# OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 17 February 2011 [1]

1. This appeal has been brought by Elf Aquitaine SA ('Elf Aquitaine') against the judgment by which the Court of First Instance ('the General Court') rejected its application for annulment of the decision of 19 January 2005 [2] ('the decision at issue'), by which the Commission found that a certain number of undertakings – including the undertaking consisting in Elf Aquitaine and its subsidiary Arkema SA ('Arkema'), formerly Elf Atochem SA ('Elf Atochem') and subsequently Atofina SA ('Atofina') – had infringed Article 81(1) EC (now Article 101 TFEU) and Article 53(1) of the EEA Agreement by participating in an agreement on the market in monochloroacetic acid ('the judgment under appeal'). [3]

## I — The background to the dispute, the judgment under appeal, the procedure before the Court of Justice and the forms of order sought

2. According to paragraph 3 et seq of the judgment under appeal, the Commission's investigation into the cartel on monochloroacetic acid began in late 1999, following a report from one of the participants. On 14 and 15 March 2000, the Commission carried out on-the-spot investigations at the premises of Elf Atochem among others. On 7 and 8 April 2004, it sent a statement of objections to 12 companies, including Elf Aquitaine and Atofina (paragraphs 3 to 5 of the judgment under appeal).

3. After rejecting the counter-arguments put forward by Elf Aquitaine, the Commission found in the decision at issue that the fact that Elf Aquitaine held 98 % of the shares in Atofina was sufficient to mean that liability for Atofina's actions could be imputed to Elf Aquitaine. The Commission also took the view that the fact that Elf Aquitaine had not taken part in the production and marketing of monochloroacetic acid did not mean that it could not be regarded as forming a single economic entity together with the group's operational units (paragraphs 9 and 12 of the judgment under appeal). The fine imposed, jointly and severally, on Elf Aquitaine and Arkema by the decision at issue amounted to

1 — Original language: Italian.

2 — C(2004) 4876 fin. relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement, Case COMPE/E-1/37.773 – AMCA.

3 — Case T-174/05 *Elf Aquitaine* v *Commission* [2009] ECR II-183.

EUR 45 million (Article 2(c) of the decision at issue and paragraph 30 of the judgment under appeal).

4. On 27 April 2005, Elf Aquitaine brought an action for annulment of the decision at issue. In support of its action, it raised nine pleas in law concerning, principally and respectively: breach of the rights of the defence; failure to state adequate reasons; inconsistency of the reasoning; infringement of the rules governing the imputability to the parent company of infringements committed by its subsidiary; breach of a number of fundamental principles integral to the Community legal order; breach of the principle of legal certainty; distortion of the evidence; and misuse of powers. In the alternative, Elf Aquitaine put forward a plea that the Commission's reasoning in the calculation of the fine had been inconsistent and, in the further alternative, it claimed that the fine should be reduced to an appropriate amount. In the judgment under appeal, the General Court rejected all the pleas in law, whether submitted principally or in the alternative, and ordered Elf Aquitaine to pay the costs.

5. By application lodged at the registry of the Court of Justice on 15 December 2009, Elf Aquitaine brought the present appeal. It claims that the Court should set aside the judgment under appeal and grant the forms of order sought at first instance for the annulment of Articles 1(d), 2(c), 3 and 4(9) of the decision at issue. In the alternative, it claims that the Court should annul or reduce, on the basis of Article 261 TFEU, the fine of EUR 45 million imposed jointly and severally on Arkema and Elf Aquitaine under Article 2(c) of the decision at issue. In any event, Elf Aquitaine claims that the Commission should be ordered to pay the costs. The Commission contends that the Court should dismiss the appeal and order Elf Aquitaine to pay the costs.

