OPINION OF ADVOCATE GENERAL MAZÁK
delivered on 14 September 2010 [1]

I — Introduction

1. By their appeal, General Química SA ('GQ'), Repsol Química SA ('RQ') and Repsol YPF SA ('RYPF') (collectively referred to as the 'appellants' and sometimes 'the applicants') seek to have the judgment of the Court of First Instance (now 'the General Court') (Sixth Chamber) of 18 December 2008 in Case T-85/06 *General Química and Others* v *Commission* ('the judgment under appeal') by which the latter court dismissed their action for annulment of Commission Decision 2006/902/EC of 21 December 2005 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement against Flexsys NV, Bayer AG, Crompton Manufacturing Company Inc. (formerly Uniroyal Chemical Company Inc.), Crompton Europe Ltd, Chemtura Corporation (formerly Crompton Corporation), General Química SA, Repsol Química SA and Repsol YPF SA (Case No COMP/F/C.38.443 – Rubber chemicals) (OJ 2006 L 353, p. 50) ('the contested decision') set aside in part.

2. In the contested decision the Commission declared that GQ, RQ and RYPF, among other undertakings, had infringed Article 81(1) EC (now Article 101(1) TFEU) and Article 53 of the EEA Agreement by participating, between 1999 and 2000, in a cartel and concerted practices consisting in price-fixing and the exchange of confidential information in the rubber chemicals sector in the European Economic Area ('EEA'). The Commission imposed a fine of EUR 3.38 million on GQ jointly and severally with RQ and RYPF.

3. The appeal concerns the attribution of responsibility for a breach of Article 101(1) TFEU to a parent company (RYPF) in respect of the illegal conduct of a subsidiary (GQ) which is not directly held by that parent company. In that regard, GQ is a wholly owned (100 %) subsidiary of RQ, which is itself wholly owned by RYPF. The appellants allege inter alia that the General Court erred in law by extending automatically to the parent company at the head of a group the presumption that it exercises decisive influence over the conduct of its subsidiary.

1 — Original language: English.

4. The appellants claim that the Court should set aside the judgment under appeal in so far as it rejects the plea in law alleging manifest error of assessment and failure to state sufficient reasons for the finding that the appellants are jointly and severally liable for the infringement of Article 101(1) TFEU. They also request the Court to annul Articles 1(g), 1(h) and 2(d) of the contested decision in so far as it declares RQ and RYPF jointly and severally liable for an infringement of Art icle 101(1) TFEU committed by GQ and alternatively, annul the declaration of joint and several liability in respect of RYPF, in both cases ordering an appropriate reduction of the fine.

II — Background to the appeal

A — *Contested decision*

5. GQ is a Spanish company which produces certain rubber chemicals, namely primary accelerators and antidegradants of the antioxidant variety.[2] GQ is a wholly owned subsidiary of RQ, which is itself wholly owned by RYPF. The procedure which resulted in the adoption of the contested decision was initiated after Flexsys, on 22 April 2002, submitted an application pursuant to the Commission notice of 19 February 2002 on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3) ('the Leniency Notice'). On 26 and 27 September and 24 October 2002, Crompton and Bayer respectively submitted to the Commission their own applications for immunity from fines or reduction of fines.

6. On 12 April 2005, the Commission notified to GQ, RQ and RYPF a statement of objections relating to a proceeding pursuant inter alia to Article 101 TFEU. Basing its decision on the fact that GQ was a wholly-owned subsidiary of RQ, which was itself a wholly-owned subsidiary of RYPF, and on the human link between GQ and RQ in the form of the sole director ('administrador unico'), who was appointed by RQ and replaced GQ's board of directors, the Commission considered RQ and RYPF to be jointly and severally liable for GQ's infringement.

2 — Rubber chemicals are synthetic or organic chemicals that act as productivity and quality enhancers in the manufacture of rubber. The automobile sector is the largest user of rubber parts, mainly in the form of tyres. Antidegradants and accelerators are the most important rubber chemicals in terms of market value, accounting for approximately 85 to 90% of all rubber chemicals.

7. By letter of 15 June 2005, RQ and RYPF submitted a joint answer to the statement of objections. By letter of 20 June 2005, GQ replied separately from its parent companies. GQ, RQ and RYPF were heard on 18 July 2005. They contested inter alia the attribution to RQ and RYPF of liability for the infringement alleged to have been committed by GQ. They submitted, first, that RQ and RYPF were not involved in or aware of GQ's conduct and, secondly, that GQ carried out its business in the rubber chemicals market as an autonomous entity.

8. By the contested decision, the Commission however found GQ, RQ and RYPF jointly and severally liable for GQ's infringement. As regards the attribution of liability for GQ's conduct to RQ and RYPF, the Commission states in the contested decision that a parent company can be presumed liable for the illegal conduct of its wholly-owned subsidiaries, but that it is possible for it to reverse the presumption of actual exercise of decisive influence over these subsidiaries. The Commission also states that that presumption cannot be rebutted by alleging that the parent company did not encourage its subsidiaries to behave illegally. Lastly, according to the contested decision, when that presumption applies, the undertaking concerned cannot rebut it by simply stating that the parent company was not directly involved in or was not aware of the cartel.

9. The Commission states in particular that the contention that RQ and RYPF (referred to, without distinction, by the name 'Repsol' in the contested decision) were not entrusted with the day-to-day business or the operational management of GQ is not sufficient to reverse the presumption of actual exercise of decisive influence over GQ.

10. Furthermore, the Commission states that 'Repsol' and GQ have provided documents clarifying their relationships, the management structure and reporting requirements. It observes that, according to the applicants, GQ's business plan and sales objectives are not subject to approval by the parent companies. There are no industrial relationships, synergies or vertical overlaps between the activities of 'Repsol' and the subsidiary, in so far as GQ manufactures products that are unrelated to those of 'Repsol'. There were no overlaps in the management boards of the three companies during the period of the infringement. The Commission also mentions the explanations on the part of 'Repsol' according to which GQ was left alone to manage its commercial policy without interference on its part, since 'Repsol' acquired GQ as a part of a larger package rather than out of interest in its activities and has attempted to sell it several times without success.

11. However, in recitals 259 to 264 to the contested decision, the Commission notes that 'Repsol' had been the sole shareholder of GQ since 1994. According to the Commission, it was thus in a position to gain knowledge of GQ's actions on account of its 100 % control and overall responsibility. As regards the attempts to sell GQ, the Commission takes the view that, even assuming that those attempted sales could demonstrate that 'Repsol' was not interested in its subsidiary's activities, that did not mean it was not interested in exercising decisive influence over GQ to ensure that the goodwill and commercial value of GQ would not diminish during the period required to find an interested buyer.

12. In the contested decision, the Commission also observes that attribution to a parent company of liability for a subsidiary's market behaviour does not require that the parent company's activities overlap, even partially, or are closely connected with those of its subsidiary. Following the same line of reasoning, the Commission states that the lack of overlap in their respective management boards does not as such show that GQ is autonomous, considering that it reported to RQ on its sales, production and financial results, as is apparent from the documents submitted by 'Repsol'.

