyond the forms of order sought by the parties. Pursuant to that principle, the scope of the annulment it orders may not go further than that sought by the applicant.[26] It is not entitled to redefine the principal subject-matter of the action or to raise a plea of its own motion except in particular cases where the public interest requires its intervention.[27] The EU judicature has the power and, where appropriate, the obligation to raise certain pleas of procedural legality of its own motion.[28]

36. It should be noted that the principle of *ne ultra petita* applies to its full extent only in civil law proceedings, where it manifests itself as the principle of party disposition. In public law proceedings, on the other hand, which include proceedings under competition law, its scope is more difficult to define. In my opinion, that principle does not really play a separate role but becomes an aspect of the general right to a fair trial. As Advocate General Léger put it, the role of the court in this context is not a passive one and it cannot be expected to be merely 'the mouthpiece of the parties'.[29] I would observe in particular that the prohibition barring a court from raising pleas of its own motion applies only in the context of annulment litigation, that is to say involving a review of legality. It does not, however, play a similar role in the context of unlimited jurisdiction.

23 — Judgment in *Prym and Prym Consumer* v *Commission* (C-534/07 P, EU:C:2009:505, paragraph 86).

24 — Judgment in *KNP BT* v *Commission* (C-248/98 P, EU:C:2000:625, paragraph 40).

25 — By a further 4% in addition to the 10% reduction previously granted by the Commission to take account of the appellants' less regular or less active participation in the infringement.

26 — See the judgments in *Meroni* v *High Authority* (46/59 and 47/59, EU:C:1962:44, p. 411, in particular p. 419); *Nachi Europe* (C-239/99, EU:C:2001:101, paragraph 24); *Comunità montana della Valnerina* v *Commission* (C-240/03 P, EU:C:2006:44, paragraph 43); and points 146 to 148 of the Opinion of Advocate General Kokott in *Commission* v *Alrosa* (C-441/07 P, EU:C:2009:555).

27 — Judgment in *Commission* v *Roodhuijzen* (T-58/08 P, EU:T:2009:385, paragraph 34 and the case-law cited). None the less, it follows from the case-law that, within the framework of the dispute as defined by the parties, the EU judicature, while it must rule only on the claims submitted by the parties, cannot be bound by the arguments put forward by the parties in support of their claims or it may be forced to base its decisions on erroneous legal considerations (judgment in *ETF* v *Michel*, T-108/11 P, EU:T:2013:625, paragraphs 42 and 51).

28 — Infringement of essential procedural requirements and lack of competence within the meaning of Article 263 TFEU constitutes a ground of public policy which must be raised by the EU judicature of its own motion (see the judgment in *Hungary* v *Commission*, T-240/10, EU:T:2013:645). Failure to state reasons is a plea relating to procedural legality. It is important to note, however, that the reason the court raises of its own motion a plea involving a matter of public policy is not to remedy an inadequacy in the application but to ensure compliance with a rule which, because of its importance, is not subject to the discretion of the parties at any stage in the proceedings. The question of the raising of pleas of the court's own motion must none the less be distinguished from the scope of the principle of *ne ultra petita*, which is concerned with the forms of order sought by the parties.

29 — Opinion of Advocate General Léger in *Parliament* v *Gutiérrez de Quijano y Lloréns* (C-252/96 P, EU:C:1998:157, paragraph 36).

37. This brings me to the question of how to apply the principle of *ne ultra petita* in the context of unlimited jurisdiction, the present case being essentially concerned with the limits of that jurisdiction. In the judgment in *Groupe Danone* v *Commission*, the Court stated that 'the Community judicature is empowered to exercise unlimited jurisdiction where *the question of the amount of the fine is before it* and … that jurisdiction may be exercised to reduce that amount as well as to increase it'. [30]

