Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber)

11 July 2014*

(Competition — Agreements, decisions and concerted practices — Paraffin waxes market — Slack wax market — Decision finding an infringement of Article 81 EC — Price fixing and market sharing — Liability of a parent company for the infringements of the competition rules committed by its subsidiaries and by a joint venture owned in part by it — Decisive influence exercised by the parent company — Presumption where the parent company holds 100% of the shares — Succession of undertakings — Proportionality — Equal treatment — 2006 Guidelines on the method of setting fines — Aggravating circumstances — Role of leader — Setting a limit on the fine — Unlimited jurisdiction)

In Case T-541/08,

Sasol, established in Rosebank (South Africa),

Sasol Holding in Germany GmbH, established in Hamburg (Germany),

Sasol Wax International AG, established in Hamburg,

Sasol Wax GmbH, established in Hamburg,

represented by W. Bosch, U. Denzel, C. von Köckritz, lawyers,

applicants,

v

European Commission, represented by F. Castillo de la Torre and R. Sauer, acting as Agents, and by M. Gray, Barrister,

defendant,

APPLICATION, primarily, for annulment in part of the Commission's 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) and, in the alternative, for annulment or reduction of the fine imposed on the applicants,

THE GENERAL COURT (Third Chamber),

composed of O. Czúcz (Rapporteur), President, I. Labucka and D. Gratsias, Judges,

Registrar: N. Rosner, Administrator,

* Language of the case: English.

having regard to the written procedure and further to the hearing on 3 July 2013,

gives the following

Judgment

Background to the dispute

1. *Administrative procedure and adoption of the contested decision*

1 By 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) ('the contested decision'), the Commission of the European Communities found that the applicants, Sasol Wax GmbH, Sasol Wax International AG, Sasol Holding in Germany GmbH and Sasol (which is hereinafter referred to as 'Sasol Ltd') (the applicants together 'Sasol'), with other undertakings, infringed Article 81(1) EC and Article 53(1) of the EEA Agreement, by participating in a cartel concerning the paraffin waxes market in the EEA and the German slack wax market.

2 The addressees of the contested decision are, as well as Sasol, the following companies: ENI SpA; Esso Deutschland GmbH, Esso Société anonyme française, ExxonMobil Petroleum and Chemical BVBA and Exxon Mobil Corp. (together 'ExxonMobil'); H&R ChemPharm GmbH, H&R Wax Company Vertrieb GmbH and Hansen & Rosenthal KG (together 'H&R'); Tudapetrol Mineralölerzeugnisse Nils Hansen KG; MOL Nyrt. ('Mol'); Repsol YPF Lubricantes y Especialidades SA, Repsol Petróleo SA and Repsol YPF SA (together 'Repsol'); Shell Deutschland Oil GmbH, Shell Deutschland Schmierstoff GmbH, Deutsche Shell GmbH, the Shell International Petroleum Company Ltd, the Shell Petroleum Company Ltd, Shell Petroleum NV and the Shell Transport and Trading Company Ltd (together 'Shell'); RWE Dea AG and RWE AG (together 'RWE'); and also Total SA and Total France SA (together 'Total') (recital 1 in the preamble to the contested decision).

3 Paraffin waxes are manufactured in refineries from crude oil. They are used for the production 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 contested decision).

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 contested decision).

5 The Commission began its investigation after Shell Deutschland Schmierstoff informed it, by letter of 17 March 2005, of the existence of a cartel and submitted an application to it for immunity under the Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the 2002 Leniency Notice') (recital 72 of the contested decision).

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 'H&R/Tudapetrol', ENI, MOL and also at those of the companies in the Sasol, ExxonMobil, Repsol and Total groups (recital 75 of the contested decision).

7 Between 25 and 29 May 2007, the Commission sent a statement of objections to each of the companies listed in paragraph 2 above and thus also to the applicants (recital 85 of the contested decision). By letter of 13 August 2007, Sasol Wax and Sasol Wax International replied jointly to the statement of objections. By another letter of the same date, Sasol Holding in Germany and Sasol Ltd also replied jointly to the statement of objections.

8 On 10 and 11 December 2007, the Commission held a hearing in which the applicants took part (recital 91 of the contested decision).

9 In the contested decision, in the light of the evidence available to it, the Commission considered that the addressees, which 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'). In the case of RWE (later Shell), ExxonMobil, MOL, Repsol, Sasol and Total, the infringement affecting paraffin waxes also consisted of customer and/or market allocation ('the second part of the infringement'). Furthermore, the infringement committed by RWE, ExxonMobil, Sasol and Total, also related to slack wax sold to end-customers on the German market ('the slack-wax part of the infringement') (recitals 2, 95 and 328, and Article 1 of the contested decision).

10 The unlawful practices took shape at anti-competitive meetings called 'technical meetings' or sometimes 'Blauer Salon' meetings of the participants and at 'slack wax meetings' devoted specifically to questions relating to slack wax.

11 The fines imposed in this case were 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 (OJ 2006 C 210, p. 2) ('the 2006 Guidelines'), in force at the time the statement of objections was notified to the companies in paragraph 2 above.

12 The contested decision includes, in particular, the following provisions:

'Article 1

The following undertakings have infringed Article 81(1) [EC] and — from 1 January 1994 — Article 53 [EEA] 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:

…

Sasol Wax GmbH: from 3 September 1992 to 28 April 2005;

Sasol Wax International AG: from 1 May 1995 to 28 April 2005;

Sasol Holding in Germany GmbH: from 1 May 1995 to 28 April 2005;

Sasol [Ltd]: from 1 May 1995 to 28 April 2005;

…

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

…

Sasol Wax GmbH: from 30 October 1997 to 12 May 2004;

Sasol Wax International AG: from 30 October 1997 to 12 May 2004;

Sasol Holding in Germany GmbH: from 30 October 1997 to 12 May 2004;

Sasol [Ltd]: from 30 October 1997 to 12 May 2004;

…

Article 2

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

ENI SpA: EUR 29 120 000;

Esso Société Anonyme Française: EUR 83 588 400,

of which jointly and severally with

ExxonMobil Petroleum and Chemical BVBA and Exxon Mobil [Corp.]: for EUR 34 670 400, of which jointly and severally with Esso Deutschland GmbH for EUR 27 081 600;

Tudapetrol Mineralölerzeugnisse Nils Hansen KG: EUR 12 000 000;

Hansen & Rosenthal KG jointly and severally with H&R Wax Company Vertrieb GmbH: EUR 24 000 000,

of which jointly and severally with

H&R ChemPharm GmbH for EUR 22 000 000;

MOL Nyrt.: EUR 23 700 000;

Repsol YPF Lubricantes y Especialidades SA jointly and severally with Repsol Petróleo SA and Repsol YPF SA: EUR 19 800 000;

Sasol Wax GmbH: EUR 318 200 000,

of which jointly and severally with

Sasol Wax International AG, Sasol Holding in Germany GmbH and Sasol [Ltd] for EUR 250 700 000;

Shell Deutschland Oil GmbH, Shell Deutschland Schmierstoff GmbH, Deutsche Shell GmbH, Shell International Petroleum Company Limited, the Shell Petroleum Company Limited, Shell Petroleum NV and the Shell Transport and Trading Company [Ltd]: EUR 0;

RWE-Dea AG jointly and severally with RWE AG: EUR 37 440 000;

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

2. *The structure of the Sasol group and Vara and the imputation of liability to the parent companies in the contested decision*

13 In recital 449 of the contested decision, the Commission first identified, as regards the Sasol group, the company directly responsible for the infringement. Thus it found that persons attending the technical meetings were employed by Hans-Otto Schümann GmbH & Co. KG ('HOS') from the beginning of the infringement, on 3 September 1992, until 30 April 1995. From 1 May 1995 until 31 December 2002, it was Schümann Sasol GmbH & Co. KG, which, in 2000, became Schümann Sasol GmbH (together 'Schümann Sasol'). From 1 January 2003 onwards, the employer was Sasol Wax.

14 Consequently, in recital 452 of the contested decision, Sasol Wax, the successor of HOS and Schümann Sasol, was found liable for direct participation in the infringement for the period from 3 September 1992 to 28 April 2005.

15 The Commission also examined the development over time of the holdings in HOS, Schümann Sasol and Sasol Wax. In that regard, it distinguished between three periods (recital 454 of the contested decision).

16 As regards the first period, from 3 September 1992 to 30 April 1995 ('the Schümann period'), the Commission found that HOS was ultimately controlled by Mr Schümann personally, through Vara Holding GmbH & Co. KG ('Vara'), which was the only limited partner in HOS (recitals 450 and 457 of the contested decision). Mr Schümann had a majority shareholding in Vara, the other shareholders being members of his family. In the contested decision, neither Vara nor Mr Schümann was held liable for the infringement committed by HOS.

17 The second period lasted from 1 May 1995 to 30 June 2002 ('the joint venture period'). On 1 May 1995, Sasol Ltd acquired two thirds of HOS. Following a reorganisation, HOS became Schümann Sasol and continued to be the company directly liable for the infringement. Schümann Sasol was a 99.9% subsidiary of Schümann Sasol International AG, one third of which was still held by Vara and, ultimately, by the Schümann family. Two thirds of Schümann Sasol International was held by Sasol Holding in Germany, itself a wholly owned subsidiary of Sasol Ltd. For this period, the Commission held the following companies jointly and severally liable: Sasol Wax (as the legal successor of Schümann Sasol), Sasol Wax International (as the legal successor of Schümann Sasol International, parent company of Schümann Sasol), Sasol Holding in Germany (as the parent company holding two thirds of the shares in Schümann Sasol International) and Sasol Ltd (as the parent company of Sasol Holding in Germany) (recitals 451 and 478 of the contested decision). It considered that the last three companies had exercised decisive influence over Schümann Sasol (recital 453 of the contested decision). Neither Vara, which held one third of Schümann Sasol International, nor the Schümann family, which owned Vara, was found liable for the infringement committed by Schümann Sasol, which was then owned by Schümann Sasol International ('Schümann Sasol International' or 'the joint venture'), the company owned jointly by Vara and the Sasol group.

18 The third period ran from 1 July 2002 to 28 April 2005, the date on which the infringement ended ('the Sasol period'). On 30 June 2002, the Sasol group acquired the remaining one third of Schümann Sasol International, which had until then been owned by Vara. Schümann Sasol was renamed Sasol Wax and remained the subsidiary of Schümann Sasol International, which in turn was renamed Sasol Wax International. Sasol Wax International was then wholly owned by Sasol Holding in Germany and, ultimately, by Sasol Ltd. For that period, the Commission held the four applicants jointly and severally liable for the infringement committed by Sasol Wax, as it considered that the first three applicants had exercised a decisive influence over Sasol Wax (recitals 451 and 453 of the contested decision).

Procedure and forms of order sought

19 By application lodged at the Court Registry on 15 December 2008, the applicants brought the present action.

20 Acting upon a report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure. In the context of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, the Court requested the parties to reply in writing to certain questions and to produce certain documents. The parties complied with that request within the prescribed period.

21 The parties presented oral argument and replied to questions put by the Court at the hearing on 3 July 2013.

22 In the light of the factual links with Case T-540/08 *Esso and Others* v *Commission*, Case T-543/08 *RWE and RWE Dea* v *Commission*, Case T-544/08 *Hansen & Rosenthal and H&R Wax Company Vertrieb* v *Commission*, Case T-548/08 *Total* v *Commission*, Case T-550/08 *Tudapetrol* v *Commission*, Case T-551/08 *H&R ChemPharm* v *Commission*, Case T-558/08 *ENI* v *Commission*, Case T-562/08 *Repsol Lubricantes y Especialidades and Others* v *Commission* and Case T-566/08 *Total Raffinage Marketing* v *Commission*, and the similarity and difficulty of the legal issues raised, the Court decided to reserve judgment in those related cases until after the last hearing, namely that of 3 July 2013 held in the present case.

23 In the application, the applicants claim that the Court should:

— principally, annul the contested decision in so far as it relates to them;

— in the alternative, annul or reduce in an appropriate manner the fine imposed on them in the contested decision;

— order the Commission to pay the costs.

24 The Commission contends that the Court should:

— dismiss the action in its entirety, including the claims in the alternative;

— order the applicants to pay the costs.

Law

25 In support of their action, the applicants put forward seven pleas in law. The first plea alleges that Sasol Ltd, Sasol Holding in Germany and Sasol Wax International were wrongly found liable for the infringement committed by Schümann Sasol during the joint venture period. The second plea alleges that Sasol Ltd, Sasol Holding in Germany and Sasol Wax International were wrongly found liable for the infringement committed by Sasol Wax during the Sasol period. The third plea alleges a failure to have regard to the principle of equal treatment in that the Commission did not find Vara jointly and severally liable for the Schümann period and the joint venture period. The fourth plea alleges incorrect determination of the basic amount of the fine. The fifth plea alleges that Sasol was wrongly assumed to hold a leading role. The sixth plea alleges that the same cap was unlawfully placed on the amount of the fine as regards the different periods of the infringement. The seventh plea alleges unlawful failure to grant full immunity to Sasol with regard to certain parts of the fine.

1. *The first plea, alleging that Sasol Ltd, Sasol Holding in Germany and Sasol Wax International were wrongly found liable for the infringement during the joint venture period*

26 The applicants submit that the Commission wrongly concluded that Sasol Ltd, via its 100% subsidiary Sasol Holding in Germany, alone exercised decisive influence over Schümann Sasol International and wrongly found Sasol Ltd, Sasol Holding in Germany and Sasol Wax International liable for the joint venture period. The organisational, financial and legal relationships between Schümann Sasol and the aforementioned companies, on which the Commission relied in the contested decision, do not support such a conclusion.

27 The applicants submit, principally, that Vara, the other parent company, alone exercised a decisive influence over Schümann Sasol International during the joint venture period. In the alternative, they submit that that decisive influence was exercised jointly by the two parent companies.

28 The Commission responds that Sasol was sanctioned according to its own responsibility and in line with the 2006 Guidelines. Moreover, it is established case-law that the Commission is not obliged to state reasons why it has not adopted an infringement decision in respect of third parties and that one undertaking cannot challenge a penalty imposed upon it on the ground that another undertaking has not been fined.

Preliminary observations

29 As regards the joint and several liability of a parent company for the conduct of its subsidiary or a joint venture owned by it, the fact that a subsidiary or a joint venture has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company (see, to that effect, Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, paragraph 132).

30 European Union competition law refers to the activities of undertakings and the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraph 54, and Joined Cases T-141/07, T-142/07, T-145/07 and T-146/07 *General Technic-Otis and Others* v *Commission* [2011] ECR II-4977, paragraph 53).

31 The Courts of the European Union have also stated that the concept of an undertaking, in that context, has to be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (see Case 170/83 *Hydrotherm Gerätebau* [1984] ECR 2999, paragraph 11; *Akzo Nobel and Others* v *Commission*, cited in paragraph 30 above, paragraph 55 and the case-law cited; and Case T-234/95 *DSG* v *Commission* [2000] ECR II-2603, paragraph 124). They have emphasised that, for the purposes of applying the competition rules, formal separation of two companies resulting from their having distinct legal identity is not decisive; the test is whether or not there is unity in their conduct on the market. Thus, it may be necessary to establish whether two or more companies that have distinct legal identities form, or fall within, one and the same undertaking or economic entity adopting the same course of conduct on the market (*Imperial Chemical Industries* v *Commission*, cited in paragraph 29 above, paragraph 140; Case T-325/01 *DaimlerChrysler* v *Commission* [2005] ECR II-3319, paragraph 85; and *General Technic-Otis and Others* v *Commission*, cited in paragraph 30 above, paragraph 54).

32 When such an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement (*Akzo Nobel and Others* v *Commission*, cited in paragraph 30 above, paragraph 56, and *General Technic-Otis and Others* v *Commission*, cited in paragraph 30 above, paragraph 55).

33 The conduct of a subsidiary may be imputed to the parent company, because of their membership of the same undertaking, when that subsidiary does not decide independently upon its own conduct on the market, because it is under the decisive influence of the parent company in that regard, having regard in particular to the economic, organisational and legal links between those two legal entities (see, to that effect, *Akzo Nobel and Others* v *Commission*, cited in paragraph 30 above, paragraph 58, and Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 527).

34 A subsidiary's conduct on the market is under the decisive influence of a parent company in particular where the subsidiary carries out, in all material respects, the instructions given to it by the parent company in that regard (*Imperial Chemical Industries* v *Commission*, cited in paragraph 29 above, paragraphs 133, 137 and 138; see, to that effect, Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, paragraph 27).

35 A subsidiary's conduct on the market is, as a rule, also under the decisive influence of a parent company when the latter retains only the power to define or approve certain strategic commercial decisions, if necessary by its representatives on the bodies of the subsidiary, whereas the power to define the subsidiary's commercial policy in the strict sense is delegated to the managers responsible for the subsidiary's operational management, chosen by the parent company and representing and promoting its commercial interests (see, to that effect, Case T-25/06 *Alliance One International* v *Commission* [2011] ECR II-5741, paragraphs 138 and 139, confirmed by the order of the Court of Justice of 13 December 2012 in Case C-593/11 P, not published in the ECR, paragraph 30).

36 When the unity of a subsidiary's conduct on the market and that of its parent company is ensured, in particular in the circumstances described in paragraphs 34 and 35 above or by other economic, legal organisational links between the companies in question, those companies form a single economic unit and therefore form a single undertaking, in accordance with the case-law referred to in paragraph 31 above. The fact that a parent company and its subsidiary constitute a single undertaking for the purpose of Article 81 EC enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement (see, to that effect *Akzo Nobel and Others* v *Commission*, cited in paragraph 30 above, paragraph 59).

37 The case-law set out in paragraphs 29 to 36 above is also applicable to the imputation of liability to one or more parent companies for an infringement committed by their joint venture (*General Technic-Otis and Others* v *Commission*, cited in paragraph 30 above, paragraphs 52 to 56).

38 The Court will examine in the light of those rules the applicants' arguments and the findings in the contested decision concerning the imputation of liability for the infringement at issue to the applicants on account of the conduct of (i) Schümann Sasol and (ii) its parent company Schümann Sasol International, the latter being owned during the joint venture period two thirds by Sasol Holding in Germany and one third by Vara.

Contested decision

39 In the contested decision, the Commission rejected the applicants' arguments seeking to show that during the joint venture period Schümann Sasol International was actually controlled by Vara. The basis for reaching that conclusion was in essence as follows:

'…

(471) The Commission considers that Sasol, via its 100%-subsidiary Sasol Holding in Germany GmbH, exercised decisive influence over Schümann Sasol International …

(472) As explained by Sasol, the management board, responsible for the day-to-day business, consisted of one representative each from Sasol and Vara respectively, plus a chairman. According to the by-laws of the management board, it shall, to the extent possible, pass its resolutions unanimously or otherwise by simple majority. In the event of a tie, the chairman of the management board shall have a casting vote. According to Sasol, the chairman was, for most of the joint venture period, a person representing Vara. Following further investigation, the Commission does not agree with Sasol on this point. The person in question was more likely the chairman due to his knowledge of the business and that it was also Sasol's wish that he would be chairman of the joint venture. It was important for Sasol, as the majority shareholder, to have a person on the management board who was familiar with the previous business of HOS. The person in question had worked for the German predecessor of Schümann Sasol International … and was thus familiar with the operative business of the company, which would be taken over by Sasol. Moreover, at the time the person in question started as chairman (2 May 1995), he was not employed by Vara. In fact, he was not employed by Vara before 1997. The person was chairman of the joint venture from 2 May 1995 until 30 June 2001, when he was replaced by Mr [D. S. R.] of Sasol.

(473) The supervisory board of the joint venture consisted of six members, four representatives of Sasol and two of Vara. As explained by Sasol, the shareholder and voting rights agreement provided that Sasol and Vara should unanimously decide on resolutions to be passed, with each of them having one decision and consequently Sasol's majority in the supervisory board would be abolished. If no consensus could be reached, the proposal was deemed to have been rejected. However, the shareholder and voting rights agreement also established in section 3 on resolutions of the supervisory board that section 1 of the agreement shall apply *mutatis mutandis*. Section 1.5 of the agreement states that if a unanimous decision cannot be reached with regard to the matters referred to in that section (a-d), the proposal of Sasol, for as long as it held more than 50% of the issued share capital in the company, shall prevail and Vara shall vote in accordance with the proposal of Sasol. The matters referred to in subparagraphs a-d of section 1.5 are the following: the establishment of the annual accounts, the appointment of auditors, the appointment of special auditors and the approval of capital investments by the company or any of its affiliated companies.

(474) [As regards the general meeting], Sasol explains that Vara had a blocking minority since the resolutions required a majority of 3/4 of all votes cast and Vara held 1/3 of the votes. In addition, according to Sasol, the shareholder and voting rights agreement provided that Sasol and Vara undertook to take all shareholders actions jointly and to vote unanimously on all matters, with each having one vote and if unanimity could not be reached neither Sasol nor Vara should take action and thus Vara could not be outvoted. However, as explained above, the shareholder and voting rights agreement in section 1.5, which applies to the [general meeting], lists certain matters for which Sasol's wish shall prevail (see recital (473)).

(475) With regard to the situation described in recitals (472)-(474), and in particular Sasol's ability to enforce its wish on important strategic decisions, if no consensus could be reached, such as those listed in section 1.5 of the shareholder and voting rights agreement (e.g. approval of capital investments), Sasol must be considered to have been in control of the joint venture. That managers of [Schümann Sasol] had formerly been with HOS, as Sasol argues, does not contradict this finding as the supervisory board's approval was required for such staffing decisions if they concerned senior management position (section 2(2)(c) of the by-laws of the management board) and Sasol was thus able to veto such decisions.

…

(481) For the reasons stated above, the Commission holds not only the acting company [Schümann Sasol], but also its parent companies Sasol International AG, Sasol Ltd and Sasol Holding in Germany GmbH liable for the joint venture period since it has been established that Sasol was in control of the joint venture … As set out in recitals (329)-(333), different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Article 81 [EC] if the companies concerned do not determine independently their own conduct on the market. In the case of a joint venture, it is possible to find that the joint venture and parents together form an economic unit for the purposes of the application of Article 81 [EC] if the joint venture has not decided independently upon its own conduct on the market. Whether or not the joint venture is to be regarded as a full-function joint venture … is irrelevant in this context as … [the] factual evidence demonstrate[s] decisive influence. The fact that the parents of a joint venture can be held liable is in line with the practice of the Commission on this specific issue, following the general legal principles explained in recital (340) set by the Community Courts. The fact that in another case, the Decision was not addressed to parent companies of a joint venture does not mean under these circumstances that Sasol International AG, Sasol Ltd and Sasol Holding in Germany GmbH, as the parent companies within the Sasol group, cannot be held liable for activities of [their] subsidiary, since the Commission enjoys a margin of discretion in deciding which entities of an undertaking it holds liable for an infringement and its assessment is done on a case-by-case basis.'

