Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

17 September 2015*

(Appeals — Competition — Paraffin waxes market — Slack wax market — Duration of participation in an unlawful cartel — Cessation of the participation — Interruption of the participation — Absence of collusive contact established during a certain period of time — Continuation of the infringement — Burden of proof — Public distancing — Perception of the other participants in the cartel of the company's intention to distance itself — Obligation to state reasons — Principles of the presumption of innocence, equal treatment, effective judicial protection and that penalties must be specific)

In Case C-634/13 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 26 November 2013,

Total Marketing Services SA, successor in law to Total Raffinage Marketing, represented by A. Vandencasteele, C. Lemaire and S. Naudin, avocats,

appellant,

the other party to the proceedings being:

European Commission, represented by P. Van Nuffel and A. Biolan, acting as Agents, assisted by N. Coutrelis, avocat,

defendant at first instance,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, A. Rosas, E. Juhász (Rapporteur), D. Šváby and A. Prechal, Judges,

Advocate General: N. Wahl,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 15 January 2015,

after hearing the Opinion of the Advocate General at the sitting on 26 March 2015,

gives the following

* Language of the case: French.

Judgment

1 By its appeal, Total Marketing Services SA, successor in law to Total Raffinage Marketing, formerly Total France SA ('Total France') asks the Court to set aside the judgment of the General Court of the European Union in *Total Raffinage Marketing* v *Commission* (T-566/08, EU:T:2013:423, 'the judgment under appeal') by which that court dismissed Total France's application, primarily, for annulment in part of Commission Decision C(2008) 5476 final of 1 October 2008, relating to a proceeding under Article [81 EC] and Article 53 of the EEA Agreement (Case COMP/39.181 — Candle waxes) (summary published in OJ 2009 C 295, p. 17, 'the decision at issue'), and, in the alternative, for annulment or reduction of the fine imposed on Total France.

Background to the case and the decision at issue

2 In the judgment under appeal, the General Court made the following findings:

'1 By [the decision at issue], the [European] Commission found that [Total France] and its parent company which holds almost 100% of its capital, Total SA, had, with other undertakings, infringed Article 81(1) EC and Article 53(1) of the Agreement on the European Economic Area (EEA) [of 2 May 1992 (OJ 1994 L 1, p. 3)] by participating in a cartel concerning the EEA market for paraffin waxes and the German market for slack wax.

2 The addressees of the [decision at issue] are, as well as [Total France] and its parent company, Total SA ("the Total group" or "Total"), the following undertakings: ...

3 Paraffin waxes are manufactured in refineries from crude oil. They are used for the production of a variety of products such as candles, chemicals, tyres and automotive products as well as in the rubber, packaging, adhesive and chewing gum industries (recital 4 of the [decision at issue]).

4 Slack wax is the raw material required for the manufacture of paraffin waxes. It is produced in refineries as a by-product in the manufacture of base oils from crude oil. It is also sold to end-customers, to producers of particle boards for instance (recital 5 of the [decision at issue]).

5 The Commission began its investigation after [a company] informed it, by letter of 17 March 2005, of the existence of a cartel … (recital 72 of the [decision at issue]).

6 On 28 and 29 April 2005, the Commission carried out, pursuant to Article 20(4) of 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), on-site inspections at the premises of … Total [France] (recital 75 of the [decision at issue]).

7 On 29 May 2007, the Commission sent a statement of objections to [the addressees of the decision at issue] including Total France (recital 85 of the [decision at issue]). By letter of 14 August 2007, Total France replied to the statement of objections.

8 On 10 and 11 December 2007, the Commission held a hearing in which Total France took part (recital 91of the [decision at issue]).

9 In the [decision at issue], in the light of the evidence available to it, the Commission considered that the addressees, who constituted the majority of the producers of paraffin waxes and slack wax in the EEA, had participated in a single, complex and continuous infringement of Article 81 EC and Article 53 of the EEA Agreement, covering the EEA territory. That infringement consisted in agreements or concerted practices aimed at price fixing, and exchanging and disclosing commercially-sensitive information affecting paraffin waxes ("the principal part of the

infringement"). As far as … Total is concerned, the infringement relating to paraffin waxes also concerned customers or market sharing ("the second part of the infringement"). Furthermore, the infringement committed by ... Total also included slack wax sold to end-customers in the German market ("the slack wax part of the infringement") (recitals 2, 95 and 328 and Article 1 of the [decision at issue]).

10 Those unlawful practices took place during anti-competitive meetings called "technical meetings" or sometimes "Blauer Salon" meetings by the participants and during "slack wax meetings" specifically devoted to questions relating to slack wax.