38. This opens the way for two distinct interpretations. On the one hand, it could be argued that, in order to enable the General Court to exercise its unlimited jurisdiction, a party must raise the matter of the amount of the fine expressly and precisely in *the form of order sought in its application*. On the other hand, it could also be inferred from the position adopted by the Court of Justice that it is sufficient for the matter of the fine to constitute *the subject-matter of the dispute and to be the subject of an exchange of argument in the context of the pleas raised*. That question is of particular importance given that the exercise of unlimited jurisdiction effectively empowers the General Court to increase the fine, even though the parties' claim has to do only with its reduction. [31]

39. How the principle of *ne ultra petita* is to be implemented in the context of unlimited jurisdiction is not absolutely clear, but there seems to be some support for its application in the manner of the first interpretation drawn from the judgment in *Groupe Danone* v *Commission*, to the effect that the amount of the fine must have been *referred to in the form of order sought*. Thus, in the judgment in *Commission and Others* v *Siemens Österreich and Others*, the Court held that the General Court had ruled *ultra petita* in annulling a provision of the Commission's decision and in varying the fines imposed, incorporating them in a single amount for the payment of which the parties were held jointly and severally liable. [32] Furthermore, in the judgment in *Alliance One International* v *Commission*, the Court, while dismissing the plea alleging breach of the principle of *ne ultra petita*, pointed out that, notwithstanding the absence of any such request in the application, the party had sought, in the alternative, the reduction of the fine imposed on another participant in a cartel and jointly and severally on itself, and that the purpose of its pleas in law was, inter alia, to justify the grant of such a reduction. [33]

40. In the light of all of the foregoing, I consider that the complaints raised by the appellants are not actually based on infringement of the principle of *ne ultra petita* or the incorrect raising by the General Court of a plea of its own motion. In any event, it is my view that those complaints stem from an incorrect reading of the judgment under appeal. As I have already said, the arguments put forward by the parties concern the extent of the unlimited jurisdiction that may be exercised by the General Court, which, in finding that the appellants were liable for the aforementioned two aspects of the cartel, actually established that the infringement at issue had been committed.

41. If, however, the complaints raised by the appellants were none the less to be regarded as alleging infringement of the principle of *ne ultra petita*, it would be sufficient to observe in this regard that, at first instance, it was the appellants who produced Mr V.C.'s statement in order to demonstrate that they had not participated in the monitoring and compensation mechanisms. In the form of order sought by them before the General Court, they claimed, principally, that that Court should annul the decision at issue in its entirety. In the alternative, they sought the annulment of Articles 1, 2 and 3 of

30 — C-3/06 P, EU:C:2007:88, paragraph 62, emphasis added. See also the Opinion of Advocate General Poiares Maduro in that case (C-3/06 P, EU:C:2006:720, paragraphs 46 to 50).

31 — See, in that regard, the judgments in *Shell Petroleum and Others* v *Commission* (T-343/06, EU:T:2012:478) and *Innolux and Others* v *Commission* (T-91/11, EU:T:2014:92).

32 — C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 129.

33 — C-679/11 P, EU:C:2013:606, paragraphs 103 to 107.

the decision at issue in so far as those articles relate to them, as well as, in the alternative, a reduction of the fine imposed on them by Article 2 of the decision at issue.[34] As regards the form of order sought by the Commission, it is indisputable that, at first instance, it contended that the application should be dismissed.

42. As I pointed out above, the General Court annulled in part the decision at issue and reduced the fine imposed by the Commission. Analysed in that way, the judgment under appeal does not appear to be vitiated by any error of law arising from a breach of the principle of *ne ultra petita*. Consequently, I propose that the Court should dismiss the first part of the second plea as unfounded.

## VI – **Unlimited jurisdiction and the right to a fair trial**

### A – *Arguments of the parties*

43. In the second part of the second plea, the appellants submit that the General Court disregarded the right to a fair trial (encompassing the principle of equality of arms) and the rights of the defence and, more specifically, the rule that the parties should be heard, in holding in paragraphs 624 to 626 of the judgment under appeal that it was for it to take account, in the exercise of its unlimited jurisdiction, of Mr V.C.'s statement in holding the appellants liable for their participation in the monitoring system and their awareness of the compensation mechanism.

