Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

21 January 2016*

[Text rectified by order of 28 April 2016]

(Appeal — Article 81 EC — Agreements, decisions and concerted practices — Spanish market for penetration bitumen — Market sharing and price coordination — Excessive length of the proceedings before the General Court — Article 261 TFEU — Regulation (EC) No 1/2003 — Article 31 — Unlimited jurisdiction — Article 264 TFEU — Annulment, in whole or in part, of the Commission's decision)

In Case C-603/13 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 22 November 2013,

Galp Energía España SA, established in Alcobendas (Spain),

Petróleos de Portugal (Petrogal) SA, established in Lisbon (Portugal),

Galp Energía SGPS SA, established in Lisbon,

represented by M. Slotboom, advocaat, and G. Gentil Anastácio, advogado,

appellants,

the other party to the proceedings being:

European Commission, represented by C. Urraca Caviedes and F. Castillo de la Torre, acting as Agents, and by J. Rivas Andrés, avocat, and G. Eclair-Heath, Solicitor,

defendant at first instance,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Fourth Chamber, acting as President of the Fifth Chamber, K. Lenaerts, President of the Court, acting as a Judge of the Fifth Chamber, D. Šváby (Rapporteur), A. Rosas and C. Vajda, Judges,

Advocate General: N. Jääskinen,

Registrar: M. Ferreira, Principal Administrator,

* Language of the case: English.

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

after hearing the Opinion of the Advocate General at the sitting on 16 July 2015,

gives the following

Judgment

1 By their appeal, GALP Energía España SA ('GALP Energía España'), Petróleos de Portugal (Petrogal) SA ('Petróleos de Portugal') and GALP Energía SGPS SA ('GALP Energía SGPS') (together, 'the appellants'), seek to have set aside the judgment of the General Court of the European Union of 16 September 2013 in *Galp Energía España and Others* v *Commission* (T-462/07, EU:T:2013:459) ('the judgment under appeal'), by which that Court, first, partially annulled Commission Decision C(2007) 4441 final of 3 October 2007 relating to a proceeding under Article 81 EC, now Article 101 TFEU (Case COMP/38.710 — Bitumen (Spain)) ('the contested decision'), and reduced the amount of the fine imposed on them and, secondly, dismissed the action as to the remainder.

Legal context

2 Article 31 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1) provides:

'The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.'

Background to the dispute and the contested decision

3 The background to the dispute was set out in paragraphs 1 to 85 of the judgment under appeal and may be summarised as follows for the purposes of the present proceedings.

4 The product concerned by the infringement is penetration bitumen, a type of bitumen which has not been processed and is used for the construction and maintenance of roads.

5 The Spanish bitumen market comprises, first, three producers, namely the Repsol, CEPSA-PROAS and BP groups, and, secondly, importers, including the Nynäs group and that formed by the appellants.

6 From 1990 to 2003, 89.29% of the shares of Galp Energía España, formerly Petrogal Española SA, were held by Petróleos de Portugal and 10.71% by Tagus RE, an insurance company 98% of the shares of which are held by Petróleos de Portugal. Since 2003, Galp Energía España has been a wholly-owned subsidiary of Petróleos de Portugal. The latter, for its part, has been a wholly-owned subsidiary of Galp Energía SGPS since 22 April 1999.

7 Galp Energía España is engaged in the sale and marketing of bitumen in Spain. Its turnover for bitumen sales to unrelated parties in Spain was EUR 13 000 000 in 2001, the last full year of the infringement, corresponding to 4.54% of the relevant market. The consolidated total turnover of Galp Energia SGPS amounted to EUR 12 576 000 000 in 2006.

8 Following an application for immunity submitted on 20 June 2002 by the BP Group pursuant to the Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3), investigations were carried out on 1 and 2 October 2002 at the premises of the Repsol, PROAS, BP and Nynäs groups and of that formed by the appellants.

9 On 6 February 2004, the Commission sent the undertakings concerned a first round of requests for information pursuant to Article 11(3) of Council Regulation No 17 of 6 February 1962: first regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87).

10 By faxes of, respectively, 31 March 2004 and 5 April 2004, Repsol and PROAS submitted an application to the Commission pursuant to its Notice on immunity from fines and reduction of fines in cartel cases, together with a corporate statement.

11 After having sent four other requests for information to the undertakings concerned, the Commission formally initiated proceedings and, between 24 and 28 August 2006, notified a statement of objections to the BP, Repsol, CEPSA-PROAS and Nynäs groups and to that formed by the appellants.

12 On 3 October 2007, the Commission adopted the contested decision by which it found that the 13 companies to which it was addressed had participated in a complex of agreements and concerted practices in the marketing of penetration bitumen on Spanish territory (excluding the Canary Islands) in the form of market sharing and price coordination.