6. The representatives of the parties presented oral argument at the hearing on 25 November 2010.

## II — Analysis

### A — *The appeal*

7. Elf Aquitaine relies on six grounds of appeal, the sixth by way of an alternative.

1. The first ground of appeal

8. By its first ground of appeal, Elf Aquitaine claims that the General Court failed to draw the proper inferences from the criminal law nature of the fines imposed under Article 101 TFEU. The fact that the fines are of a criminal law nature should have led the General Court to apply in full the principle of liability for personal acts, the principle that penalties must be specific to the offender to the offence and the principle of the presumption of innocence, enshrined in Article 6(1) and (2) of the European Convention for the Protection of Human Rights and Fundamental freedoms ('ECHR'). [4] According to Elf Aquitaine, the General Court erred by applying those principles solely to an entity without legal personality – the *undertaking* Autofina/Elf Aquitaine – and not applying them to the companies which, in its view, made up the undertaking and constituted the only entities which could have legal rights and obligations. In the circumstances, that approach had led the General Court, on the one hand, to deny Elf Aquitaine the benefit of the presumption of innocence, by leaving it out of account in relation to the preliminary investigation, and to exclude it from the application of the principles that criminal liability and penalties must be specific to the offender, by rejecting the evidence adduced by Elf Aquitaine to show that it had nothing to do with the infringement and that its subsidiary operated entirely independently on the market. The Commission argues, by way of a preliminary point, that the question of the nature of the fines imposed for infringing the rules on competition – a question on which the Court of Justice has so far refrained from adopting an explicit position – can be left open in the present case, since the rights devolving from that categorisation, such as the rights of the defence and the presumption of innocence, are, in any event, recognised and guaranteed by case-law.

9. In common with the Commission, I take the view that the Court is not duty bound, in the present case, expressly to adopt a position regarding the nature of the fines imposed for infringing the competition rules, which – I would point out – are expressly categorised, by Article 23(5) of Regulation No 1/2003, as not being of a criminal law nature. [5] In fact, by its first ground of appeal, Elf Aquitaine claims, not that the General Court denied the criminal law nature of the fines, but that it acted in breach of the fundamental rights accruing to Elf Aquitaine as a legal person held liable for an infringement attracting penalties which, in its view, are of a criminal law nature. Looked at more closely, the specific allegations put forward by Elf Aquitaine in the context of that ground of appeal largely overlap with those raised by the remaining grounds: more specifically, by the second ground of

4 — Signed in Rome on 4 November 1950.

5 — Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1). According to the case-law of the European Court of Human Rights, the fact that a penalty is not defined as a criminal law penalty in the legal order of a Contracting State does not prevent it from being acknowledged as being of a criminal law nature for the purposes of applying the ECHR (see European Court of Human Rights, judgment of 8 June 1976, *Engel and Others*, Series A No. 22). Without pursuing my analysis further, I would point out that, in the light of that case-law, it seems unlikely that the penalties imposed on the basis of Regulation No 1/2003 can be anything other than of a criminal-law nature for the purposes of the Convention.

appeal, by which Elf Aquitaine claims that the General Court infringed the rights of the defence in denying Elf Aquitaine its right to be involved in the preliminary investigation; and by the fifth ground of appeal, alleging breach of the principle that criminal liability and penalties must be specific to the offender, as well as breach of the principle of the presumption of innocence, in that the presumption on which the Commission relied in order to establish Elf Aquitaine's liability for the conduct of Atofina was not open to rebuttal. It follows that the first ground of appeal cannot really stand alone, save for the claim that the General Court erred in applying the fundamental rights invoked by Elf Aquitaine to the *undertaking* comprising Elf Aquitaine and its subsidiary and not to Elf Aquitaine alone. However, as will become clearer below, that claim too seeks to allege a material breach of those rights and is reiterated at various points in the appeal.

10. On the basis of the foregoing, I do not consider it necessary to undertake a separate analysis of the first ground of appeal, and certainly not to examine it separately from the second and fifth grounds. The claims submitted in relation to the second and fifth grounds of appeal will be assessed on the basis of the assumption that Elf Aquitaine is correct in its basic premiss, that is to say, it is correct in asserting that the penalties for infringing the EU competition rules are of a criminal law nature.

2. The second ground of appeal: breach of Elf Aquitaine's rights of defence

11. By its second ground of appeal, Elf Aquitaine claims that the General Court acted in breach of Elf Aquitaine's rights of defence because it misconstrued the principles of equity and equality of arms. This ground of appeal is divided into two parts.