13. Furthermore, the Commission states that, according to 'Repsol', GQ determined autonomously the prices of the products which it sold to Repsol Italia and that that shows that GQ acted autonomously and that its interests were divergent from those of 'Repsol'. However, the Commission states in the contested decision that the agency contract between GQ and Repsol Italia shows that there are vertical links between 'Repsol' and their subsidiary. Lastly, the Commission observes that the information forwarded by GQ to Repsol Italia concerning an increase in the price of its products does not constitute evidence of a conflict of interests between GQ and 'Repsol' because any increase in GQ's turnover resulting from a price increase of its products would also increase the turnover of 'Repsol'.

14. The contested decision further states that even though the sole director had delegated his powers with regard to the operational management of GQ, he still acted as a link between GQ and RQ, through whom information on sales, production and financial results were passed to the parent company. Furthermore, GQ's financial results were consolidated with those of 'Repsol', with the result that GQ's profits or losses were reflected in the profits or losses of the group.

15. Lastly, the Commission adds on that point that a parent company and its wholly-owned subsidiary may be presumed to constitute a single undertaking for the purpose of Article 101 TFEU. In those circumstances, the Commission considers that RQ and RYPF have not rebutted the presumption of liability for GQ's unlawful conduct.

16. In Article 1 of the contested decision, the Commission found that GQ, RQ and RYPF participated, from 31 October 1999 to 30 June 2000, in a complex of agreements and concerted practices in breach of inter alia Article 101 TFEU, consisting of price fixing and the exchange of confidential information relating to certain rubber chemicals in the EEA. Article 1(f) of the contested decision refers to GQ's participation in the infringement, while Article 1(g) and Article 1(h) of the contested decision refer respectively to the participation of RQ and RYPF in the infringement.

17. In Article 2(d) of the contested decision, the Commission imposed a fine in the amount of EUR 3.38 million on GQ, jointly and severally with RQ and RYPF, for the infringements referred to in Article 1 of the contested decision.

B — *Judgment under appeal*

18. By application lodged at the Registry of the General Court on 8 March 2006, GQ, RQ and RYPF brought an action for the partial annulment of the contested decision. In support of their claims before the General Court, GQ, RQ and RYPF relied on three grounds. Firstly, manifest error of assessment and failure to state reasons concerning the joint and several liability of GQ, RQ and RYPF. Secondly, incorrect calculation of the fine. Thirdly, incorrect assessment, lack of reasoning and breach of the principle of equal treatment in the application of the Leniency Notice.

19. Given that the appellants' claims in the current appeal proceedings only relate to the ruling of the General Court on the first ground of annulment raised in the proceedings before that court, [3] only that section of the judgment under appeal will be reproduced. Thus in paragraphs 58 to 84 of the judgment under appeal, the General Court sets out its conclusions relating to the first plea as follows:

'58 According to settled case-law, the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent company, especially where the subsidiary does not independently decide its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (Case 107/82 *AEG Telefunken* v *Commission* [1983] ECR 3151, paragraph 49, and Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, "*Stora*", paragraph 26).

59 Furthermore, in the specific case where a parent company holds 100 % of the shares in a subsidiary which has committed

3 — Relating to incorrect assessment and failure to state reasons concerning the joint and several liability of GQ, RQ and RYPF.

an infringement, there is a rebuttable presumption that the parent company actually exerts a decisive influence over its subsidiary's conduct (see, to that effect, Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 136, and the case-law cited) and that they therefore constitute a single undertaking for the purpose of Article [101 TFEU] (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*, "*Tokai II*", not published in the ECR, paragraph 59). It is thus for a parent company which disputes before the Community judicature a Commission decision fining it for the conduct of its subsidiary to rebut that presumption by adducing evidence to establish that its subsidiary was independent (*Avebe* v *Commission*, paragraph 136; see also, to that effect, *Stora*, paragraph 58 above, paragraph 29).

60 In that regard, it is true that, as submitted by the applicants, the Court of Justice referred, in *Stora*, paragraph 58 above (paragraphs 28 and 29), as well as to the fact that the parent company owned 100 % of the capital of the subsidiary, to other circumstances, such as the fact that it was not disputed by the parent company that it exercised influence over the commercial policy of its subsidiary or that both companies were jointly represented during the administrative procedure. However, those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the elements on which the [General Court] had based its reasoning before concluding that that reasoning was not based solely on the fact that the parent company held the entire capital of its subsidiary.

61 In addition, and contrary to what the applicants submit, it is not because the parent company incited its subsidiary to commit the infringement or, a fortiori, because the parent company is involved in the infringement, but because they constitute a single undertaking for the purpose of Article [101 TFEU] that the Commission is able to address the decision imposing fines to the parent company of a group of companies. It must be borne in mind that Community competition law recognises that different companies belonging to the same group form an economic entity and therefore an undertaking within the meaning of Articles [101 and 102 TFEU] if the companies concerned do not determine independently their own conduct on the market (Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 290).

62 In those circumstances, it is sufficient for the Commission to prove that the entire capital of a subsidiary is held by its parent company for the presumption that the parent company exercises decisive influence over the conduct of the subsidiary on the market to be established. The Commission will then be able to hold the parent company jointly and severally liable for payment of the fine imposed on its subsidiary, even where it is found that the parent company did not participate directly in the agreements, unless the parent company proves that its subsidiary acts independently on the market.

63 Therefore, in the present case, the Commission did not fail to have regard to the case-law of the Court of Justice and the [General Court] by merely referring to the fact that 100 % of the capital of GQ was owned by its parent companies and rebutting the applicants' arguments aimed at showing that GQ is independent, in order to attribute to those companies the anti-competitive actions of GQ.

64 The Commission did not therefore err in finding RQ and RYPF responsible for an infringement which, as a result of that attribution of liability, they themselves are deemed to have committed (see, to that effect, Case C-294/98 P *Metsä-Serla Oyj and Others* v *Commission* [2000] ECR I-10065, paragraph 28). The argument that RQ and RYPF did not directly participate in the infringement in question is on that basis irrelevant.

65 Secondly, as regards the argument that RYPF and RQ provided the Commission, during the pre-litigation procedure, with a set of documents to rebut the presumption of liability and to adduce tangible proof of GQ's commercial and operational independence, it must be pointed out that it is for the parent company to put before the Court any evidence relating to the economic and legal organisational links between its subsidiary and itself which in its view is apt to demonstrate that they do not constitute a single economic entity.

66 In the present case, the Commission states, at recital 262 to the contested decision, that the sole director still acts as a link between GQ and RQ, that RYPF consolidates GQ's and RQ's accounts at group level and that RQ and RYPF replied jointly to the statement of objections. Such factors militate in favour of the existence of a single entity.

67 It was therefore for RYPF and RQ to show, at the pre-litigation stage, that GQ independently decided its own conduct on the market and that RYPF and RQ did not exert a decisive influence on its policy.