44. The appellants claim that the General Court infringed the right to a fair trial, in particular the principle of equality of arms, and the rights of the defence, including the rule that the parties should be heard, by not informing the parties in detail, before giving judgment, of the nature and cause of that new complaint, in accordance with the requirements laid down in Article 6 of the European Convention on Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') and Articles 47 and 48 of the Charter.

45. The Commission contests the appellants' arguments, stressing that the appellants were the first to mention the evidence produced by Mr V.C. in connection with their awareness. In its submission, it is therefore absurd for the appellants to claim that they could not have been aware of that evidence.[35]

### B – *Assessment*

#### 1. Introductory remarks

46. The right to a fair trial, guaranteed by Article 6(1) of the ECHR, is a general principle of EU law, now enshrined in the second subparagraph of Article 47 of the Charter. The principle of effective judicial protection provided for in Article 47 comprises several elements, which include, inter alia, the rights of the defence, the principle of equality of arms and the right of access to a court or tribunal.

34 — See paragraph 87 of the judgment under appeal.

35 — Judgment in *I. garantonová* v *Commission* (T-392/09, EU:T:2012:674, paragraphs 78 and 79).

47. As regards the rule that the parties should be heard, it is common ground that that rule forms part of the rights of the defence. It applies to any procedure which may result in a decision by a Community institution perceptibly affecting a person's interests. [36] The principle of equality of arms, which is a corollary of the very concept of a fair hearing, implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent. [37] That principle may be relied on in penalty proceedings brought by the Commission. [38]

48. As I see it, in the field of competition law, it is essential to bear in mind that *it is for the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating* to the requisite legal standard the existence of circumstances constituting an infringement. What the applicant is required to do in the context of a legal challenge is to identify the impugned elements of the decision at issue, to formulate grounds of challenge in that regard and to adduce evidence — direct or circumstantial — to demonstrate that its objections are well founded. [39]

2. Assessment of the fact that the General Court took account of Mr V.C.'s statement in the light of its unlimited jurisdiction

49. It is apparent from the judgment under appeal that Mr V.C.'s statement was made on 6 December 2007, that is to say after the decision at issue was adopted, and that it was annexed to the application to the General Court and submitted by the appellants in the file relating to the proceedings before that Court. [40] The Commission relied on that statement in its pleadings. [41] That statement was deemed to be admissible before the General Court. The appellants also relied on it, in particular in the context of their fourth plea in law before the General Court. [42]

50. I note that observance of the rights of the defence in competition matters requires that the undertaking under investigation has been afforded the opportunity during the administrative procedure to make known its views on the truth and relevance of the facts alleged and on the documents used by the Commission to support its claim that there has been an infringement of the EC Treaty. [43] It is, inter alia, the statement of objections that allows the undertakings under investigation to acquaint themselves with the evidence which the Commission has at its disposal and to render the rights of the defence fully effective. [44]

51. Now, as the Commission points out, it is apparent from the case-law that 'a party which itself submitted the facts in question was by definition in a position to state their possible relevance to the resolution of the case at the time when it submitted them'. [45]

52. In this regard, it is common ground that, in exercising unlimited jurisdiction in respect of the amount of the fine, the General Court must take as the effective date that on which it delivers its judgment. Thus, a distinction should be drawn between, *on the one hand*, the taking into account by the General Court of additional documents or factors on which the Commission had not relied, [46] or