11 According to the [decision at issue], employees of Total France had directly participated in the infringement throughout its duration. The Commission therefore held Total France liable for its participation in the cartel (recitals 555 and 556 of the [decision at issue]). In addition, Total France was, between 1990 and the end of the infringement, directly or indirectly owned as to more than 98% by Total SA. The Commission considered that it could be presumed on that basis that Total SA exercised decisive influence over the conduct of Total France, both companies being part of the same undertaking (recitals 557 to 559 of the [decision at issue]). In answer to an oral question at the hearing concerning the imputation of liability to its parent company, [Total France] referred to all the information communicated by Total SA in the related Case T-548/08 *Total SA* v *Commission*, delivered today. In that case, Total SA stated, in response to a written question from the [General] Court, that Total France was directly or indirectly wholly owned by it during the relevant period.

12 The fines imposed in the present case have been calculated on the basis of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 … ("the 2006 Guidelines"), in force at the time the statement of objections was notified to the companies referred to in paragraph 2 above.'

...

15 [In application of the 2006 Guidelines], the Commission arrived at an adjusted basic amount for the fine of EUR 128 163 000.

16 As no reduction of the amount of the fine was made ..., the adjusted basic amount of EUR 128 163 000 equates to the total amount of the fine (recital 785 of the [decision at issue]).

17 The [decision at issue] includes the following provisions:

"Article 1

The following undertakings have infringed Article 81(1) [EC] and — from 1 January 1994 — Article 53 of the EEA Agreement by participating, for the periods indicated, in a continuing agreement and/or concerted practice in the paraffin waxes sector in the common market and, as of 1 January 1994, within the EEA:

...

Total France ...: from 3 September 1992 to 28 April 2005 and

Total SA: from 3 September 1992 to 28 April 2005.

For the following undertakings, the infringement also includes slack wax sold to end customers in the German market for the periods indicated:

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

Total SA: from 30 October 1997 to 12 May 2004.

...

Article 2

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

...

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

...'

The application before the General Court and the judgment under appeal

3 In support of the order sought by its application, lodged at the General Court Registry on 17 December 2008, the appellant raised a total of 11 pleas in law. A 12th plea in law was raised at the hearing before the General Court. The General Court rejected all of those pleas, with the exception of the eighth, alleging that the calculation method set out in paragraph 24 of the 2006 Guidelines was unlawful. The General Court held that, when determining the multiplier reflecting the duration of Total France's participation in the infringement, the Commission had breached the principles of proportionality and equal treatment by assimilating a period of participation of 7 months and 28 days for paraffin waxes, and of 6 months and 12 days for slack wax, to participation for a full year. Consequently, the General Court reduced the total amount of the fine imposed on the appellant from EUR 128 163 000 to EUR 125 459 842. In the judgment given on the same day in *Total* v *Commission* (T-548/08, EU:T:2013:434), on the other hand, the General Court dismissed the application brought by the parent company, Total SA, in its entirely and did not reduce the fine imposed on that company to the same extent.

Forms of order sought

4 The appellant claims that the Court should:

— set aside the judgment under appeal on the ground that the General Court incorrectly found that the appellant's participation in the infringement had not ceased after 12 May 2004;

— set aside the judgment under appeal on the ground that the General Court incorrectly found no unjustified unequal treatment between the appellant and Repsol YPF Lubricantes y Especialidades SA, Repsol Petróleo SA and Repsol YPF SA ('Repsol') concerning the duration of their participation in the infringement;

— set aside the judgment under appeal on the ground that the General Court incorrectly found that the appellant's participation in the infringement had not been interrupted between 26 May 2000 and 26 June 2001;

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

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

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

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

5 The Commission claims that the Court should:

— dismiss the appeal;

— order the appellant to pay the costs, including those incurred before the General Court.

The appeal

6 The appeal is based on four grounds of appeal.

The first ground of appeal, alleging that the General Court erred in law in the finding that the appellant participated in the infringement after the meeting of 11 and 12 May 2004 and until 28 April 2005

7 In paragraph 370 of the judgment under appeal, the General Court cited recital 602 of the decision at issue, which states:

'[The appellant] states that it did not participate in any Technical Meetings after the meeting on 11 and 12 May 2004 and that its representative cancelled his journey for the meeting of 3 and 4 November 2004, internally communicating that he did so because of advice from his superior. The Commission notes that there is no evidence of any withdrawal from the cartel. In cases of complex infringements, the fact that an undertaking is not present in a meeting, or does not agree what is discussed in a meeting, does not mean that the undertaking has stopped its participation in an on-going infringement. In order to terminate the infringement, the undertaking must clearly distance itself from the cartel. … [The appellant] has not put forward clear evidence that it adopted a fully autonomous and unilateral strategy on the market nor that it clearly and openly distanced itself from the activities of the cartel. On the contrary, evidence in the Commission's possession shows that [the appellant] received formal invitations to all three of the subsequent Technical Meetings (namely, the last three Technical Meetings before the inspections were carried out). The Commission observes that [the appellant's] representative confirmed that he would attend the meeting of 3 and 4 November 2004, although he appears to have cancelled his journey later. Also for the 23 and 24 February 2005 meeting, a room was already booked by [Sasol Wax International AG, Sasol Holding in Germany GmbH and Sasol Limited, the organiser of the meeting ("Sasol")] for the [appellant's] representative at the hotel where the meeting took place, which appears to have been cancelled later. The Commission therefore concludes that for Sasol and the other participants, it was clear that [the appellant] had been a member of the cartel until the end. The Commission also observes that the discussions in the meetings were not fundamentally different from the previous meetings but that the participants continued to discuss price increases without mentioning any move by [the appellant] to leave the cartel (see recitals 175, 176 and 177) and that it was not unusual during the cartel that companies did not attend some meetings. Both of these factors show that [the appellant] was not perceived as having dropped out of the cartel after the meeting of May 2004. The internal communication of [the appellant's] representative as to his reasons for not attending a meeting cannot, in any event, be seen as public

distancing. As there is also nothing else to suggest that [the appellant] distanced itself from the cartel, the Commission considers that [the appellant's] involvement in the cartel did not end prior to the inspections.'

8 In paragraphs 372 to 379 of the judgment under appeal, the General Court confirmed the position of the Commission concerning the criterion of public distancing and the perception of that distancing by the other participants in the cartel, and ruled that the appellant had not distanced itself publicly from the cartel according to the perception of the other participants.

9 Furthermore, in paragraphs 377 to 379 of the judgment under appeal, the General Court analysed the internal e-mail of 3 November 2004, sent by a representative of the appellant in the technical meetings to another employee of the appellant, which read as follows 'In view of the objective of the meeting in Austria, I am going along with Thibault's recommendation. I am cancelling my trip to Vienna (departure initially scheduled for this afternoon)' and concluded that such an internal e-mail not communicated to the other participants cannot constitute public distancing. Similarly, in paragraph 380 of that judgment, the General Court found that the mere fact that the appellant did not participate in the last technical meetings does not demonstrate that it did not use the information on prices charged by its competitors which it received at the tens of earlier technical meetings which it attended, and that it did not take advantage of the market-sharing and customer-sharing agreements put in place at the earlier technical meetings. In the same paragraph, the General Court found that the appellant had adduced no evidence showing that it had ceased to implement the cartel on 12 May 2004.

Arguments of the parties

10 The appellant claims that, after the technical meetings of 11 and 12 May 2004, it did not participate in any of the three meetings organised from that date and until the inspections carried out by the Commission on 28 and 29 April 2005, which amounts to an uninterrupted absence of one year, a period which greatly exceeds the ordinary periods between the holding of the collusive meetings. Furthermore, no illicit concerted practices between the appellant and the other participants in the cartel, of any nature, was evidenced nor alleged during that period. In addition, the internal e-mail referred to in paragraph 9 of the present judgment establishes that the absence of its representative from the subsequent meetings until that of the month of May 2004 was not the result of chance, but followed from directions of his management relating to the object of those meetings.

11 According to the case-law of the Court, the requirement of public distancing is based on the fundamental premiss that an undertaking which has participated in an anti-competitive meeting is deemed to have subscribed to what was discussed in that meeting unless it openly distances itself from it (judgment in *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraphs 81 and 82 and the case-law cited). In addition, as appears from the established case-law of the General Court concerning the taking of evidence on the duration of an undertaking's participation in a cartel, it is for the Commission to prove not only the existence of the cartel but also its duration and that, in the absence of evidence directly establishing the duration of an infringement, the Commission is to adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates.

12 The appellant thereby concludes that, in the absence of any evidence of collusive contacts or activities between an undertaking and other participants in a cartel from a certain date and for a specified period, the Commission is unable to base its finding that that undertaking continued to participate in the cartel on the argument that the undertaking did not distance itself from the cartel. By confirming

that approach of the Commission, the General Court reversed the burden of proof in relation to the duration of participation in an infringement, which lies on the Commission, and therefore erred in law.