Distinguishing the concept of control from the actual exercise of decisive influence, as applied in the context of Article 81 EC

40 First of all, the Court points out that when the Commission considered whether the infringement committed by Schümann Sasol, the subsidiary of the joint venture, could be imputed to another company, it did not expressly distinguish between the concepts of 'control' and 'power of control', on the one hand, and 'economic unit' and 'actual exercise of decisive influence over commercial conduct', on the other.

41 The applicants submit that that approach is incorrect, given that the concept of control does not signify the actual exercise of decisive influence.

42 In the first place, it must be borne in mind that, according to Article 3(2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004 L 24, p. 1), '[c]ontrol shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking'.

43 According to the case-law, the Commission cannot, in order to impute the anti-competitive conduct of one company to another under Article 81 EC, take as its basis the mere ability to exercise decisive influence (as is the case regarding the application of Regulation No 139/2004 when establishing control), without needing to ascertain whether that influence has actually been exercised (*General Technic-Otis and Others* v *Commission*, cited in paragraph 30 above, paragraph 69).

44 On the contrary, it is, in principle, for the Commission to demonstrate such decisive influence on the basis of factual evidence (see Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 136 and the case-law cited). Such evidence includes the accumulation of posts by the same natural persons in the management of the parent company and its subsidiary or joint undertaking (Case T-132/07 *Fuji Electric* v *Commission* [2011] ECR II-4091, paragraph 184; see also, to that effect, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 119 and 120), or the fact that those

companies were required to follow the instructions issued by their single management and could not act independently on the market (see, to that effect, *HFB and Others* v *Commission*, cited in paragraph 33 above, paragraph 527).

45 In the present case, the Commission did not rely on such a direct demonstration of the exercise of decisive influence by Sasol Ltd and Sasol Holding in Germany over Schümann Sasol International.

46 In essence, the Commission examined the decision-making power which Sasol could exercise in the bodies of the joint venture through its representatives. The analysis in that regard is based essentially on an abstract examination of the decision-making procedures within those bodies, based on the provisions of the shareholders' agreement and the by-laws of the management board, which reproduced the voting mechanisms in the joint venture's articles of association. In addition, the Commission bases its conclusion regarding the imputation of liability to Sasol Holding in Germany and Sasol Ltd for the conduct of Schümann Sasol International in particular on the statement that 'it has been established that Sasol was in control of the joint venture' (recital 481 of the contested decision).

47 It follows that, in the present case, the Commission concluded that Sasol Ltd and Sasol Holding in Germany exercised decisive influence over the commercial conduct of Schümann Sasol International essentially on the basis of an abstract analysis of the documents signed before Schümann Sasol International began to operate, along the lines of an analysis according to the merger clearance rules.

48 Secondly, the Court is therefore called upon to examine to what extent such an abstract and prospective analysis, carried out in the area of mergers where the adoption of the clearance decision precedes the commencement of the joint venture, may also serve to demonstrate that decisive influence is actually exercised over the commercial conduct of a joint venture in a decision which holds the parent companies liable for the joint venture's past infringement of Article 81 EC.

49 In that regard, it is apparent from the case-law that, even though the power or possibility to determine the commercial decisions of the joint venture, in itself, relates only to the simple ability to exercise decisive influence over its commercial conduct — and thus falls within the concept of 'control' within the meaning of Regulation No 139/2004 — the Commission and the Courts of the European Union may presume that the legislation and the provisions of agreements relating to the operation of that undertaking, in particular the joint venture's articles of association and the shareholder and voting rights agreement, have been implemented and complied with. To that extent, the examination of whether decisive influence has actually been exercised over the commercial conduct of the joint venture may consist in an abstract analysis of the documents signed before it began to operate, along the lines of an analysis of control. In particular, when the legislation in question and the contractual provisions envisage that the votes of each parent company were necessary for a resolution to be passed by a body of the joint venture, the Commission and the Courts of the European Union may determine, in the absence of proof to the contrary, that the resolutions were adopted jointly by the parent companies (see, to that effect, *Avebe* v *Commission*, cited in paragraph 44 above, paragraphs 137 to 139; *Fuji Electric* v *Commission*, cited in paragraph 44 above, paragraphs 186 to 193; and *General Technic-Otis and Others* v *Commission*, cited in paragraph 30 above, paragraphs 112 and 113). Similarly, when the provisions in question enable one parent company alone to determine the decisions of the bodies of the joint venture, the Commission and the Courts of the European Union may find, in the absence of proof to the contrary, that that parent company exercised decisive influence over those decisions.

50 However, given that the examination concerning the actual exercise of decisive influence is retrospective and may therefore be based on concrete evidence, both the Commission and the interested parties may adduce proof that the commercial decisions of the joint venture were taken by procedures other than those apparent from the mere abstract examination of the agreements regarding the operation of the joint venture (see, to that effect, *Fuji Electric* v *Commission*, cited in

paragraph 44 above, paragraphs 194 and 195, and *General Technic-Otis and Others* v *Commission*, cited in paragraph 30 above, paragraphs 115 to 117). In particular, the Commission or the interested parties may adduce proof that, notwithstanding the power of a single parent company to adopt the decisions in question through its representatives occupying positions on the bodies of the joint venture, they were taken, in fact, by several or all of the parent companies unanimously.

The merits of the Commission's finding that Sasol Holding in Germany and Sasol Ltd were liable for the infringement of Schümann Sasol International

51 The applicants dispute, in essence, on two grounds, the Commission's analysis that Sasol Holding in Germany and Sasol Ltd were liable for Schümann Sasol International's infringement. First, they submit that the Commission made an error of assessment in failing to acknowledge that Mr B. I., chairman of Schümann Sasol International's management board, was Vara's representative. In the applicants' view, Vara was able, through its representative Mr B. I. to determine on its own the decisions of the management board during most of the joint venture period, since, under the by-laws of the management board, the chairman had a casting vote in the event of a tie. Secondly, the applicants submit that, in accordance with the articles of association of the joint venture and the shareholders' agreement, Vara could block most of the decisions in the general meeting and the supervisory board of the joint venture, so that Sasol Holding in Germany could not adopt those decisions on its own through its representatives' votes. On that basis, the applicants submit that Sasol Holding in Germany could not exercise decisive influence over the commercial conduct of Schümann Sasol International.

52 First of all, it should be borne in mind that, as regards the imputation of liability for a joint venture's infringement to several parent companies, the Commission may demonstrate the actual exercise of decisive influence, by proving that the joint venture is jointly managed by its parent companies. As regards the nature of that joint management, in its judgment in *Avebe* v *Commission*, cited in paragraph 44 above (paragraphs 136 to 138), the Court considered relevant the evidence that the members of the bodies of the joint venture appointed by each of the parent companies, representing their commercial interests, had to work in close collaboration when defining and implementing the joint venture's commercial policy and that the decisions adopted by them had necessarily to reflect a concurrence of wills of each of the parent companies which were found liable by the Commission. The Court examined not only the strategic decision-taking inside the joint venture, but also the day-to-day management, and stated that the two managers appointed by the two parent companies had to work in close collaboration in that regard also (*Avebe* v *Commission*, cited in paragraph 44 above, paragraphs 136 to 138).

53 However, in the present case, the Commission did not find both parent companies liable for the infringement by Schümann Sasol International, but only Sasol Holding in Germany and its parent company Sasol Ltd.

54 Where the Commission finds only one of the parent companies solely liable for their joint venture's infringement, it must show that the decisive influence on the joint venture's commercial conduct was exercised unilaterally by that parent company.

55 It is apparent from the contested decision and its pleadings in the proceedings before the Court that the Commission takes the view that the condition set out in paragraph 54 above was met in the present case. It found in recital 471 of the contested decision that 'Sasol [Ltd], via its 100%-subsidiary Sasol Holding in Germany GmbH, exercised decisive influence over Schümann Sasol International AG'. In addition, the Commission states, in paragraph 49 of the defence, that, 'Sasol Ltd (via Sasol Holding) exercised sole control over [Schümann] Sasol International' and, in paragraph 67 of that pleading, that 'Vara was not to be held liable for the infringement because solely Sasol exercised decisive influence over the joint venture'.

56 Consequently, the Court must examine whether the Commission could properly conclude, on the basis of the facts set out in the contested decision and despite the applicants' arguments during the administrative procedure concerning Vara's importance in the joint venture's management, that Sasol unilaterally exercised decisive influence over Schümann Sasol International.

The management board of Schümann Sasol International

57 The applicants state that resolutions of the management board of Schümann Sasol International were adopted by a simple majority and that, in the event of a tie, the chairman of the management board had a casting vote. However, the chairman of the management board, Mr B. I., represented Vara's interests.

58 They submit, essentially, that the Commission incorrectly assessed the evidence available to it, when it came to the conclusion that Mr B. I. did not represent Vara, but was chairman of the joint venture according to Sasol's wishes. The Commission based that finding on Vara's submission of 11 October 2007, in which Mr B. I. responded to the Commission's questions on behalf of Vara and paradoxically stated that — although he named himself as representing Vara for any further questions the Commission might have — he did not represent Vara in the joint venture period.

59 In addition, the applicants refer to their submission of 18 April 2008, according to which Mr B. I. in fact continuously acted as Mr Schümann's right-hand man and represented Vara in the joint venture with Sasol. Before the joint venture period, Mr B. I. was the dominating individual of Vara-controlled HOS, where he was managing director from 1987 onwards and served as Mr Schümann's confidant. In addition, Mr B. I. has also been active in leading positions in Vara and other companies owned by Mr Schümann during and after the joint venture period. That Mr B. I. has to be closely attributed to Vara and Mr Schümann is furthermore reflected in the announcement of the establishment of the joint venture dated 6 June 1995.

60 The applicants submit that the Commission was aware of those facts during the administrative procedure, but none the less ignored them and preferred without any further justification Vara's submission, which came from Mr B. I. personally, that is a person who himself held part of Vara's share capital as a limited partner.

61 The Commission observes, first of all, that the concept of decisive influence does not relate to the operational management of a joint venture but to the basic orientations concerning its commercial policy. As is clear from the articles of association of Schümann Sasol International, the management board acted under the auspices of the supervisory board and actions of the management board concerning important aspects of its commercial policy required the prior approval of the supervisory board.

62 Next, the Commission maintains that Mr B. I. did not represent Vara but owed his position to his knowledge of the field in which Schümann Sasol operated and that his appointment corresponded to Sasol's wishes. Vara informed the Commission by its submission of 11 October 2007 that Mr B. I. had been appointed as a manager of Sasol International because Sasol wanted to tap his in-depth knowledge of the HOS business and thus to have him on the management board. According to the Commission, this is credible as Sasol had a particular interest in the successful management of the joint venture and wished to preserve continuity by running the day-to-day business with a person on the management board who was familiar with the paraffin wax business and in particular with the previous business of HOS. In any event, in paragraph 10 of the rejoinder, the Commission takes the view that its findings, as set out in recital 472 of the contested decision, imply that Mr B. I. represented Sasol, not Vara, on the management board of Schümann Sasol International.

63 The Court considers it appropriate to examine, first of all, Mr B. I.'s role in the management board of Schümann Sasol International and, then, the more general question as to whether Sasol could unilaterally determine the resolutions adopted within that management board.

Mr B. I.'s role

64 It must be borne in mind that during almost the entire joint venture period, Mr B. I. was the chairman of the management board of Schümann Sasol International.

65 During the administrative procedure, the applicants stated that Mr B. I. was Vara's representative, whereas Vara stated that his appointment reflected Sasol's wishes, so that he did not represent Vara.

66 First of all, it must be noted that the findings in recital 472 of the contested decision reflect precisely the content of a Vara submission of 11 October 2007. By contrast, the position expressed in Sasol's submission of 18 April 2008 according to which Mr B. I. represented Vara, as well as the supporting documents, were rejected by the Commission.

67 As regards the wording of the Commission's statements concerning Mr B. I.'s role, the applicants submit, in substance, that it made an error of assessment in failing to acknowledge that he represented Vara on the management board.

68 First, it must be noted that Mr B. I. held important positions in the companies owned by Mr Schümann and the Vara group before, during and after the joint venture period.

69 It must be borne in mind that on 29 November 1996 Mr B. I. became a limited partner of Vara, one of the direct parent companies of Schümann Sasol International. In that capacity he owned part of Vara's authorised capital, Vara's other owners being the members of the Schümann family. The Court considers in that regard that the ownership of part of the authorised capital is capable of demonstrating that Mr B. I. could identify himself with Vara's specific commercial interests.

70 Similarly, during at least part of the joint venture period and in addition to performing his duties as chairman of the management board of Schümann Sasol International, Mr B. I. was managing director of Vara.

71 It is apparent from the case-law that the accumulation of managerial posts in one of the parent companies and their joint venture is a strong indication that the parent company in question exercises decisive influence over the commercial decisions of the joint venture, through the exercise of the decision-making power held by such a member of the joint venture's management (see, to that effect, *Fuji Electric* v *Commission*, cited in paragraph 44 above, paragraph 199).

72 Next, Mr B. I. was, from 15 June 1995, a managing director of Vara Beteiligungsgesellschaft mbH. According to one of the pieces of evidence produced by the applicants, he still held that position in 2011 alongside Mr Schümann. In addition, he was managing director of Beteiligungsgesellschaft Hans-Otto Schümann mbH from 4 April 1989 until the date of its liquidation, on 13 September 1996. That company is also associated with Mr Schümann, Vara's founder and main shareholder.

73 In addition, it must be pointed out that on 1 July 2001, when Mr D. S. R. replaced Mr B. I. as chairman of Schümann Sasol International's management board, Mr B. I. became one of the six members of that company's supervisory board. In so doing, Mr B. I. replaced Mr E. B. R who was also, in the Commission's view, Vara's representative, the composition of the supervisory board otherwise remaining unchanged. This indicates that Mr B. I. represented Vara on the supervisory board. That

factor is moreover in itself sufficient to reject the Commission's argument that Mr B. I. represented Sasol on the management board, since it is inconceivable that in such a case, immediately after the end of his term, he could have begun to represent Vara on the supervisory board.

74 Lastly, it must be noted that, in the letter of 2 February 1995 to all employees of HOS, Mr Schümann and Mr B. I. informed the employees of HOS about their ongoing negotiations with Sasol. In the letter, they state: '[W]e will still be able to influence the [new management of the joint venture] in the future as in the past.'

75 On that basis, the Court finds that the applicants adduced already at the stage of the administrative procedure evidence capable of proving that Mr B. I. had close links with the Vara group and Mr Schümann, that he could identify himself with Vara's specific commercial interests, in particular because of his status as a limited partner, and that Vara could exercise a significant influence over the decisions of the management board of the joint venture because of the accumulation of posts held by Mr B. I., which could cause the commercial policy of Schümann Sasol International to be aligned with that of Vara's.

76 Consequently, the Commission made an error of assessment when it dismissed that body of relevant evidence and only stated, in the contested decision, that the appointment of Mr B. I. reflected Sasol's wishes. Such a description gives a distorted picture of the relevant circumstances of the case and does not fulfil the criterion that liability for an infringement of Article 81 EC must be established on the basis of precise and consistent evidence, and that the Commission must take into consideration, in an impartial manner, all the relevant matters of fact and of law submitted to it (see, to that effect, Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank and Others* v *Commission* [2006] ECR II-3567, paragraphs 59 to 63; see, by analogy, Case C-450/98 P *IECC* v *Commission* [2001] ECR I-3947, paragraph 57 and the case-law cited).

77 That conclusion is not undermined by any of the Commission's arguments.

78 First, the Commission refers to the fact that Sasol agreed to the appointment of Mr B. I. as chairman of the management board.

79 It must be observed in that regard that, in accordance with the articles of association of Schümann Sasol International and the shareholders' agreement, all the members of the management board and its chairman had to be appointed by the supervisory board, by a unanimous vote taken by the representatives of Vara and Sasol. Thus, first, the composition of the management board had to reflect an agreement between the two parent companies, that is to say, the will of both companies. Secondly, Vara had also to agree to the appointment of the members, designated by Sasol, which the Commission regarded as Sasol's representatives.

80 Consequently, the fact that Sasol agreed to the appointment of Mr B. I. as chairman of the management board does not support the finding that he represented Sasol's commercial interests, beyond what is necessary for the proper management of a joint venture owned by two parent companies, nor rebut the evidence adduced by the applicants to show that Vara exerted influence within the management board through Mr B. I.'s decision-making power.

81 Secondly, it must be observed that the only concrete piece of evidence on which the Commission based its conclusion that Mr B. I. did not represent Vara, but that his appointment reflected Sasol's wishes, is Vara's statement of 11 October 2007, referred to in paragraph 66 above.

82 In the Commission's view, that statement is especially reliable, since it was sent in reply to a request for information from the Commission. Vara had a fundamental interest in presenting the situation correctly, given that a false statement could be punished by a fine under Article 23(1) of Regulation No 1/2003.

83 In that regard, it must be noted that the first page of the reply of 11 October 2007 to the request for information, containing the statement in question, indicates that the person responsible for the replies was in the first place Mr B. I. It is also established, as the applicants note, that at that time Mr B. I. was still a limited partner of Vara.

84 In addition, it must be found that the Commission did not define in its request for information to Vara, nor indeed in the contested decision, what it understood by the term 'representation'. Consequently, since Mr B. I. had not been formally authorised to represent Vara on the joint venture's management board, Vara could maintain, in its statement, that it was not represented, without the risk of incurring a fine.

85 In addition, it must be noted that an examination of the organisational links between the joint venture and the parent company does not necessarily relate to the representation of the parent company under a formal mandate from it to the director of the joint venture. It is more useful to take into consideration representation, in the broad sense, of the parent company's commercial interests (see paragraph 35 above) and the influence on the bodies of the joint venture with a view to aligning its commercial policy with that of the parent company, as shown, in particular, by an accumulation of posts in the parent company's management and the joint venture, and the ownership of part of the parent company's authorised capital by a director of the joint venture (see paragraph 44 above).

86 From that point of view, it must be added that the question of the representation of a parent company's commercial interests on a joint venture's management board is not a simple fact, which if denied may reasonably lead to a fine if the facts have been distorted. On the contrary, that question comes within the assessment which the Commission must carry out by taking into consideration, in an impartial manner, all the relevant matters of law and of fact submitted to it by the parent companies, which often have conflicting interests leading them to emphasise one or other of the relevant matters. It must also be pointed out that, in the present case, the Commission did not impose a fine under Article 23(1) of Regulation No 1/2003 on either Sasol or Vara, even though they made diametrically opposed statements on the issue in question.

87 In the light of the foregoing, it is appropriate to consider whether the Commission's error of assessment when examining Mr B. I.'s role (see paragraph 76 above) could affect the assessment of the influence exerted by Sasol on the management board of Schümann Sasol International.

The determination of the decisions of the management board of Schümann Sasol International

88 The applicants submit that, because of the dominant role of the members of the management board representing Vara, in particular that of Mr B. I., Sasol Ltd and Sasol Holding in Germany could not determine the decisions of that management board.

89 First, it should be noted that, in his notice of 6 June 1995 to the staff of Schümann Sasol AG (which became Schümann Sasol International), Mr B. I. described the roles of the management board of the joint venture. He stated that 'in addition to coordinating the work of the management board, [he would] continue to be responsible for marketing, sales and procurement and supervision of the subsidiaries', while Mr D. S. R. (of Sasol) would remain in his post in South Africa and be responsible for production and technical matters. Mr B. I. also stated that a third board member would be assigned to Hamburg (Germany).

90 It must be found that Mr B. I.'s decision-making powers are an indication of his central role on Schümann Sasol International's management board.

91 Secondly, it must be noted that in the letter of 2 February 1995 which Mr B. I. and Mr Schümann sent to all the HOS employees, they indicated that they could still influence the new management of the joint venture as in the past, when Vara was HOS's sole shareholder (see paragraph 74 above).

92 It is also apparent from that letter that it was the hope of Mr B. I. and Mr Schümann that the latter and Vara could, through Mr B. I., play a central role in Schümann Sasol International's management.

93 Thirdly, should it become apparent that, in fact, Mr B. I. represented Vara and Mr Schümann on the management board of Schümann Sasol International, it must be noted that the Commission did not refer, in the contested decision, to any evidence to prove that, despite Mr B. I.'s decision-making powers and his casting vote as chairman in the event of a tie, Sasol could unilaterally determine the management board's decisions.

94 Fourthly, such a capacity of Sasol to determine decisively the decisions of the management board is not apparent from the evidence concerning the various compositions of the management board submitted by the applicants during the administrative procedure.

95 Between 2 May and 31 October 1995, Schümann Sasol International's management board comprised Mr B. I. and Sasol's representative, Mr D. S. R. As the applicants correctly note, Mr B. I. could impose his own decisions in the management board on account of his casting vote.

96 During the period from 1 November 1995 to 30 June 2001, Schümann Sasol International's management board comprised Mr B. I., its chairman, and Mr D. S. R. and Mr H. G. B. The applicants take the view that Mr H. G. B. was Vara's representative, whereas the Commission contends that he was Sasol's representative.

97 It must be found that, in the contested decision, the Commission did not examine whether Mr H. G. B. did in reality represent the commercial interests of either parent company. In addition, there is evidence that Mr H. G. B. represented Vara's interests (see paragraph 99 below). Consequently, that composition of the management board also does not allow the conclusion that Sasol unilaterally determined that board's decisions.

98 Between 1 July 2001 and 16 May 2002, Mr D. S. R. (Sasol) was chairman of the management board, the other member being Mr H. G. B.

99 First of all, it must be noted that that composition of the management board shows that Mr H. G. B. was Vara's representative. It is not reasonable to suppose that Vara, owning one third of Schümann Sasol International's share capital, agreed to a management board composed solely of Sasol representatives.

100 The applicants submit that during that period, all the resolutions of the management board were passed unanimously.

101 It must be noted that there is not the slightest analysis of that period in the contested decision. Given that Sasol alone was found entirely liable for the infringement committed by the joint venture, the Commission should have shown that Sasol had unilaterally exercised decisive influence over Schümann Sasol International's commercial policy (see paragraph 54 above).