13 The various types or components of unlawful conduct which were identified are as follows:

— the establishment of sales quotas;

— the allocation of volumes of the product and customers between all participants in the cartel, on the basis of those quotas;

— the monitoring of the implementation of the market-sharing and customer-sharing arrangements, through the exchange of information on sales volumes ('the monitoring system');

— the establishment of a compensation mechanism to correct deviations from the market-sharing and customer-sharing arrangements ('the compensation mechanism');

— the agreement on the variation of bitumen prices and the time at which the new prices would apply;

— participation in regular meetings and other contacts in order to agree on the above restrictions of competition and to implement or modify them as required.

14 The Commission considered it established that the staff of Galp Energía España had participated in the cartel on its behalf. In the light of the case-law on the presumption that a parent company actually exercises decisive influence over its wholly-owned subsidiary, and given the shareholding relationship between Galp Energía España, Petróleos de Portugal and Galp Energia SGPS, the Commission took the view that Galp Energía España, Petróleos de Portugal and also, from 22 April 1999, Galp Energia SGPS had constituted a single undertaking for the purposes of the application of Article 81(1) EC.

15 The Commission considered that each of the two restrictions of competition established, namely the horizontal market-sharing arrangements and the price-coordination, was by its nature among the most serious types of infringements of Article 81 EC, which, according to the case-law, are capable of warranting the classification of 'very serious' infringements solely on the basis of their nature, without there being any need for such conduct to cover a particular geographic area or have a particular impact.

16 The Commission took the view that it was not possible to measure the actual impact of the cartel on the market, due inter alia to insufficient information on likely bitumen net price developments in Spain in the absence of the arrangements. The Commission took the view that it was not required to demonstrate precisely the actual impact of the cartel on the market at issue or to quantify it, but that

it could confine itself to estimates of the probability of such an effect. In any event, the Commission considered that the cartel agreements were effectively implemented and that it was likely that they produced actual anticompetitive effects.

17 In view of the nature of the infringement, the Commission considered that the Repsol, PROAS, BP and Nynäs groups and that formed by the appellants had committed a very serious infringement of Article 81 EC and stated that this conclusion was irrespective of whether the cartel had had a measurable impact on the market at issue. The Commission added that it took account of the fact that the collusion had concerned only the Spanish market.

18 The Commission set the 'starting amount' of the fines to be imposed by taking into account the seriousness of the infringement, the estimated value of the relevant market, namely EUR 286 400 000 in 2001, the last full year of the infringement, and the fact that the infringement was limited to sales of bitumen in one Member State. In the light of those factors, the Commission set the starting amount of the fines at EUR 40 000 000.

19 The Commission then placed the undertakings to which the contested decision was addressed in different categories, defined by reference to their relative importance on the relevant market, for the purposes of applying differential treatment, in order to take account of their effective economic capacity to cause significant damage to competition. To that end, the Commission relied on their shares, expressed in values of sales, of the Spanish market for penetration bitumen in 2001.

20 Repsol and PROAS, whose shares of the relevant market amounted, respectively, to 34.04% and 31.67% in 2001, were placed in the first category, BP, with a market share of 15.19%, in the second category, and Nynäs and the appellants, whose market shares were between 4.54% and 5.24%, in the third category. On that basis, the starting amounts of the fines to be imposed were adjusted as follows:

— category 1, for Repsol and PROAS: EUR 40 000 000;

— category 2, for BP: EUR 18 000 000;

— category 3, for Nynäs and the appellants: EUR 5 500 000.

21 In order to fix the amount of the fines at a level that would ensure a sufficient deterrent effect, the Commission considered it appropriate to apply a multiplier of 1.8 and 1.2 respectively to the fines to be imposed on BP and Repsol, by reference to their total turnover for 2006, the last year preceding the adoption of the contested decision, but not to apply a multiplier to the fines to be imposed on PROAS, Nynäs and the appellants.

22 After increasing the starting amount of the fines according to the length of the infringement, bringing the basic amount of the fine to EUR 9 625 000 for GALP Energía España and Petróleos de Portugal and to EUR 7 150 000 for GALP Energía SGPS, the Commission also concluded that the amounts of the fines to be imposed on Repsol and PROAS had to be increased by 30% on the basis of aggravating circumstances, since those two undertakings had been the leaders of the cartel.

23 The Commission compared the appellants' role with the roles of Repsol, PROAS and BP and examined whether a reduction of the amount of the fines was justified. The Commission considered it appropriate to distinguish the different role played by the appellants by taking into account their more limited involvement in the infringement and decided to reduce the amount of their fines by 10%.