13 Noting that this ground of appeal does not relate to the duration of the interruption of participation in a cartel, but on the continuation of participation until the end of the cartel, the Commission claims that, by this ground of appeal, the appellant is merely repeating the arguments that it raised before the General Court concerning the assessment of factual evidence with the result that this ground of appeal must, principally, be considered as inadmissible.

14 In the alternative, the Commission notes that the duration of participation in an infringement is a question of fact, evidence of which must be adduced on a case-by-case basis in the light of the particular circumstances of the case. In the present case, evidence of the appellant's continued participation in the infringement follows from the combination of two inextricably linked components, namely, first, the fact that it continued to be invited to the technical meetings, which supposes that the host must have perceived the invitee as a member of the cartel, and, second, the fact that it did not distance itself from the cartel. Thus, neither the Commission nor the General Court based its decision on the mere absence of the appellant's publicly distancing itself from the cartel.

15 In summary, the Commission contends that the case-law of both the Court of Justice and of the General Court confirms that the absence of public distancing is a factor of great importance where other evidence is found to suggest continued participation in a cartel and that, in any event, the perception of the other members of the cartel is essential. In recital 602 of the decision at issue, far from basing its decision solely on the absence of the appellant's publicly distancing itself from the cartel, the Commission relied on indicia which ought to be assessed as a whole. The General Court therefore exercised its prerogative in assessing the appropriate weight to be given to that evidence.

Findings of the Court

16 It is agreed between the parties that the appellant did not participate in the last three meetings of the cartel held between 12 May 2004 and 29 April 2005.

17 Having cited recital 602 of the decision at issue verbatim in paragraph 370 of the judgment under appeal, the General Court upheld the position of the Commission expressed in that recital, according to which the appellant had continued to participate in the infringement beyond the month of May 2004.

18 The General Court ruled that it could not be concluded that an undertaking had definitively ceased to belong to a cartel unless it had publicly distanced itself from the content of the cartel and it added that the decisive criterion in that regard was the understanding that the other parties participating in the cartel had of that undertaking's intention.

19 Thus, as the General Court ruled, even if it is undisputed that an undertaking is no longer participating in the collusive meetings of a cartel, it must distance itself publicly from that cartel if it is to be considered as having discontinued its participation in it, and the evidence of that distancing must be assessed according to the perception of the other participants in that cartel.

20 It must be noted that, in accordance with the case-law of the Court, a public distancing is necessary in order that an undertaking which participated in collusive meetings can prove that its participation was without any anti-competitive intention. For that purpose, the undertakings must demonstrate that it had indicated to its competitors that it was participating in those meetings in a spirit that was

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

21 The Court has also held that an undertaking's participation in an anti-competitive meeting creates a presumption of the illegality of its participation, which that undertaking must rebut through evidence of public distancing, which must be perceived as such by the other parties to the cartel (see, to that effect, judgment in *Comap* v *Commission*, C-290/11 P, EU:C:2012:271, paragraphs 74 to 76 and the case-law cited).

22 Therefore, the case-law of the Court requires a public distancing as necessary proof in order to rebut the presumption recalled in the previous paragraph only in the case of an undertaking that participated in anti-competitive meetings; however, it does not require in all circumstances that there be such a distancing that puts an end to participation in the infringement.

23 With regard to participation in an infringement that took place over several years rather than in individual anti-competitive meetings, it can be concluded from the case-law of the Court that the absence of public distancing forms only one factor amongst others to take into consideration with a view to establishing whether an undertaking has actually continued to participate in an infringement or has, on the contrary, ceased to do so (see, to that effect, judgment in *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 75).

24 Consequently, the General Court erred in law in considering in paragraphs 372 and 374 of the judgment under appeal, that public distancing constitutes the only means available to an undertaking involved in a cartel of proving that it has ceased participating in that cartel, even in the case where that company has not participated in anti-competitive meetings.

25 Nevertheless, that error of law by the General Court cannot invalidate the findings in the judgment under appeal concerning the appellant's participation in the infringement between 12 May 2004 and 29 April 2005.

26 It is settled case-law that in most cases the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (see judgments in *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 57, and in *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 70).

27 As regards, in particular, an infringement extending over a number of years, the Court has held that the fact that direct evidence of an undertaking's participation in that infringement during a specified period has not been produced does not preclude that participation from being regarded as established also during that period, provided that that finding is based on objective and consistent indicia (see, to that effect, judgments in *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, C-105/04 P, EU:C:2006:592, paragraphs 97 and 98, and in *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 72).