36 — Judgment in *Commission* v *Ireland and Others* (C-89/08 P, EU:C:2009:742, paragraph 50).
37 — Judgment in *Otis and Others* (C-199/11, EU:C:2012:684, paragraphs 46 to 49 and 71 and 72).
38 — See in particular the judgment in *LR AF* 1998 v *Commission* (T-23/99, EU:T:2002:75, paragraph 171).
39 — Judgment in *KME Germany and Others* v *Commission* (C-272/09 P, EU:C:2011:810, paragraphs 104 to 106).
40 — Paragraph 293 of the judgment under appeal.
41 — Paragraphs 293 and 612 of the judgment under appeal.
42 — Paragraph 320 of the judgment under appeal.
43 — See in particular the judgment in *Archer Daniels Midland* v *Commission* (C-511/06 P, EU:C:2009:433, paragraph 85 and the case-law cited).
44 — Ibid. (paragraph 86 and the case-law cited).
45 — Judgment in *1. garantovaná* v *Commission* (T-392/09, EU:T:2012 :674, paragraphs 78 and 79).
46 — Judgment in *Shell Petroleum and Others* v *Commission* (T-343/06, EU:T:2012:478, paragraphs 176, 220 and 232).

factors of which it had not been aware, at the time when it adopted the decision and, *on the other hand*, the determination of the anticompetitive conduct and the taking into account of the cartel members' liability, which was either expressly ruled out in the Commission decision or was not proved by the Commission.

53. Thus, as regards the taking into account of additional factors, it is apparent from the case-law that, 'in the exercise of its unlimited jurisdiction recognised by Article 261 TFEU and Article 31 of Regulation No 1/2003, the General Court has the power to assess the appropriateness of the amounts of fines, on the basis inter alia of additional information which is not mentioned in the statement of objections or the Commission decision'. [47]

54. As Advocate General Wathelet stated in his Opinion in *Telefónica and Telefónica de España* v *Commission*, the General Court must therefore itself assess whether the fine is appropriate and proportionate and it is required itself to ascertain whether all the relevant factors for the purpose of calculating the fine have actually been taken into account by the Commission, it being understood that, in order to do so, the General Court must be able to review the facts and circumstances relied on before it by the applicants. [48]

55. To that end, the General Court may also take into account factors of which the Commission was unaware at the time when it adopted decision at issue. [49] Thus, the General Court takes into account factors subsequent to the Commission's decision, in particular as regards the undertaking's financial situation. [50]

56. From that point of view, the fact that Mr V.C.'s statement was taken into account does not infringe the rights of the defence and the rule that the parties should be heard, even though the value attached to it by the General Court is not absolutely clear. [51] On the one hand, since it was produced after the decision at issue was adopted, that document cannot contradict the evidence adduced by the Commission, and, on the other hand, that statement is relied on in order to establish the liability of the undertakings concerned. It none the less seems to me that, in the light of the aforementioned case-law, the fact that that statement was taken into account in the context of the evaluation of the penalty by the General Court acting in the exercise of its unlimited jurisdiction is in itself permissible. [52]

47 — Ibid. (paragraph 220).

48 — C-295/12 P, EU:C:2013:619, point 129.

49 — Judgment in *Arkema France and Others* v *Commission* (T-217/06, EU:T:2011:251, paragraphs 249 to 256), concerning the taking into account of the fact that the undertaking at issue was no longer controlled by the Total Group and, therefore, that increasing the fine so that it would act as a deterrent was no longer justified.

50 — Judgment in *Novácke chemické závody* v *Commission* (T-352/09, EU:T:2012:673), concerning a declaration that the payment of a fine would not affect the undertaking's viability, as well as the judgment in *Reagens* v *Commission* (T-30/10, EU:T:2014:253, paragraph 305), concerning matters relating to financial capacity.

51 — By way of illustration, as regards price fixing, it is apparent from paragraph 405 of the judgment under appeal that the statement in question 'is not in any event capable of contradicting the non-contemporaneous and contemporaneous evidence analysed above, evidence which was put forward by the Commission in support of the appellants' participation in the price-coordination activities'.

52 — Moreover, I think it is worth recalling that the Court has held that, notwithstanding the fact that the General Court had not notified the parties of its intention of taking into account the additional reduction, this was part of a legal assessment which the General Court was entitled to make in the exercise of its unlimited jurisdiction, without notifying the parties, prior to the delivery of the judgment (see the judgment in *Alliance One International* v *Commission*, C-679/11 P, EU:C:2013:606, paragraph 110).