(a) The first part

12. Elf Aquitaine first claims that the General Court failed to guarantee the protection of its rights of defence even at the stage of the preliminary investigation, which preceded the issue of the statement of objections. At that stage of the administrative procedure, not only was Elf Aquitaine not given a hearing by the Commission, it was not even informed of the suspicions against it. In the circumstances, according to Elf Aquitaine, there was all the more reason to observe those requirements in its regard, since it had not taken part in the infringement and was unaware of the very existence of the infringement. Moreover, the belated notification (at the stage of the statement of objections) meant that it was unable to take the measures necessary to mount a proper defence, particularly in terms of preserving any evidence capable of demonstrating its subsidiary's autonomy on the market. According to Elf Aquitaine, it is incompatible with the criminal law nature of penalties imposed pursuant to Article 101 TFEU to confine exercise of the rights of the defence strictly to the stage following the

issue of the statement of objections. In its reply, Elf Aquitaine refers, in particular, in support of its arguments, to the Commission's 'Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU', published in January 2010 ('the Best Practices').

13. In considering that submission, it is first necessary to determine whether – and, if so, within what limits – the Commission is under a duty, in order to respect the rights of the defence of undertakings involved in a proceeding for infringement of the rules on competition, to inform such undertakings of the suspicions against them as soon as the preliminary investigation is launched, hence before the statement of objections is notified.

14. In that connection, I would point out that, according to settled case-law, in any procedure that is likely to result in the imposition of penalties – and, in particular, fines and penalty payments, as provided for under Regulation No 1/2003 – the rights of the defence are fundamental rights forming an integral part of the general principles of law whose observance the Court ensures. [6]

It is also necessary to bear in mind that the administrative procedure under Regulation No 1/2003, which takes place before the Commission, is divided into two separate and consecutive stages, each of which has its own internal logic. The first phase, covering the period up to notification of the statement of objections, begins on the date on which, in the context of a preliminary investigation, the Commission adopts, in exercise of the powers conferred upon it by Regulation No 1/2003, measures which involve the allegation of an infringement and which have major repercussions on the situation of the undertakings under suspicion. This stage must enable the Commission, after investigation, to adopt an initial position on the course which the procedure is to follow. The second stage extends from the statement of objections to the adoption of the final decision. It must enable the Commission to reach a final decision on the alleged infringement. [7] It is not until the beginning of this second stage that the undertaking concerned is informed, through the statement of objections, of all of the essential elements on which the Commission is relying and only then does the undertaking have a right of access to the file. [8] According to the findings of the Court in *Dalmine*, the undertaking concerned is not able to rely in full on the rights of the defence until after notification of the statement of objections, [9] and it is through the notification of the statement of

6 — See, to that effect, 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, paragraph 64, and Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraph 68.

7 — See, to that effect, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraphs 181 to 183, and Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraph 38.

8 — See, to that effect, *Limburgse Vinyl Maatschappij and Others*, cited in footnote 7, paragraphs 315 and 316, and *Aalborg Portland and Others* v *Commission*, cited in footnote 6, paragraphs 66 and 67.

9 — See Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 59.

objections, on the one hand, and access to the file, on the other, that those rights are safeguarded and the right to due process is ensured. [10] The Court also held in *Dalmine* that, if those rights were extended to the period preceding notification of the statement of objections, 'the effectiveness of the Commission's investigation would be compromised, since the undertaking concerned would already be able, at the preliminary investigation stage, to identify the information known to the Commission, hence the information that could still be concealed from it.' [11]

15. In the present case, Elf Aquitaine takes issue with the General Court for failing to acknowledge that the Commission was under an obligation to inform Elf Aquitaine, as of the preliminary investigation stage, that it was under suspicion. The breach alleged by Elf Aquitaine relates, therefore, to an obligation of a more general nature than the notification of individual items of evidence gathered in the course of the preliminary investigation and concerns information regarding the alleged infringement under investigation.