28 Even if a public distancing is not the only means available to an undertaking implicated in a cartel of proving that it has ceased participating in that cartel, such distancing none the less constitutes an important fact capable of establishing that anti-competitive conduct has come to an end. The absence of public distancing forms a factual situation on which the Commission can rely in order to prove that an undertaking's anti-competitive conduct has continued. However, in a case where, over the course of a significant period of time, several collusive meetings have taken place without the participation of the representatives of the undertaking at issue, the Commission must also base its findings on other evidence.

29 In this case, the General Court correctly concluded in paragraphs 377 to 379 that the internal email of 3 November 2004 sent by the representative of the appellant to another employee of the company could not amount to a public distancing.

30 However, it must be pointed out that the rejection of this plea at first instance is not based just on the absence of the appellant's having publicly distanced itself from the cartel. It is apparent from recital 602 of the decision at issue, cited in paragraph 370 of the judgment under appeal, that there was other factual evidence on which the Commission had relied and which was not disputed by the appellant, such as the initial confirmation of the participation of the appellant's representative in the meeting of 3 and 4 November 2004 and the initial reservation by the organiser of the collusive meetings of a hotel room for the representative for the meeting of 23 and 24 February 2005.

31 Therefore, that factual evidence, in conjunction with the absence of the appellant's publicly distancing itself from the cartel and the perception of the organiser of the collusive meetings constituted consistent indicia permitting finding that the appellant had continued to participate in the cartel.

32 Consequently, since it is ineffective, the first ground of appeal cannot be upheld.

The third ground of appeal, alleging that the General Court erred in law in the finding that the appellant had not interrupted its participation in the infringement between 26 May 2000 and 26 June 2001

33 In recital 159 of the decision at issue, the Commission stated that, according to the statements made by Shell, Total France had been accused by the other participants, during the meeting of 25 and 26 May 2000, of selling at prices that were too low.

34 Recital 603 of the decision at issue is worded as follows:

'Total France … claims that it interrupted its participation between 2000 and 2001 and that the fact that its representative left the meeting [of 25 and 26 May 2000] in anger was a sign of distancing. … The Commission observes … that there is nothing to suggest that Total ha[d] publicly distanced itself from the cartel. That [Total France's representative, "X"] left the meeting does not, as such, constitute a public distancing considering that even Total does not argue that [X] announced an intention to stop Total's participation in the cartel. Rather, [X's] anger shows that he was not satisfied with the agreement reached. Total's reappearance after less than a year confirms that it had no intention to stop its involvement. The Commission does not, therefore, consider Total's short temporary absence as constituting an interruption of its involvement in the cartel.'

35 The General Court found, in essence, in paragraphs 401 and 402 of the judgment under appeal, that it has not been demonstrated that, during the meeting held on 25 and 26 May 2000, the appellant's representative distanced himself from the infringement as perceived by the other participants in that meeting.

Arguments of the parties

36 The appellant claims that, as the statement made before the Commission by one of the undertakings belonging to the cartel shows, its representative stormed out of the meeting of 25 and 26 May 2000 in a state of exasperation and did not participate in any of the following three meetings until its new representative attended the meeting of 26 and 27 June 2001. The General Court's finding, namely that the appellant had not proved that there had been a public distancing, amounts to an infringement of the presumption of innocence. The General Court thus erred in law in that regard, particularly since its approach concerning the appellant was contrary to that followed with regard to another undertaking participating in that cartel.

37 The Commission submits, primarily, that this ground of appeal is inadmissible. It is a ground based on a question of fact, since it relates as much to the assessment of the duration of participation in a cartel as the concept of public distancing, both of which are factual situations. The appellant is merely calling the interpretation of the facts by the General Court into question.

38 In the alternative, the Commission claims that this ground of appeal is unfounded since, in order to find that the participation in the cartel at issue had continued between 26 May 2000 and 20 June 2001, the Commission did not, as appears from recital 603 of the decision at issue, take into consideration only the lack of public distancing. The General Court upheld that analysis by relying not on the absence of distancing alone but also on an assessment of the circumstances in which the appellant's representative had left the meeting of 25 and 26 May 2000. The Commission takes the view that the duration of an undertaking's participation in a cartel is a question of fact and that, in the present case, the absence of evidence of anti-competitive contact or of participation in such contact during the period of one year does not suffice, in itself, to establish an interruption in that cartel.

Findings of the Court

39 This ground of appeal is based on two arguments. First, the conduct of the appellant's representative during the meeting of 25 and 26 May 2000 bears witness to the appellant's distancing itself publicly from the cartel at issue. Second, the appellant did not participate in any of the three collusive meetings organised between 26 May 2000 and 26 June 2001.