68 In that regard it is important to point out that the applicants have stated that RQ had proved to the Commission that it had ordered GQ to cease any practice which might constitute an infringement of competition rules following the inspection which took place at GQ's place of business on 27 September 2002.

69 That statement by the applicants is in itself sufficient to prove that RQ exerted a decisive influence on GQ's policy, not only on the market but also as regards the unlawful conduct which is the subject-matter of the contested decision.

70 For the sake of completeness, the Court will however examine whether, as the applicants claim, the Commission made an error of assessment in the contested decision as regards the evidence submitted by the applicants or whether it erroneously disregarded it.

71 In that regard, it must be held that the fact that the activities of the subsidiary differ, even completely, from the activities of the group or even the fact that the parent company has tried, without success moreover, to resell its subsidiary, is not capable of rebutting the presumption that RQ and RYPF are liable. Even though groups of undertakings and holding companies frequently have different business activities and sometimes sell some of their subsidiaries, they have already been regarded as constituting a single undertaking for the purpose of Article [101 TFEU] (see, to that effect, Case T-330/01 *Akzo Nobel* v *Commission* [2006] ECR II-3389, paragraphs 78 and 82).

72 Furthermore, the Commission, in reply to the request for documents made by the applicants, submitted to the Court a document which included the minutes of RQ's board of directors of 1998 to 2000 and which set out GQ's financial results and a resolution relating to the sale of GQ's holding in Silquímica, SA and to the sale of GQ's real property. That document substantiates in all material respects the Commission's findings in the contested decision. If RQ's board of directors plays a significant role in several essential aspects of GQ's strategy, such as the sale of real property or the sale of a holding, and reserves the power of final decision in that regard, it follows that it exerts a decisive influence on GQ's conduct.

73 As regards the argument relating to the lack of overlap in the membership of the organs of the applicant companies, it must be held that it is apparent from the letter of 5 April 2004 sent by GQ to the Commission and submitted by the applicants during the pre-litigation procedure that Mr [*confidential*] was both chairman of GQ's board of directors from 1996 to 2000 and a member of RQ's board of directors from 1998 to 1999. Moreover, it must be pointed out that, when questioned on that point at the hearing, the applicants conceded, at least implicitly, that there had been such an overlap.

74 Similarly, the arguments alleging that the Commission did not, in the contested decision, examine the factual evidence which showed that only GQ's executives decided on and implemented the company's commercial policy, without RQ's being informed beforehand or giving its authorisation, cannot succeed in the light of the case-law cited above. The same is true of the claims that the information given to RQ by GQ did not concern the commercial policy but the financial results of the subsidiary.

75 As regards the relationship between GQ and Repsol Italia, it must be held that the Commission, in the contested decision, is right to rebut the applicants' argument relating to an alleged conflict of interests between GQ and its parent companies by stating that RYPF consolidates the accounts of the group, which is made up of a number of subsidiaries, including GQ and Repsol Italia. Furthermore, the Commission is also right to find that that relationship is such as to strengthen the presumption that there is a single undertaking.

76 In those circumstances, it must be concluded, as did the Commission at recital 264 to the contested decision, that the applicants have not managed to rebut the presumption that the parent companies are liable.

77 Lastly, none of the arguments put forward in the alternative by the applicants is capable of undermining the contested decision.

78 First, as regards the argument that the Commission never asked for information relating to the relationship between RQ and RYPF and never attempted to establish whether RQ and RYPF were part of the same undertaking, it is sufficient to state that, since the applicants do not dispute that RYPF owns 100% of the capital of RQ, it was for RYPF to rebut the presumption that it exerted a decisive influence on RQ's policy and, together with RQ, constituted a single undertaking for the purpose of Article [101 TFEU], which it has not done.

79 Secondly, as regards the argument that it was unforeseeable that RYPF would be found jointly and severally liable with RQ and GQ, the applicants submit, in essence, that, unlike the contested decision, the statement of objections justified RYPF's liability not in the light of GQ's unlawful conduct, but exclusively in relation to that of RQ.

80 It must be stated that the statement of objections and the contested decision do not differ on that point. Recital 254 to the contested decision states that the applicants are jointly and severally liable, in particular on account of RQ's 100% holding in GQ and RYPF's 100% holding in RQ, whereas the statement of objections states, in paragraph 344, that RQ's liability extends to RYPF as a result of the presumption of its actual control and decisive influence resulting from its 100% ownership of RQ's capital.

81 The argument that the two statements are contradictory is based on a

misunderstanding of the case-law relating to the imputability of the infringement. The presumption of liability deriving from the ownership of capital applies not only in cases where there is a direct relationship between the parent company and its subsidiary, but also in cases, such as the present one, where that relationship is indirect, by way of an interposed subsidiary.

82 Therefore, since Community competition law recognises that different companies belonging to the same group form an economic entity and therefore an undertaking for the purposes of Articles [101 and 102 TFEU] if the companies concerned do not determine independently their own conduct on the market, it is of little importance whether those companies are controlled directly or indirectly by a parent company, in so far as liability for the infringement may in any event be attributed to that parent company (see, to that effect, *Michelin* v *Commission*, paragraph 61 above, paragraph 290).

83 It must therefore be concluded that the applicants could not reasonably deduce from the statement of objections, and in particular from paragraph 344 thereof, that the Commission would not attribute the infringement at issue to RYPF.

84 In view of all of the foregoing, the first plea must be rejected.'

III — Forms of order sought

20. By their appeal, the appellants claim that the Court should:

— set aside the judgment of 18 December 2008 in Case T-85/06 in so far as it rejects the plea in law alleging manifest error of assessment and failure to state sufficient reasons for the finding that the applicants are jointly and severally liable;

— annul Article 1(g) and (h) and Article 2(d) of the contested decision in so far as they declare that RYPF and RQ, together with GQ, are jointly and severally liable for an infringement of Article 81(1) of the EC Treaty (now Article 101 TFEU) and, in the alternative, in so far as the contested decision finds against RYPF, in both cases ordering an appropriate reduction of the penalty.

21. The Commission claims that the Court should:

— dismiss the appeal;

— order the appellants to pay the costs.

IV — The appeal

22. The appellants raise two pleas in support of their appeal. Firstly, error of law concerning the attribution of responsibility for infringement of Article 81(1) EC (now Article 101(1) TFEU) and the interpretation and application of the presumption of control of a parent company over its subsidiary, including breach of the rules on burden of proof and distortion of facts. The appellants also allege transformation of the presumption into a legal presumption (iuris et de iure) and failure to apply the principle of personal responsibility. Secondly, error of law concerning the attribution of responsibility to the parent company of the group, RYPF, by means of an inappropriate extension of the presumption of control of a parent company over its subsidiary. The appellants also allege reversal of the burden of proof and the existence of automatic responsibility in relation to the group of companies.