16. The Court has yet to hand down a specific ruling as to the existence of such an obligation. However, its case-law does offer a number of key points for analysis. In *Hoechst* v *Commission*, the Court held that, in carrying out its task, 'the Commission must however ensure that the rights of the defence are not impaired during preliminary inquiry procedures, which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable.' [12] Consequently, according to the Court, although certain rights of the defence relate only to the inter partes procedure which follows the delivery of the statement of objections, other rights – for instance, the right to benefit from legal aid and the right to respect for the confidentiality of correspondence between lawyer and client, [13] or indeed the right not to testify against oneself [14] – must be respected as early as the preliminary inquiry. In relation to the 'reasonable time' principle, the Court has held that the excessive duration of the first phase of the preliminary investigation may have an effect on the future ability of the undertakings concerned to defend themselves, particularly by impeding the establishment of evidence designed to refute the existence of conduct which could render the undertakings concerned liable and that '[f]or that reason, examination of any interference with the exercise of the rights of the defence must not be confined to the actual phase in which those rights are fully

10 — Ibid, paragraph 58.

11 — Ibid, paragraph 60. That finding must, however, be considered in the light of Dalmine's complaint that it had not been informed, prior to the statement of objections, of the fact that the Commission had access to minutes drawn up in the course of investigations in the context of national criminal proceedings, which Dalmine claimed were inadmissible as evidence in the procedure launched by the Commission, paragraphs 54, 55 and 60. A similar claim concerning the failure to communicate, at the stage prior to the statement of objections, certain evidence used by the Commission at the next stage in the procedure, was rejected by the General Court in Case T-99/04 *AC-Treuhand* v *Commission* [2008] ECR II-1501, paragraph 49.

12 — Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 15. That principle was recently reaffirmed in *Aalborg Portland and Others* v *Commission*, cited in footnote 6, paragraph 63.

13 — Recognised by the Court in Case 155/79 *AM & S* [1982] ECR 1575.

14 — See Case 374/87 *Orkem* v *Commission* [1989] ECR 3283.

effective, that is to say, the second phase of the administrative procedure'... but 'must extend to the entire procedure and be carried out by reference to its total duration.' [15]

17. In *AC-Treuhand* v *Commission*, relied upon by Elf Aquitaine, the General Court found the considerations set out in point 16 above to be applicable by analogy to the issue before it. In particular, according to the General Court, even though 'in formal terms, the undertaking concerned does not have the status of "a person charged" during the preliminary investigation stage, the initiation of the investigation in its regard, by the adoption of a measure of inquiry concerning it, cannot generally be dissociated, in substantive terms, from the existence of suspicion, hence from an implied imputation of misconduct... which justifies the adoption of that measure.' [16] It follows – again according to the General Court – that the Commission is required to provide the undertaking concerned, as of the preliminary investigation stage, with certain information on the subject-matter and purpose of the investigation. I agree with that finding. As well as inhering to the central role which the Court attaches to the rights of the defence in proceedings in which penalties may be imposed, [17] it is the logical corollary of what the Court has already held in relation to the need to secure the observance of those rights, in cases of infringement of the rules on competition, even during the preliminary investigation stage.

18. As regards the full implications of that duty, the General Court also states in *AC-Treuhand* v *Commission* that 'when the *first measure is taken in respect of an undertaking*, the Commission is required to inform the undertaking concerned, inter alia, of the subject-matter and purpose of the investigation under way', regardless of whether these are requests for information – of an informal nature (under Article 11(2) of Regulation No 17/62, now under Article 18(1) and (2) of Regulation No 1/2003) or in the form of the adoption of a decision (under Article 11(5) of Regulation No 17/62, now Article 18(1) and (3) of Regulation No 1/2003) – or a decision ordering investigation (in accordance with Article 14(3) of Regulation No 17/62, now Article 20 of Regulation No 1/2003). [18] In *AC-Treuhand*, therefore, as the Commission correctly pointed out in its observations, the

15 — See *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, cited in footnote 7, paragraphs 49 and 50.

16 — Cited in footnote 11, paragraph 52.

17 — See, for example, Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler and Others* v *Commission* [2009] ECR I-7191, paragraph 34 and paragraph 37 et seq.

18 — Cited in footnote 11, paragraphs 53 to 56. Emphasis added.

duty to inform the undertaking concerned (or the legal persons of which it is made up) was considered to exist *as of the adoption in its regard of an investigative measure under Regulation No 1/2003*. It is, in fact, in consequence of that measure that an infringement is first imputed, albeit implicitly, to the undertaking concerned, and that the undertaking, although not yet 'charged', is affected by that imputation.