40 As to whether the conduct of the appellant's representative during the meeting of 25 and 26 May 2000 was capable of evidencing public distancing, it must be noted that that conduct was assessed by the Commission in recital 603 of the decision at issue and that assessment was reviewed by the General Court. In that regard, as appears from paragraphs 398 and 401 of the judgment under appeal, after having assessed the circumstances in which that meeting took place and taken into consideration the perception that the other participants in that meeting could have had of the state of mind of the appellant's representative, the General Court found, in paragraph 402 of that judgment, that that state of mind did not evidence a public distancing from the anti-competitive practice. In accordance with the case-law, such a factual assessment cannot be reviewed by the Court of Justice in an appeal.

41 As to whether the appellant's absence from the three collusive meetings held between 26 May 2000 and 26 June 2001 amounts to proof that its involvement in the cartel was interrupted, it must be held that, by the reference to paragraph 372 of the judgment under appeal which it made in paragraph 402 of that judgment, the General Court erred in law in the same way as stated in paragraph 24 of the present judgment with regard to the assessment of the first ground of appeal by considering that it was for the appellant to prove that it had distanced itself from that cartel in the perception of the other participants despite the fact that it had not participated in those meetings.

42 Nevertheless, in accordance with the Court's case-law, already stated in paragraph 27 of the present judgment, the fact that direct evidence of an undertaking's participation in a cartel during a certain period has not been produced does not, in the case of an infringement lasting several years, preclude participation in that cartel, also during that period, from being regarded as established, provided that such participation is based on objective and consistent indicia.

43 In the present case, the absence of public distancing on the part of the appellant was not the only reason for which the appellant's conduct must be considered as an infringement also during the period at issue.

44 It appears from paragraphs 398 and 401 of the judgment under appeal that the fact that the appellant's representative left the meeting of 25 and 26 May 2000 abruptly was explained by personal reasons, and could not be regarded as an expression of Total France's own intention to distance itself from the cartel, which also corresponded to the perception that other participants in that meeting could have had of that event. Furthermore, after that representative's replacement by another employee, Total France began to participate in the collusive meetings again, that fact being capable of supporting the finding that that representative's conduct was explained by the existence of a conflict of a personal nature.

45 As a result, alongside the absence of public distancing, there were objective and consistent indicia which allow the finding that the appellant's participation in the cartel was not interrupted during the period at issue.

46 Consequently, since it is ineffective, the third ground of appeal cannot be upheld.

The second ground of appeal, alleging breach of the principle of equal treatment and failure to state reasons

47 In paragraph 386 of the judgment under appeal, the General Court stated that the Commission had considered that Repsol's participation in the cartel had ended on 4 August 2004, since for the meeting that was to be held that same day Repsol had not received any official invitation from Sasol, the organiser of the meetings, containing the agenda, which showed that Sasol harboured doubts as to Repsol's continuing participation in the cartel.

48 In paragraph 387 of the judgment under appeal, the General Court considered that the fact that the official invitations to meetings, containing the agenda, ceased to be sent to Repsol made it clear that Sasol had changed its view and that it was no longer assured of Repsol's participation in the cartel after 4 August 2004 and that that was sufficient to support the view that Repsol had distanced itself from that cartel in the eyes of the other participants in the cartel. On the other hand, in paragraphs 388 to 390 of that judgment, the General Court found that that was not the case of the appellant, since it had continued to receive the official invitations to meetings containing the agenda and held that the Commission had treated differently two situations that were different and, consequently, it had not breached the principle of equal treatment.

Arguments of the parties

49 The appellant maintains that the General Court's analysis is based, first, on an error of law. It appears from the documents submitted by the Commission before the General Court that, for the meeting of 3 and 4 August, just like the appellant, Repsol had, in addition to an invitation without the agenda, received the same 'official' invitation including the agenda. Repsol was also allegedly the addressee of an invitation for the meeting of 3 and 4 November 2004. Therefore, the General Court's finding is based on a distortion of the evidence. Second, the General Court required the appellant to furnish proof of public distancing but not Repsol whose withdrawal from the cartel was accepted without distancing. The judgment under appeal does not provide evidence capable of justifying such a difference of treatment, which constitutes an infringement of the principle of equal treatment.

50 The Commission submits, primarily, that this ground of appeal is ineffective because, even supposing that the General Court had erred in its assessment as far as Repsol is concerned, that error of law does not concern the appellant and is therefore not capable of bringing about a reduction in the length of the infringement established in so far as the appellant is concerned, an issue which falls exclusively within the scope of the first ground of appeal.