102 However, it must be borne in mind (see paragraph 52 above) that the passing of unanimous resolutions in the management board shows close collaboration between the parent companies and, therefore, joint management of the joint venture, which constitutes evidence that a decisive influence has been exercised jointly and not by one of the parent companies alone (see, to that effect, *Avebe* v *Commission*, cited in paragraph 44 above, paragraphs 137 and 138, and *Fuji Electric* v *Commission*, cited in paragraph 44 above, paragraph 194).

103 Consequently, that composition of the management board cannot support the conclusion that Sasol unilaterally determined Schümann Sasol International's decisions.

104 Lastly, between 17 May and 24 September 2002, Schümann Sasol International's management board comprised Mr D. S. R., Mr H. G. B. and Mr C. D. I.

105 The applicants submit that Mr H. G. B. and Mr C. D. I. were Vara representatives, so that even as chairman Mr D. S. R. could be outvoted by them.

106 It must be noted that, in the contested decision, the exercise of decisive influence by either parent company through Mr H. G. B. and Mr C. D. I. is not examined, nor is the composition of the management board set out generally. In addition, there is evidence to show that Mr H. G. B. represented Vara's interests (see paragraph 99 above). Consequently, it is not apparent from the contested decision that, during the period in question, Sasol could, through its representatives on the management board, unilaterally determine that board's decisions.

107 In the light of the foregoing, it must be found that the Commission has not proved in the contested decision that, in the light of Mr B. I.'s decision-making powers and those of the other members of the management board who could be associated with Vara, Sasol did in fact unilaterally determine the content of the decisions of Schümann Sasol International's management board through members who represented Sasol's commercial interests and sought to align Schümann Sasol International's conduct with its own. Nor is there any direct evidence in the contested decision (see paragraph 44 above) which could demonstrate such a decisive influence by Sasol.

Relevance of operational management

108 The Commission raises the issue of the fact that the management board of Schümann Sasol International was responsible for the day-to-day management of that company. It argues that, according to paragraphs 63 to 65, 82 and 83 of Case T-112/05 *Akzo Nobel and Others* v *Commission* [2007] ECR II-5049, the operational management of a subsidiary is irrelevant in determining whether there is an economic unit between a subsidiary and its parent company, since control over the commercial policy in the strict sense is not a condition for considering that a parent company forms one undertaking with a subsidiary. Rather, it is sufficient if a parent plays a significant role with regard to the matters that define the subsidiary's commercial policy.

109 It must be noted that the judgment referred to by the Commission relates to a factual situation in which the parent company held 100% of the subsidiary's share capital.

110 It is true that the question of operational management may be irrelevant in so far as a wholly-owned subsidiary with a single parent company is concerned, given that the demonstration that the subsidiary is operationally independent is not in itself capable of rebutting the presumption that decisive influence is exercised (see the case-law cited in paragraph 153 below).

111 However, where there is a sole shareholder, all the decisions — including those concerning the operational management of the subsidiary — are taken by managers who are designated and appointed either directly or indirectly (by the bodies whose members have been designated by the parent company) by the single parent company. Similarly, where there is no other shareholder, the only commercial interests that are evident within the subsidiary are as a rule those of the sole shareholder. Consequently, the Commission may presume that decisive influence has been exercised even where the operational management is conducted by the managers of the subsidiary autonomously.

112 By contrast, in the case of joint ventures, there are several shareholders and the decisions of the joint venture's bodies are taken by members representing the commercial interests of the various parent companies, which may coincide, but which may also diverge. Consequently, the question whether a parent company has exercised actual influence over the operational management of the joint venture, in particular through the managers appointed by it or who at the same time occupy positions in the parent company's management, continues to be relevant.

113 Lastly, it must be borne in mind that the Court examined in detail decision-making procedures within operational management in the judgments in *Fuji Electric* v *Commission*, cited in paragraph 44 above (paragraph 195), and *General Technic-Otis and Others* v *Commission*, cited in paragraph 30 above (paragraphs 112 to 117), in order to assess whether the applicants in those cases exercised decisive influence as regards their joint ventures' conduct on the market.

114 Consequently, the Court must reject the Commission's argument that determination of the joint venture's commercial policy in the strict sense by its parent company is irrelevant when examining whether there is an economic unit between them.

Conclusion on the management board of Schümann Sasol International

115 First, the Commission made an error of assessment in the contested decision when it examined Mr B. I.'s role (see paragraph 76 above). It cannot be ruled out that, in the absence of that error, the Commission would have concluded that Vara exercised decisive influence over the decisions of the management board of Schümann Sasol International during a considerable part of the joint venture period. Secondly, in any event, the Commission has failed to show that Sasol had in fact unilaterally determined the content of the decisions of the management board of Schümann Sasol International (see paragraph 107 above). Thirdly, it must be noted that the influence exercised over the decisions of the joint venture's management board is entirely relevant from the perspective of whether the parent companies may be found liable for a joint venture's infringement (see paragraph 114 above).

The supervisory board and the shareholders' meeting of Schümann Sasol International

116 The applicants submit that, because of the decision-taking powers held by Vara, the Commission could not properly find that Sasol had decisively influenced the decisions taken in the supervisory board and general meeting of Schümann Sasol International.

117 It must be borne in mind that the evidence set out by the Commission in recitals 473 and 474 of the contested decision indicates that both Sasol and Vara could block all the decisions within the general meeting and supervisory board of Schümann Sasol International, except those falling within section 1.5 of the shareholders' agreement.

118 Of the decisions referred to in section 1.5 of the shareholders' agreement, only the approval of investments falls with the category of strategic commercial decisions affecting the joint venture according to the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 (OJ 2008 C 95, p. 1).

119 In addition, in accordance with point 69 of the Commission Consolidated Jurisdictional Notice under Regulation No 139/2004, the most important veto rights concern decisions on the appointment and dismissal of the senior management and the approval of the budget of the joint venture. Point 69 also states that the power to co-determine the structure of the senior management, such as the members of the board, usually confers upon the holder the power to exercise decisive influence on the commercial policy of an undertaking. The same is true with respect to decisions on the budget since the budget determines the precise framework of the activities of the joint venture and, in particular, the investments it may make.

120 In accordance with the legislation and the provisions of the agreements governing the operation of the joint venture (Schümann Sasol International), Sasol Holding in Germany had the power to determine unilaterally only the decisions as to the approval of investments, not the most important strategic commercial decisions, namely those relating to the budget, the appointment and dismissals of the management or those relating to the business plan.

121 Consequently, the Commission has failed to show, by an abstract analysis based on the legislation and the provisions of the agreements governing the operation of the joint venture (see paragraph 49 above), that Sasol alone could determine, on the supervisory board and at the general meeting of Schümann Sasol International, all the strategic commercial decisions affecting the latter. On the contrary, it is apparent from the abstract analysis that the most important of those decisions had to be adopted jointly by Sasol Holding in Germany and Vara.

122 In addition, the contested decision does not show on the basis of concrete evidence (see paragraph 50 above) that, actually, Sasol Ltd and Sasol Holding in Germany determined alone, notwithstanding Vara's blocking power, the strategic commercial decisions of the joint venture Schümann Sasol International.

123 In the light of the foregoing, the Court concludes that the Commission has failed to show that Sasol had unilaterally determined the most important decisions of the supervisory board and general meeting of Schümann Sasol International and, in particular, the strategic commercial decisions relating to the budget, business plan and the appointment of the latter's senior management.

The actual exercise by Sasol Holding in Germany of decisive influence over the market conduct of Schümann Sasol International

124 Recital 475 of the contested decision states, '[w]ith regard to the situation described in recitals (472)-(474), and in particular Sasol's ability to enforce its wish on important strategic decisions, if no consensus could be reached, such as those listed in section 1.5 of the shareholder and voting rights agreement (e.g. approval of capital investments), Sasol must be considered to have been in control of the joint venture'. In recital 481 of the contested decision, the Commission found that 'it ha[d] been established that Sasol was in control of the joint venture' and that 'factual evidence demonstrat[ed] decisive influence' by Sasol Holding in Germany over Schümann Sasol International.

125 It follows from the foregoing analysis that the Commission failed to show, in the contested decision, that Sasol had determined unilaterally the resolutions of Schümann Sasol International's management board and the most important strategic decisions taken by the general meeting and its supervisory board (see paragraphs 115 and 123 above).

126 Similarly, the Commission has failed to demonstrate, by direct evidence, that Sasol Holding in Germany and Sasol Ltd exercised decisive influence over the commercial conduct of Schümann Sasol International.

127 Consequently, the Commission's analysis which led to Sasol Holding in Germany and Sasol Ltd being found liable for the infringement by Schümann Sasol, the subsidiary of Schümann Sasol International, is vitiated by errors of assessment. Accordingly, the first plea in law must be upheld and the contested decision annulled in so far as it makes Sasol Holding in Germany and Sasol Ltd liable for the infringement by Schümann Sasol.

128 The contested decision must therefore be annulled inasmuch as the Commission found that Sasol Holding in Germany and Sasol Ltd had taken part in the infringement before 1 July 2002.

The applicants' offer to adduce evidence

129 The applicants propose that the oral testimony of Mr C. D. I. (current board member of Sasol Wax International) be heard concerning the fact that, during the joint venture period, the basic orientation of the joint venture's commercial strategy and operations was determined by Vara, through Mr Schümann and Mr B. I.

130 In the light of the foregoing analysis, the Court considers that that testimony is not required, so that the offer to provide evidence is rejected.

2. *The second plea, alleging that Sasol Ltd, Sasol Holding in Germany and Sasol Wax International were wrongly found liable for the infringement during the Sasol period*

131 The applicants argue that the Commission unlawfully imputed liability for the actions of Sasol Wax to (i) its parent company Sasol Wax International, (ii) that company's parent company, Sasol Holding in Germany, and (iii) the company heading the group, Sasol Ltd, during the Sasol period, from 1 July 2002 to 28 April 2005.

The first part of the plea, alleging an error in law regarding the possibility of finding a parent company liable for an infringement committed by a subsidiary on the sole basis of a presumption founded on 100% ownership

132 In recital 494 of the contested decision, the Commission found as follows:

'[I]t is established case-law that the Commission can presume that parent companies exercise decisive influence on their wholly-owned subsidiary. Where such a presumption applies, as in this case for Sasol Wax International AG, Sasol Holding in Germany GmbH and Sasol Ltd, it is for the parent companies to rebut the presumption by adducing evidence demonstrating that [their] subsidiary decided independently on its conduct on the market.'

133 The applicants state that the Commission erred in law by applying the wrong legal standard. There is no valid legal basis justifying the presumption that a 100% shareholding as such is sufficient to establish a parent company's liability for the cartel behaviour of its subsidiary. Such a presumption is inconsistent with the principle of individual legal responsibility and the presumption of innocence.

134 The Court points out that in the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed the European Union competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary and, secondly, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary. In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (see Case C-97/08 P *Akzo Nobel and Others* v *Commission*, cited in paragraph 30 above, paragraphs 60 and 61 and the case-law cited).

135 In addition, according to the case-law, the presumption of liability based on the holding, by a company, of the entire share capital of another company, applies not only in cases where there is a direct relationship between the parent company and its subsidiary, but also where, as in the present case, that relationship is indirect due to the interposition of another company (Case C-90/09 P *General Química and Others* v *Commission* [2011] ECR I-1, paragraph 90).

136 Consequently, the Commission has not erred in law by finding that where a parent company has a 100% shareholding in a subsidiary, it can presume that that parent company, as well as the indirect parent companies, have in fact exercised decisive influence over the subsidiary's commercial policy.

137 When the presumption that a parent company has exercised decisive influence over a subsidiary is not rebutted, the Commission can show that the direct and indirect parent companies and their subsidiary form a single economic unit and therefore form a single undertaking for the purpose of the case-law referred to in paragraph 31 above. The fact that parent companies and their subsidiary constitute a single undertaking for the purpose of Article 81 EC enables the Commission to address a decision imposing fines to the parent companies, without having to establish their personal involvement in the infringement (see the case-law cited in paragraph 36 above).

138 Such a step does not infringe the principle of personal responsibility. Sasol Wax International, Sasol Holding in Germany and Sasol Ltd were found individually liable for an infringement which they are deemed to have committed themselves on account of their close legal and economic links with Sasol Wax, as a consequence of holding all the shares in the latter (see, to that effect, *Metsä-Serla and Others* v *Commission*, cited in paragraph 34 above, paragraph 34).

139 As regards the alleged failure to observe the principle of the presumption of innocence, it should be borne in mind that, according to that principle, every person accused is presumed to be innocent until his guilt has been established according to law. It thus precludes any formal finding and even any allusion to the liability of an accused person for a particular infringement in a final decision unless that person has enjoyed all the usual guarantees accorded for the exercise of the rights of defence in the normal course of proceedings resulting in a decision on the merits of the case (Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse* v *Commission* [2007] ECR II-4225, paragraph 76).

140 The application of the principle of the presumption of innocence in the field of competition law must be adapted to the fact that, unlike criminal proceedings which are necessarily directed at a person (natural or legal), competition law applies to an undertaking, namely an economic unit comprising, as the case may be, several legal persons. In addition, companies at the head of a group are free to reorganise their internal structures, in particular by setting up companies having separate legal personality for certain activities.

141 In such circumstances, in order to safeguard the effectiveness of European Union competition law, the mere fact that a parent company owns 100%, or almost 100%, of a subsidiary which has participated directly in an infringement may be sufficient for the Commission to establish that the parent company is liable. Once that objection has been communicated by the Commission, it is for the parent company to adduce evidence to the contrary in order to prove the absence of an economic unit between itself and its subsidiary. In the present case, the Commission followed that approach, carefully examining the evidence put forward by the applicants, and thus respected the principle of the presumption of innocence.

142 The first part of the second plea in law must therefore be rejected.

The second part of the plea, based on the allegedly erroneous finding that the presumption of control had not been rebutted

143 The applicants submit that, by the evidence appearing in their replies to the statement of objections, they showed that, in fact, Sasol Wax International had not exercised a decisive influence over Sasol Wax, since it did not involve itself in Sasol Wax's strategic commercial decisions or operational management.

The contested decision

144 As regards the evidence produced by the applicants in the context of their replies to the statement of objections, the Commission stated, in the contested decision, as follows:

'…

(498)
Concerning the managing directors and the composition and role of the supervisory board of Sasol Wax GmbH, Sasol acknowledges that Sasol Wax International AG had the authority to appoint the managing directors and the members of the supervisory board of Sasol Wax GmbH. It is also confirmed that several members of Sasol Wax GmbH's supervisory board over the years were also members of Sasol Wax International AG's management board. However, Sasol claims that this is not relevant as the supervisory board did not have a significant role (no effective control on the management and/or strategy of Sasol Wax GmbH), that it was in the hands of former Vara employees and did not influence the business conduct of Sasol Wax GmbH. Firstly, it is sufficient that Sasol International AG had the authority to appoint the managing directors and members of the supervisory board and it is therefore irrelevant whether it continued to be occupied by so-called former Vara employees. Secondly, concerning the role of the supervisory board, the articles of association list certain matters for which the supervisory board shall be competent, e.g. appointment, dismissal and supervision of the management, approval of annual accounts and budgets, approval of investments over EUR 0.5 million and changes in the business organisation. Although Sasol claims that none of these powers played a significant role in the business conduct of Sasol Wax GmbH, that there had been no cases in which the supervisory board had exerted any influence of the management of Sasol Wax GmbH and that the directors of Sasol Wax GmbH routinely took actions that were essential for the strategic commercial behaviour of Sasol Wax GmbH without asking for the supervisory board's approval, the powers which were conferred to the supervisory board show that it was foreseen that the supervisory board would actually have a strategic and financial role and responsibility which is separated from the day-to-day management of the company as normally carried out by the management board and directors of the company.

(499)
Sasol also argues that Sasol Wax International AG's lack of influence is confirmed by the fact that representatives of Sasol at the technical meetings continued to be the former Vara employees and that the business unit managers whose activities were affected by the technical meetings had no relation with Sasol Ltd. With regard to the conduct of the so-called former Vara employees, these persons were, at the time when they committed the illegal activities, employees of the Sasol group, and it is irrelevant whether they had formerly been employed by Vara or that their direct employer was a subsidiary of Sasol Wax International AG, Sasol Holding in Germany GmbH or Sasol Ltd as long as it can be shown that the parent companies exercised decisive influence over that affiliate.'

General observations

145 According to the case-law, in order to rebut the presumption that a parent company has exercised decisive influence over its subsidiary's conduct as described in paragraph 134 above, it was for the applicants to put forward any evidence relating to the economic and legal organisational links between Sasol Wax and Sasol Wax International which in their view were apt to demonstrate that they did not constitute a single economic entity. When making its assessment, the Court must take into account all the evidence adduced, the nature and importance of which may vary according to the specific features of each case (Case T-112/05 *Akzo Nobel and Others* v *Commission*, cited in paragraph 108 above, paragraph 65, upheld on appeal in Case C-97/08 P *Akzo Nobel and Others* v *Commission*, cited in paragraph 30 above, and Case T-39/07 *Eni* v *Commission* [2011] ECR II-4457, paragraph 95).

146 The presumption in question is based on the fact that, first, save in quite exceptional circumstances, a company holding all the capital of a subsidiary can, by dint of that shareholding alone, exercise decisive influence over that subsidiary's conduct and, secondly, that it is within the sphere of operations of those entities against whom the presumption operates that evidence of the lack of actual exercise of that power to influence is generally apt to be found (Case C-521/09 P *Elf Aquitaine* v *Commission* [2011] ECR I-8947, paragraph 60).

147 In addition, the application of such a presumption is justified by the fact that, where the parent company is the subsidiary's sole shareholder, it has at its disposal all the possible means of ensuring that the subsidiary's commercial conduct is aligned with its own. In particular, it is the sole shareholder that defines, in principle, the extent of the subsidiary's autonomy by establishing the latter's statutes, chooses its management and takes or approves the subsidiary's strategic commercial decisions, if necessary by having representatives on the subsidiary's bodies. Likewise, the economic unity between the parent company and its subsidiary is normally further protected by obligations arising under the company law of the Member States, such as the obligation to keep consolidated accounts, the obligation for the subsidiary to account periodically for its activities to the parent company and also by the approval of the subsidiary's accounts in a general meeting consisting solely of the parent company, which necessarily means that the parent company follows, at least in broad terms, the commercial activities of the subsidiary.

148 Moreover, it should be emphasised that in the case of a subsidiary which is wholly, or almost wholly, owned by just one parent company, there is in principle just one commercial interest and the members of the subsidiary's bodies are designated and appointed by the sole shareholder, which may give them at least informal instructions and impose performance criteria on them. In such a case, therefore, there is necessarily a relationship of confidence between the management of the subsidiary and the management of the parent company, and the management of the subsidiary necessarily acts by representing and promoting the only commercial interest that exists, namely the interest of the parent company (see, also, paragraph 35 above). Thus, the unity of the market conduct of the parent company and of its subsidiary is ensured in spite of any autonomy conferred on the management of the subsidiary as regards its operational management, which comes within the definition of its commercial policy in the strict sense. As a general rule, moreover, it is the sole shareholder that defines, alone and according to its own interests, the procedure whereby the subsidiary takes decisions and that determines the subsidiary's operational autonomy, which it may change on its own initiative by amending the rules governing the functioning of the subsidiary or in the context of a restructuring, or indeed by setting up informal decision-taking structures.

149 Thus, the presumption that the parent company does in fact exercise decisive influence over the commercial conduct of its subsidiary is justified in so far as it covers typical situations as regards the relationship between a subsidiary and its single parent company, by providing that the ownership of all or virtually all the share capital of the subsidiary by a single parent company means in principle that they pursue the same conduct on the market.

150 The fact none the less remains that, following the statement of objections, the companies concerned have every opportunity to show that the mechanisms described at paragraphs 147 and 148 above, normally leading to the alignment of the commercial conduct of the subsidiary with that of its parent company, did not operate in the ordinary manner, so that the economic unity of the group was severed.

The operational management of Sasol Wax

151 The applicants claim to have shown that it was the Sasol group's policy not to interfere with the autonomous conduct of its subsidiary Sasol Wax. In that regard, they rely on a communication signed by the managers of Sasol Wax International on 9 April 2001.

152 Accordingly, the applicants state that 'all day-to-day operational matters were to be handled by Sasol Wax … as an autonomous entity', whereas '[v]isions, missions and strategy' were to be developed by Sasol Wax International. In addition, there was not a single case in which the directors of Sasol Wax were confronted with a direction of a veto of Sasol Wax International, and the managers of Sasol Wax International during the Sasol period could not recall a single instruction being given to the directors of Sasol Wax.

153 In that regard, the Court has held that the fact that a subsidiary has its own local management and its own resources does not prove, in itself, that that company decides upon its conduct on the market independently of its parent company. The division of tasks between subsidiaries and their parent companies and, in particular, the fact that the local management of a wholly-owned subsidiary is entrusted with the management of day-to-day activities is normal practice in large undertakings composed of a multitude of subsidiaries ultimately owned by the same holding company. Consequently, in the case of a wholly-owned or virtually wholly-owned subsidiary directly involved in the infringement, the evidence adduced in that regard is not capable of rebutting the presumption that decisive influence over the subsidiary's conduct was actually exercised by the parent company and by the ultimate holding company (see, to that effect, *Alliance One International* v *Commission*, cited in paragraph 35 above, paragraphs 130 and 131).

154 Such an approach is moreover justified by the considerations in paragraphs 35, 147 and 148 above, from which it is apparent that the managers of a subsidiary 100%- or almost 100%-owned by a single parent company normally act by representing and promoting the only commercial interests that exist, namely those of the single parent company. They therefore ensure that the subsidiary's commercial conduct is consistent with that of the rest of the group in exercising their autonomous powers.

155 It follows that the applicants' arguments based on the operational autonomy of Sasol Wax, which are not capable of showing that the economic unit between the latter and Sasol Wax International has been severed, must be rejected.

Strategic commercial decisions

156 First, the applicants note that Sasol Wax International did not exercise its power to appoint the managing directors of Sasol Wax and did not replace the old HOS management. Sasol Wax was managed as an independent economic unit in the tradition of the Schümann family by three managing directors inherited from HOS. The Commission erred in law in dismissing that factor as irrelevant in the contested decision and in finding that it was sufficient that Sasol Wax International had the authority to appoint the managing directors.