24 Galp Energía España and Petróleos de Portugal were therefore ordered, in Article 2 of the operative part of the contested decision, jointly and severally to pay a fine of EUR 8 662 500, EUR 6 435 000 of which had to be paid jointly and severally by Galp Energía SGPS.

Procedure before the General Court and the judgment under appeal

25 By application lodged at the Registry of the General Court on 19 December 2007, the appellants applied for annulment, in whole or in part, of the contested decision, and, in the alternative, for a reduction of the amount of the fine imposed on them.

26 In support of their action, the appellants raised nine pleas.

27 The General Court upheld the appellants' third plea and annulled Article 1 of the decision in so far as it finds that Galp Energía España, Petróleos de Portugal and Galp Energía SGPS were involved in a complex of agreements and concerted practices in the Spanish market for bitumen, to the extent that that complex includes the system for monitoring the implementation of the market-sharing and customer-allocation arrangements and the compensation mechanism to correct deviations from the market-sharing and customer-allocation arrangements.

28 In that regard, as is apparent in particular from paragraphs 215, 292, 293 and 301 of the judgment under appeal, the General Court relied solely on evidence contemporaneous with the facts to hold that the appellants' responsibility in respect of the monitoring system and the compensation mechanism had not been established. It thus refused to take into consideration the statement of Mr V.C., the director of sales of bitumen at Petrogal Española SA (now Galp Energía España), of 6 December 2007, submitted in the procedural file by the appellants and, consequently, not admitted by the Commission as evidence against them in the contested decision.

29 In paragraphs 611, 625 and 626 of the judgment under appeal, the General Court nevertheless concluded, in view of Mr V.C.'s statement of 6 December 2007, that the appellants were aware of the participation of the other members of the cartel in the compensation mechanism, that they could also foresee the participation of the other members of the cartel in the monitoring system, and that, therefore, they could be held liable in respect of those two aspects of the infringement.

30 In the light of that evidence, the General Court held, in paragraph 630 of the judgment under appeal, that it was not necessary to vary the starting amount for the fine, but it considered it necessary, in paragraph 632 of that judgment, to increase the level of the reduction of the fine applied by the Commission in respect of mitigating circumstances.

31 In paragraphs 635 and 636 of that judgment, the General Court therefore partially upheld the ninth plea and reduced the amount of the fine by an additional 4%, which was added to the 10% reduction already granted by the contested decision.

32 The General Court dismissed the parties' other pleas for annulment, including the fifth and six pleas, alleging that the finding that they had participated in price coordination and the finding relating to the duration thereof were vitiated by illegality.

33 Consequently, the amount of the fine imposed on Galp Energía España and on Petróleos de Portugal, in Article 2 of the operative part of the contested decision, was set at EUR 8 277 500, while the amount of the fine imposed on Galp Energía SGPS, in that same article, was set at EUR 6 149 000.

Forms of order sought

34 By their appeal, the appellants request that the Court of Justice should:

— principally, set aside the judgment under appeal;

— annul Articles 1, 2 and 3 of the contested decision in so far as they concern the appellants and/or reduce the amount of the fine imposed on them;

— in the alternative, set aside the judgment and refer the case back to the General Court; and

— order the Commission to pay the costs.

35 The Commission contends that the Court of Justice should:

— dismiss the appeal; and

— order the appellants to pay all the costs.

The appeal

36 The appellants put forward three grounds in support of their appeal.

The first ground of appeal, alleging errors of law affecting the finding that the appellants had participated in price-coordination activities during the period 1995 to 2002

Arguments of the parties

37 By their first ground of appeal, which is divided into three parts, the appellants claim that the General Court wrongly applied Article 81(1) EC, distorted the evidence and disregarded the procedural rules regulating the assessment of evidence and the general principle of the presumption of innocence guaranteed by Article 48 of the Charter of Fundamental Rights of the European Union ('the Charter') by holding, in paragraphs 407 and 456 of the judgment under appeal, that the Commission could not be considered to have unlawfully concluded that the appellants had participated in price coordination 'until 2002'. Moreover, they submit, the General Court failed to give adequate legal reasons for that finding.

38 By the first part of their ground of appeal, the appellants complain that, in paragraphs 370 to 408 of the judgment under appeal, in order to hold that the Commission had demonstrated the appellants' participation in the price-coordination activities between 1995 and 2002, the General Court failed to take account of two exonerating elements, namely the fact that neither BP's leniency application nor the contemporaneous documents submitted by BP mentioned that the appellants had participated in the price-coordination activities.

39 By the second part of their ground of appeal, the appellants criticise the General Court on the ground that it failed to find that the contested decision does not contain any evidence of the date on which the appellants' alleged participation in the price-coordination activities started.