19. Contrary to the assertions made by Elf Aquitaine, that finding seems perfectly compatible with the requirements of Article 6 ECHR. According to the case-law of the European Court of Human Rights, the concept of 'criminal charge', which appears in Article 6(1) ECHR, is autonomous in nature. [19] It further emerges from the case-law of the European Court of Human Rights, especially with regard to the duration of the procedure, that the guarantees under Article 6 ECHR apply in criminal matters from the day on which a person is officially 'charged'. [20] That concept refers to the official notification given by the competent authority of the criminal offence alleged. [21] Consonant with the prominence accorded in a democratic society to the right to a fair trial, [22] the European Court of Human rights has chosen to construe 'charge' in 'substantive' rather than 'formal' terms. [23] Looking beyond the formal elements, it considers the reality of the procedure at issue, and dovetails the date from which the guarantees of a fair trial apply with the date on which the authorities adopt measures as a result of which it is likely that 'the situation [of the suspect] has been substantially affected', [24] such as a search. [25]

20. In the present case, Elf Aquitaine was not the subject of any investigative measure

19 — European Court of Human Rights, judgment of 27 February 1980, *Deweer* v *Belgium*, Series A, No 35, paragraph 42.

20 — European Court of Human Rights, judgment of 27 June 1968, *Neumeister* v *Austria*, Series A, No 8, paragraph 18.

21 — European Court of Human Rights, *Deweer* v *Belgium*, cited in footnote 19, paragraphs 42 and 47; judgment of 15 July 1982 *Eckle* v *Germany*, Series A, No 51, paragraph 73; judgment of 21 May 2003 *Janosevic* v *Sweden*, Reports of judgments and decisions 2002-VII, paragraph 91, in which the start date, for the purposes of calculating the duration of the procedure, is set at the time when the tax authority notified the person concerned of a tax assessment including tax surcharges (see, to the same effect, the judgment of 21 May 2003 *Västberger Taxi Aktiebolag and Vulic* v *Sweden*, paragraph 103).

22 — European Court of Human Rights, judgment of 9 October 1979, *Airey* v *Ireland*, Series A, No 32, paragraph 24.

23 — European Court of Human Rights, *Deweer* v *Belgium*, cited in footnote 19, paragraph 44.

24 — See European Court of Human Rights, *Eckle* v *Germany*, cited in footnote 21, paragraph 74. In that judgment, in setting the start date for determining the duration of the procedure, the European Court of Human Rights ruled that this was neither the date on which the complaint was lodged, because, although that led to the opening of a first preliminary investigation on which the file was subsequently closed, it 'did not lead to any formal measures of inquiry', nor the date on which the second preliminary investigation was set under way, beginning with 'numerous witnesses [being] interviewed in connection with the allegations made against Mr. Eckle.' Having been unable to ascertain 'as from what moment the applicants [Mr and Mrs Eckle] officially learned of the investigation or began to be affected by it', the European Court of Human Rights set a date subsequent (by about a year) to the opening of the first preliminary investigation.

25 — See European Court of Human Rights, *Eckle* v *Germany*, cited in footnote 24. In *Deweer*, however, the European Court of Human Rights rejected the notion that 'charged' for the purposes of Article 6(1) ECHR covered inspections carried out at the applicant's business premises, since they formed part of the normal checks to ensure compliance with the law.

during the three years which elapsed between the first request for information addressed to its subsidiary Elf Atochem and the notification of the statement of objections. [26] Accordingly, the allegations made in relation to Elf Aquitaine were not officially notified until the statement of objections was drawn up. On the other hand, it is probable that – as the Commission stated at the hearing – Elf Aquitaine's liability, which is not based on direct involvement in the arrangement, was not put in issue until a late stage in the preliminary investigation, at the point when, for the purposes of notifying the statement of objections, the Commission had to identify the undertakings which it considered to have been involved in the infringement. [27] Consequently, only as of the statement of objections could Elf Aquitaine be regarded as facing a 'criminal charge' for the purposes of Article 6 ECHR – assuming that allegations of an infringement of the Community competition rules fall to be framed in those terms (see point 10 above) – and the guarantees provided for under Article 6 could not apply to it until then.