157 It must be noted that such an argument has already been rejected by the Court in its judgment in *Alliance One* v *Commission*, cited in paragraph 35 above (paragraph 137). In the light of the power of the sole shareholder, in this case Sasol Wax International, to choose the managers of Sasol Wax after the acquisition of its entire share capital, the fact that those managers remained in office can be attributed only to a decision by the single parent company and indicates their affiliation to it. Consequently, that factor cannot rebut the presumption that the parent company exercises decisive influence over its subsidiary's conduct.

158 Secondly, the applicants state that they submitted complete sets of minutes of all supervisory board meetings of Sasol Wax and of Sasol Wax International. None of those documents included any indication of any significant influence being exercised on Sasol Wax by its direct or indirect parent companies. In addition, the managers of Sasol Wax routinely took initiatives concerning the strategic commercial behaviour of Sasol Wax without asking for the supervisory board's or the shareholders' approval. Examples included the long-term supply contracts with ExxonMobil and Shell that were

negotiated and entered into by the directors of Sasol Wax only, the staffing of the business units of Sasol Wax, as well as a cost-cutting programme and the outsourcing of Sasol Wax's logistics services to third parties.

159 It must be stated that the initiatives of the managers of Sasol Wax do not relate to the most important strategic commercial decisions from the point of view of assessing the unity of the market conduct of the subsidiary and its parent company, such as those relating to the budget, the business plan, major investments or the appointment of senior management. Similarly, the applicants do not deny that the supervisory board was responsible for approving Sasol Wax's annual accounts.

160 Consequently, in the light of the foregoing considerations, it must be concluded that the applicants' arguments do not prove that the usual mechanisms ensuring the unity of the market conduct of the parent company and its wholly-owned subsidiary, providing the basis for the presumption that decisive influence is actually exercised, were disrupted (see paragraphs 147 and 148 above), so that the Commission could properly determine that there was an economic entity corresponding to the concept of an undertaking, as provided for in Article 81 EC.

The irrebuttable nature of the presumption

161 The applicants submit that if it were considered that, despite all the evidence put forward by them, that evidence was insufficient to rebut the presumption of actual control by the parent company of decisive influence over its subsidiary's conduct, this presumption would in fact be irrebuttable, in breach of Article 2 of Regulation No 1/2003, the obligation to state reasons, the principle of individual legal responsibility and the presumption of innocence.

162 In that regard, it must be noted that the applicants' arguments adduced to rebut the presumption in question describe the ordinary operations of a large international undertaking the local unit of which, Sasol Wax, is run by the managers kept in post by decision of Sasol Wax International, its 100% parent company, which also decided to delegate the powers to define the commercial policy in the strict sense to those managers while retaining the power to adopt the strategic commercial decisions in Sasol Wax's supervisory board and the general meeting.

163 Rebutting the presumption of the actual exercise of decisive influence by a parent company over its subsidiary's conduct is not, however, a question of the quantity and detail of the evidence when that evidence describes the usual form of organisation in a large multinational undertaking, where the powers of operational management are delegated to the managers of its local units. In order to rebut that presumption, it is necessary to set out unusual circumstances which show that, notwithstanding the fact that the subsidiaries of the group are wholly owned by their parent companies, the economic unity of the group has been severed, as the mechanisms ensuring the alignment of the subsidiaries' commercial conduct with that of their parent companies did not operate in the usual way.

164 However, the applicants have not adduced such evidence in this case.

165 It must also be borne in mind that the Court of Justice and the General Court have already held that the presumption of the exercise of decisive influence by a parent company over its subsidiary is not irrebuttable. According to the case-law, a presumption, even where it is difficult to rebut, remains within acceptable limits so long as it is proportionate to the legitimate aim pursued, it is possible to adduce evidence to the contrary and the rights of the defence are safeguarded (*Elf Aquitaine* v *Commission*, cited in paragraph 146 above, paragraph 62, and judgment of 27 September 2012 in Case T-343/06 *Shell Petroleum and Others* v *Commission*, ECR, paragraph 54). That is true of the presumption of the existence of an economic unit between a subsidiary and its single parent company, in the light also of the considerations in paragraphs 147 to 150 above.

166 Consequently, the applicants' complaint alleging that the presumption at issue is irrebuttable must be rejected.

Conclusion

167 In the light of all the foregoing considerations, it must be concluded that the Commission correctly found that Sasol Wax and Sasol Wax International formed an economic unit within the meaning of the case-law cited in paragraph 36 above, and the companies comprising that unit may be found joint and severally liable for the infringement in question.

168 Moreover, it must be pointed out that the applicants do not put forward any specific argument as regards rebutting the presumption of the actual exercise of decisive influence by Sasol Holding in Germany over the commercial conduct of Sasol Wax International or by Sasol Ltd over Sasol Holding in Germany.

169 The second plea in law must therefore be rejected in its entirety.

The applicants' offer to adduce evidence

170 The applicants propose that the oral testimony of Mr C. D. I. and Mr R. G. S., who managed Sasol Wax during the Sasol period, be heard concerning the fact that neither Sasol Wax International nor Sasol Ltd gave instructions to their subsidiary and that Sasol Wax independently determined its commercial conduct.

171 In the light of the foregoing analysis, the Court considers that that testimony cannot affect the question of the imputation of liability to Sasol Wax International, Sasol Holding in Germany and Sasol Ltd for the infringement by Sasol Wax. Consequently, there is no need to accept the applicants' offer to adduce evidence.

3. *The third plea, concerning the fact that Vara was not found jointly and severally liable for the Schümann period and the joint venture period*

172 The applicants point out that, during the Schümann period, the company directly involved in the infringement, HOS, was controlled by Vara and ultimately by Mr Schümann personally. Similarly, during the joint venture period, Vara also had at least joint control over the operating entity, Schümann Sasol. By failing to hold Vara liable for the actions of HOS and Schümann Sasol, and attributing joint and several liability exclusively to Sasol for the joint venture period, the Commission treated Sasol differently from Vara.

173 The Commission does not offer any explanation for the different treatment of Sasol on the one hand and Vara/Mr Schümann on the other. In addition, the applicants refer to the principles established in *HFB and Others* v *Commission*, cited in paragraph 33 above (paragraph 105).

174 That approach by the Commission severely compromises possible means of recourse for Sasol Ltd, Sasol Holding in Germany and Sasol Wax International for the purpose of bringing an action for recovery against Mr Schümann and/or Vara, since Sasol would have to prove that the latter were involved in the infringement. This would be particularly difficult since the applicants would have to explain why neither Vara or Mr Schümann were found liable by the Commission. In addition, a finding that they were jointly and severally liable was all the more important to Sasol since the cartel was founded, inter alia, by HOS and Mr Schümann, at a time when Sasol was not engaged in the European paraffin wax business.

175 Lastly, as a result of the failure to find Vara jointly and severally liable, the Commission did not apply the 10% ceiling of Article 23(2) of Regulation No 1/2003 with regard to Vara's turnover.

176 The Commission argues that it enjoys a discretion in deciding which entities of an undertaking it finds liable for an infringement, its assessment being done on a case-by-case basis, and it is not under an obligation to state reasons why other measures of a similar kind to those addressed to the entities found liable were not adopted vis-à-vis third parties.

177 In any event, the Commission states that, according to the case-law, when an undertaking's conduct has infringed Article 81(1) EC, it cannot escape penalty on the ground that another undertaking has not been fined. Even if the Commission erred in not finding Vara liable for the infringement, respect for the principle of equal treatment must be reconciled with the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party.

178 First of all, the Court notes that as the first plea in law has been upheld there is no need to examine a failure to have regard to the principle of equal treatment regarding the joint venture period, since the contested decision is annulled in that respect.

179 In the following paragraphs, the Court will examine only the applicants' complaint of discrimination in comparison with Vara and Mr Schümann as regards the Schümann period.

180 First of all, the Commission expressly acknowledged, in recital 457 of the contested decision, that 'HOS, the company directly involved in the infringement, was ultimately controlled by Mr … Schümann personally and that responsibility for the infringement committed in this period rest[ed] ultimately with Mr Schümann'. However, the Commission did not find either Vara, HOS' direct parent company, or Mr Schümann, jointly and severally liable for HOS' infringement.

181 According to the case-law, the principle of equal treatment, which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified, is a general principle of EU law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union (order of 15 June 2012 in Case C-494/11 P *Otis Luxembourg and Others* v *Commission*, not published in the ECR, paragraph 53; see also, to that effect, Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2010] ECR I-8301, paragraphs 54 and 55).

182 In addition, it must be noted that the possibility, provided for by the case-law referred to in paragraph 36 above, of imposing the penalty on the parent company for its subsidiary's unlawful conduct does not in itself mean that the subsidiary may not itself be penalised. An undertaking — that is to say, an economic unit consisting of personal, tangible and intangible elements (Case 19/61 *Mannesmann* v *High Authority* [1962] ECR 357, 371) — is directed by the organs provided for in its statutes and any decision imposing a fine on it may be addressed to the management as provided for in the undertaking's statutes (management board, management committee, chairman, manager, etc.), even though the financial consequences of the fine are ultimately borne by its owners. That rule would not be observed if the Commission, faced with unlawful conduct on the part of an undertaking, were always required to ascertain who is the owner exercising a decisive influence on the undertaking and were allowed to impose a sanction only on that owner (see, to that effect, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraphs 279 to 281). Since the power to penalise the parent company for the conduct of a subsidiary thus has no bearing on the legality of a decision addressed only to the subsidiary that participated in the infringement, the Commission may choose to penalise either the subsidiary that participated in the infringement or the parent company that controlled it during that period (Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraph 331).

183 That choice is also available to the Commission in the case of economic succession in the control of the subsidiary. Although, in such a case, the Commission may impute the conduct of a subsidiary to the former parent company for the period prior to the transfer and thereafter to the new parent company, it is not required to do so and may choose to penalise only the subsidiary for its own conduct (*Raiffeisen Zentralbank Österreich and Others* v *Commission*, cited in paragraph 182 above, paragraph 332).

184 In the present case, the applicants do not challenge the imputation of liability to Sasol Wax for the infringement committed by HOS on account of the legal succession between companies. Such an imputation of liability is moreover justified by the case-law according to which, when an entity that has committed an infringement of the competition rules is subject to a legal or organisational change, that change does not necessarily create a new undertaking free of liability for its predecessor's infringements of the competition rules, when, from an economic point of view, the two are identical (see Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraph 79 and the case-law cited).

185 However, the applicants submit that since the Commission found Sasol Wax International, Sasol Holding in Germany and Sasol Ltd jointly and severally liable with Sasol Wax in respect of the Sasol period, it could not, without infringing the principle of equal treatment, exempt HOS' parent companies from joint and several liability in relation to the Schümann period.

186 It must be found that, in owning the entire share capital of the company directly involved in the infringement during the Sasol period, Sasol Wax International, Sasol Holding in Germany and Sasol Ltd, were in the same situation as Vara and Mr Schümann as regards the Schümann period.

187 Consequently, the Commission treated two comparable situations differently.

188 The Commission's other arguments cannot call that finding in question.

189 First, the Commission contends that the limitation rules laid down in Article 25 of Regulation No 1/2003 prevented it from finding Vara and Mr Schümann jointly and severally liable for HOS's infringement, since they owned HOS' entire share capital only until 30 April 1995.

190 In that regard, while the Court is not called upon to determine in the context of the present proceedings the liability of Vara and Mr Schümann for Schümann Sasol's infringement, it must be held that it is possible that, in the absence of errors made by it as identified in the examination of the first plea in law, the Commission might have examined whether such liability existed. Had the Commission found that the liability of Vara and Mr Schümann concerned the joint venture period, in this case until 30 June 2002, none of the limitation periods in Article 25 of Regulation No 1/2003 would have expired on 17 March 2005 when the Commission was informed of the cartel and HOS's involvement.

191 It follows that the Commission's arguments based on limitation must be rejected: in order to justify unequal treatment, it cannot properly rely on a difference between Vara's situation and that of Mr Schümann, on the one hand, and that of the applicants, on the other, which might not have arisen in the absence of its errors of assessment.

192 Secondly, the case-law relied on by the Commission cannot remedy the unequal treatment referred to in paragraph 187 above. In its judgment in *Raiffeisen Zentralbank Österreich and Others* v *Commission*, cited in paragraph 182 above (paragraph 331), the Court confirmed that the Commission could properly find 'either the subsidiary that participated in the infringement or the parent company that controlled it during that period' liable, but it did not state that the Commission could find the new parent company jointly and severally liable in respect of the period following the sale of the subsidiary and at the same time exempt from joint and several liability the former parent company in respect of

the period preceding the sale. Similarly, the case-law accepts the Commission's practice of finding either (i) only the company directly participating in the cartel liable or (ii) both the former and new parent company jointly and severally liable with the subsidiary (Case T-40/06 *Trioplast Industrier* v *Commission* [2010] ECR II-4893, paragraph 72, and Joined Cases T-117/07 and T-121/07 *Areva and Others* v *Commission* [2011] ECR II-633, paragraph 137). By contrast, the Commission has not cited any precedent in case-law which would have supported a division of liability such as that which it adopted in the present case.

193 The consequences of the unequal treatment established in paragraph 187 above must therefore be examined.

194 According to the case-law, the principle of equal treatment must be reconciled with the principle of legality and thus a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party. A possible unlawful act committed in favour of another undertaking, which is not party to the present proceedings, cannot induce the Court to find that it is discriminatory and, therefore, unlawful with regard to the applicants. Such an approach would be tantamount to laying down a principle of 'equal treatment in illegality' and to requiring the Commission to disregard the evidence in its possession to sanction the undertaking which has committed a punishable infringement, solely on the ground that another undertaking which may find itself in a comparable situation has unlawfully escaped being penalised. In addition, where an undertaking has acted in breach of Article 81(1) EC, it cannot escape being penalised altogether on the ground that other undertakings have not been fined, where, as in this case, those undertakings' circumstances are not the subject of proceedings before the Court (Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 197, and Case T-120/04 *Peróxidos Orgánicos* v *Commission* [2006] ECR II-4441, paragraph 77).

195 It must be held that the Commission properly found that Sasol Wax was liable for the infringement by HOS, to which it succeeded as the company directly participating in the cartel (see paragraph 184 above), so that it could legitimately be found liable for the period from 3 September 1992 to 28 April 2005.

196 Similarly, as is apparent from the examination of the second plea in law, the Commission did not err in law in finding Sasol Wax International, Sasol Holding in Germany and Sasol Ltd liable for the infringement committed directly by Sasol Wax during the Sasol period. Consequently, the Commission correctly found them jointly and severally liable in respect of the period from 1 July 2002 to 28 April 2005 so that, to that extent, the third plea in law must be rejected.

197 However, the unequal treatment established in paragraph 187 above gives grounds for varying the contested decision in so far as it has the result of increasing the liability of Sasol Wax International, Sasol Holding in Germany and Sasol Ltd as regards the portion of the fine imposed in respect of the Schümann period (see paragraph 452 below).

198 In addition, it must be noted that the fact that the contested decision is not annulled as regards the failure to find Vara and Mr Schümann liable in respect of the unlawful conduct of HOS does not affect the applicants' possible right to bring an action for recovery before the national court.

4. *The fourth plea in law, alleging that the basic amount of the fine was wrongly determined*

The first part, alleging the lack of a valid legal basis for the contested decision

199 First, the applicants claim that Article 23(2) of Regulation No 1/2003 does not constitute a valid legal basis for the adoption of the contested decision.

200 That provision does not amount to the 'clear and unambiguous legal basis' that is required of Commission decisions imposing sanctions, in particular in the light of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), and of the Charter of Fundamental Rights, since it grants the Commission unlimited scope to impose fines of up to 10% of the turnover of the undertaking concerned.

201 It should be noted that the Court has already examined such arguments and rejected them.

202 First of all, the applicants' argument relating to the lack of a 'clear and unambiguous legal basis' must be understood as meaning that they are relying on the principle of the legality of criminal offences and penalties (*nullum crimen*, *nulla poena sine lege*), as enshrined in particular in Article 49(1) of the Charter of Fundamental Rights. That principle requires that EU rules define offences and penalties clearly (see, to that effect, Case C-352/09 P *ThyssenKrupp Nirosta* v *Commission* [2011] ECR I-2359, paragraph 80).

203 In addition, according to the case-law, in adopting decisions imposing fines for participation in unlawful cartels, the Commission does not have unlimited discretion in setting such fines, since the provisions applicable provide for a ceiling on fines, based on the turnover of the undertakings concerned, that is to say, based on an objective criterion. Thus, although there is no absolute ceiling applicable to all infringements of the competition rules, the fine which may be imposed is nevertheless subject to a quantifiable and absolute ceiling calculated by reference to each undertaking in respect of each infringement, so that the maximum amount of the fine which may be imposed on a given undertaking is determinable in advance (Case T-279/02 *Degussa* v *Commission* [2006] ECR II-897, paragraphs 74 to 76; Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik* v *Commission* [2008] ECR II-2567, paragraphs 35 and 36; and the judgment of 12 December 2012 in Case T-400/09 *Ecka Granulate and non ferrum Metallpulver* v *Commission*, not published in the ECR, paragraph 28).

204 Moreover, while it is true that the criteria of the gravity and the duration of an infringement, referred to in Article 23(3) of Regulation No 1/2003, leave the Commission wide discretion, they are criteria which have been adopted by other legislatures for similar provisions, allowing the Commission to adopt sanctions taking account of the degree of illegality of the conduct in question (*Degussa* v *Commission*, cited in paragraph 203 above, paragraph 76; *Schunk and Schunk Kohlenstoff-Technik* v *Commission*, cited in paragraph 203 above, paragraph 37; and *Ecka Granulate and non ferrum Metallpulver* v *Commission*, cited in paragraph 203 above, paragraph 29).

205 Furthermore, in setting a fine such as that in question in the present case, the Commission was required to comply with the general principles of law, in particular the principles of equal treatment and proportionality, as developed by the case-law of the Court of Justice and the General Court. Similarly, the Commission's administrative practice is subject to unlimited review by the Courts of the European Union. That review has in fact made it possible, through a consistent and published body of case-law, to define any indeterminate concepts contained in Article 23(2) and (3) of Regulation No 1/2003 (*Degussa* v *Commission*, cited in paragraph 203 above, paragraphs 77 and 79; *Schunk and Schunk Kohlenstoff-Technik* v *Commission*, cited in paragraph 203 above, paragraph 41; and *Ecka Granulate and non ferrum Metallpulver* v *Commission*, cited in paragraph 203 above, paragraph 30).

206 In addition, it should be noted that while competition law is indeed similar to criminal law, it is not at the 'heart' of criminal law. Outside the 'hard core' of criminal law, the guarantees in matters of criminal law laid down in Article 6 of the ECHR will not necessarily apply with their full stringency (see European Court of Human Rights, *Jussila v. Finland* [GC], no. 73053/01, § 43, ECHR 2006-XIV).

207 It must also be noted in that context that, in the area of competition law, unlike criminal law, both the benefits and the penalties for unlawful activities are purely pecuniary, as is the motivation of the offenders whose actions are in line with an economic logic. Consequently, were the fine to be imposed for participation in an unlawful cartel to be more or less predictable, this would have highly

damaging consequences for European Union competition policy, since the undertakings committing the infringements could directly compare the costs and benefits of their unlawful activities, and also take into account the chances of being discovered, and thus attempt to ensure that those activities are profitable (see, to that effect, *Degussa* v *Commission*, cited in paragraph 203 above, paragraph 83; *Schunk and Schunk Kohlenstoff-Technik* v *Commission*, cited in paragraph 203 above, paragraph 45; and *Ecka Granulate and non ferrum Metallpulver* v *Commission*, cited in paragraph 203 above, paragraph 32).

208 On the basis of the foregoing considerations, it must be found that Article 23(2) of Regulation No 1/2003 constitutes both a means of enabling the Commission to implement European Union competition policy with the necessary efficiency and a sufficiently clear and precise legal basis for the adoption of decisions imposing fines on the participants in cartels. Consequently the applicants' complaint in that regard must be rejected.

209 Secondly, the applicants submit that the Commission infringed the principle of non-retroactivity in applying the 2006 Guidelines in the contested decision although the infringement at issue had ended in April 2005.

210 In that regard, the Court has held that the fact that the Commission, in the past, had imposed fines of a certain level for certain types of infringement does not mean that it is precluded from raising that level within the limits indicated in Regulation No 1/2003 if that is necessary to ensure the implementation of European Union competition policy. The proper application of the European Union competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 109; Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11005, paragraph 81; and *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 44 above, paragraph 169).

211 The supervisory task conferred on the Commission by Article 81 EC and Article 82 EC not only includes the duty to investigate and punish individual infringements but also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles (*Musique Diffusion française and Others* v *Commission*, cited in paragraph 210 above, paragraph 105, and *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 44 above, paragraph 170).

212 Consequently, the undertakings in question must take account of the possibility that the Commission may decide at any time to raise the level of the fines by reference to that applied in the past. That is true not only where the Commission raises the level of fines when imposing fines in individual decisions but also if that increase takes effect by the application, in particular cases, of rules of conduct of general application, such as the Guidelines (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 44 above, paragraphs 229 and 230).

213 Consequently, the replacement of the 1998 Guidelines by a new method of calculating fines, contained in the 2006 Guidelines, on the assumption that this new method had the effect of increasing the level of the fines imposed, was reasonably foreseeable for the participants in the cartel, having regard to the time when that cartel was implemented. In addition, according to the case-law cited in paragraph 206 above, the guarantees in matters of criminal law laid down in Article 6 of the ECHR will not necessarily apply with their full stringency in the field of competition law. The scope of that case-law must be extended, by analogy, to Article 7 of the ECHR. In any event, the introduction of new guidelines did not change the maximum amount of fine, provided for in Article 23(2) of Regulation No 1/2003, which is the sole legislative framework applicable. Accordingly, in applying the 2006 Guidelines in the contested decision to infringements committed before they were adopted, the Commission did not infringe the principle of non-retroactivity (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 44 above, paragraphs 231 and 232).

214 Lastly, it must be noted that if the Commission were obliged to apply the guidelines in force at the time when the infringement was committed, covering 13 years in the present case, that would render meaningless the Commission's right, acknowledged in the case-law cited in paragraph 210 above, to adjust the methods for calculating the fine in the light of its obligation to apply the European Union competition rules effectively.

215 It follows that the applicants' second complaint must also be rejected, as must therefore the first part of the fourth plea in it is entirely.