40 They claim, in this regard, that the statements of Repsol and of PROAS in relation to leniency do not mention any concrete facts, inter alia concerning dates, meetings, telephone calls or price increases, and that those statements are not sufficiently precise and consistent to establish that the appellants participated in the price-coordination activities from 1995 to 2002. To that effect, they maintain also that the date of the start of the market-sharing cannot be considered to be the date of the start of Petróleos de Portugal's participation in the price agreements, since those two agreements constitute, according to the contested decision, separate aspects of the cartel.

41 By the third part of their ground of appeal, the appellants criticise the General Court for holding that the exchange of internal e-mails at Galp Energía España on 18 and 19 October 2000, assessed in paragraphs 387 to 404 of the judgment under appeal, constitutes contemporaneous evidence establishing the appellants' participation in price coordination.

42 The Commission considers that this ground of appeal is inadmissible in its entirety and, in any event, unfounded.

Findings of the Court

43 As a preliminary point, it should be noted that, according to settled case-law, it is apparent from Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment under appeal and also the legal arguments specifically advanced in support of the appeal, failing which the appeal or the ground of appeal in question will be dismissed as inadmissible (see, inter alia, judgment in *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 29 and the case-law cited).

44 Accordingly, a ground of appeal supported by an argument that is not sufficiently precise and substantiated to enable the Court to exercise its powers of judicial review does not satisfy those conditions and must be declared inadmissible (see, to that effect, judgment in *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 30 and the case-law cited).

45 The arguments alleging infringement of Article 81(1) EC, inadequate reasoning in the contested decision, infringement of the rules of procedure governing the assessment of evidence and of the general principle of the presumption of innocence, and the allegations of distortion of the evidence do not identify, with the required precision, any error of law on the part of the General Court, but consist of general and unsubstantiated statements, with the result that they must be rejected as inadmissible.

46 With regard to the first and third parts of the present ground of appeal, in so far as the appellants complain that the General Court, first, failed to take account of two items of evidence in order to find that the Commission had demonstrated the appellants' participation in the price-coordination activities between 1995 and 2002 and, secondly, found that the exchange of the appellants' internal e-mails of 18 and 19 October 2000 constitutes contemporaneous evidence demonstrating their participation in the price coordination, suffice it to note that, in accordance with the second subparagraph of Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal lies on a point of law only. The General Court, consequently, has exclusive jurisdiction to find and appraise the relevant facts and the evidence submitted to it. The appraisal of those facts and the assessment of that evidence thus do not, save where they distort the facts or evidence — this being a matter merely mentioned imprecisely and not substantiated by the appellants in the present case — constitute a point of law subject, as such, to review by the Court on appeal (see, inter alia, to that effect, judgment in *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 84).

47 Those arguments must therefore be rejected as inadmissible.

48 As regards the second part of the present ground of appeal, in so far as the appellants complain that the General Court failed to find that the contested decision did not include any evidence relating to the start of the appellants' alleged participation in the price-coordination activities at issue, suffice it to note that, contrary to what they claim, that argument was not raised by the appellants before the General Court. It is therefore new and, consequently, inadmissible.

49 In light of the foregoing, the first ground of appeal must be rejected as inadmissible in its entirety.

The third ground of appeal, alleging a failure by the General Court to adjudicate within a reasonable time

Arguments of the parties

50 The appellants claim that the General Court infringed Article 47 of the Charter and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), as it failed to adjudicate within a reasonable time, thereby justifying the setting-aside of the judgment under appeal and the annulment of the contested decision, or, in the alternative, a significant reduction of the fine imposed on them.

51 They state that their action for annulment was lodged on 19 December 2007, the written procedure concluded on 21 October 2008, the oral procedure was opened on 12 November 2012, the hearing was held on 24 January 2013 and the judgment was delivered on 16 September 2013.

52 Since the whole procedure lasted approximately five years and nine months (69 months), with a period of four years and one month (49 months) between the conclusion of the written procedure and the opening of the oral procedure, the appellants take the view, pursuant to the criterion defined by the Court in the judgment in *Baustahlgewebe* v *Commission* (C-185/95 P, EU:C:1998:608), that the General Court failed to fulfil its obligation to adjudicate within a reasonable time.

53 The appellants point out in this regard, first, that the case was much less complex than the majority of the other cartel cases brought before the General Court and that the number of actions was limited, since only four members of the cartel brought an action, and, secondly, the excessive length of the procedure before the General Court is in no way attributable to their conduct.

54 The Commission, for its part, submits that, in accordance with the well-established case-law of the Court, in the absence of any effect of the failure to adjudicate within a reasonable time on the outcome of the dispute, setting aside the judgment under appeal would not remedy the failure to adjudicate within a reasonable time.