21. In its reply and at the hearing, Elf Aquitaine referred specifically to Article 6(3)(a) ECHR, under which everyone charged with a criminal offence has the right 'to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.' According to the case-law of the European Court of Human Rights, the guarantees provided for under Article 6(3)(a) constitute a particular aspect of the right to a fair trial, which is guaranteed in general terms under Article 6(1), and they come into play from the point at which the person is 'charged' – a concept which must also be construed, under the Convention, as referring to a substantive and not just a formal situation. [28] In that regard, the case-law relied upon by Elf Aquitaine in its reply does not appear to have any bearing in this case. In *Salduz*, it was alleged that Article 6(3)(c) of the ECHR had been infringed in that the applicant had been deprived of the right to have the assistance of a lawyer while in police custody. Paragraphs 50 et seq and, in particular, paragraph 54 of the judgment in *Salduz*, which Elf Aquitaine cites specifically, relate to the situation of a person upon whom a preventive measure is brought to bear – and who, clearly therefore, has the status of a person accused – and who is interviewed by the

26 — However, that fact was not cited by Elf Aquitaine during either the administrative procedure or before the General Court to claim that the investigation was inadequate.

27 — Elf Aquitaine claims that it was the only parent company concerned by the infringement which was not informed until the statement of objections was notified and refers, by way of example, to Akzo Nobel NV. As Elf Aquitaine itself points out, however, Akzo Nobel NV had been the subject of investigative measures (requests for information) during the preliminary investigation.

28 — European Court of Human Rights, judgment in *Casse* v *Luxembourg* of 27 April 2006, paragraphs 29 to 33, 71 and 72. In that judgment, the European Court of Human Rights found that the applicant had to be regarded as having been 'charged' for the purposes of Article 6(3)(a) ECHR on the date on which a search was ordered at the premises of the bank where he had been employed, because it was at that point that his status as 'suspect' became absolutely clear as a result of a number of tallying factors (see paragraph 33).

police without a lawyer being present. [29] *Dayanan* concerned a similar situation. [30]

22. Turning to the argument which Elf Aquitaine bases on the Best Practices, it is sufficient to point out that, according to that document, which refers on this point to *AC-Treuhand*, 'at the moment of the first investigative measure addressed to them', undertakings are informed of the fact that they are subject to a preliminary investigation as well as about the subject-matter and purpose of such an investigation. [31] In any event, in paragraph 5 of the Best Practices, the Commission explains that these 'reflect the views of DG Competition... on Best Practices at the time of [their] publication and will be applied as from the date of publication for on-going and future cases.' It is further clarified, in footnote 10, that '[w]ith regard to cases which are on-going at the time of the publication of the Best Practices, the latter will only apply to pending procedural steps and not to those already finalised.' It follows that the Best Practices are not, in any event, applicable *ratione temporis* to the procedure which led to the adoption of the decision at issue.

23. Elf Aquitaine contends lastly that the fact that it was not informed at the preliminary investigation stage of the suspicions against it compromised the exercise of its rights of defence during the subsequent inter partes phase of the procedure. In that connection, it has to be said that – as the Commission commented – in any event, an allegation of that nature is no more than a general reference to the possibility that evidence capable of demonstrating its subsidiary's market autonomy may have been lost and is unsupported by even a shred of evidence.

24. On the basis of all the above considerations, the first part of the second ground of appeal raised by Elf Aquitaine must, in my view, be rejected.

(b) The second part

25. In the context of this part of the second ground of appeal, Elf Aquitaine submits first that, by endorsing the Commission's reliance on a presumption of liability so strong

29 — European Court of Human Rights, judgment of 27 November 2008, *Salduz* v *Turkey*. I would refer to the full text of paragraphs 54 and 62 of that judgment, from which only a few extracts are quoted in the appeal.

30 — European Court of Human Rights, judgment of 13 October 2009, *Dayanan* v *Turkey*, paragraph 31 et seq., cited by Elf Aquitaine.