The second part, alleging an error in including micro-wax sales in the value of Sasol's sales

216 Point 13 of the 2006 Guidelines states that in determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA. The footnote to that point states that indirect sales will be taken into account for instance for horizontal price-fixing arrangements on a given product, where the price of that product then serves as a basis for the price of lower or higher quality products.

217 The applicants submit that micro waxes were not affected by the cartel, so that it follows that the Commission erred in including the turnover from those products in the value of sales taken into account to calculate the fine.

The principles of the assessment of evidence

218 According to the case-law, the Commission must prove the infringements which it has found and adduce evidence capable of demonstrating to the requisite legal standard the existence of the facts constituting an infringement (see Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 58, and *Dresdner Bank and Others* v *Commission*, cited in paragraph 76 above, paragraph 59 and the case-law cited).

219 As regards the scope of review by the Court, it is settled case-law that, where the Court hears an action for the annulment of a decision applying Article 81(1) EC, it must undertake in a general manner a comprehensive review of the question of whether or not the conditions for the application of Article 81(1) EC are met (see Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383, paragraph 62 and the case-law cited).

220 In that regard, any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment of a decision imposing a fine (*Dresdner Bank and Others* v *Commission*, cited in paragraph 76 above, paragraph 60, and Case T-112/07 *Hitachi and Others* v *Commission* [2011] ECR II-3871, paragraph 58).

221 In the latter situation, it is necessary to take account of the principle of the presumption of innocence resulting in particular from Article 6(2) of the ECHR, which is one of the fundamental rights which are general principles of EU law. Given the nature of the infringements in question and the nature and degree of gravity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (*Hitachi and Others* v *Commission*, cited in paragraph 220 above, paragraph 59; see, to that effect, *Dresdner Bank and Others* v *Commission*, cited in paragraph 76 above, paragraph 61 and the case-law cited).

222 Thus, the Commission must show precise and consistent evidence in order to establish the existence of the infringement. However, it should be emphasised that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement (see *Dresdner Bank and Others* v *Commission*, cited in paragraph 76 above, paragraphs 62 and 63 and the case-law cited).

223 The items of evidence on which the Commission relies in the contested decision in order to prove the existence of an infringement of Article 81(1) EC by an undertaking must not be assessed separately, but as a whole (see Case T-53/03 *BPB* v *Commission* [2008] ECR II-1333, paragraph 185 and the case-law cited).

224 It must also be pointed out that, in practice, the Commission is often obliged to prove the existence of an infringement under conditions which are hardly conducive to that task, in that several years may have elapsed since the time of the events constituting the infringement and a number of the undertakings covered by the investigation have not actively cooperated therein. Whilst it is necessarily incumbent upon the Commission to establish that an illegal price-fixing agreement was concluded, it would be excessive also to require it to produce evidence of the specific mechanism by which that objective was attained. Indeed, it would be too easy for an undertaking guilty of an infringement to escape any penalty if it was entitled to base its argument on the vagueness of the information produced regarding the operation of an illegal agreement in circumstances in which the existence and anti-competitive purpose of the agreement had nevertheless been sufficiently established. Undertakings are able properly to defend themselves in such circumstances provided that they have an opportunity to comment on all the evidence relied on against them by the Commission (Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 203).

225 As regards the evidence which may be relied on to establish an infringement of Article 81 EC, the prevailing principle of EU law is that evidence may be freely adduced (Case T-50/00 *Dalmine* v *Commission* [2004] ECR II-2395, paragraph 72, and *Hitachi and Others* v *Commission*, cited in paragraph 220 above, paragraph 64).

226 As regards the probative value of the various items of evidence, the only relevant criterion for the purposes of evaluating the evidence produced is its reliability (*Dalmine* v *Commission*, cited in paragraph 225 above, paragraph 72).

227 According to the general rules regarding evidence, the reliability and, thus, the probative value of a document depends on its origin, the circumstances in which it was drawn up, the person to whom it is addressed and its content (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraphs 1053 and 1838, and *Hitachi and Others* v *Commission*, cited in paragraph 220 above, paragraph 70).

228 Where the Commission bases its decision solely on the conduct of the undertakings in question on the market to conclude that there has been an infringement, it is sufficient for those undertakings to prove the existence of circumstances which cast the facts established by the Commission in a different light and thus allow another plausible explanation of those facts to be substituted for the one adopted by the Commission in concluding that the European Union competition rules had been infringed (see, to that effect, *JFE Engineering and Others* v *Commission*, cited in paragraph 224 above, paragraph 186).

229 Where, on the other hand, the Commission has relied on documentary evidence, it is for the undertakings concerned not merely to present a plausible alternative to the Commission's theory but to show that the evidence used in the decision is insufficient to establish the existence of the infringement (*JFE Engineering and Others* v *Commission*, cited in paragraph 224 above,

paragraph 187). Such an approach to evaluating the evidence does not constitute a breach of the principle of the presumption of innocence (see, to that effect, Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraph 181).

230 As anti-competitive agreements are known to be prohibited, the Commission cannot be required to produce documents expressly attesting to contacts between the traders concerned. The fragmentary and sporadic items of evidence which may be available to the Commission should, in any event, be capable of being supplemented by inferences which allow the relevant circumstances to be reconstituted. The existence of an anti-competitive practice or agreement may therefore 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 (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraphs 55 to 57; see, also, *Dresdner Bank and Others* v *Commission*, cited in paragraph 76 above, paragraphs 64 and 65 and the case-law cited).

231 When assessing the probative value of documentary evidence, it is necessary to attach great importance to the fact that a document was drawn up in close connection with the facts (Case T-157/94 *Ensidesa* v *Commission* [1999] ECR II-707, paragraph 312, and Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission* [2003] ECR II-5761, paragraph 181) or by a direct witness of those facts (*JFE Engineering and Others* v *Commission*, cited in paragraph 224 above, paragraph 207).

232 The fact that a document is unsigned or undated or is badly written does not impugn its evidentiary value, in particular when its origin, probable date and content can be determined with sufficient certainty (Joined Cases T-217/03 and T-245/03 *FNCBV and Others* v *Commission* [2006] ECR II-4987, paragraph 124; see also, to that effect, Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 86).

233 It follows from the principle of the free evaluation of evidence that even if the lack of documentary evidence may be relevant in the global assessment of the set of indicia relied on by the Commission, it does not, in itself, enable the undertaking concerned to call the Commission's claims into question by submitting an alternative version of the facts. That is only the case where the evidence submitted by the Commission does not enable the existence of the infringement to be established unequivocally and without the need for interpretation (*Hitachi and Others* v *Commission*, cited in paragraph 220 above, paragraph 65; see also, to that effect, the judgment of 12 September 2007 in Case T-36/05 *Coats Holdings and Coats* v *Commission*, not published in the ECR, paragraph 74).

234 In addition, no provision or general principle of EU law prohibits the Commission from relying, as against an undertaking, on statements made by other undertakings accused of having participated in the cartel. If that were not the case, the burden of proving conduct contrary to Article 81 EC, which is borne by the Commission, would be unsustainable and incompatible with the task of supervising the proper application of those provisions (*JFE Engineering and Others* v *Commission*, cited in paragraph 224 above, paragraph 192, and *Hitachi and Others* v *Commission*, cited in paragraph 220 above, paragraph 67).

235 As regards statements, particularly great probative value may be attached to those which, first, are reliable, secondly, are made on behalf of an undertaking, thirdly, are made by a person under a professional obligation to act in the interests of that undertaking, fourthly, go against the interests of the person making the statement, fifthly, are made by a direct witness of the circumstances to which they relate and, sixthly, were provided in writing deliberately and after mature reflection (*Hitachi and Others* v *Commission*, cited in paragraph 220 above, paragraph 71; see also, to that effect, *JFE Engineering and Others* v *Commission*, cited in paragraph 224 above, paragraphs 205 to 210).

236 However, a statement by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence, though the degree of corroboration required may be less in view of the reliability of the statements at issue (*JFE Engineering and Others* v *Commission*, cited in paragraph 224 above, paragraphs 219 and 220, and *Hitachi and Others* v *Commission*, cited in paragraph 220 above, paragraph 68).

237 In addition, even if some caution as to the evidence provided voluntarily by the main participants in an unlawful cartel is generally called for, considering the possibility that those participants might tend to play down the importance of their contribution to the infringement and maximise that of the others, the fact remains that seeking to benefit from the application of the 2002 Leniency Notice in order to obtain immunity from, or a reduction of, the fine does not necessarily create an incentive to submit distorted evidence in relation to the participation of the other members of the cartel. Indeed, any attempt to mislead the Commission could call into question the sincerity and the completeness of the cooperation of the person seeking to benefit from the 2002 Leniency Notice, and thereby jeopardise his chances of benefiting fully under it (*Hitachi and Others* v *Commission*, cited in paragraph 220 above, paragraph 72; see also, to that effect, *Peróxidos Orgánicos* v *Commission*, cited in paragraph 194 above, paragraph 70).

238 In particular, where a person admits that he committed an infringement and thus admits the existence of facts going beyond those whose existence could be directly inferred from the documentary evidence, that implies, *a priori*, in the absence of special circumstances indicating otherwise, that that person had resolved to tell the truth. Thus, statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence (*JFE Engineering and Others* v *Commission*, cited in paragraph 224 above, paragraphs 211 and 212; Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others* v *Commission* [2007] ECR II-947, paragraph 166; and judgment of 8 July 2008 in Case T-54/03 *Lafarge* v *Commission*, not published in the ECR, paragraph 59).

239 The case-law cited is applicable, by analogy, to Article 53 of the EEA Agreement.

The contested decision and the statements of the participants in the cartel

240 First of all, it must be recalled that recital 111 of the contested decision states:

‘In most of the technical meetings the price discussions concerned paraffin waxes in general and only rarely the different kinds of paraffin waxes (such as fully-refined paraffin waxes, semi-refined paraffin waxes, wax-blends/specialties, hard paraffin waxes or hydro-finished paraffin waxes) were specified. Moreover, it was understood by all the companies that prices for all types of paraffin waxes would be increased by the same amount or percentage.’

241 Shell’s statement of 26 April 2005, to which the Commission refers in recital 111 of the contested decision, indicates that all the kinds of paraffin waxes were concerned by the price-fixing practices. Shell stated that, in the technical meetings, it was generally understood by the participants that the prices of all the kinds of paraffin waxes would be increased by the same amount or percentage.

242 In addition, in its oral statement of 21 March 2007, Shell also stated that it was only rarely that the different kinds of paraffin waxes (such as fully-refined paraffin waxes, semi-refined paraffin waxes, hard paraffin waxes and wax-blends/specialties) had been mentioned. The participants were in agreement that the prices of all the kinds of paraffin waxes should increase by the same amount or percentage.

243 Next, Total stated that the price increases related mainly to ordinary grade paraffin used principally in the candles sector, the only paraffin which really interested Sasol and the other German producers (DEA and Hansen & Rosenthal). Candles were one of the main openings for paraffin in Europe, and a variation in prices on that market would result in a variation in the prices of the other applications.

244 Sasol also confirmed that practice by stating that the agreements concluded at the technical meetings more or less set the trend for other product segments, since the participants had frequently tried to transpose approximately the price increases decided upon to the other categories of product.

245 Consequently, the concordant statements of the participants in the cartel support and confirm the content of recital 111 of the contested decision.

The alleged lack of agreement as to the prices of the micro waxes

246 The applicants do not deny that micro waxes were occasionally mentioned at the technical meetings. However, they argue that it is apparent from the statements of the undertakings participating in the cartel, collected during the administrative procedure, that fully-refined and semi-refined paraffin waxes were at the heart of the 'Blauer Salon' meetings. In addition, there was not a single meeting during the infringement period indicated in which the participants agreed on micro-wax prices or allocated micro-wax customers. This is confirmed by the submissions of Shell.

247 First, the Court notes that Shell's statement of 14 June 2006, to which the applicants refer, simply describes the characteristics of micro waxes and provides details of the raw materials comprising them. It does not relate to whether or not there were unlawful practices in respect of those products.

248 Secondly, it is important to point out that the infringement concerning the paraffin waxes attributed to the applicants 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), and also consisted of customer and/or market allocation (the second part of the infringement).

249 The applicants do not deny that the principal part of the cartel is complex, namely that it combines price agreements, concerted practices and the exchange of sensitive information.

250 Article 81(1) EC provides that 'the following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market'.

251 In order for there to be an agreement within the meaning of Article 81(1) EC it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 256, and *HFB and Others* v *Commission*, cited in paragraph 33 above, paragraph 199). An agreement within the meaning of Article 81(1) EC can be regarded as having been concluded where there is a concurrence of wills on the very principle of a restriction of competition, even if the specific features of the restriction envisaged are still under negotiation (Case T-240/07 *Heineken Nederland and Heineken* v *Commission* [2011] ECR II-3355 paragraph 45; see also, to that effect, *HFB and Others* v *Commission*, cited in paragraph 33 above, paragraphs 151 to 157 and 206).

252 The concept of a concerted practice refers to a form of coordination between undertakings which, without having been taken to a stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 115, and Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 158).

253 In this respect, Article 81(1) EC precludes any direct or indirect contact between economic operators of such a kind as either to influence the conduct on the market of an actual or potential competitor or to reveal to such a competitor the conduct which the operator concerned has decided to follow itself or contemplates adopting on the market, where the object or effect of those contacts is to restrict competition (*Heineken Nederland and Heineken* v *Commission*, cited in paragraph 251 above, paragraph 47; see also, to that effect, *Commission* v *Anic Partecipazioni*, cited in paragraph 252 above, paragraphs 116 and 117).

254 Consequently, in order to include the turnover from the sale of micro waxes in the participants' value of sales, the Commission was not required to show that agreements on price had been concluded at the technical meetings. It follows that the applicants' arguments based on the alleged lack of agreements as regards the fixing of the price of micro wax and the customer allocation with regard to those products must be rejected as ineffective.

The documentary evidence relating to micro waxes

255 It is appropriate to examine the documentary evidence relating to the micro waxes, set out in the contested decision and also in the documentation referred to in that decision communicated to the applicants during the administrative procedure.

256 First, the MOL note concerning the technical meeting of 24 June 1994 in Budapest (Hungary), to which the Commission refers in the footnotes to recital 132 of the contested decision, states, under the heading 'Repsol':

'Sales: 60 000 t [20 000 t imports]

Cepsa/Elf 15-2 000 t incl. 3 000 t micro

ERT only slack wax 15 000 to'

257 That information, not reproduced in the contested decision, but communicated to the applicants during the administrative procedure, shows that the participants mentioned the tonnages of paraffin waxes, including micro waxes, sold or intended to be sold to the various customers, with a view to sharing markets and customers.

258 Secondly, the MOL note relating to the technical meeting of 30 and 31 October 1997 in Hamburg, cited in recital 145 of the contested decision, states:

'Shortage 50/52 micro -> Repsol Mobil Agip

...

microwax — French prices 1 500-1 600 raise 10%'

259 Thirdly, the MOL note relating to the meeting of 5 and 6 May 1998 in Budapest, to which the Commission refers in a footnote to recital 147 of the contested decision, states:

'Total — [illegible] 5 500 — 6 500 micro [viscosity] 14-15[;] to Cepsa 4 900 emu [illegible] + 4% Total/E'

260 In the light also of the other evidence mentioned by the Commission in recital 147 of the contested decision, those various pieces of information show that the participants mentioned the tonnages of paraffin waxes, including micro waxes, sold or intended to be sold to the various customers, with a view to sharing markets and customers.

261 Fourthly, the MOL note relating to the meeting of 13 and 14 April 1999 in Munich (Germany), cited in recital 153 of the contested decision, contains a table an entire column of which is headed 'Micro'. The information relating to the other columns, classifying the other kinds of paraffin waxes according their melting point, leaves no doubt that micro waxes are being referred to.

262 Fifthly, a Sasol debriefing note of the 'Blauer Salon' meeting of 26 and 27 June 2001 in Paris (France), cited in recital 163 of the contested decision, contains the following information:

'[D]uring July: cancel prices of special customers (= those that do not buy, or that buy significantly below last year/budget) at earliest possible date, i.e. for instance 30 days. Goal: to set a landmark!

[E]nd of August[:] Cancel all prices by 30.9.01.

By 1.10.01 + € 7,-

Wood/emulsions + rubber/tyres = follows

If customers ask for trend of prices in second half year:

Trend is upward because all budget figures e.g. crude oil $ 25,-/Dollar exchange rate DM 2,- significantly exceeded. Moreover micro waxes + about 30%/higher grade paraffins extremely scarce + expensive.'

263 That information shows, first, that the participants in the cartel took the view that the price increases of all the kinds of paraffin wax were linked and, secondly, that they also devised explanations for those increases vis-à-vis customers.

264 Sixthly, a manuscript note found at Total concerning the meeting of 11 and 12 May 2004, cited in recital 174 of the contested decision, states '1 July — … + micro wax: 25 -> 50 $/T'. That is therefore a direct trace that refers to a discussion, if not an agreement, regarding the micro-wax prices.

265 As noted in paragraph 222 above, it is not necessary for every item of evidence produced by the Commission to be precise and consistent in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the Commission, viewed as a whole, meets that requirement.

266 In addition, in the light of the case-law cited in paragraph 230 above, the Commission cannot be required to produce documents expressly attesting to contacts between the traders concerned. The fragmentary and sporadic items of evidence which may be available to it should, in any event, be capable of being supplemented by inferences which allow the relevant circumstances to be reconstituted.

267 In addition, the MOL notes were drawn up during the meetings by the person who attended them and their content is structured and relatively detailed. The probative value of those notes is therefore very high. As regards the minutes of the 'Blauer Salon' meetings drawn up by Sasol, they are documents dating from the time of the facts and drawn up *in tempore non suspecto*, that is shortly after each technical meeting. Even though not present at the technical meetings, the person who drafted them relied on information obtained from a participant. The probative value of those minutes is therefore high.

268 In the light of all the evidence gathered by the Commission, it must be found that the prices, volumes produced and other commercially-sensitive information relating to micro waxes, as well as the volumes of micro waxes sold or intended to be sold to customers, were discussed at the technical meetings.

The applicants' remaining arguments

269 The applicants submit that the prices for fully-refined or semi-refined paraffin waxes (as the products which were the subject of the agreements in question) did not 'serve as a basis for the price of' micro waxes as 'lower or higher quality products' within the meaning of point 13 of the 2006 Guidelines, so that the prices for micro waxes cannot have been influenced by price agreements related to fully-refined and semi-refined paraffin waxes. Micro waxes are (unlike wax blends or wax specialties) not manufactured on the basis of fully-refined or semi-refined paraffin waxes. They do not even have the same raw material as fully-refined or semi-refined paraffin waxes. While fully-refined or semi-refined paraffin waxes are manufactured on the basis of light crude oils, micro wax is produced on the basis of brightstock oil. The raw material for micro waxes and micro waxes themselves differ significantly from slack wax and fully-refined or semi-refined paraffin waxes. All this was brought to the Commission's attention in detail on pages 2 to 4 of Sasol's application for leniency.

270 Lastly, the applicants refer to the chart in their response to the statement of objections. It is apparent from that chart that the price curves for semi-refined paraffins and fully-refined paraffins moved largely in parallel, while micro wax prices were 'more erratic'. Thus, the price of micro waxes is not linked to the market for fully and semi-refined paraffins, and the Commission was therefore not entitled to take Sasol's micro-wax sales into account when determining the basic amount of the fine.

271 As regards the various characteristics of micro waxes in relation to other paraffin waxes, it must be noted that, according to the case-law, whether or not the cartelised products belong to the various product markets does not affect the legality of the contested decision when the Commission has material evidence that the anti-competitive activities directly or indirectly concerned all the products covered by the decision (see, to that effect, judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, not published in the ECR ('the Tokai II judgment'), paragraph 90).

272 In the light of the direct proof that there were discussions on prices and commercially-sensitive information relating to micro waxes and the market allocation of micro waxes (see paragraphs 255 et seq.), it must be found that the applicants' arguments cannot call into question the validity of the Commission's approach of taking into account the turnover from the sale of micro waxes when calculating the basic amount of the fine.

273 Lastly, the applicants submit that they are able to manufacture paraffin waxes out of slack wax, whereas they are unable to manufacture micro wax out of brightstock slack wax. This means that Sasol is a purchaser of micro waxes and was thus not at all interested in price increases for micro wax.

274 That argument cannot succeed.

275 First of all, it is apparent from the file that the artificially high prices of slack wax did not apply to the cross-supplies of that product among the participants in the cartel. In addition, in response to a written question from the Court, the applicants provided detailed data on the volumes of their purchases and sales of micro waxes between 2002 and 2005 expressed in both euros and tonnes. It is apparent from that data that the resale price exceeded on average the price which the applicants paid for the micro waxes by 63.7%. Consequently, it may reasonably be envisaged that that the artificial prices arising from the cartel did not apply either to the cross-supplies of micro waxes between the participants in the cartel, as also in the case of slack wax. Consequently, even if Sasol did not itself produce micro waxes, it could take full advantage of the effects of the cartel on their price, given that it could obtain micro waxes from the producers participating in the cartel or from other sources at a price corresponding to a competitive price and resell them at the artificially high prices arising from the cartel.

276 Consequently, in the light of the foregoing considerations, it must be concluded that the Commission did not err in including the micro-wax sales in the value of sales.

277 Consequently, the second part of the fourth plea must be rejected.

The third part, alleging errors affecting the calculation of the basic amount of the fine regarding slack wax

278 The applicants argue that the Commission identified in the contested decision only one technical meeting in which slack wax sold to end-customers was discussed and that it did not definitely assert that Sasol had taken part in that meeting. Consequently, the gravity of the infringement related to slack wax sold to end-customers on the German market cannot justify a proportion of 15% of the sales value. Similarly, the Commission was wrong to assume that the infringement had lasted six years and six months.