57. In any event, the situation in the case at issue differs in my opinion from that which gave rise to the judgment in *Commission* v *Edison*,[53] in which the Court endorsed the General Court's reasoning that the factor relied on in the Commission decision was not set out in the statement of objections and Edison SpA had not had the opportunity to put forward its views on it during the administrative procedure. The General Court was therefore justified in holding that that factor could not be relied on as against that company.[54]

3. Infringement of the principle of unlimited jurisdiction and the rights of the defence in so far as the General Court held the appellants liable

58. The issue of the formal taking into account of Mr V.C.'s statement must none the less be distinguished from that raised by the way in which the General Court used that statement, that is to say the consequences which it attached to it and the purpose for which it used it. It is apparent from the judgment under appeal that the General Court took it into account for the purposes of assessing the fine. However, in so doing, the General Court held the appellants liable without giving them the opportunity to have their arguments heard.

59. Unlike the Commission, I take the view that the inferences which the General Court drew from that document are not merely a matter of fact. On the contrary, they are particularly important from the point of view of the rights of the defence. As Advocate General Kokott stated in *Commission* v *Alrosa*, the General Court is liable to adopt 'an unexpected decision' not only where it assesses the case on the basis of facts which were not known to the parties but also where it assesses the situation at issue on the basis of facts which, although known to the parties, had never been addressed as such in the course of the judicial proceedings.[55]

60. The crucial factor in the present case is that, in taking account of Mr V.C.'s statement, the General Court altered the characterisation of the alleged act as found in the Commission decision.

61. In establishing the existence of a particular line of conduct in determining the appellants' liability, the General Court exceeded its unlimited jurisdiction. For, in so doing, it found an infringement which had not been established by the Commission. In this regard, paragraph 621 of the judgment under appeal, by which the General Court appears to suggest, in breach of all the rules cited above, that additional information might concern the finding of the infringement, and paragraph 622 of the judgment under appeal, seem to justify the setting aside of the judgment under appeal.

62. Furthermore, the judgment under appeal is vitiated by flagrantly contradictory reasoning. Thus, in paragraph 614, the General Court states that it is not for the Court to substitute an entirely new statement of reasons for the erroneous statement used by the Commission. In paragraph 626, however, the General Court holds the appellants liable in respect of the aforementioned two aspects of the infringement.

63. By the same token, the General Court draws what to my mind is an artificial and therefore erroneous distinction between the establishment of liability 'for the purposes of the fine' and the establishment of liability per se. It is common ground that the fine constitutes the penalty for the liability previously found. Thus, without that previous finding, the question of the amount of the fine does not arise. Consequently, the General Court first of all dismantled the infringement established by the Commission before remodelling it, in the context of the ninth plea in law, and, in so doing, exceeded its unlimited jurisdiction.

53 — C-446/11 P, EU:C:2013:798.

54 — In its judgment in *Commission* v *Edison*, the Court referred by analogy to the judgment in *Papierfabrik August Koehler and Others* v *Commission* (C-322/07 P, C-327/07 P and C-338/07 P, EU:C:2009:500, paragraphs 34 to 37).

55 — C-441/07 P, EU:C:2009:555, points 151 and 152.

64. Lastly, it seems to me that, in this way, the General Court also infringed the rights of the defence and, in particular, the rule that the parties should be heard, inasmuch as it did not give the parties the opportunity to present their case in relation to the liability which it had itself established.

65. The exercise of unlimited jurisdiction remains subject to certain restrictions. While the competence to annul is limited to the infringement found in the decision at issue, unlimited jurisdiction does not confer upon the General Court competence to establish the existence of infringements not found by the Commission in the decision at issue. [56]

66. Consequently, the second part of the second plea must be upheld. In the light of the fundamental nature of the error thus established, that error should in my opinion have the effect of causing the judgment under appeal to be set aside.