51 In the alternative, the Commission recognises that, as far as the meeting of 3 and 4 August 2004 is concerned, it considered that Repsol was still a member of the cartel at the time when that meeting took place and that the absence of its representative from that meeting did not amount to an indicium of its having withdrawn from the cartel. As far as the meeting of 3 and 4 November 2004 is concerned, the Commission also recognises that Repsol had received the same invitation as the appellant, with the agenda, without, however, being considered as still being a member of the cartel. Nevertheless, supposing that such a finding was made following a distortion of the evidence, that distortion is of no consequence since, in that very invitation made to both, the appellant's representative was mentioned as having a room booked, unlike Repsol's representative, which the Commission considered to be an important difference.

Findings of the Court

52 It must be held that in paragraphs 386 and 387 of the judgement under appeal, the General Court distorted the facts concerning the length of Repsol's participation in the cartel. As is apparent from the documents before the Court and as the Commission has accepted, the Commission considered that, as far as the meeting of 3 and 4 August 2004 is concerned, Repsol was still a member of the cartel, since the absence of its representative did not amount to an indicium of withdrawal from the cartel and that, as far as the meeting of 3 and 4 November is concerned, Repsol had received the same type of invitation as the appellant. Therefore, the account of the facts in the aforementioned paragraphs of the judgment under appeal is vitiated by a distortion of the facts.

53 Moreover, it must also be observed that, in paragraph 387 of the judgment under appeal, the General Court based its decision exclusively on the doubt of the organiser of the collusive meetings concerning Repsol's intention to participate in those meetings after 4 August 2004, and concluded that that evidence was sufficient to consider that Repsol had distanced itself from the cartel in the view of the other participants. Thus, the General Court did not hold Repsol to the same requirement of proof of public distancing as that to which it held the appellant, which shows that that requirement was applied inconsistently and constitutes inequality of treatment.

54 None the less, and in any event, although it has been found, in the assessment of the first and third grounds of appeal, that the General Court erred in law in its approach concerning the requirement of public distancing, the errors in law thus committed cannot be effectively invoked by the appellant.

55 The principle of equal treatment must be reconciled with the principle of legality (see, to that effect, judgment in *The Rank Group*, C-259/10 and C-260/10, EU:C:2011:719, paragraph 62 and the case-law cited). Therefore, given that, in the assessment of the first ground of appeal, the finding as to the duration of the appellant's participation in the cartel was held to be correct, the possibly unjustified favourable treatment limited to Repsol cannot bring about a reduction in the length of that participation.

56 Consequently, the second ground of appeal must be rejected as unfounded.

Fourth ground of appeal, alleging infringement of the principles of effective judicial protection and that penalties must be specific to the infringing party, and the obligation to state reasons

57 Recital 696 of the decision at issue is worded as follows:

'A number of undertakings claim that they have not implemented the arrangements and point to the limited amount of pricing letters they sent or received. Several undertakings claim that their conduct on the market was not influenced by the arrangements. The Commission does not, firstly, consider such mere assertions to be sufficient evidence for non-implementation in the sense of the 2006 Guidelines ... The Commission, secondly, observes that the sending or receiving of pricing letters was

not the only means of implementation but that implementation mainly occurred through the regular (attempts of) price increases all undertakings communicated to the market, sometimes documented in the evidence of the Technical Meetings.'

58 In response to the fifth plea in law made at first instance, alleging infringement of the obligation to state reasons and of the 2006 Guidelines concerning the lack of implementation of the alleged unlawful practices, which amounts to a mitigating circumstance under point 29 of those guidelines, the General Court referred, in paragraphs 406 and 407 of the judgment under appeal, after having adopted recital 696 of the decision at issue verbatim, to its explanations with regard to the assessment of the second plea in law of the application and concluded that the Commission's affirmations relating to the implementation of the cartel by the appellant were supported by sufficient evidence.

Arguments of the parties

59 The appellant submits that the General Court did not respond to the plea alleging failure to take account of the economic evidence that it had behaved in accordance with the competition rules and examine the relevance and content of that evidence. Thus, the appellant submitted to the Commission, and then to the General Court, an in-depth economic analysis covering the entire period of the alleged infringement and demonstrating that it had never implemented the agreements said to have been concluded at the technical meetings. That analysis went unmentioned not only in the decision at issue, but also in the judgment under appeal, since paragraphs 406 and 407 of that judgment did not provide any response to the appellant's arguments. The appellant states in this regard that the analysis carried out by the General Court when examining the second plea in law raised in its application, to which paragraph 407 of the judgment under appeal refers, concerns the implementation of the cartel as a whole and not the individual behaviour of each of the undertakings concerned.