The applicants' participation in the slack-wax part of the infringement between 30 October 1997 and 12 May 2004

279 The Commission stated as follows in recital 288 of the contested decision:

'Both Sasol and Shell expressly concede that prices for slack wax were discussed between competitors, especially from the late 1990s, and have provided details of contacts with that objective (see also recital (112)). At a meeting of 30 and 31 October 1997 (see recital (145)) at least ENI, H&R/Tudapetrol, MOL, Repsol, Sasol, Dea (after 2002, Shell) and Total discussed slack wax and agreed to a price increase. Shell and Total are found to have been represented at least at one meeting specifically dedicated to a discussion on slack wax on 8 and 9 March 1999 (see recital (152)). Sasol and ExxonMobil do not, in their reply to the statement of objections, exclude having been present at this meeting, and their presence indeed appears likely given that a handwritten note on an Shell-internal email sent the following day refers to "all producers". Sasol, Shell and Total were also represented at a technical meeting on 11 and 12 May 2004 (see recital (174)) where a price for slack wax was agreed upon. In addition, the Commission observes that slack wax was a point of discussion during some technical meetings at which ExxonMobil, Sasol, Shell and Total were present. ExxonMobil has conceded that it participated in such talks between 1993 and 1996. ExxonMobil also concedes that Mr [T. H.], representing ExxonMobil, participated in discussions about slack wax for particle board producers in the German-speaking part of Europe between 1999 and 2001 and in general confirms that slack wax sold to end-customers was discussed as part of the cartel arrangements. Likewise, Total reports that discussions regarding an increase of prices for slack wax took place. Shell and ExxonMobil also confirm that meetings relating to slack wax were held outside the technical meetings. While ENI, H&R/Tudapetrol, MOL and Repsol were also represented at some of these meetings, the Commission considers that the available evidence is not sufficient to hold these undertakings liable for the

infringement as far as it relates to slack wax. Moreover, although some pieces of evidence appear to relate to other periods and markets, the Commission considers that the available evidence only allows for the conclusion that the infringement related to slack wax sold to end-customers on the German market in the years 1997 to 2004.'

280 In addition, the Commission stated the following in recital 112 of the contested decision:

'Slack wax was mentioned at some technical meetings [footnote: recitals 144, 145, 152, 157, 174 and 175 of the contested decision]. … In addition, agreements relating to slack wax sold to end-customers on the German market were reached at least once outside the technical meetings when representatives of Shell, Sasol, ExxonMobil and Total, and perhaps others, met and further discussed slack wax, i.e. fixed prices and exchanged commercially sensitive information. For instance, there is evidence of one such meeting on 8–9 March 1999 in Düsseldorf. The individuals representing the companies at the specific meeting dedicated to slack wax were, for most of the companies, the same as at the technical meetings, except for Total.'

281 It should be observed that recitals 144, 145, 152, 157, 174 and 175 of the contested decision relate, respectively, to the meetings held on 19 and 20 June 1997, 30 and 31 October 1997, 8 and 9 March 1999, 3 and 4 February 2000, 11 and 12 May 2004 and 3 and 4 August 2004.

282 In the contested decision, the Commission justified its decision finding that there were anti-competitive practices in respect of slack wax only as regards sales to end-customers in Germany, in the following terms:

'…

(289)
The Commission further considers that these discussions only concerned slack wax that was sold to end-customers (such as particle board producers) and not, for instance, producers of paraffin waxes. While the corporate statements mostly fail to distinguish between different uses of slack wax, the email referred to in recital (152) [relating to the meeting of 8 and 9 March 1999 in Düsseldorf] only mentions slack wax sold to particle board producers. The Commission therefore considers that there exists doubt as to whether slack wax sold to customers other than end-customers was subject to the infringement and therefore limits its findings to slack wax sold to end-customers. These considerations are confirmed by Shell and ExxonMobil.

(290)
The available evidence suggests that the occasional discussions on slack wax focused principally on the German market. ExxonMobil, Sasol, Shell and Total all had sales on the German market and the meetings where slack wax was discussed took place in Germany. The Commission considers that there are not enough indications to support the conclusion that the arrangements regarding slack wax also related to slack wax sold to end-customers in other countries.

(291)
The Commission considers that the infringement, insofar as it relates to slack wax sold to end-customers on the German market, began with the meeting of 30 and 31 October 1997 and ended with the meeting of 11 and 12 May 2004.

(292)
The Commission therefore considers that the discussions on slack wax sold to end-customers on the German market led to agreements and/or concerted practices in the sense of Article 81 [EC] and Article 53 of the EEA Agreement. This finding is based on the independent and corroborating statements of Shell and Sasol which are supported by the statements of ExxonMobil and Total. The documentary evidence confirms this finding.'

283 First, as regards the meeting of 30 and 31 October 1997, at which Sasol was present, the Commission relies, in recital 145 of the contested decision, on a MOL note containing the statement 'slack wax: DM 550 -> 600'. The note also contains detailed information about the price increases of paraffin waxes, stating the figures and the expected dates of implementation of the increases by producer and cartel member.

284 The Commission inferred from this that '[a]s the line "price raise in January" refer[red] to the future, this note confirm[ed] that the participating companies [had] agreed on a strategy to harmonise and to raise prices' and that '[t]he note concern[ed] both paraffin waxes and slack wax'.

285 The applicants submit that the note concerns slack wax provided to the cartel members for the purposes of producing paraffin waxes.

286 In that regard, it must be noted that, according to the statements of the participants in the cartel, inasmuch as slack wax was the subject of cross-supplies between participants, its prices were not the subject-matter of the technical meetings, but were established by bilateral negotiations between the undertakings. The present argument must therefore be rejected.

287 Next, the applicants state that MOL did not sell slack wax to customers in Germany, so that the note does not relate to the slack-wax part of the infringement. In addition, it cannot be inferred from that information that a price agreement was reached.

288 The Court finds that those arguments are irrelevant since price-fixing in general applies to all customers, including, as in the present case, German end-customers. Furthermore, the Commission explained the reasons why it decided to limit the scope of the anti-competitive practices relating to slack wax to sales to German end-customers at recitals 289 to 292 of the contested decision, reproduced at paragraph 282 above. The applicants have not submitted any argument in relation to those passages of the contested decision.

289 In addition, the Commission accused the applicants of a complex infringement, consisting in 'agreements and/or concerted practices' so that it is not necessary to prove the conclusion of agreement on specific prices.

290 Lastly, the applicants submit that the 'Blauer Salon' debriefing note relating to that meeting does not mention slack wax as a topic of the meeting.

291 In that regard, it suffices to note that, in accordance with the case-law cited in paragraph 230 above, the fragmentary and sporadic items of evidence which may be available to the Commission should, in any event, be capable of being supplemented by inferences which allow the relevant circumstances to be reconstituted, and the assessment concerns all the accessible evidence. Consequently, the Commission cannot be reasonably required to prove each detail of the infringement by several convergent pieces of documentary evidence.

292 Having regard to those considerations, the Commission correctly found, in particular in the light of the participants' statements, that the MOL note relating to that technical meeting formed part of the body of evidence demonstrating the presence of 'agreements and/or concerted practices' relating to the slack wax sold to German end-customers.

293 Secondly, as regards the meeting of 8 and 9 March 1999, referred to in recital 152 of the contested decision, the Commission stated as follows:

'Shell submits a handwritten note which, it declares, has been written by Mr [S.R.] in preparation for that meeting. This would explain the last line of this note which reads "8/9.3.99 PM — particle board". Shell states that "PM" stands for "Paraffin Mafia", the label Shell was using to refer to the

companies usually participating in technical meetings. The note contains the date at which the meeting took place which makes Shell's explanation that it was produced in preparation of the meeting plausible and consistent with other evidence. The note taken by Mr [S.R.] shows that he expected individuals representing the different companies to exchange information on the supply of some large customers with slack wax. The day after that meeting, Mr [S.R.] sent an email to his superior, Mr [S.T.], stating that [one of the participants] intended to raise the prices for slack wax used in the particle board industry by 8 to 10% as of 1 June 1999. A handwritten note on that email reads: "All producers see the necessity to raise [prices]". This shows that the individuals representing the companies at the meeting agreed on a price raise for slack wax in the particle board industry and that [one of the participants] was going to implement that agreement as of June 1999. The reference to "all producers" also shows that other undertakings, apart from Total and Shell, must have participated in the meeting.'

294 According to recital 151 of the contested decision, Sasol does not deny that it was present at the meeting.

295 Similarly, recital 152 of the contested decision states that ExxonMobil does not deny having participated and admits that its representative attended a few multilateral discussions with Sasol, Shell/Dea, and Total specifically about slack wax for particle board producers in the German-speaking part of Europe, 'possibly between 1999 and 2001'.

296 The Court finds that the statements of ExxonMobil and Shell, and the note of Shell, cited in recitals 151 and 152 of the contested decision, form part of the body evidence from which the Court may infer that Sasol participated, during the period 1999 to 2001, in at least one meeting concerned with the 'agreements and/or concerted practices' relating to the fixing of the price of slack wax intended for German end-costumers.

297 Thirdly, as regards the technical meeting of 17 and 18 December 2002 at which Sasol was present, the Commission, examining a note by Total, made the following findings in recital 168 of the contested decision:

'There is also a dated chart entitled "European Market" which was distributed at the meeting. The copy found at Total contains handwritten additions which show that the export figures were discussed during the meeting. This note also contains other handwritten comments which read, inter alia: "Petrogal March maintenance. Slack wax below 500 €. MOL July 3 weeks maintenance situation." This shows that the price of slack wax was discussed during that meeting.'

298 It must be pointed out that the applicants do not put forward any arguments in relation to the passages in question of the contested decision.

299 Consequently, the chart found at Total forms part of the body evidence demonstrating the presence of 'agreements and/or concerted practices' relating to the fixing of the price of slack wax intended for German end-customers.

300 Fourthly, as regards the meeting of 11 and 12 May 2004 at which Sasol was present, the Commission refers, in recital 174 of the contested decision, to a manuscript note found at Total containing the following information:

'-> Sasol 40 €/50 $ — End of July.

-> We: 38 — 28.

-> 1 July –

+ FRP: 70 -> 6 000 €/T

+ Teelight: 50 -> 500 €/T

+ Micro wax: 25 -> 50 $/T

...

-> 40 €/T Slack wax.'

301 Recital 174 of the contested decision states that 'the last line [of this document] shows that a price increase for slack wax was also agreed upon' and '[f]rom the overall context of the note, it can be inferred that the arrow preceding the price figure points to an agreed strategy for the future, namely, an envisaged price increase'.

302 The applicants state that there is no indication that this line actually refers to an agreement regarding slack wax sold to end customers in Germany. No other undertaking participating in the meeting of 11/12 May 2004 indicated that such an agreement may have been reached. Since ExxonMobil, as one of the most important sellers of slack wax sold to end customers, was not among the participating undertakings listed in recital 174 of the contested decision, it is highly unlikely that slack wax sold to end customers might in fact have been discussed in this meeting.

303 Those arguments must be rejected on the basis of the considerations set out in paragraphs 289 and 291 above and it must be found that the note in question forms part of the body of evidence demonstrating the presence of 'agreements and/or concerted practices' relating to the slack wax sold to German end-customers.

304 In short, it must be concluded that the Commission gathered a body of documentary evidence demonstrating the existence of 'agreements and/or concerted practices' relating to the slack wax sold to German end-costumers.

305 The applicants none the less argue that that evidence does not show that agreements were concluded with Sasol.

306 As regards agreements of an anti-competitive nature reached, as in the present case, at meetings of competing undertakings, the Court of Justice has already held that an infringement of Article 81 EC is constituted when those meetings have as their object the restriction, prevention or distortion of competition and are thus intended to organise artificially the operation of the market. In such a case, in order to prove that the undertaking participated in the cartel, it is sufficient for the Commission to establish that the undertaking concerned participated in meetings during which agreements of an anti-competitive nature were concluded. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (*Aalborg Portland and Others* v *Commission*, cited in paragraph 230 above, paragraph 81, and Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel* v *Commission* [2007] ECR I-729, paragraph 47).

307 The reason underlying that rule is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it (*Aalborg Portland and Others* v *Commission*, cited in paragraph 230 above, paragraph 82, and *Sumitomo Metal Industries and Nippon Steel* v *Commission*, cited in paragraph 306 above, paragraph 48).

308 Consequently, the applicants' presence in the anti-competitive meetings and their failure to distance themselves from the content of the infringement gives good grounds for the Commission to attribute the latter to them, without the need to prove specifically that they concluded agreements at those meetings. Consequently, the argument raised by the applicants in that regard is irrelevant.

309 Lastly, the applicants submit that the technical meetings of 30 and 31 October 1997 and 11 and 12 May 2004 were not included in the statement of objections as 'slack-wax meetings'.

310 That argument cannot succeed. The evidence concerning the slack-wax part of the infringement, cited in the contested decision, was already included in the statement of objections. Similarly, the statement of objections clearly mentioned that the slack-wax part of the infringement was imputed to the applicants.

311 Moreover, it must be pointed out that the applicants do not dispute the Commission's finding that the practices relating to paraffin waxes and those relating to slack wax constitute a single and continuous infringement. Accordingly, the evidence relating to the practices concerning slack wax must be assessed in the context of all the evidence relating to the single infringement gathered by the Commission. That evidence shows the existence of continuous contacts between the undertakings that participated in the practices relating to slack wax.

312 In the light of all the foregoing considerations, the Court must uphold the finding in the contested decision that the applicants participated in the slack-wax part of the single, complex and continuous infringement, as referred to in the contested decision, during the period from 30 October 1997 to 12 May 2004.

313 It follows from this that the Commission did not err in taking into account, when calculating the basic amount of the fine imposed on the applicants, the value of sales made by the supply of slack wax and in applying the multiplier corresponding to the duration in question.

The disproportionate nature of the multiplier of 15% applied to the turnover from slack-wax sales

314 The applicants submit that the Commission failed to have regard to the principle of proportionality by using 15% of Sasol's sales of slack waxes to end-customers in Germany in order to calculate the amount of the fine.

315 According to the case-law, the principle of proportionality requires that measures adopted by the institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13; Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 96; and judgment of 12 September 2007 in Case T-30/05 *Prym and Prym* v *Commission*, not published in the ECR, paragraph 223).

316 In the procedures initiated by the Commission in order to penalise infringements of the competition rules, the application of the principle of proportionality requires that fines must not be disproportionate to the objectives pursued, that is to say, compliance with those rules, and that the amount of the fine imposed on an undertaking for an infringement in competition matters must be proportionate to the infringement, seen as a whole, having regard, in particular, to its gravity and duration (see, to that effect, *Prym and Prym Consumer* v *Commission*, cited in paragraph 315 above, paragraphs 223 and 224 and the case-law cited). In particular, the principle of proportionality requires the Commission to set the fine proportionately to the factors taken into account for the purposes of assessing the gravity of the infringement and also to apply those factors in a way which is consistent

and objectively justified (Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraphs 226 to 228, and Case T-446/05 *Amann & Söhne and Cousin Filterie* v *Commission* [2010] ECR II-1255, paragraph 171).

317 First, it must be noted that the slack-wax part of the infringement consisted, inter alia, in collusive activities concerning price-fixing between competitors and therefore fell within the category of the most harmful infringements to free competition.

318 Consequently, the Court considers that the application of the 15% rate to the value of slack-wax sales for the purposes of calculating the amount of the fine is proportionate to the gravity of that part of the infringement.

319 Secondly, it must be that pointed out that the Commission took into account the relevant factors in a way which is consistent and objectively justified. The slack-wax part of the infringement falls within point 23 of the 2006 Guidelines, displaying the most harmful forms of infringement, for which the application of a proportion 'at the higher end of the scale', that is between 15% and 30% of the value of sales, is generally justified. In fixing the proportion at 15% of the value of slack-wax sales, the Commission complied fully with those guidelines, since it chose the lowest proportion that could be applied, according to the general rule laid down by the 2006 Guidelines, to horizontal price-fixing agreements or concerted practices.

320 Thirdly, the applicants submit, none the less, that a factor of 15% is disproportionate, in the light of the small number of meetings and participants, the limited scope of the slack-wax part of the infringement and the relatively low market share of the participants.

321 As regards the allegedly small number of meetings at which the question of slack wax was discussed, it must be found, as is apparent from the analysis in paragraphs 283 to 310 above, that there were significantly more than the two meetings accepted by the applicants. In addition, the Commission proved to the requisite legal standard that the applicants had participated in the slack-wax part of the single, complex and continuous infringement, referred to in the contested decision, during the period from 30 October 1997 to 12 May 2004 (see paragraph 312 above). Consequently, the argument alleging a small number of meetings concerning slack wax must be rejected.

322 As regards the limited scope of the slack-wax part of the infringement in that the latter concerns only the sales to German end-customers and Sasol's allegedly limited market share, it must be noted that those factors have already been taken into account in calculating the basic amount of the fine. Indeed, only the turnover of the Sasol undertaking (reflecting its exact market share) from the sales to the group of customers in question (reflecting the reduced scope of the slack-wax part of the infringement) was taken into account when calculating the value of sales to which the proportion of 15% was subsequently applied in order to reflect the gravity of the infringement.

323 The applicants' arguments must therefore be rejected.

324 Fourthly, the applicants rely on the fact that they were not producers of slack wax.

325 In that connection, it must be borne in mind that the artificially high prices of slack wax did not apply to the cross-supplies between participants. Consequently, notwithstanding the fact that Sasol did not itself produce slack wax, it could take advantage of the slack-wax part of the infringement, given that it could obtain slack wax at a competitive price and resell it to German end-customers at the artificially high prices arising from the cartel.

326 The present argument must therefore also be rejected.

327 Consequently, the Commission did not fail to have regard to the principle of proportionality in taking as a multiplier 15% of the value of sales in order to reflect the gravity of the slack-wax part of the infringement.

328 In the light of the foregoing, the present complaint must be rejected, as therefore must the third part of the fourth plea.

The fourth part of the plea, based on the failure to determine the basic amount of the fine differently according to the different periods of participation in the cartel by the various companies

329 The applicants submit that, according to the decision-making practice of the Commission, where different addressees are fined for different periods of the infringement, the Commission must determine the basic amount of the fine to be imposed by dividing the sales-related part of the basic amount by the number of different periods.

330 However, in the present case, in order to reflect the duration of the infringement, the Commission applied a multiplier of 13 for Sasol Wax for the entire period of the infringement, on the one hand, and a multiplier of 10 for the periods for which all the applicants were held to be jointly and severally liable, on the other, while taking into account the same value of sales for those different periods.

331 The Commission adopted that approach without explaining why the proper application of the EU competition rules required an especially severe punishment for a South African group of companies for periods of an infringement in which it was not active in Europe at all (the Schümann period) or was only active through a joint venture (the joint venture period), when the Commission saw no reason to penalise Vara, the previous parent company of HOS, holding a third of Schümann Sasol's share capital.

332 In so doing, it is alleged that the Commission failed to have regard to the principle of the prohibition of excessive fines and the principle of individual legal responsibility.

333 First of all, it should be borne in mind that, under point 6 of the 2006 Guidelines, the combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement. In addition, point 13 of those guidelines states that, in determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA.

334 According to the case-law, to the extent to which reliance is to be placed on the turnover of the undertakings involved in the same infringement for the purpose of determining the proportions between the fine to be imposed, the period to be taken into consideration must be ascertained in such a way that the resulting turnovers are as comparable as possible. Consequently, an individual undertaking cannot compel the Commission to rely, in its case, upon a period different from that used for the other undertakings, unless it proves that, for reasons peculiar to it, its turnover in the latter period does not reflect its true size and economic power or the scale of the infringement which it committed (Case T-319/94 *Fiskeby Board* v *Commission* [1998] ECR II-1331, paragraph 42, and judgment of 30 September 2009 in Case T-175/05 *Akzo Nobel and Others* v *Commission*, not published in the ECR, paragraph 142).

335 In recital 634 of the contested decision, the Commission stated that it acknowledged that the year 2004 was, due to the enlargement of the European Union in May, an exceptional year and that it considered it appropriate not to use the value of sales in the year 2004 as the only basis for the calculation of the fine but to use the value of sales of the last three business years of the entity's involvement in the infringement.

336 Consequently, with regard to the principal part and the second part of the infringement, relating to paraffin waxes, the Commission used the average value of sales of paraffin waxes by Sasol during the years 2002 to 2004. Accordingly, it arrived at a figure of EUR 167 326 016. As regards the third part of the infringement, concerning slack wax, the Commission used Sasol's average value of sales during the financial years 2001 to 2003. It therefore established an amount corresponding to EUR 5 404 922 for slack wax.

337 First, it is appropriate to examine the applicants' arguments from the point of view of the position of Sasol Wax.

338 The applicants submit that the part of the fine for which only Sasol Wax is liable amounts to EUR 67.5 million, representing about 22% of its turnover of 2007. A fine of such an amount will commercially destroy Sasol Wax, unless the Sasol group voluntarily bears the fine, despite the absence of any fault and liability with regard to the Schümann period.

339 In so far as that argument concerns the capping of the fine, reference should made to the analysis relating to the sixth plea in law.

340 Moreover, it must be pointed out that the applicants have not put forward any argument to show that the value of sales used for calculating the basic amount of the fine imposed on Sasol Wax did not appropriately reflect the economic importance of the infringement committed by it or its relative weight in the cartel, within the meaning of the 2006 Guidelines and the case-law cited in paragraph 334 above.

341 Similarly, the applicants do not deny that Sasol Wax is liable, as the legal successor of the earlier companies which participated directly in the cartel, for the infringements committed by HOS and Schümann Sasol.

342 It should be added that, according to the case-law, in calculating fines imposed under Article 23(2) of Regulation No 1/2003, differentiated treatment of the undertakings concerned is inherent in the exercise of the Commission's powers under that provision. In exercising its discretion, the Commission is required to fit the penalty to the individual conduct and specific characteristics of the undertakings concerned in order to ensure that, in each case, the European Union competition rules are fully effective (see Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 44 and the case-law cited). The applicants have not, however, relied on any rule of law which would oblige the Commission to individualise the value of sales within a group.

343 Consequently, it must be found that the applicants have failed to prove that the Commission had in any way erred in using the average value of the sales of the Sasol undertaking during the period from 2002 to 2004 in order to calculate the basic amount of the fine imposed on each of the companies comprising it, for the entire period of its participation in the parts of the infringement concerning the paraffin waxes, that is the period from 3 September 1992 to 28 April 2005.

344 For the same reasons, the applicants have not shown either that the Commission had in any way erred in using the average value of the sales of the Sasol undertaking during the period from 2001 to 2003 in order to calculate the basic amount of the fine imposed on each of the companies comprising it, for the entire period of its participation in the parts of the infringement concerning slack wax, that is the period from 30 October 1997 to 12 May 2004.

345 As regards the need for the Sasol group to bear, from an economic perspective, the part of the fine imposed on Sasol Wax exceeding 10% of its turnover, the Court considers that that question does not concern the calculation of the basic amount of the fine, but rather the examination carried out in the context of the sixth plea in law.

346 Consequently, the applicants' arguments must be rejected, without prejudice to the outcome of the examination of the sixth plea in law.