A — *First plea*

23. The appellants claim that the General Court erroneously adopted a criterion for the attribution of responsibility to the parent company for the actions of its subsidiary which is unrelated to the facts and circumstances of the case or to the infringement committed by that subsidiary. Thus, the General Court erred in law by attributing responsibility to the parent company for the actions of its subsidiary due to its finding of an economic unit on the basis of the simple possibility or capacity of the parent company to exercise decisive influence over its subsidiary.

24. The appellants consider that the General Court incorrectly applied the case-law pursuant to which the behaviour of a subsidiary may be attributed to the parent company where that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company with which it forms an economic unit. [4] The General Court was not entitled to base its finding of the existence of an economic unit solely on the basis of a rebuttable presumption [5] in accordance with which a parent company which holds all the shares in its subsidiary is in a position to exercise a decisive influence over the behaviour of the latter.

4 — Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, paragraphs 133 and 134.

5 — Case 107/82 *AEG Telefunken* v *Commission* [1983] ECR 3151, paragraph 50.

25. The appellants therefore consider that the General Court in the judgment under appeal, in finding that the Commission is not required to adduce additional evidence establishing that the parent company actually influenced the behaviour of its subsidiary [6] breaches the principle of personal responsibility and the rules on burden of proof and renders the presumption in question irrebuttable as it is impossible to demonstrate the absence of personal responsibility of the parent company.

26. The appellants consider that the presumption of decisive influence based on the holding of a 100% of the share capital does not relieve the Commission of the burden of proving the responsibility of the parent company, by verifying on the basis of evidence whether the parent company actually exercised control over its subsidiary and whether the subsidiary largely applied the instructions received. [7]

27. Moreover, according to the appellants, the kind of evidence that must be produced in order to rebut the presumption is not identified. The judgment under appeal places no limits on the power of appreciation enjoyed by the Commission in relation to the assessment and appraisal of the evidence produced in an attempt to rebut the presumption.

28. The Commission claims that the appellants are calling into question the settled Community case-law concerning joint and several liability. In its judgment in *AEG Telefunken* v *Commission*, [8] the Court clearly established a presumption that a wholly-owned subsidiary of a parent company necessarily follows a policy laid down by the same statutory bodies which fix the latter's policy. Thus responsibility may be attributed to the parent company for an infringement committed by its subsidiary, even in the absence of any evidence that the parent company was involved in any manner in the facts giving rise to the infringement in question. In addition, in its judgment in *Stora Kopparbergs Bergslags* v *Commission*, [9] the Court also confirmed the responsibility of the parent company on the basis of that presumption without requiring any additional element capable of linking the parent company to the infringement.

29. In that regard the Commission considers that contrary to the claims of the appellants, the presumption in question does not relieve the Commission of the burden of proof placed upon it. Indeed, as explained by Advocate General Kokott in her Opinion in Case C-97/08 P *Akzo Nobel and Others* v *Commission*, [10] recourse to the presumption in question does not lead to a reversal of the burden of proof (that would be incompatible with the presumption of innocence). Since the parent company's 100% shareholding in its subsidiary supports prima facie the conclusion that decisive influence is actually being exercised, it is for the parent company to rebut that conclusion, adducing cogent evidence to the contrary. The Commission is therefore only required to produce the

6 — And thus following a recent line of case-law of that court which reinterprets Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, such as Case T-112/05 *Akzo Nobel and Others* v *Commission* [2007] ECR II-5049, paragraphs 60 and 61, and Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik* v *Commission* [2008] ECR II-2567, paragraph 57.

7 — See Case T-325/01 *DaimlerChrysler* v *Commission* [2005] ECR II-3319, paragraph 218, and 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 132.

8 — Cited in footnote 5.

9 — Cited in footnote 6.

10 — [2009] ECR I-8237.

necessary evidence that the presumption is applicable.

30. It is settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company having regard in particular to the economic, organisational and legal links between those two legal entities. That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking which 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. [11]

31. As regards the specific case at hand which concerns a parent company which has a 100% shareholding in a subsidiary which has infringed the European Union (EU) competition rules, in my view, the written pleadings in the present appeal which were lodged on 27 February 2009 (appeal) and on 14 May 2009 (defence) have been overtaken to a certain extent by the judgment of the Court in Case C-97/08 P *Akzo Nobel and Others* v *Commission*, which was handed down on 10 September 2009. Indeed, this fact was acknowledged by the parties at the hearing in the present appeal on 29 April 2010.

32. The Court in Case C-97/08 P *Akzo Nobel and Others* v *Commission* held that the parent company which has a 100% shareholding in a subsidiary which has infringed the EU competition rules is in a position to exercise a decisive influence over the conduct of the subsidiary and there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary. [12] In such circumstances, 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. [13]

33. Contrary therefore to the claims of the appellants, the General Court did not err in law in finding that in the case of a wholly owned subsidiary, the Commission is not required to adduce additional evidence establishing that the parent company effectively exercised a decisive influence over the conduct

11 — See Case C-97/08 P *Akzo Nobel and Others* v *Commission* (cited in footnote 10), paragraphs 58 and 59 and the case-law cited therein. The corporate veil is in effect lifted in order to reveal the economic entity or undertaking responsible for an infringement.

12 — See paragraph 60 of that judgment (cited in footnote 10). In my view, the presumption in question has the merit that it is clear in nature thus facilitating legal certainty. See in that regard, Advocate General Kokott's Opinion in Case C-97/08 P *Akzo Nobel and Others* v *Commission*, point 71. Parent companies are thus put on notice of their possible responsibilities in certain circumstances for the actions of their subsidiaries and can accordingly take appropriate measures, which due to their 100% shareholding in those subsidiaries they have the power to take, to ensure compliance by the latter with competition law.

13 — See Case C-97/08 P *Akzo Nobel and Others* v *Commission*, paragraph 61 (cited in footnote 10). When the presumption in question arises, I consider that the burden of proof in effect shifts to the parent company if it wishes to rebut that presumption and the onus is on it to adduce evidence to show that its subsidiary acts independently on the market. I would note that I am not aware of any case before the Court of Justice or indeed the General Court in which the presumption in question was actually rebutted.

of its subsidiary in order for the presumption to arise. [14] Thus in accordance with the presumption in question, the Commission is not required to adduce additional evidence establishing that the parent company actually influenced the behaviour of its subsidiary or indeed had any knowledge of the infringement or the subsidiary's role in the infringement. [15]

34. It must however be stressed that the Court in Case C-97/08 P *Akzo Nobel and Others* v *Commission* underscored the rebuttable nature of the presumption in question. To have found otherwise would, in my view, lead to a breach of fundamental rights. [16] The rebuttable nature of the presumption is necessary in order to guarantee the rights of defence and access to justice of the parent company in question and serves in particular to counterbalance the fact that the presumption greatly reduces the evidentiary burden imposed on the Commission. All the evidence adduced by the parent company must thus be assessed and weighted with great care. The appellants' contention that the presumption is actually irrebuttable must thus be rejected.