60 The Commission submits, primarily, that this plea in law is inadmissible given that the appellant does not state precisely the contested points of the judgment under appeal nor legal arguments specifically advanced in support of the appeal. Furthermore, by this ground of appeal, the appellant, in reality, seeks to obtain a complete re-evaluation from the Court of the fifth plea in law at first instance.

61 In the alternative, the Commission claims that the General Court examined the fifth plea in law in paragraphs 405 to 408 of the judgment under appeal and that those paragraphs refer to the evaluation carried out by the General Court when considering the second plea in law at first instance. In paragraphs 243 to 259 of the judgment under appeal, which also relate to the examination of the second plea in law raised in the application at first instance, the General Court endorsed the Commission's reasoning that the appellant had not adduced evidence to show that it had adopted competitive behaviour in the market. In addition, in paragraphs 163 to 190 of the judgment under appeal, which also form part of the examination of the second ground of appeal, the General Court rejected on the basis of specific evidence the appellant's argument that it has not implemented the price-fixing agreement of the cartel.

Findings of the Court

62 By its fourth ground of appeal, the appellant submits that the General Court did not respond to its fifth plea in law in the application at first instance alleging failure to take into account evidence of its allegedly competitive conduct and, in particular, an in-depth economic analysis covering the entire period of the infringement.

63 That argument proceeds on the basis of a manifestly erroneous reading of the judgment under appeal, and in particular of the General Court's reasoning in paragraph 406 et seq. of that judgment. Having cited verbatim in paragraph 406 of the judgment under appeal recital 696 of the decision at issue in

which the Commission referred in a general manner to the fact that 'a number of undertakings' claimed that they had not implemented the arrangements agreed in the course of the cartel at issue, the General Court referred in paragraph 407 of that judgment to the explanations that it gave in its examination of the second plea of the application at first instance.

64 By the second ground of appeal, the appellant claims that there was no proof of the implementation of the price-fixing agreements.

65 Clearly, in paragraphs 166 to 185 of the judgment under appeal, which are devoted to the examination of that claim, the General Court examined the evidence adduced by the Commission also concerning the appellant's individual participation in the implementation of those agreements, such as pricing letters exchanged between those participating in the cartel and announcing increases in prices, letters — following arrangements agreed during the previous collusive meeting — stating increases in prices to customers and statements made in that regard by some of those participating in the cartel and referring in addition to telephone conversations between the representatives of the undertakings implicated in the cartel to ensure that those arrangements were properly implemented.

66 Having stated, in paragraph 189 of the judgment under appeal, that the Commission had information about more than 50 anti-competitive meetings between 1992 and 2005 and that it has produced 343 pricing letters from the appellant directed at informing its customers of forthcoming price increases, the General Court found in paragraph 190 of that judgment that the Commission was correct to find that the cartel had been implemented by the appellant.

67 By the fourth limb of the second plea in law of the application at first instance, the appellant claimed that it had adopted competitive conduct in the market in conformity with the rules on competition.

68 It must also be held that, in paragraphs 233 to 259 of the judgment under appeal, the General Court examined the appellant's arguments in detail, including its invocation of an economic analysis of its pricing policy. In addition to the specific examination of those arguments, the General Court particularly relied on the fact that the appellant had participated in more than half of the more than 50 anti-competitive meetings held between 1992 and 2005, that it had admitted to having regularly increased its prices, which was in itself in an indicium of the application of agreements formed during those meetings, and that it had in that regard sent 343 pricing letters to its customers. It thus found that the circumstances invoked by the appellant did not permit the conclusion that, for the 13 years over the course of which it had adhered to the agreements at issue, the appellant had actually eluded their application by adopting competitive behaviour in the market.

69 Consequently, the appellant's complaint that the General Court did not specifically take the appellant's own conduct into account, but assessed the overall situation with that of the other participants with regard to the implementation of the cartel as a whole, is unfounded.

70 In the light of those considerations, the fourth ground of appeal must also be rejected.

71 Since none of the grounds of appeal raised by the appellant has been upheld, the appeal must be dismissed.

Costs

72 In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those rules, which applies to the procedure on appeal by virtue of Article 184(1) of those rules, the unsuccessful party is

to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the appellant has been unsuccessful in its submissions and the Commission has applied for costs against it, the appellant must be ordered to pay the costs.

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

1. Dismisses the appeal;

2. Orders Total Marketing Services SA to pay the costs.

[Signatures]