347 Secondly, it must be found that the imputation of the actions of Schümann Sasol to Schümann Sasol International, during the joint venture period, must be upheld because of the application of the presumption that decisive influence has been exercised by the parent company over the conduct of its wholly-owned subsidiary, a presumption which has not been rebutted by the applicants.

348 In addition, the applicants do not challenge the imputation of the liability of Schümann Sasol International to Sasol Wax International because of the legal succession between those two legal persons.

349 Consequently, it must be found that the applicants have failed to show that the Commission erred in using the same value of sales for Sasol Wax and its single parent company, Sasol Wax International.

350 Thirdly, it must be borne in mind that the first plea in law has been upheld and the contested decision annulled as regards the imputation of liability for the conduct of Schümann Sasol during the joint venture period to Sasol Holding in Germany and Sasol Ltd (see paragraph 127 above). Consequently, the question as to the alleged unlawfulness on account of the value of sales used in order to calculate the fine, as imposed on the latter for the joint venture period, no longer arises.

351 Moreover, as regards the Sasol period, during which the entire share capital of Sasol Wax was indirectly held by Sasol Holding in Germany and Sasol Ltd, there is no rule of law which prevented the Commission from using the same value of sales in order to calculate the amount of the fine imposed on the subsidiary directly involved in the infringement and its parent companies.

352 In the light of all the foregoing considerations, the General Court considers that the Commission did not fail to have regard, in the context of establishing the value of sales, to the principle of the prohibition of excessive fines and the principle of individual legal responsibility. Consequently, the fourth part of the fourth plea must be rejected, as therefore must the fourth plea in its entirety, without prejudice to the consequences of upholding the first and sixth pleas in law.

5. *The fifth plea in law, based on the erroneous assumption that Sasol played a leading role*

353 The applicants claim that the Commission erred in law and committed a manifest error of assessment of the evidence in concluding that the part of the fine to be issued against Sasol with regard to paraffin waxes was to be increased by 50% (equivalent to EUR 210 million) since Sasol was a leader of the cartel concerning paraffin waxes.

The contested decision

354 The Commission set out its findings as regards Sasol's leadership role in recitals 681 to 686 of the contested decision:

'…

(681) Point 28 of the 2006 Guidelines on fines provides that "[the] basic amount may be increased where the Commission finds that there are aggravating circumstances, such as: … role of leader in, or instigator of the infringement …" In the statement of objections, the Commission has stated that it would "also pay particular attention to the leading role that Sasol may have played, as it results from the facts described above". In its reply to the statement of objections, Sasol submits that it has not played such a leading role in the infringement. Sasol argues that it only played a leading role in the technical part of the technical meetings which was owed to its superior knowledge of the business; furthermore, Sasol, being dependent on supplies from its competitors, was not in a position to lead the cartel although it concedes having initiated the discussions on prices; even if HOS — being small in terms of turnover compared to its competitors — may have played a leading role, its influence has decreased over time. Finally, Sasol argues that its leading role is not reflected by the available evidence. Sasol appears to suggest that Total and ExxonMobil played a leading role with respect to certain periods and/or aspects of the infringement.

(682) Sasol's arguments cannot be accepted. The evidence described in Chapter 4 shows that:

(1) Sasol convened almost all technical meetings by sending invitations and proposing agendas and organised many of them by reserving hotel rooms, renting meeting rooms and arranging for dinners;

(2) Sasol chaired the technical meetings and initiated and organised the discussions on prices;

(3) Sasol followed-up the technical meetings by bilateral contacts, at least on several occasions; and

(4) Sasol represented one of the other undertakings involved at least once (see recital (129)).

(683) The argument that Sasol merely convened, organised and chaired the technical part of the technical meetings cannot be accepted. There is no indication that Sasol relinquished its leading role when the discussions during the technical meetings turned to the anti-competitive issues which were an integral part of those technical meetings, and Sasol itself concedes that it initiated discussions on prices. None of the contemporaneous notes show a change of structure between the two parts of the meetings. The Commission in any event considers that both parts of the meetings were closely interlinked and that no clear-cut distinction between the two is possible. Finally, the other participants at the technical meetings perceived Sasol as the leader of the cartel. This is particularly evident by the email sent by ExxonMobil's representative (see recital (600)) in order to terminate ExxonMobil's involvement in the cartel. There is no indication that Sasol ever tried to counteract the other participants' impression that it lead the cartel. That Sasol may have been dependent by the other companies for supply does not exclude that it took a leading role in the cartel. Given that Sasol was the market leader in paraffin waxes, the supply dependence is only one aspect of the situation, the others being that Sasol was, to a certain extent, able to influence the market for paraffin waxes and that Sasol was a powerful buyer. While Sasol and its predecessors may be small compared to other addressees of the present decision in terms of worldwide turnover, it must not be forgotten that it is the biggest player on the market for paraffin waxes in terms of value of sales. It is also not a precondition for a finding of a leading role that the undertaking concerned was economically independent from its competitors or that it was able to exert pressure on them. For finding leadership, case-law does not require that the leader dictates the behaviour of the others. The Commission, therefore, does not consider that this leading role is rebutted by the extracts of the statements quoted by Sasol.

(684) As Sasol's leading role cannot be demonstrated as far as slack wax is concerned, the Commission concludes that the aggravating circumstance of having played a leading role can only be applied to the other products to which the infringement related.

(685) In so far as Sasol suggests that other undertakings played a leading role with respect to certain periods or aspects of the infringement, the Commission observes that these allegations are not based on evidence and cannot, therefore, be taken into consideration.

(686) In view of the above, the basic amount of the fine for Sasol should be increased by 50% of the part of the basic amount that is based on Sasol's sales in fully-refined paraffin waxes, semi-refined paraffin waxes, wax blends, specialties, hydro-finished wax and hard paraffin waxes.'

Relevant case-law

355 According to well-established case-law, where an infringement has been committed by a number of undertakings, it is necessary, in determining the amount of the fines, to establish their respective roles in the infringement throughout the duration of their participation in it (see, to that effect, *Commission* v *Anic Partecipazioni*, cited in paragraph 252 above, paragraph 150). It follows, in particular, that the role of 'ringleader' (leader) played by one or more undertakings in a cartel must be taken into account for the purposes of calculating the amount of the fine, in so far as the undertakings which played such a role must therefore bear special responsibility in comparison with the other undertakings (see, to that effect, Case C-298/98 P *Finnboard* v *Commission* [2000] ECR I-10157, paragraph 45).

356 In accordance with those principles, point 28 of the 2006 Guidelines lays down, under the heading of 'Aggravating circumstances', a non-exhaustive list of circumstances which can result in an increase in the basic amount of the fine, which includes the role of leader in the infringement (see, by analogy, Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraphs 280 to 282, and Case T-343/06 *Shell Petroleum and Others* v Commission [2012] ECR, paragraph 197).

357 In order to be classified as a leader in a cartel, an undertaking must have been a significant driving force for the cartel and have borne individual and specific liability for the operation of the cartel. That factor must be assessed in the light of the overall context of the case. It may, inter alia, be inferred from the fact that the undertaking, through specific initiatives, voluntarily gave a fundamental boost to the cartel. It may also be inferred from a combination of indicia which reveal the determination of the undertaking to ensure the stability and success of the cartel (*BASF* v *Commission*, cited in paragraph 356 above, paragraphs 299, 300, 351, 370 to 375 and 427, and *Shell Petroleum and Others* v *Commission*, cited in paragraph 356 above, paragraph 198).

358 That is the case where the undertaking participated in cartel meetings on behalf of another undertaking which did not attend them and notified that other undertaking of the results of those meetings. The same applies where it is shown that that undertaking played a central role in the actual operation of the cartel, for example by organising various meetings, collecting and distributing information within the cartel, and by most often suggesting proposals relating to the operation of the cartel (*BASF* v *Commission*, cited in paragraph 356 above, paragraphs 404, 439 and 461, and *Shell Petroleum and Others* v *Commission*, cited in paragraph 356 above, paragraph 199). In establishing such a central role, chairing meetings and the taking of an initiative to create the cartel or being instrumental in securing the involvement of a new participant are also relevant (see, to that effect, Case T-29/05 *Deltafina* v *Commission* [2010] ECR II-4077, paragraphs 333 and 335).

359 By contrast, the fact that an undertaking exerted pressure, or even dictated the conduct of other members of the cartel is not a necessary precondition for that undertaking to be described as a leader in the cartel. The market position enjoyed by an undertaking and the resources at its disposal also cannot constitute evidence of a role of leader in the infringement, even though they form part of the context in which such evidence must be assessed (Case T-357/06 *Koninklijke Wegenbouw Stevin* v

Commission [2012] ECR, paragraph 286, and *Shell Petroleum and Others* v *Commission*, cited in paragraph 356 above, paragraph 201; see also, to that effect, *BASF* v *Commission*, cited in paragraph 356 above, paragraphs 299 and 374).

360 In addition, according to the case-law, having regard to the significant consequences regarding the amount of the fine to be imposed on the leader of a cartel, it is for the Commission to set out in the statement of objections the evidence which it considers relevant to enable an undertaking under investigation which may be classified as a leader of the cartel to respond to such an objection. However, in light of the fact that that statement remains a step in the adoption of the final decision and does not therefore constitute the Commission's definitive position, the Commission cannot be required, already at that stage, to carry out a legal classification of the evidence on which it relies in its final decision in classifying an undertaking as leader of the cartel (Case C-511/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-5843, paragraphs 70 and 71).

361 Lastly, the Court would point out that the passages of documents and statements which were not expressly cited either by the Commission in the contested decision or in the statement of objections can be taken into account by the Court in the exercise of its unlimited jurisdiction, provided that the those documents and statements were made accessible to the applicants in the administrative procedure after the statement of objections (Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraph 55; see, to that effect, *BASF* v *Commission*, cited in paragraph 356 above, paragraph 354, and *Shell Petroleum and Others* v *Commission*, cited in paragraph 356 above, paragraph 176).

Compliance with the obligation to state reasons as to the finding regarding Sasol's role as leader

362 The applicants submit that the Commission has not stated sufficient reasons for its finding that Sasol played a leadership role in the cartel.

363 It is settled case-law that the statement of reasons on which an individual decision is based must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to the wording of the measure in question but also to the context in which it was adopted and to all the legal rules governing the matter (see Case C-367/95 P *Commission* v *Sytravel and Brink's France* [1998] ECR I-1719, paragraph 63 and the case-law cited).

364 In the present case, it must be found that the Commission did state in a sufficiently precise manner, in recitals 681 to 686 of the contested decision, the factors on which it relied in coming to the view that Sasol was the leader of the part of the infringement concerning the paraffin waxes. The Commission set out the facts which it considered relevant in that regard and specified the documents in support of those findings of fact.

365 The complaint that the statement of reasons was insufficient must therefore be rejected as unfounded.

The substantive assessment of the evidence gathered by the Commission in support of its conclusion concerning the leading role of Sasol

366 First of all, the applicants submit that the facts in the contested decision are not sufficient to establish a leadership role of Sasol, so that the Commission made a manifest error of assessment and an error of law in that regard.

367 First, it is appropriate to examine the evidence in recital 682 of the contested decision, according to which Sasol convened almost all technical meetings, sent invitations and proposed agendas for those meetings, organised many of the meetings by reserving hotel rooms, renting meeting rooms and arranging dinners, chaired the meetings and initiated and organised the discussions on prices.

368 The applicants do not dispute the accuracy of the facts referred to above.

369 They do, however, contend that Sasol did not set an agenda for the cartel discussion, but only for the — legitimate — technical part of the meetings. In addition, the dates and venues of the 'Blauer Salon' meetings were not unilaterally determined by Sasol, but agreed by all participants.

370 In addition, the applicants submit that Sasol did not organise or structure the price discussion of the cartel participants in any way. After chairing the technical part of the meeting, Sasol usually started the discussion on prices, but pricing was then openly discussed and the pricing decisions were agreed upon by all participants in an open 'round table discussion'. There is no indication of any pressure that Sasol exerted on any other participant to achieve a certain outcome of the discussions.

371 The Court considers that the arguments put forward by the applicants cannot lessen the importance of the fact that it was Sasol which convened almost all technical meetings, sent the invitations to the participants, reserved hotel rooms, rented meeting rooms and arranged dinners. This demonstrates that it was Sasol which organised the anti-competitive meetings from a practical point of view.

372 In addition, the fact that Sasol sent the invitations is of particular importance, going beyond that of practical organisation, given that when the participants in the cartel were absent from a technical meeting or from several successive meetings, and had not therefore learned of the venue and date of the next technical meeting on the spot, they could attend subsequent meetings at the invitation of Sasol.

373 Similarly, the fact that Sasol set the agenda at least for the legitimate, technical part of the discussions is evidence of a certain pre-eminence among the participants in the technical meetings, capable of strengthening Sasol's existing authority on account of its status as the largest producer of paraffin waxes in the EEA, having a 22.4% market share in 2004.

374 In addition, the fact that it was Sasol which generally started the discussion on prices is also important since it was therefore generally Sasol which moved the legitimate, technical discussions on to discussions which were anti-competitive in nature. Thus, even in the absence of details concerning the anti-competitive discussions on the agenda set by Sasol, a natural consequence of the clandestine nature of cartels, it was generally Sasol which determined the place of the anti-competitive discussion among the subjects discussed. In addition, it is apparent from the file that it was generally Sasol which was the first to announce the target price for paraffin waxes or the increase, as well as the start date for the application of the new prices with regard to customers.

375 Moreover, it should be borne in mind that, according to the case-law cited in paragraph 359 above, the fact that an undertaking exerted pressure, or even dictated the conduct of other members of the cartel is not a necessary precondition for that undertaking to be described as a leader in the cartel. Consequently, the applicants cannot properly rely on the fact that Sasol did not exert any pressure on the other participants during the technical meetings.

376 Secondly, the applicants do not deny that, on at least one occasion, Sasol represented one of the other undertakings in question, namely Wintershall. In addition, Sasol informed the other participants in the cartel, the representatives of which had been unable to attend a meeting, of the results of that meeting, as is shown in recital 103 of the contested decision and point 185 of the annex to that decision as regards MOL, Eni and Repsol.

377 Thirdly, the Commission also notes, in recital 683 of the contested decision, that the other participants at the technical meetings perceived Sasol as the leader of the cartel. This is particularly evident from the email sent by ExxonMobil's representative in order to terminate ExxonMobil's involvement in the cartel.

378 The applicants submit that the evidence gathered by the Commission does not support its finding that the other participants perceived Sasol to be the leader. ExxonMobil's email was only sent to Sasol because it was Sasol that sent the preceding email with the agenda for the proposed meeting.

379 ExxonMobil's email was examined in recital 600 of the contested decision. The Commission found as follows:

'ExxonMobil states that the last meeting attended by one of its representatives was a technical meeting on 27 and 28 February 2003 in Munich. In reaction to the invitation for the meeting on 15 January 2004 which was sent by Mr [M.] of Sasol, Mr [Hu.] of ExxonMobil replies inter alia: "The agenda items seems to be of interest to us. However, as we understand this group of competitors meets without the support of an industry trade association and therefore without a structure and statutes. We feel uncomfortable with this and would like to suggest to bring these meetings under the umbrella of the EWF either as part of the technical committee, or as a separate subcommittee. ExxonMobil will not attend this meeting without the support of a statuted industrial trade association."'

380 In the light of the context of that email, the Court finds that the reference to meetings between 'competitors … without the support of an industry trade association' shows that ExxonMobil wished to bring to an end its participation in the infringement, as the Commission indeed correctly found. The use of more explicit language would not have been reasonable, given the clandestine nature of cartels and the risks of a fine arising from the explicit reference in an email to anti-competitive conduct.

381 The fact that that email was sent only to Sasol and not to the other participants shows beyond a reasonable doubt that ExxonMobil regarded Sasol as the leader of the cartel.

382 The statements of Shell and Sasol referred to in recital 107 of the contested decision contain concordant evidence, in that both undertakings stated that the meetings were generally organised and chaired by Sasol's representative.

383 Consequently, the applicants' arguments in that regard must be rejected and the Commission's finding that the other participants perceived Sasol as the leader of the cartel upheld.

384 In the light of the foregoing, it must be found that Commission gathered a body of concordant evidence which, in the light of the relevant case-law, justifies the conclusion that Sasol was a significant driving force for the cartel and bore individual and specific liability for its operation, so that the Commission properly found that it was the leader of the parts of the cartel concerning paraffin waxes.

385 The applicants' other arguments cannot call in question the validity of that finding.

386 First, the applicants state that the only difference between Sasol and the other participants is the fact that Sasol organised and chaired the meetings, started the pricing discussions and the implementation of agreed price increases more often and that it was usually the first to implement the prices agreed upon by all participants.

387 First of all, it must be found that the contested decision is not based solely on those statements, as is indeed apparent from the examination above.

388 Next, as the Commission correctly notes, there was no other undertaking than Sasol for which there is so much evidence pointing to its role as a leader. It is apparent from the annex to the contested decision that there is explicit evidence of meetings organised by the other participants in respect of only 5 meetings, in this case 1 by MOL, 3 by Total and 1 by Shell, out of a total of 51. On the other hand, the initiation and organisation of 11 meetings can be attributed to Sasol by reference to email invitations and agendas.

389 The present argument must therefore be rejected.

390 Secondly, the applicants submit that Sasol was not in a position to be the leader of the cartel, since it was dependent on the other participants in the cartel which were vertically integrated, from which it obtained slack wax, the raw material for paraffin waxes.

391 That argument cannot succeed. Sasol's share of the paraffin waxes market in the EEA was 22.4% in 2004, so that Sasol was, as the applicants accept, the largest supplier of paraffin waxes and the 'market leader'. In addition, it was an important purchaser of slack wax, for example: by its own admission it was the most important purchaser of the slack wax produced by Shell and ExxonMobil. It therefore had a strong negotiating position vis-à-vis the slack wax producers on account of its buyer power. Moreover, the fact that Sasol was not subjected to any pressure as regards the price of slack wax by the vertically integrated producers is sufficiently shown by the fact that even the resale of slack wax by it to the German end-customers was a profitable commercial activity. It follows from this that the commercial importance of Sasol among the cartel's participants was not affected by the fact that it was not vertically integrated.

392 Thirdly, the applicants submit that the Commission could not properly find that the anti-competitive agreements and practices concerning slack wax and paraffin wax constituted a single, continuous infringement and at the same time that a leading role for Sasol as regards slack waxes could not be established. Given that a partial leadership of a cartel is not possible, the Commission made an error of assessment in that regard.

393 As the Commission correctly observes, the concepts of 'single and continuous infringement' and 'leader in the infringement' are not based on the same conditions. The concept of a 'single, continuous infringement' is based on the idea of a single anti-competitive aim, whereas the concept of 'the leader of the infringement' depends on an undertaking being a significant driving force in the cartel.

394 Consequently, no rule of law obliges the Commission to prove that Sasol's role as leader extended to all parts of the infringement. On the contrary, the fact that the Commission did not find that Sasol had the role of leader regarding the slack-wax part of the infringement, despite its role as organiser of the technical meetings, during which slack wax was also discussed, reflects a fair approach on the part of the Commission.

395 In the light of the foregoing, it must be concluded that the Commission has adduced several concordant items of evidence from which, taken together, it can be found that Sasol was a significant driving force for the cartel.

396 Consequently, the Commission did not commit any error of assessment or error of law by concluding, on the basis of a body of consistent and convergent evidence, that the applicants had taken on the role of leader of the cartel in the area of paraffin waxes.

397 As a consequence, the present complaint must be rejected.

The allegedly excessive, disproportionate and discriminatory nature of the 50% increase in the basic amount of the fine in respect of the role of ringleader

398 The applicants submit that the increase of the basic amount of the fine by EUR 210 million is grossly excessive and disproportionate. Consequently, they ask the Court to set aside the 50% increase of the fine or at the very least to reduce substantially the rate of increase in order to reflect adequately and proportionally the gravity of Sasol's infringement in comparison to those of the other participants.

399 First, the applicants submit that the Commission inferred the alleged leadership role of Sasol solely from circumstances that, to a lesser extent, also apply to other participants in the cartel, so that there is no qualitative difference between Sasol's and the other participants' contributions to the cartel. The Commission therefore infringed the principle of equal treatment in considering these facts only to the detriment of Sasol and not also to the detriment of the other participants.

400 It must be noted that, as is apparent from the analysis in paragraphs 367 to 396 above, the Commission showed that Sasol was, in the light of its role as the cartel's leader, in a different situation to the other participants. It was possible to reach that conclusion on the basis of both quantitative and qualitative factors, given that only Sasol could be accused of certain forms of conduct indicative of the role of leader. The Commission may in any event properly differentiate the basic amount of fine imposed on the various participants taking into account the particular intensity of the organisational activities of a single participant in the cartel.

401 Consequently, having regard to the particular situation of Sasol in relation to that of the other participants, in the light of the case-law cited in paragraph 181 above, the Commission did not fail to have regard to the principle of equal treatment.

402 Secondly, the applicants submit that Sasol's infringement is not of such greater gravity than the infringement of the other participants that a 50% increase of the fine could be justified. Sasol's financial strength is also significantly lower than that of the other cartel participants, so that it is already hit much harder by the basic amount of fine than all the other participants of the cartel.

403 The rate of increase of 50% added to the basic amount of the fine represents 125% of Sasol Wax's annual EEA sales of paraffin waxes. It is also equivalent to 75% of the aggregate basic amount of the fines imposed on all other cartel participants, even though Sasol Wax's market share is about 25 to 30%.

404 According to the case-law, the amount of the fine must be adjusted in order to take account of the desired impact on the undertaking on which it is imposed, so that the fine is not rendered negligible, or excessive, notably by reference to the financial capacity of the undertaking in question, in accordance with the requirements that follow from, first, the need to ensure that the fine is effective and, second, respect for the principle of proportionality (*Degussa* v *Commission*, cited in paragraph 203 above, paragraph 283, and Case T-410/03 *Hoechst* v *Commission* [2008] ECR II-881, paragraph 379).

405 According to the case-law cited in paragraph 316 above, the application of the principle of proportionality requires that fines must not be disproportionate to the objectives pursued, that is to say, to compliance with the European Union competition rules, and that the amount of the fine imposed on an undertaking for an infringement in competition matters must be proportionate to the infringement, seen as a whole, having regard, in particular, to its gravity and duration. In particular, the principle of proportionality requires the Commission to set the fine proportionately to the factors taken into account for the purposes of assessing the gravity of the infringement and also to apply those factors in a way which is consistent and objectively justified.