Findings of the Court

55 It should be recalled that the sanction for a breach, by a Court of the European Union, of its obligation under the second paragraph of Article 47 of the Charter to adjudicate on the cases before it within a reasonable time must be an action for damages brought before the General Court, since such an action constitutes an effective remedy. Accordingly, a claim for compensation for the damage caused by the failure on the part of the General Court to adjudicate within a reasonable time may not be made directly to the Court of Justice in the context of an appeal, but must be brought before the General Court itself (judgments in *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 66; *ICF* v *Commission*, C-467/13 P, EU:C:2014:2274, paragraph 57; and *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363, paragraphs 17 and 18).

56 Where a claim for damages is brought before the General Court, which has jurisdiction under Article 256(1) TFEU, it must determine such a claim sitting in a different composition from that which heard the dispute giving rise to the procedure the duration of which is criticised (see, to that effect, judgments in *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 67; *ICF* v *Commission*, C-467/13 P, EU:C:2014:2274, paragraph 58; and *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363, paragraph 19).

57 None the less, where it is evident, without it being necessary for the parties to adduce evidence in that regard, that the General Court has breached, in a sufficiently serious manner, its duty to adjudicate within a reasonable period, the Court of Justice can find accordingly (see, to that effect, judgments in *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 90; *ICF* v *Commission*, C-467/13 P, EU:C:2014:2274, paragraph 59; and *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363, paragraph 20).

58 That is the position in the present case. The length of the proceedings before the General Court, namely almost five years and nine months, including, in particular, a period of four years and one month which elapsed without any procedural acts, between the end of the written procedure and the hearing, cannot be justified either by the nature or complexity of the case, or by the context thereof. First, the proceedings brought before the General Court were not particularly complex. Secondly, it is apparent neither from the judgment under appeal nor from the evidence presented by the parties that that period of inactivity was objectively justified or that the appellants had contributed to it.

59 It follows, however, from the considerations set out in paragraph 55 of the present judgment that the third ground of appeal must be rejected.

The second ground of appeal, alleging that the General Court exceeded its unlimited jurisdiction

Arguments of the parties

60 The appellants' second ground of appeal comprises three parts.

61 By the first part of this ground of appeal, they submit that the General Court, in paragraphs 625, 626 and 630 of the judgment under appeal, erred in law by exceeding its powers in so far as, in the context of a plea raised of its own motion, it held, in the exercise of its powers of unlimited jurisdiction, that the appellants were liable with respect to two elements of the infringement of Article 81(1) EC, namely the knowledge of the compensation mechanism and the foreseeability of the monitoring system.

62 The General Court, the appellants contend, also ruled *ultra petita* in the present case, since the Commission did not rely on those grounds in the contested decision, those grounds were not invoked as pleas for annulment by the appellants and were not the subject of any exchange of argument except that relating to the admissibility of Mr V.C.'s statement.

63 For its part, the Commission submits that the General Court was entitled, when it ruled on the level of the fine imposed on the appellants, to take account of the latters' awareness of the monitoring and compensation mechanisms, since that is a matter of fact. The Commission takes the view that the General Court was entitled to do the same with regard to Mr V.C.'s statement, in particular in so far as, in paragraph 40 of the judgment in *KNP BT* v *Commission* (C-248/98 P, EU:C:2000:625), the Court recognises the General Court's ability, when it assesses the appropriateness of fines, to take account of additional information not included in the decision which was submitted for its examination, as information required in accordance with the obligation to state reasons. Finally, the Commission takes the view that the ground of appeal is ineffective in so far as the General Court has already reduced the amount of the fine.

64 By the second part of the second ground of appeal, the appellants claim that, by holding, in paragraphs 624 and 625 of the judgment under appeal, that it was for it, in the exercise of its unlimited jurisdiction, to take into consideration Mr V.C.'s statement for the purpose of establishing that the appellants were liable on the basis of their knowledge of the compensation mechanism and of the

foreseeability of the monitoring system, the General Court disregarded the right to a fair trial, including the principle of the equality of arms, the rights of the defence and, in particular, the right to be heard.

65 The General Court, they submit, infringed those principles by failing precisely to inform the appellants, before ruling, of the nature and purpose of that new ground, in accordance with the requirements set out in Article 6 of the ECHR and in Articles 47 and 48 of the Charter.

66 The Commission disputes those arguments by emphasising that the evidence presented by Mr V.C. relating to knowledge of the monitoring and compensation mechanisms on the part of the appellants was mentioned for the first time by the latter. It is therefore, in its view, absurd for the appellants to claim that they were unable to obtain information about that evidence.