35. The presumption will however stand unless the parent company can demonstrate that its subsidiary acts independently on the market. A claim that a wholly owned subsidiary acts independently on the market must be supported by clear and consistent evidence which must be assessed by the Commission, that assessment ultimately being subject to judicial review before the Court of Justice.

36. Moreover, I consider that while certain evidence, taken in isolation, may not be sufficient to rebut the presumption in question, all the evidence adduced by the parent company must be assessed as a whole in order to determine whether that body of evidence is sufficient to rebut the presumption. As the Court clearly stated in Case C-97/08 P *Akzo Nobel and Others* v *Commission*, in order to ascertain whether a subsidiary determines its conduct on the market independently, account must be taken of all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company, which may vary from case to case and cannot therefore be set out in an exhaustive list. [17]

37. The appellants have made a number of additional claims that the General Court erred in law or distorted the facts as regards evidence produced by them before that court. These claims are contested by the

14 — See paragraph 62 of the judgment under appeal.

15 — See Advocate General Kokott's Opinion in Case C-97/08 P *Akzo Nobel and Others* v *Commission* (cited in footnote 10), points 90 and 91.

16 — See in particular Article 47 of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1), as adjusted at Strasbourg on 12 December 2007 (OJ 2007 C 303, p. 1), which is entitled 'Right to an effective remedy and to a fair trial' and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), which is entitled 'Right to a fair trial'. I would draw an analogy in that regard with the case-law of the Court in the field of public procurement where the Court has considered rules of national law automatically excluding certain participants from public contracts as contrary to EU law. See Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559, paragraphs 33 and 35; Case C-213/07 *Michaniki* [2008] ECR I-9999, paragraphs 63 to 69; Case C-538/07 *Assitur* [2009] ECR I-4219, paragraphs 29 to 33; and Case C-376/08 *Serrantoni and Consorzio stabile edili* [2009] ECR I-12169, paragraphs 40 to 46.

17 — See paragraph 74 (case cited in footnote 10). Contrary therefore to the claims of the appellants at point 27 above, the Court of Justice and the General Court are not required to indicate in the abstract what kind of evidence must be produced in order to rebut the presumption.

Commission. I consider, as will be seen in more detail below, that the majority of the appellants' claims merely seek a new assessment of the facts in question by the Court which is clearly beyond its remit in appeal cases. [18]

38. The appellants consider that, contrary to the finding of the General Court at paragraph 66 of the contested judgment, that the fact that the sole director acts as a link between GQ and RQ, that RYPF consolidates GQ's and RQ's accounts at group level and that RQ and RYPF replied jointly to the Commission's statement of objections militates in favour of the existence of a single entity, such elements do not permit a finding of the existence of an economic unit justifying the imputation of responsibility to the parent company.

39. Prior to examining in substance each factor in question, I consider that those factors were not relied upon by the General Court in isolation but merely as additional supporting evidence of the existence of an economic unit based on 100 % ownership of the share capital of a subsidiary. [19] It would appear that both the appellants and the Commission are in agreement that the accounts in question were consolidated at group level as a result of a legal obligation due to links between the companies in question. Given that all relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company may be taken into account as evidence of the existence of an economic unit, [20] I consider that the General Court did not err in taking that factor into account, albeit as purely additional supporting evidence. Moreover, as the appellants do not dispute the fact that there was effectively a link between GQ and RQ in the form of the sole director, such evidence was not irrelevant as additional evidence on the existence of an economic unit consisting of GQ, RQ and RYPF. Furthermore, the fact that RQ and RYPF replied jointly to the Commission's statement of objections is also not irrelevant, again as additional supporting evidence demonstrating the existence of an economic unit. [21]

40. The appellants also consider that the General Court erred in its legal qualification of and distorted the facts at paragraphs 68 and 69 of the judgment under appeal concerning RQ's request that GQ comply with the rules on competition law following an

18 — It is settled case-law that the Court of Justice has no jurisdiction to establish the facts or, without exception, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. Save where that evidence has been distorted, its appraisal therefore does not constitute a point of law which is subject, as such, to review by the Court of Justice. Where an appellant alleges distortion of the evidence by the General Court, he must indicate precisely the evidence alleged to have been distorted and show the errors of appraisal which, in his view, led to such distortion. Such distortion exists where, without recourse to new evidence, the assessment of the existing evidence is manifestly incorrect. See, to that effect, Case C-413/08 P *Lafarge* v *Commission* [2010] ECR I-5361, paragraphs 15 to 17 and the case-law cited.

19 — See paragraphs 58 to 63 of the judgment under appeal.

20 — See paragraphs 72 to 74 of Case C-97/08 P *Akzo Nobel and Others* v *Commission* (cited in footnote 10).

21 — See by analogy, *Stora Kopparbergs Bergslags* v *Commission*, cited in footnote 6, paragraph 29, and Case C-97/08 P *Akzo Nobel and Others* v *Commission*, cited in footnote 10, paragraph 50.

inspection of the latter's premises on 27 September 2002 as that request does not demonstrate the existence of an economic unit. I consider that the appellants have failed to establish an error in law or a distortion of the facts by the General Court. The issuance of such a cessation order, which is not contested by the appellants, is evidence, albeit post infringement, that RQ exercised decisive influence over GQ's conduct on the market.

41. The General Court at paragraph 69 of the judgment under appeal stated that the issuance of the order was sufficient in itself to establish that RQ exercised decisive influence over GQ. However, this statement, which is somewhat misleading, is not grounds for annulling the judgment under appeal as it must read in the conjunction with paragraphs 62 and 63 of the judgment under appeal which clearly refer to the application of the presumption in question to the facts of the case at hand.

42. The appellants also claim that the General Court, within the framework of the summary assessment which it carried out at paragraphs 70 to 76 of the judgment under appeal, merely for the sake of completeness, erred in its legal appreciation of and distorted the rebuttal evidence produced by the appellants. Due to the sound and coherent nature of that evidence, an objective and impartial observer would find that GQ was independent from RQ.

43. The appellants claim that the General Court, at paragraph 71 of the judgment under appeal, manifestly distorted facts by failing to indicate that the activities of GQ predated its entry into the RQ group, that GQ's activities were not related to those of RQ and the numerous attempts by RQ to sell GQ between 1993 and 2004. According to the appellants these elements constitute clear evidence of RQ's lack of interest in GQ.

44. It will be recalled that, at paragraph 71 of the judgment under appeal, the General Court considered that those assertions were not sufficient to rebut the presumption in question, as parent and subsidiary companies frequently have different activities and parent companies at times sell their subsidiaries. I consider that the appellants by their claims have failed to show to the correct legal standard a distortion of the facts as they have failed to show the errors of appraisal which, in their view, led to the distortion of the facts in question. In my view, the appellants, although formally pleading an error of law, are essentially calling into question the factual assessment carried out by the General Court. Moreover, as regards the claim that the General Court failed to indicate that the activities of GQ predated its entry into the RQ group, I do not see the legal or factual relevance of such a claim given that RQ acquired all the shares in GQ between 1989 and 1993 while the infringement spans from 31 October 1999 until 30 June 2000 and thus long after GQ became the wholly owned subsidiary of RQ.