406 In the present case, it must be pointed out that the fact that the basic amount of the fine represents 125% of Sasol Wax's annual EEA sales of paraffin waxes in essence arises purely because Sasol Wax participated in the cartel for 13 years and the duration of the participation is a multiplier applied to the value of sales.

407 Similarly, the fact that the increase on account of the leadership role is equivalent to 75% of the aggregate basic amount of the fines imposed on all other cartel members is due to the fact that Sasol, the market leader in paraffin waxes with a 22.4% market share, achieved sales much higher in value than those of the other participants.

408 None of the applicants' comparisons is therefore relevant to analysing the proportionality of the 50% in increase in the basic amount on account of the leadership role in the cartel.

409 By contrast, the Court has confirmed, in circumstances similar to those of the present case and in the exercise of its unlimited jurisdiction, that an increase of 50% in the basic amount of the fine appropriately reflected the additional harmful effect of the infringement that stemmed from the role of leader of the cartel (*Koninklijke Wegenbouw Stevin* v *Commission*, cited in paragraph 359 above, paragraph 302).

410 Moreover, it must be observed that the increase in the basic amount of the fine does not concern the question of the financial capacity of the undertaking found liable for the infringement. The calculation criterion used in that regard is the limit on the total amount of the fine of 10% of the undertaking's annual turnover. Accordingly, the arguments put forward by the applicants in that regard are ineffective.

411 Consequently, in the light of the circumstances of the present case and the evidence gathered by the Commission proving Sasol's role as leader of the cartel, it must be concluded that the Commission did not fail to have regard to the principle of proportionality and did not increase the basic amount of the fine excessively by applying a 50% increase on account of Sasol's leadership role.

412 Accordingly, the complaints alleging the failure to have regard to the principles of equal treatment and proportionality must be rejected.

413 In the light of all the above considerations, the fifth plea in law must be rejected in its entirety.

6. *The seventh plea, based on the failure to grant full immunity to Sasol with regard to certain parts of the fine*

414 The applicants claim that the Commission erred in law and infringed point 23 of the 2002 Leniency Notice by basing the fine to be imposed on Sasol on a number of elements provided voluntarily by Sasol that were unknown to the Commission prior to Sasol's submissions and that had a significant and direct bearing on the gravity and duration of the infringement.

415 In recital 741 of the contested decision, the Commission concluded that the evidence provided by Sasol after the inspections, by two submissions lodged in April and May 2005 and in the accompanying annexes, constituted significant added value within the meaning of the 2002 Leniency Notice, as it strengthened the Commission's ability to prove the facts pertaining to the cartel.

416 In addition, in recital 743 of the contested decision, the Commission states that the first evidence which had a direct bearing on the determination of the cartel's duration was not provided by Sasol but was found during the inspections, namely the MOL notes and the 'Blauer Salon' debriefing notes and was contained in Shell's application for immunity.

417 On that basis, recital 749 of the contested decision states that the Commission reduced Sasol's fine by 50%, namely the maximum rate of reduction that may be granted under the 2002 Leniency Notice to an undertaking which is not the first to disclose the existence of a cartel, which in the present case was Shell.

The first part of the plea, concerning information with regard to meetings before 2000

418 The applicants claim that the meeting in Budapest that took place on 3 and 4 February 2000 was the earliest meeting mentioned by Shell in its application for immunity. Shell's submission lacked any concrete evidence relating to meetings held before that date. Thus, the Commission had to rely on Sasol's submissions to prove meetings, in particular in the period from 1995 until 2000.

419 As regards the MOL notes and the 'Blauer Salon' debriefing notes, found during the inspections, and which is thus evidence acquired prior to the voluntary communications by Sasol, the applicants submit that these sources did not cover all the meetings included in the Commission's decision and that the information available through those notes was in most cases not self-explanatory and was as such not sufficient to prove the duration of the infringement. In addition, the applicants refer to seven technical meetings held between 1996 and 2001, the essential elements of which, such as dates, venues, identity of the participants and anti-competitive contents could only be established by the Commission with the required degree of certainty through Sasol's applications for leniency.

420 Consequently, the applicants submit that it was on the basis of the evidence supplied by Sasol that the Commission was able to prove sufficiently the existence of an infringement between 1992 and 1999. They therefore ask the Court to modify the contested decision and to grant them full immunity for that part of the infringement concerning the years 1992-1999.

421 It must be found that the applicants' arguments are not borne out either by the content of the contested decision or the documents cited therein.

422 First, as regards the period between the first meeting, in 1992, and the eighth meeting, which was held on 27 January 1995, the Commission had at its disposal information on the cartel from sources other than Sasol's application for leniency, namely MOL notes and Sasol's debriefing notes of 'Blauer Salon' meetings, found during the inspections. This information related to the technical meetings of 3 and 4 September 1992 (recital 126 of the contested decision), 26 March 1993 (recital 129 of the contested decision), 2 June 1993 (recital 130 of the contested decision), 25 October 1993 (recital 131 of the contested decision), 24 June 1994 (recital 132 of the contested decision), 30 September 1994 (recital 133 of the contested decision) and 27 January 1995 (recital 134 of the contested decision). The MOL notes and the 'Blauer Salon' debriefing notes relating to those meetings, referred to in the contested decision, enabled the Commission to ascertain the identity of the participants, the date and venue of the meetings, and even, for the most part, the content of the discussions and their anti-competitive nature.

423 As regards the period between the ninth meeting, held on 16 and 17 March 1995, and the twenty-second meeting, held on 27 and 28 October 1999, Sasol's statements enabled only three meetings to be brought to the Commission's notice, namely those of 12 and 13 January 1999 (recital 150 of the contested decision), 2 and 3 March 1999 (recital 151 of the contested decision) and 23 and 24 September 1999 (recital 155 of the contested decision). By contrast, the Commission could ascertain, on the basis of the MOL notes found at the inspections, that four meetings were held, namely those of 22 and 23 June 1995 (recital 136 of the contested decision), 14 and 15 May 1996 (recital 140 of the contested decision), 12 and 13 February 1998 (recital 146 of the contested decision) and 8 and 9 July 1999 (recital 154 of the contested decision). In addition, the Commission could also piece together the content of two of those meetings on the basis of the evidence gathered at the inspections.

424 It follows that the evidence available to the Commission before Sasol's submissions were lodged enabled it to prove the existence of the infringement for the period prior to 3 February 2000. Consequently, the applicants' claims have no basis in fact.

425 Secondly, the applicants cannot rely on the fragmentary nature of the information in the MOL notes and the 'Blauer Salon' debriefing notes.

426 It must be pointed out that the MOL notes are manuscript notes prepared during the meetings by the person attending and that their content is structured and relatively detailed. Their probative value is therefore very high. As regards Sasol's 'Blauer Salon' debriefing notes, these are documents dating from the time of the infringement and drafted *in tempore non suspecto*, that is shortly after the technical meeting to which they refer. Their probative value is therefore high.

427 In addition, according to the case-law cited in paragraph 230 above, in the light of the clandestine nature of cartels, the Commission cannot be required to produce documents expressly attesting to contacts between the traders concerned. The fragmentary and sporadic items of evidence which may be available to the Commission should, in any event, be capable of being supplemented by inferences which allow the relevant circumstances to be reconstituted. The existence of an anti-competitive practice or agreement may therefore 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.

428 The MOL notes and debriefing notes referred to above constitute a body of evidence on the basis of which the Commission could properly find that the cartel was already in place between 1992 and 1999.

429 Admittedly, the two submissions from Sasol facilitated the Commission's work by providing additional evidence and clarification as to the interpretation of the other evidence available. However, that contribution is appropriately reflected by the 50% reduction in the fine granted to Sasol on the ground of its cooperation.

430 The first part of the seventh plea in law must therefore be rejected.

The second part of the plea, concerning the allocation of markets and customers

431 Recital 653 of the contested decision states that, since it has been established that ExxonMobil, MOL, Repsol, RWE, Sasol, Shell and Total had also taken part in customer and/or market allocation, constituting the second part of the infringement, the proportion of the value of sales taken into account for those undertakings was set at 18%, instead of 17%, the rate applied to the undertakings which had participated in only the first part of the infringement.

432 The applicants observe that the previous information on that issue provided by Shell prior to their submissions was fragmentary, according to recital 741 of the contested decision. Similarly, they submit that the detailed evidence for customer and/or market allocations stems from Sasol's submissions of 30 April and of 12 May 2005.

433 In that regard, it is sufficient to point out that there was evidence, indicating clearly that customers were allocated during the technical meetings, (i) in the MOL notes cited in the contested decision in recitals 145 and 147, (ii) in one of Sasol's debriefing notes, cited in recital 168 of the contested decision, and (iii) in one of Total's notes, referred to in recital 170 of that decision. Those pieces of evidence had been obtained at the time of the inspections, that is before Sasol's submissions were lodged.

434 Accordingly, the applicants' claims have no basis in fact.

435 As regards the fragmentary nature of the information in those notes, it is sufficient to refer to the considerations set out in paragraphs 426 and 427 above.

436 In light of the foregoing, the second part of the present plea — and consequently the seventh plea in its entirety — must be rejected.

The exercise of unlimited jurisdiction and the determination of the final amount of the fine

437 It should be borne in mind that review of the lawfulness of decisions adopted by the Commission is supplemented by the unlimited jurisdiction conferred on the Courts of the Union by Article 31 of Regulation No 1/2003, in accordance with Article 229 EC, and now by Article 261 TFEU. That jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed. The review provided for in the Treaties therefore implies, in accordance with the requirements of the right to effective judicial protection set out in Article 47 of the Charter of Fundamental Rights, that the Union judicature exercises a review of both law and fact and that it is empowered to assess the evidence, annul the contested decision and vary the amount of fines (see, to that effect, Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraphs 60 to 62, and Case T-368/00 *General Motors Nederland and Opel Nederland* v *Commission* [2003] ECR II-4491, paragraph 181).

438 It is therefore for the Court, in the exercise of its unlimited jurisdiction, to assess, on the date on which it adopts its decision, whether the applicants received a fine which properly reflects the gravity and the duration of the infringement in question, in such a way that their fines are proportionate in the light of the criteria set out in Article 23(3) of Regulation No 1/2003 (see, to that effect, Case T-156/94 *Aristrain* v *Commission* [1999] ECR II-645, paragraphs 584 to 586, and Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 93).

439 It must, however, be pointed out that the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, and that proceedings before the Courts of the European Union are *inter partes* (Case C-386/10 P *Chalkor* v *Commission* [2011] ECR I-13085, paragraph 64)

1. *The first part of the sixth plea in law, alleging the failure to apply separate ceilings as regards the Schümann period*

440 The applicants point out that Sasol Ltd, Sasol Holding in Germany and Sasol Wax International were not found liable for the part of the fine relating to the Schümann period (that is to say EUR 67.5 million), which corresponds to 22% of the turnover of Sasol Wax, the company solely liable for the infringement during the Schümann period as the legal successor of HOS. However, the Commission wrongfully failed to establish and apply the 10% ceiling laid down in Article 23(2) of Regulation No 1/2003 as regards the Schümann period.

441 The fine imposed on Sasol Wax for the Schümann period is excessive and would commercially destroy Sasol Wax, unless Sasol Ltd voluntarily bore the fine, in which case Sasol Ltd would indirectly be held liable for the Schümann period.

442 Thus, the Commission infringed Article 23(2) of Regulation No 1/2003 and the principle of the individual nature of punishments. Consequently, the applicants request the Court to annul the contested decision in so far as it imposes on Sasol Wax a fine exceeding the ceiling of 10% of the

turnover attributable to Mr Schümann and the group of companies controlled by him in 2007. At the hearing, the applicants requested, in the alternative, a reduction of that part of the fine capping it at 10% of the turnover of Sasol Wax.

443 The Commission contends that, when calculating the 10% ceiling laid down by Article 23(2) of Regulation No 1/2003, it must take account of the economic entity as it exists at the date when the contested decision is adopted, as is clear from the case-law. Moreover, the Commission points out that neither Mr Schümann nor Vara is an addressee of the contested decision and, for that reason alone, the Commission cannot apply the 10% ceiling to their turnover.

444 According to the case-law, the 10% ceiling of turnover refers to the total turnover of the undertaking concerned, inasmuch as that turnover alone gives an indication of that undertaking's size and influence on the market (see *Cimenteries CBR and Others* v *Commission*, cited in paragraph 227 above, paragraph 5022 and the case-law cited). In addition, the ceiling aims inter alia to protect undertakings against excessive fines which could destroy them commercially (*Tokai II*, cited in paragraph 271 above, paragraph 389, and Case T-138/07 *Schindler Holding and Others* v *Commission* [2011] ECR II-4819, paragraph 193).

445 It follows that the objective sought by the introduction of the 10% ceiling can be realised only if that ceiling is applied initially to each separate addressee of the decision imposing the fine. It is only if it subsequently transpires that several addressees constitute the 'undertaking' in the sense of the economic entity responsible for the infringement penalised, and that is still the case at the date when the decision is adopted, that the ceiling can be calculated on the basis of the overall turnover of that undertaking, that is to say of all its constituent parts taken together. By contrast, if that economic unit has broken up in the meantime, each addressee of the decision is entitled to have the ceiling in question applied individually to it (*Tokai II*, cited in paragraph 271 above, paragraph 390; judgment of 13 September 2010 in Case T-26/06 *Trioplast Wittenheim* v *Commission*, not published in the ECR, paragraph 113; and judgment of 16 November 2011, in Case T-54/06 *Kendrion* v *Commission*, not published in the ECR, paragraph 92).

446 First, in the present case, it is not disputed that, during the Schümann period of the infringement, HOS, subsequently Sasol Wax, did not form an economic entity with Sasol Ltd, Sasol Holding in Germany and Sasol Wax International. However, when the contested decision was adopted, Sasol Wax formed an economic unit with the other applicants.

447 Secondly, it must be noted that the judgments relied on by the Commission in its pleadings (*HFB and Others* v *Commission*, cited in paragraph 33 above, paragraph 528; the judgment of 8 July 2008 in Case T-52/03 *Knauf Gips* v *Commission*, not published in the ECR, paragraph 353; and *Tokai II*, cited in paragraph 271 above, paragraph 389) do not concern situations in which, during a period covered by the infringement, the company directly liable did not yet form an economic unit with the parent companies owning its share capital when the contested decision was adopted. Consequently, the approaches adopted in those judgments cannot be followed literally in a factual situation which differs on that crucial point.

448 Thirdly, it must be added that one of the positive consequences of the rules according to which the formal separation between two companies must be disregarded and fines must be imposed jointly and severally on a subsidiary and its parent company forming the same undertaking (see paragraphs 31 and 36 above) is the elimination of the risk that a company may avoid or minimise fines by concentrating the unlawful activities in a subsidiary with a negligible turnover. The rule that the ceiling on the fine must be determined with regard to the total turnover of the undertaking may be regarded as ensuring such a result. Such an objective is not undermined by a different ceiling being applied in respect of a period of the infringement preceding the establishment of an economic unit between the subsidiary participating directly in the cartel and the parent company owning it at the

time of the adoption of the Commission's decision, when the assets of the subsidiary are not reallocated to the other legal entities following its purchase and, subsequently, after the discovery of the cartel.

449 Fourthly, the Commission does not challenge the applicants' statement that, since Sasol Wax was not in a position to pay the part of the fine for the Schümann period equivalent to 22% of its annual turnover, Sasol Ltd, the ultimate holding company, would have to pay a part of the fine in Sasol Wax's place, namely the part above the 10% ceiling, which is not supposed to be borne by Sasol Wax.

450 Fifthly, it must also be noted that, during the Schümann period, Sasol Wax International, Sasol Holding in Germany and Sasol Ltd could not benefit from the unlawful activities, since they did not yet own Sasol Wax.

451 Sixthly, it is appropriate to take into account the fact that, under national law, the joint and several liability for payment of the fine imposed for a breach of Article 81 EC confers on each of the jointly and severally liable debtors against which a claim for payment has been brought the right to seek recovery from the other debtors of the proportional amount of the debt paid on its behalf (see, to that effect, Case C-652/11 P *Mindo* v *Commission* [2013] ECR, paragraphs 36 and 37). In the present case, the applicants plead precisely difficulties in bringing an action for recovery against Vara and Mr Schümann in the absence of a finding of liability against them by the Commission, which has not contradicted them on that point.

452 Consequently, the unequal treatment by the Commission (see paragraphs 187 and 197 above), in conjunction with the absence of a separate ceiling for the portion of the fine relating to the Schümann period, is capable of increasing the financial liability of Sasol Wax International, Sasol Holding in Germany and Sasol Ltd for the infringement committed by HOS. The part of the fine exceeding 10% of Sasol Wax's turnover is supposed to be payable by its parent companies, while, at the same time, the failure to find Vara and Mr Schümann jointly and severally liable is capable of affecting the final apportionment of the fine before a national court, to the detriment of the applicants and, in particular, the three current parent companies of Sasol Wax.

453 In the light of all the foregoing considerations, the Court considers that, in the specific circumstances of the case, it is appropriate to limit the part of the fine imposed on Sasol Wax in respect of the infringement during the Schümann period to 10% of its turnover in 2007. Since that turnover amounted to EUR 308 600 000, the part of the fine imposed on Sasol Wax in respect of that period of the infringement is set at EUR 30 860 000.

454 The part of the fine thus set is without prejudice to a subsequent assessment by the Commission as to the impact in that regard of the present judgment.

2. *The second part of the sixth plea in law, alleging the absence of a separate ceiling as regards the joint venture period, examined in conjunction with the upholding of the first plea in law*

455 The applicants reiterate that Sasol Holding in Germany and Sasol Ltd cannot be held responsible for the joint venture period and the Sasol period. As a consequence, the portion of the fine relating to those periods should have been capped at 10% of the turnover of Sasol Wax, or — should the Court consider Schümann Sasol and Schümann Sasol International, as well as Sasol Wax and Sasol Wax International, to have formed one economic entity during the respective periods — at 10% of the turnover of Sasol Wax International in 2007.

456 As is apparent from the examination of the second plea in law, the contested decision must be upheld in so far as the Commission found that there was an economic unit between Schümann Sasol and Schümann Sasol International, and also between their successors, Sasol Wax and Sasol Wax International.

457 However, it must be borne in mind that, on the basis of the final conclusions concerning the first plea in law, the contested decision must be varied in so far as the Commission finds Sasol Holding in Germany and Sasol Ltd liable for the infringement committed by the single economic entity constituted by Schümann Sasol and Schümann Sasol International.

458 First, it must be pointed out that the part of the fine imposed on Sasol Wax and Sasol Wax International, relating to the joint venture period (EUR 179 657 803), far exceeds 10% of the turnover of Sasol Wax International (EUR 480 800 000 in 2007).

459 Secondly, the Commission does not challenge the applicants' statement that, since Sasol Wax International was not in a position to pay the whole of the fine relating to the joint venture period, Sasol Ltd, the ultimate holding company, would have to pay part of the fine in its place, namely that part exceeding the 10% ceiling, which is not supposed to be payable by Sasol Wax International.

460 Thirdly, it must be found that the error of assessment identified in the context of the first plea in law calls in question the composition of the undertaking which committed the infringement during the joint venture period. In addition, holding various companies jointly and severally liable in respect of the infringement committed by Schümann Sasol is conditional upon a prior finding that they together formed a single undertaking for the purpose of Article 81 EC when the infringement was committed. Since the undertaking has in the present case been incorrectly determined, it cannot be precluded that, in the absence of the errors of assessment in question, the Commission would have found Vara and Mr Schümann jointly and severally liable for the infringement committed by Schümann Sasol.

461 Fourthly, in the light of the case-law cited in paragraph 451 above, the Court finds that the errors of assessment concerning the definition of the undertaking that committed the infringement during the joint venture period, in conjunction with the absence of a separate ceiling for the portion of the fine relating to that period, are capable of increasing the financial consequences for the applicants of the infringement committed directly by Schümann Sasol. This is because the part of the fine exceeding 10% of the turnover of Sasol Wax International is supposed to be payable by its parent companies, while, at the same time, the failure to find Vara and Mr Schümann jointly and severally liable is capable of affecting the final apportionment of the fine before a national court, to the detriment of the applicants and, in particular, Sasol Holding in Germany and Sasol Ltd.

462 In the light of all the foregoing considerations, the Court considers that, in the specific circumstances of the case, it is appropriate to limit the part of the fine imposed on Sasol Wax and Schümann Sasol International on account of the infringement committed during the joint venture period to 10% of the turnover of Schümann Sasol International in 2007. Since that turnover amounted to EUR 480 800 000, the part of the fine at issue, imposed on Sasol Wax and Sasol Wax International, must be reduced to EUR 48 080 000.

463 The part of the fine thus set is without prejudice to a subsequent assessment by the Commission as to the impact in that regard of the present judgment.

3. *The part of the fine relating to the Sasol period*

464 Lastly, as regards the Sasol period of the infringement and the corresponding part of the fine, amounting to EUR 71 042 197, the Court considers, in the exercise of its unlimited jurisdiction, that the amount of the fine imposed on the applicants is appropriate, in the light of the gravity and the duration of the infringement committed.

Costs

465 Pursuant to Article 87(3) of the Rules of Procedure, the General Court may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads.

466 In the present case, three of the seven pleas put forward by the applicants have been upheld and the amount of the fine imposed on each of them has been substantially reduced. Consequently, the Court decides that, on a fair assessment of the circumstances, the Commission must bear its own costs and pay two thirds of those incurred by the applicants, which must therefore bear one third of their own costs.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. **Annuls Article 1 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) in so far as the European Commission found therein that Sasol Holding in Germany GmbH and Sasol had participated in the infringement before 1 July 2002;**

2. **Reduces the amount of the fine imposed on Sasol Wax GmbH to the sum of EUR 149 982 197 for the payment of which, first, Sasol Wax International AG shall be jointly and severally liable to the extent of EUR 119 122 197 and, secondly, Sasol and Sasol Holding in Germany shall be jointly and severally liable to the extent of EUR 71 042 197;**

3. **Dismisses the action as to the remainder;**

4. **Orders the Commission to bear its own costs and to pay two thirds of the costs incurred by Sasol, Sasol Holding in Germany, Sasol Wax International and Sasol Wax;**

5. **Orders Sasol, Sasol Holding in Germany, Sasol Wax International and Sasol Wax to bear one third of their own costs.**

Czúcz Labucka Gratsias

Delivered in open court in Luxembourg on 11 July 2014.

[Signatures]

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