67 By the third part of their second ground of appeal, the appellants claim that, by holding them to be liable in respect of two elements of the infringement, the General Court, in paragraph 626 of the judgment under appeal, distorted the evidence and infringed the principle of the presumption of innocence. The finding, they submit, is based on an incomplete citation of Mr V.C.'s statement, which, they contend, shows clearly that Mr V.C. was unaware of the nature of the compensation mechanism forming the subject-matter of the decision.

68 According to the Commission, the General Court, on the contrary, did not distort the evidence in Mr V.C.'s statement.

Findings of the Court

69 By the first part of their second ground of appeal, read in conjunction with the second part thereof, the appellants claim that the General Court exceeded the bounds of its unlimited jurisdiction, as defined in Article 261 TFEU and Article 31 of Regulation No 1/2003.

70 For the purpose of determining whether the first part of this ground of appeal is well-founded, it must, first of all, be noted that, after stating, first, in paragraphs 265, 266, 270 and 292 of the judgment under appeal, that the Commission had failed to demonstrate that the appellants had participated in the compensation and control mechanisms at issue and, secondly, in paragraph 282 of that judgment, that the Commission did not base the contested decision on any ground other than the participation of the appellants in those two elements in order to hold them liable in that regard, the General Court stated as follows in paragraphs 624 to 626 and 630 of that judgment:

'624 … it is for the Court, in the present case, to take account, in the exercise of its unlimited jurisdiction, of Mr V.C.'s statement of 6 December 2007.

625 In the light of that statement, it must be concluded that the applicants were aware of the participation of the other members of the cartel in the compensation mechanism and they could have also foreseen the participation of the other members of the cartel in the monitoring system.

626 They can therefore be held liable in respect of those two aspects of the infringement (Case C-49/02 P *Commission* v *Anic Partecipazioni* [EU:C:1999:356], paragraph 83).

…

630 Given that the applicants can be held liable in respect of the monitoring system and the compensation mechanism, and in respect of all the other forms of unlawful conduct, there is no need to vary the starting amount of the fine … .'

71 It should also be noted that the system of judicial review of Commission decisions relating to proceedings under Articles 101 TFEU and 102 TFEU consists in a review of the legality of the acts of the institutions for which provision is made in Article 263 TFEU, which may be supplemented, pursuant to Article 261 TFEU and at the request of applicants, by the General Court's exercise of unlimited jurisdiction with regard to the penalties imposed in that regard by the Commission (judgment in *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 42).

72 [Rectified by order of 28 April 2016] In that regard, as the Court has stated on many occasions, the scope of judicial review provided for in Article 263 TFEU extends to all the elements of Commission decisions relating to proceedings applying Articles 101 TFEU and 102 TFEU which are subject to in-depth review by the General Court, in law and in fact, in the light of the pleas raised by the appellants (see, to that effect, judgments in *KME Germany and Others* v *Commission*, C-272/09 P, EU:C:2011:810, paragraphs 102 and 109; *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraphs 62 and 82; and *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraphs 56 and 59) and taking into account all the elements submitted by the latter, whether those elements pre-date or post-date the contested decision, whether they were submitted previously in the context of the administrative procedure or, for the first time, in the context of the proceedings before the General Court, in so far as those elements are relevant to the review of the legality of the Commission decision (see, to that effect, judgment in *Knauf Gips* v *Commission*, C-407/08 P, EU:C:2010:389, paragraphs 87 to 92).

73 It should be noted, however, that the EU Courts cannot, in the context of the review of legality referred to in Article 263 TFEU, substitute their own reasoning for that of the author of the contested act (see, to that effect, judgment in *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraph 89 and the case-law cited).

74 Moreover, Article 261 TFEU provides that '[r]egulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations'. Making use of the power granted by that provision, the EU legislature stated, in Article 31 of Regulation No 1/2003, that 'the Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment [and that] it may cancel, reduce or increase the fine or periodic penalty payment imposed'.

75 Therefore, when they exercise their unlimited jurisdiction provided for in Article 261 TFEU and Article 31 of Regulation No 1/2003, the EU Courts are empowered, in addition to the mere review of the legality of the penalty, to substitute their own assessment in relation to the determination of the amount of that penalty for that of the Commission, which adopted the measure in which that amount was initially fixed (see, to that effect, judgment in *Groupe Danone* v *Commission*, C-3/06 P, EU:C:2007:88, paragraph 61).

76 By contrast, the scope of that unlimited jurisdiction is strictly limited, unlike the review of legality provided for in Article 263 TFEU, to determining the amount of the fine (see, to that effect, inter alia, judgments in *Groupe Danone* v *Commission*, C-3/06 P, EU:C:2007:88, paragraph 62; *Alliance One International* v *Commission*, C-679/11 P, EU:C:2013:606, paragraph 105; *Commission and Others* v *Siemens Österreich and Others*, C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 126; and *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 45).