45. The appellants claim that the fact that at paragraph 72 of the judgment under appeal

the General Court only referred to two issues debated at two meetings of RQ's board of directors during an eight year period between 1998 and 2005 shows, in reality, the total absence of influence and intervention by RQ in the activities of GQ. The General Court found that the minutes of RQ's board of directors from 1998 to 2000 set out GQ's financial results and a resolution relating to the sale of GQ's holding in Silquímica and to the sale of real property belonging to GQ. The General Court stated on the basis of that evidence that RQ's board of directors plays a significant role in several essential aspects of GQ's strategy and exerts a decisive influence on GQ's conduct thereby rejecting the claim by the applicants at first instance that the minutes of RQ's board of directors from 1998 to 2000 only refer to GQ's financial results. [22]

46. In my view, the appellants in the present appeal are seeking to diminish the relevance of the references in the minutes of the board of directors of RQ between 1998 and 2000 to the sale of GQ's holding in Silquímica and the sale of GQ's real property. Given that the appellants failed to inform the General Court of the references in the minutes in question to the sale of GQ's holding in Silquímica and the sale of GQ's real property at first instance and in the absence of any demonstration that the General Court distorted the facts in question or breached the rules on burden of proof, I consider that the appellants' argument concerning paragraph 72 of the judgment under appeal should be rejected. The appellants are essentially calling into question the factual assessment carried out by the General Court which is beyond the Court's jurisdiction in an appeal case in the absence of distortion of facts.

47. The General Court found at paragraph 73 of the judgment under appeal that Mr [*confidential*] was both chairman of GQ's board of directors from 1996 to 2000 and a member of RQ's board of directors from 1998 to 1999. The appellants had claimed at first instance that there was no overlap in the membership of their organs in order to rebut the presumption that RYPF and RQ exercise decisive influence over GQ. The appellants in the present appeal concede that there was in fact such an overlap but that it only related to one person and was thus of a purely marginal nature. The appellants also claim that the Commission knew of the overlap during the administrative procedure but did not take that fact into account in its statement of objection or in the contested decision as a factor establishing the existence of an economic unit between RQ and GQ.

48. In my view, the appellants have failed to demonstrate that the General Court distorted the facts in question or breached the rules on burden of proof. The arguments of the appellants concerning paragraph 73 of the judgment under appeal should thus be rejected. I consider that it is not relevant for

22 — GQ had relied on the mere reference to its financial results in the minutes in question in order to demonstrate that its managers establish and execute its strategic and commercial plans and merely provide general information to RQ. The General Court, relying on evidence submitted by the Commission in its rejoinder at first instance concerning references in the minutes in question to the sale of GQ's holding in Silquímica and the sale of real property belonging to GQ thus considered that the evidence submitted by the Commission substantiates its findings in the contested decision with regard to the exercise of decisive influence.

the purposes of rebutting the presumption in question, which is based solely on the ownership of 100 % of the shares in a company, that the Commission did not rely on other additional factors which may in fact confirm the existence of an economic unit.

49. The appellants consider that, at paragraph 74 of the judgment under appeal, the General Court incorrectly rejected the evidence produced to the effect that only GQ's executives decided on and implemented the company's commercial policy as well as the claim that the information provided by GQ to RQ related only to results in accordance with budgets and strategic or commercial plans. [23] The General Court at paragraph 74 of the judgment under appeal considered that those claims could not succeed in the light of the case-law cited in the judgment under appeal. [24]

50. In my view, the General Court by merely making a reference to case-law has failed to examine, even in the most cursory manner, whether the detailed evidence adduced by the appellants at first instance could rebut the presumption in question. Indeed, it would appear from the judgment under appeal that the General Court considered, purely on the basis of the case-law cited, that such evidence cannot rebut the presumption in question. I consider that the case-law relied upon by the General Court in the judgment under appeal does not support its finding at paragraph 74 as that case-law merely refers to the possibility of imputing to a parent company the conduct of its subsidiary where the latter carried out in all material respects the instructions given to it by the parent company, having regard in particular to the economic and legal links between them. It also refers to the rebuttable presumption and the possibility for the parent company to rebut that presumption. The sections of the case-law cited therefore do not support the statement by the General Court that the evidence adduced by the appellants at first instance cannot rebut the presumption. Given the lack of any other appraisal or reasoning on the part of the General Court of the specific and detailed evidence adduced by the appellants, I consider that the General Court erred in law in its finding at paragraph 74 of the judgment under appeal. The General Court failed to given the appellants an adequate opportunity to rebut the presumption, a right which is clearly guaranteed by the case-law of the Court. [25] Moreover, the Court, in Case C-97/08 P *Akzo Nobel and Others* v *Commission*, advocating a case-by-case approach, specifically avoided defining in advance and in a restrictive or exhaustive manner the evidence which may be assessed in order to determine whether a subsidiary determines its conduct on the market

23 — The appellants in their pleadings at first instance claimed that in their response to the Commission's statement of objections they produced detailed evidence demonstrating that GQ's executives acted formally and materially as the directors of that company and independently decided on the commercial policy of GQ. These claims were made in order to rebut the presumption in question. In that regard, the applicants referred in their reply to the Commission's statement of objections to a number of contracts concluded and signed by the directors of GQ or the managers of GQ's factory for the supply of raw materials, the storage of products, cooperation and technical assistance in the manufacturing of products and collective agreements between workers and management. The appellants also claimed at first instance, in order to rebut the presumption in question, that the directors of GQ established the annual budget of that company and merely gave general information on their state of execution to RQ.

24 — In that regard, I would note that the General Court at paragraph 74 of the judgment under appeal merely makes a reference to the case-law previously cited. I shall therefore, for the sake of completeness, examine all the case-law cited by the General Court prior to paragraph 74 of the judgment under appeal namely, *AEG Telefunken* v *Commission*, cited in footnote 5, paragraph 49; *Stora Kopparbergs Bergslags* v *Commission*, cited in footnote 6, paragraph 26; Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 136; judgment of 15 June 2005 (Second Chamber) 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, paragraph 59; Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 290; and Case C-294/98 P *Metsä-Serla Oyj and Others* v *Commission* [2000] ECR I-10065, paragraph 28.

25 — Case C-97/08 P *Akzo Nobel and Others* v *Commission*, cited in footnote 10, paragraphs 63 to 65.

independently. In its judgment in that case the Court stated that account must be taken not only of the role of the parent company concerning, inter alia, the pricing policy and production and distribution activities of the subsidiary but also of all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company. [26] Thus rather than discounting in advance any category of evidence as irrelevant for the purposes of rebutting the presumption in question or giving any particular importance to a given category, the Court in Case C-97/08 P *Akzo Nobel and Others* v *Commission* adopted an inclusive approach regarding rebuttal evidence. This is not to say that evidence advanced in order to rebut the presumption may prove, in fact, to be wholly inadequate in that regard following its examination.