## VII – **Distortion of the clear sense of the evidence**

67. In view of the nature of the error found to have been committed, there is, to my mind, no need to give a ruling on the third part of the second plea. I shall therefore address that part only in the alternative. In this regard, I note that the appellants submit that, by holding them liable for two aspects of the infringement, the General Court, in paragraph 626 of the judgment under appeal, distorted the clear sense of the evidence and infringed the principle of the presumption of innocence. That finding, they contend, is based on an incomplete citation of Mr V.C.'s statement, which clearly shows that Mr V.C. was entirely unaware of the nature of the compensation mechanism forming the subject-matter of the decision.

68. Moreover, they argue, Mr V.C.'s statement gives no indication of when he became aware that 'there was some sort of compensation mechanism'. The Commission, on the other hand, takes the view that the General Court did not distort the clear sense of the evidence contained in Mr V.C.'s statement.

69. It should be recalled in this regard that, where an appellant alleges distortion of the evidence by the General Court, it must, pursuant to the second subparagraph of Article 256(1) TFEU, the first paragraph of Article 51 of the Statute of the Court of Justice and point (d) of Article 168(1) of the Rules of Procedure of the Court of Justice, indicate precisely the evidence alleged to have been distorted by the General Court and show the error of appraisal which, in its view, led to that distortion. [57]

70. There is such distortion where, without recourse to new evidence, the assessment of the existing evidence appears to be clearly incorrect. [58] As I see it, however, by the third part of the second plea, the appellants are proposing a reading of Mr V.C.'s statement that is different from that adopted by the General Court. The arguments relied on in the present case do not however support the conclusion that the General Court manifestly exceeded the limits of a reasonable assessment of that evidence. [59]

71. On that basis, the third part of the second plea must be dismissed as unfounded.

56 — See to that effect the judgment in *Tokai Carbon and Others* v *Commission* (T-71/03, T-74/03, T-87/03 and T-91/03, EU:T:2005:220, paragraph 370).

57 — Judgment in *Commission* v *Aalberts Industries and Others* (C-287/11 P, EU:C:2013:445, paragraph 50).

58 — Judgments in *PKK and KNK* v *Council* (C-229/05 P, EU:C:2007:32, paragraph 37) and *Lafarge* v *Commission* (C-413/08 P, EU:C:2010:346, paragraph 17).

59 — See by analogy the judgment in *Activision Blizzard Germany* v *Commission* (C-260/09 P, EU:C:2011:62, paragraph 57).

## VIII – **Referral of the case back to the General Court**

72. I note that, on appeal, the appellants claim that Articles 1, 2 and 3 of the decision at issue should be annulled in so far as they relate to them or that the amount of the fine should be reduced.

73. In accordance with the first subparagraph of Article 61 of the Statute of the Court of Justice, if the appeal is well founded, the Court of Justice may, where the judgment of the General Court is set aside, itself give final judgment in the matter, where the state of the proceedings so permits. In the light of the nature of the error committed by the General Court, I consider that the state of the present case does not permit final judgment to be given. [60] In particular, I am of the opinion that the parties did not have adequate opportunity to put to the General Court their views on the consequences to be drawn from Mr V.C.'s statement in the context of the General Court's exercise of its unlimited jurisdiction. Consequently, I propose that the Court refer the case back to the General Court.

## IX – **Conclusion**

74. For those reasons, and without prejudice to the examination of other pleas on appeal, I propose that the Court uphold the second part of the second plea. In consequence, the judgment in *Galp Energía España and Others* v *Commission* (T-426/07, EU:T:2013:459) must, in my opinion, be set aside and the case referred back to the General Court. The costs are reserved.

60 — Unlike, for example, in *Commission* v *Verhuizingen Coppens*. See the Opinion of Advocate General Kokott in that case (C-441/11 P, EU:C:2012:317, points 43 to 46).