77 It follows from this that the unlimited jurisdiction enjoyed by the General Court on the basis of Article 31 of Regulation No 1/2003 concerns solely the assessment by that Court of the fine imposed by the Commission, to the exclusion of any alteration of the constituent elements of the infringement lawfully determined by the Commission in the decision under examination by the General Court.

78 In this case, as has been noted in paragraph 70 of the present judgment, even though it had held that the Commission had failed to establish that the appellants had participated in the compensation mechanism and in the monitoring system, and that the contested decision was not based on any ground other than the participation of those appellants in those two aspects of the infringement, the General Court, in the context of its unlimited jurisdiction, held in paragraphs 625, 626 and 630 of the judgment under appeal that the appellants were aware of the participation of the other members of the cartel in the compensation mechanism, but also that they could foresee the participation of those other members in the monitoring system. Consequently, it held that, first, they could be held liable under Article 101 TFEU and, secondly, that it was necessary to take account of that fact when fixing the amount of the fine.

79 By so doing, the General Court erred in law.

80 Since the first part of the second ground of appeal is well-founded, it must be upheld.

81 Consequently, the judgment under appeal must be set aside in so far as it fixes, in paragraph 3 of its operative part, the new amount of the fines imposed on the appellants, taking account of the finding, made incorrectly by the General Court in the exercise of its unlimited jurisdiction in paragraphs 625, 626 and 630 of that judgment, according to which the appellants were aware of the participation of other members of the cartel in the compensation mechanism and that they could also foresee the participation of those other members in the monitoring system, and, therefore, that the appellants could be held liable in that regard.

82 In light of the foregoing, there is no need to rule on the other aspects of the second part and on the third part of the second ground of appeal.

The action before the General Court

83 Pursuant to the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if a judgment under appeal is set aside, the Court may give final judgment in the matter where the state of the proceedings so permits.

84 That is the position in the present case, since the Court has all the information necessary in order to rule on the action.

85 In this regard, it should be noted that it has been definitively established, with respect to paragraph 1 of the operative part of the contested decision, as partially annulled by the judgment under appeal, and in the light of the rejection of the first ground of the present appeal in paragraph 49 of the present judgment, that the appellants must be held liable for their participation, during the period from 31 January 1995 to 1 October 2002 for GALP Energía España and Petroléos de Portugal and from 22 April 1999 to 1 October 2002 for GALP Energía SGPS, in a complex of agreements and concerted practices in the marketing of penetration bitumen on the entire Spanish territory (excluding the Canary Islands) and consisting in market sharing and price coordination.

86 The General Court's finding that there is a lack of evidence of the appellants' participation in the compensation mechanism and the monitoring system is not capable, in accordance with the first paragraph of Article 264 TFEU, of leading to the annulment of the contested decision in its entirety, since those elements were ancillary components of the infringement in question. The fact that the Commission failed to adduce evidence of such participation on the part of the appellants does not alter the substance of the contested decision, in so far as the single and continuous infringement established by the Commission consists, as is apparent from paragraphs 12 and 13 of the present

judgment, essentially of two groups of principal infringements, namely market sharing and price coordination (see, to that effect, judgment in *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraphs 36 to 38).

87 In the light of the foregoing, the Court must rule, in accordance with the unlimited jurisdiction conferred on it by Article 261 TFEU and Article 31 of Regulation No 1/2003, on the amount of the fine to be imposed on the appellants (judgment in *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363, paragraph 73 and the case-law cited).

88 In this regard, it must be noted that the Court, when itself giving final judgment in the matter, in accordance with the second sentence of the first paragraph of Article 61 of its Statute, is empowered, in the exercise of its unlimited jurisdiction, to substitute its own appraisal for that of the Commission and, consequently, to cancel, reduce or increase the fine or periodic penalty payment imposed (see, inter alia, judgment in *KME Germany and Others* v *Commission*, C-389/10 P, EU:C:2011:816, paragraph 130 and the case-law cited).

89 In order to determine the amount of the fine imposed, it is for the Court to assess for itself the circumstances of the case and the nature of the infringement in question (judgment in *Nederlandsche Banden-Industrie-Michelin* v *Commission*, 322/81, EU:C:1983:313, paragraph 111).