51. It follows that the findings of the General Court at paragraph 74 of the judgment under appeal must be set aside. Under Article 61 of the Statute of the Court of Justice, if the appeal is well founded, the Court is to quash the decision of the General Court. It may then itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment. In the present case, I consider that the state of the proceedings is such as to permit final judgment in the matter. It therefore falls, in my view, to the Court to give final judgment on the matter.

52. I consider that the evidence adduced by the appellants at first instance and referred to at footnote 23 above in order to rebut the presumption in question relates to the formal competences of the directors of GQ and the independence of the latter in the day to day running of GQ. The appellants also alleged that only GQ's financial results rather than information on its commercial policy were transmitted to RQ. In my view, the claim submitted by the appellants concerning financial information must be rejected as the General Court found at paragraph 72 of the judgment under appeal that additional information, other than GQ's financial results, was forwarded to RQ. Moreover, while the directors of GQ may well have considerable independence in the day to day running of its business [27] and indeed have considerable formal independence, the General Court found as a matter of fact at paragraph 72 of the judgment under appeal that RQ's board of directors plays a significant role in several essential aspects of GQ's strategy. [28] I therefore consider after examining such factors that the appellants have failed to rebut the presumption in question.

53. The appellants consider that the General Court, at paragraph 75 of the judgment under

26 — See paragraph 74 of Case C-97/08 P *Akzo Nobel and Others* v *Commission*, cited in footnote 10.

27 — In my view, such evidence is not in itself determinative as it may or may not, depending on all the facts of the specific case, rebut the presumption in question. As Advocate General Kokott pointed out at points 89 and 90 of her Opinion in Case C-97/08 P *Akzo Nobel and Others* v *Commission* (cited in footnote 10), while specific instructions, guidelines or rights of co-determination in terms of pricing, production and sales activities or similar aspects essential to market conduct are a particularly clear indication of the existence of the parent company's decisive influence over its subsidiary's commercial policy, the autonomy of the subsidiary cannot necessarily be inferred from their absence.

28 — These factors are relevant in the light of the finding of the Court at paragraph 74 of the judgment in Case C-97/08 P *Akzo Nobel and Others* v *Commission* (cited in footnote 10), as all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company are relevant in order to ascertain whether a subsidiary determines its conduct on the market independently.

appeal, by stating that the consolidation by RYPF of the accounts of the group supported the Commission's claim concerning the existence of an economic unit, erred in its legal qualification of the relationship between GQ and Repsol Italia. The appellants claim that they had demonstrated that the non-exclusive agency relationship between GQ and Repsol Italia proved that GQ was commercially independent.

55. In view of the foregoing, I consider that the appellants' first plea should be accepted in part and for the rest rejected. The action for annulment brought by the applicants before the General Court should, in my view, be dismissed.

B — *Second plea*

54. In my view, the appellants have failed to demonstrate that the General Court erred in law or distorted the facts at paragraph 75 of the judgment under appeal in rejecting the appellants' claim at first instance that the non-exclusive agency relationship between GQ and Repsol Italia proved that GQ was commercially independent as it demonstrated a conflict of interest between GQ and its parent companies given that a price rise imposed on Repsol Italia, similarly to all other distributors, was decided unilaterally by GQ without the intervention of RQ and RYPF. The General Court found that the group consolidated its accounts, thereby concurring with the finding of the Commission in the contested decision that an increase in the price of GQ's products does not constitute evidence of a conflict of interests between GQ and its parent companies, because any increase in GQ's turnover resulting from a price increase of its products would also increase the turnover of RQ and RYPF. I consider that the appellants are in reality seeking to dispute the assessment of the facts undertaken by the General Court and that their claim with regard to paragraph 75 of the judgment under appeal should be rejected as inadmissible.

56. The appellants claim that the General Court erred in law by automatically extending responsibility for an infringement by a subsidiary to the parent company at the head of a group. This was done by means of an inappropriate extension of the presumption in question based on the capacity of the parent company to exercise a decisive influence over its subsidiary. On that basis, firstly, the General Court in the present case found RYPF responsible solely on the basis that the latter did not demonstrate the autonomy of the 'intermediary' company RQ which in turn did not demonstrate that its subsidiary GQ was effectively autonomous. As a result of the reasoning in question, RYPF was held responsible for RQ's inability to refute its responsibility for the behaviour of GQ. Secondly, the interpretation of the General Court would result in responsibility for the infringements committed by a subsidiary being always attributed to the parent company at the head of the group, without taking into account the concrete circumstances of the case and in particular the number of companies interposed between that subsidiary and the parent company in question, the nature of those interposed companies and their activities and the effective

legal and economic links between the latter companies.

57. In that regard, the appellants claim that the judgments in *Michelin* v *Commission* [29] and Case T-330/01 *Akzo Nobel* v *Commission* [30] do not provide for such an automatic extension of the exercise of decisive influence by the parent company at the head of the group. The *Michelin* v *Commission* case related to the possibility of taking into account as an aggravating circumstance repeated infringement by a parent company in respect of the behaviour of the different subsidiaries it controls. In Case T-330/01 *Akzo Nobel* v *Commission*, the General Court attributed to the parent company at the head of a group the infringement committed by a subsidiary only on the basis that the latter was controlled through a pure holding company, the sole purpose of which was to hold the shares of the subsidiary. The appellants claim by contrast that in the present case RYPF is neither the parent company of GQ nor the owner of its capital. In addition, RYPF does not approve the annual accounts of GQ and does not appoint the members of its administrative body. Finally neither the nature of RQ nor its activity permit a finding that the latter is a simple intermediary through which RYPF exercises control over GQ.

58. The Commission considers that in accordance with the judgment in *Stora Kopparbergs Bergslags* v *Commission* [31] the existence of a chain of companies through which control is exercised does not affect in any manner the assessment of whether the parent company and subsidiary form an economic unit. That approach was upheld according to the Commission in the recent case-law of the General Court in *Michelin* v *Commission* [32] and Case T-330/01 *Akzo Nobel* v *Commission*. [33] In Case T-330/01 *Akzo Nobel* v *Commission* the General Court rejected the claim by Akzo that the presumption did not apply to it given that it was a holding company with no production or sales activity and due to the 'remote' or 'indirect' nature of its control. Moreover, according to the Commission, Advocate General Kokott in her Opinion in Case C-97/08 P *Akzo Nobel and Others* v *Commission* [34] proposed that the Court reject the appeal brought against the judgment in Case T-112/05 *Akzo Nobel and Others* v *Commission*, [35] a case in which control was exercised indirectly by a parent company through interposed companies. The Commission also considers that the second plea is inoperative as the sections of the judgment under appeal which demonstrate that RYPF formed an economic unit with GQ have not been challenged.

59. The appellants by their second plea have sought to distance RYPF from the infringement committed by GQ in the present case most notably by emphasising the role played by RQ in respect of GQ, such as the fact that RQ nominates GQ's administrative body and approves the latter's annual accounts.