90 That exercise involves, in accordance with Article 23(3) of Regulation No 1/2003, taking into consideration, with respect to each undertaking sanctioned, the seriousness and duration of the infringement at issue, in compliance with the principles of, inter alia, adequate reasoning, proportionality, the individualisation of penalties and equal treatment (see, to that effect, judgments in *Commission and Others* v *Siemens Österreich and Others*, C-231/11 P to C-233/11 P, EU:C:2014:256, paragraphs 53 and 56; *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363, paragraph 75; and *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraph 77), and without the Court being bound by the indicative rules defined by the Commission in its guidelines (see, by analogy, judgment in *Italy* v *Commission*, C-310/99, EU:C:2002:143, paragraph 52), even where the latter may give guidance to the EU Courts when they exercise their unlimited jurisdiction (see, to that effect, judgment in *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 80 and the case-law cited).

91 In the present case, it must be stated that the appellants participated, within Spanish territory, in a single and continuous infringement consisting essentially in market sharing and price coordination, an infringement which is very serious by virtue of its intrinsic nature (see, to that effect, judgment in *Versalis* v *Commission*, C-511/11 P, EU:C:2013:386, paragraph 83), during a significant period of seven years and eight months in the case of GALP Energía España and Petróleos de Portugal and of three years and five months in the case of GALP Energía SGPS.

92 It is also necessary to take into consideration the fact that, as regards their individual situation, the appellants held, as is apparent from paragraph 514 of the contested decision, market shares of 4.54%, allowing it to be concluded, as the General Court did in paragraph 631 of the judgment under appeal, that, because of their size, they were not capable, by their infringing conduct, of causing significant damage to competition. Moreover, it was concluded, correctly, by the Commission, in paragraphs 566 and 567 of the contested decision, that the appellants had participated in the infringement in a more limited way than the other undertakings.

93 For the purposes of fixing the fine to be imposed on the appellants, the Court intends to adopt the assessments made by the Commission and by the General Court with respect to the basic amount of the fine and the 10% reduction thereof on account of the appellants' limited participation in the infringement at issue. An additional reduction of 10% of the basic amount must, however, be applied,

that reduction being thus added to the 10% reduction already granted in the contested decision by reason of the lack of evidence by the Commission of the appellants' participation in the compensation mechanism and the monitoring system.

94 In those circumstances, and given all the factual circumstances of the case (see judgment in *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363, paragraph 78 and the case-law cited), the amount of the joint and several fine imposed on GALP Energía España and Petróleos de Portugal is fixed at EUR 7.7 million, of which GALP Energía SGPS is held jointly and severally liable for EUR 5.72 million.

Costs

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

96 Under Article 138(1) of those Rules, which applies to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Article 138(3) of those Rules states, moreover, that, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

97 In that regard, it is appropriate to rule, in the light of the facts of the case, that the appellants are to bear two thirds of the Commission's costs and to pay two thirds of their own costs incurred in the context of the appeal, and that the Commission is to bear one third of its own costs and to pay one third of the costs of the appellants connected with the appeal proceedings. In addition, in the light of the grounds raised by the appellants before the General Court, some of which were definitively rejected, each of the parties shall bear its own costs relating to the proceedings at first instance.

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

1. **Sets aside the judgment of the General Court of the European Union of 16 September 2013 in *Galp Energía España and Others* v *Commission* (T-462/07, EU:T:2013:459) in so far as it fixes, in paragraph 3 of its operative part, the new amount of the fines imposed on GALP Energía España SA, Petróleos de Portugal SA and GALP Energía SGPS SA by taking account of the finding, made incorrectly by the General Court in the exercise of its unlimited jurisdiction in the grounds of that judgment, that GALP Energía España SA, Petróleos de Portugal SA and GALP Energía SGPS SA were aware of the participation of the other members of the cartel in the compensation mechanism and that they could also foresee the participation of those other members in the monitoring system, and, therefore, that the appellants could be held liable in that regard;**

2. **Dismisses the appeal as to the remainder;**

3. **Fixes the amount of the fine imposed jointly and severally on GALP Energía España SA and Petróleos de Portugal SA in Article 2 of Commission Decision C(2007) 4441 final of 3 October 2007 relating to a proceeding under Article 81 EC (Case COMP/38.710 — Bitumen (Spain) at EUR 7.7 million, of which GALP Energía SGPS SA is held jointly and severally liable for EUR 5.72 million;**

4. Orders GALP Energía España SA, Petróleos de Portugal SA and GALP Energía SGPS SA to bear two thirds of the costs of the European Commission and to pay two thirds of their own costs incurred in the context of the appeal, and to bear their own costs relating to the proceedings at first instance;

5. Orders the European Commission to bear one third of its own costs and to pay one third of those of GALP Energía España SA, Petróleos de Portugal SA and GALP Energía SGPS SA connected with the appeal proceedings, and to bear its own costs relating to the proceedings at first instance.

[Signatures]