29 — Cited in footnote 24.
30 — [2006] ECR II-3389.
31 — Cited in footnote 6.
32 — Cited in footnote 24.
33 — Cited in footnote 30.
34 — Cited in footnote 10.
35 — Cited in footnote 6.

60. It is settled case-law that EU competition law refers to the activities of undertakings and that 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. The Court has also stated that the concept of an undertaking, in the same context, must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal. 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. The infringement of EU competition law must be imputed unequivocally to a legal person on whom fines may be imposed and the statement of objections must be addressed to that person. It is also necessary that the statement of objections indicate in which capacity a legal person is called on to answer the allegations. [36]

61. It is clear in accordance with the settled case-law that a legal person such as a company that has not been directly involved in an infringement can nevertheless be penalised for it in certain circumstances. [37] The Court in Case C-97/08 P *Akzo Nobel and Others* v *Commission* emphasised the fact that where a parent company and its subsidiary form a single economic unit, the parent company may be held responsible for an infringement by its subsidiary despite the fact that the parent company had no personal involvement in the infringement. [38] Thus ascertaining whether companies within a corporate group form part of a single economic unit is vital in relation, inter alia, to the question of attribution of responsibility for infringements of competition law. [39] That question has undoubtedly been rendered considerably less complex and onerous for competition law enforcement authorities such as the Commission by the rebuttable presumption that the parent company of a wholly owned subsidiary exercises a decisive influence over the latter and that they both therefore form a single economic unit. Indeed, I consider that the function of the presumption in question, as explained by Advocate General Kokott in her Opinion in Case C-97/08 P *Akzo Nobel and Others* v *Commission*, [40] is to facilitate the effective enforcement of competition law while promoting legal certainty due to the straightforward manner in which the presumption arises.

36 — Case C-97/08 P *Akzo Nobel and Others* v *Commission*, cited in footnote 10, paragraphs 54 to 57.

37 — See *AEG Telefunken* v *Commission*, cited in footnote 5, paragraph 49. See by analogy Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 40 et seq.

38 — See paragraph 59.

39 — Moreover, in accordance with Article 23(2)(a) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU and 102 TFEU] (OJ 2003 L 1, p. 1), the Commission may by decision impose fines on undertakings where, either intentionally or negligently, they infringe Article 101 TFEU or Article 102 TFEU. For each undertaking participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year. Thus identifying the undertaking may have a bearing on the level of that fine. In addition, the fines imposed on undertakings may be increased pursuant to Article 23(2)(a) of Regulation No 1/2003 where there are aggravating circumstances such as where an undertaking repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 101 TFEU or 102 TFEU. See Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331. See also paragraph 28 of the Commission's 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 fine imposed on an undertaking may in certain circumstances be greatly increased due to a prior infringement of competition law carried out by a subsidiary within a group.

40 — Cited in footnote 10.

62. I consider that a parent company (RYPF) which owns 100 % of the shares of a subsidiary (RQ), which in turn owns 100 % of the shares of another company (GQ), is undoubtedly capable of exercising decisive influence over the latter company (GQ) [41] and the rebuttable presumption that the parent company (RYPF) actually exercises that influence should therefore apply. The number of wholly owned companies interposed between a parent company at the head of a corporate group and the subsidiary which participated in the infringement of competition law should not prevent the presumption from arising. In cases involving a 'chain' of wholly owned subsidiaries, the capacity of the parent company at the head of the group to exercise decisive influence over each and every subsidiary, but particularly over the subsidiary which participated in the infringement, is not, in my view, open to question. Where a company is wholly owned by another, albeit indirectly, the presumption in question should arise as in such cases the corporate structure is not, in principle, determinative.

63. I can therefore see no reason why the presumption in question should not apply to the facts of the present case. It must again be stressed that the presumption is rebuttable. The parent company at the head of a group must be afforded an opportunity to adduce evidence to rebut the presumption that it exercises a decisive influence over the conduct of its subsidiaries. Indeed, where the parent company at the head of a group can demonstrate that the subsidiary which committed the infringement or one of the 'interposed' subsidiaries between the parent and the infringing subsidiary decides independently on its own conduct on the market, that will break the chain of responsibility and the parent company at the head of the group may not be held responsible for the infringement of competition law.

41 — And RQ.

64. In my view, to find otherwise would jeopardise the rebuttable presumption and thus its function of ensuring the effective enforcement of competition law as parent companies could escape responsibility for the infringements in which their subsidiaries participated through corporate restructuring. [42] Such strategic corporate restructuring could also indirectly limit the power of the Commission to impose fines, thus potentially undermining the deterrent effect of fines. [43]

65. I therefore consider that the appellants' second plea should be rejected.

V — Costs

66. Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court itself gives final

42 — While it may be possible in some cases to identify and thus discard with relative ease sham arrangements set up to avoid the operation of the presumption, I consider that in the vast majority of cases such a possibility would not be available, particularly where a wholly owned subsidiary is more than a holding company, and therefore the presumption and its advantages would be nullified.

43 — The deterrent objective of fines imposed for infringement of EU competition rules and the need to ensure that that objective is not jeopardised or frustrated by the restructuring of undertakings was recently stressed by the Court in *ETI and Others*, cited in footnote 37; Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraphs 22 to 29; and Joined Cases C-101/ and C-110/07 P *Coop de France bétail et viande and Others* v *Commission* [2008] ECR I-10193, paragraphs 96 to 98.

judgment in the case, it is to make a decision as to costs.

67. Under Article 69(2) of those rules which, under Article 118 thereof, applies to appeals, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under the first subparagraph of Article 69(3) of those rules, the Court may, where each party succeeds on some and fails on other heads of claim, order that each party shall bear its own costs.

68. In this case, since both the appellants and the Commission have been unsuccessful in part in their claims on the appeal, it is appropriate to decide that each of them shall bear its own costs relating to the appeal.

69. By contrast, since the action for annulment brought by the appellants has been dismissed, paragraph 2 of the operative part of the judgment under appeal must be confirmed as regards the costs relating to the proceedings at first instance.

VI — Conclusion

70. I therefore consider that the Court should:

— set aside the judgment of the Court of First Instance (Sixth Chamber) of 18 December 2008 in Case T-85/06 *General Química and Others* v *Commission* in so far as it held General Química jointly and severally with Repsol Química and Repsol YPF for the infringements committed by General Química;

— dismiss the rest of the appeal;

— dismiss the action brought by General Química, Repsol Química and Repsol YPF for annulment of Commission Decision 2006/902/EC of 21 December 2005 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement against Flexsys NV, Bayer AG, Crompton Manufacturing Company Inc. (formerly Uniroyal Chemical Company Inc.), Crompton Europe Ltd, Chemtura Corporation (formerly Crompton Corporation), General Química, Repsol Química and Repsol YPF (Case No COMP/F/C.38.443 — Rubber chemicals);

— order the parties to bear their own costs relating to the appeal and General Química, Repsol Química and Repsol YPF to pay all the costs at first instance.