31 — See paragraph 14. The other paragraphs of the Best Practices to which Elf Aquitaine refers concern the possibility for the Commission to organise informal meetings with the parties during the investigative phase (paragraph 38); the 'State of Play meetings' (paragraphs 54 to 60); three-sided meetings and meetings with the Commissioner or the Director-General (paragraphs 61 to 64); and access to a non-confidential version of the complaint. Quite apart from the fact that in the current version of the Best Practices, at least the provisions relating to the 'State of Play' meetings are not applicable to cartel proceedings (see paragraph 60), it is clear from the abovementioned paragraphs that the Commission's intention is to undertake, so far as is possible, an open and transparent investigation, but not to enter into a formal commitment to implement the various initiatives described in the Best Practices in relation to every investigation.

that all the Commission had to do was simply to establish that Elf Aquitaine was more or less the sole shareholder in its subsidiary, without taking any other investigative measure in its regard, the General Court denied the need for an impartial investigation, that is to say, an investigation in which the competent authority gathers both incriminatory and exculpatory evidence in relation to the undertakings suspected of having committed an infringement. In that regard, it is sufficient to point out that the function of a presumption is precisely to enable parties to discharge the burden of proof that falls to them simply by adducing evidence of the premiss on which the presumption is based (in this case, the fact that the parent company is the sole shareholder, more or less, in the subsidiary). A claim that reliance on a presumption is incompatible with the requirements of an impartial investigation, because it allows the authority carrying out the investigation to refrain from seeking further evidence, whether incriminatory or exculpatory, amounts, in essence, to a claim that the presumption itself is in principle impermissible. The arguments submitted by Elf Aquitaine are therefore subsumed under its fifth ground of appeal, by which it challenges the presumption made by the Commission in its regard.

26. Secondly, Elf Aquitaine argues that the impartiality of the investigation carried out by the Commission is undermined by the fact that the Commission acts as investigator, prosecutor and adjudicator in an overlapping of roles which is incompatible with the criminal law nature of the penalties imposed for infringing the competition rules. According to Elf Aquitaine, the entry into force of the Charter of Fundamental Rights of the European Union – Article 41 of which establishes the need for an impartial administrative procedure – must cause the Court of Justice to amend its own case-law on the matter, in order to take account of the approaches adopted by the European Court of Human Rights offering more extensive guarantees. In response to the Commission's objection that this argument is new and, therefore, inadmissible, Elf Aquitaine states that it is simply elaborating on pleas submitted at first instance.

27. In that connection, I would first point out that the argument set out above raises a question of law which goes to the merits of the dispute brought before the General Court, which was not addressed in the judgment under appeal and did not form the subject of debate between the parties at any stage in the proceedings at first instance. It was not raised specifically by Elf Aquitaine in either the application or the reply, or in any other written observations submitted during the proceedings; and, according to the minutes of the hearing before the General Court, it does not appear to have been raised on that occasion either. I would also point out that this argument is not in substance connected with any of the points made in the grounds of the judgment under appeal, unlike the claim considered in points 13 to 24 above, which, although not raised at first instance, is based on a number of findings made the General Court in paragraph 64 of the judgment under appeal, in particular, and is consequently admissible. Lastly, in contrast to the assertions made by Elf Aquitaine, I do not consider that the above argument can be regarded as elaborating on pleas already raised at first

instance, since it puts to the Court a question of law that is separate from the points addressed in the context of those pleas. [32]

28. In its role as an appeal court, it is incumbent upon the Court of Justice, within the limits of its appellate jurisdiction, to review the way in which the General Court has exercised its own jurisdiction to review legality, in the light of the pleas and arguments raised before it. It is not for the Court of Justice, however, to criticise the General Court for failing to rule on a plea that was not raised by the parties, unless the General Court was required to raise that plea of its own motion. In the present case, that does not seem to me to be the position. In my view, therefore, the plea of inadmissibility entered by the Commission must be upheld.

29. The considerations which follow in relation to the merits of the argument raised by Elf Aquitaine are therefore presented by way of alternative, in the event that, notwithstanding my proposal, the Court should regard that argument as admissible.

30. As was mentioned by the Commission several times in its observations, the European Court of Human Rights confirmed in its judgment in *Jussila*, handed down by the Grand Chamber, what was in part already apparent from a number of earlier judgments, that is to say, that, in relation to procedures which lead to the imposition of penalties which fall to be regarded as criminal law penalties on the basis of Article 6 ECHR, it is possible to draw a distinction between the procedures (and penalties) which come under the 'hard core' of criminal law and those which do not. [33] In paragraph 43 of *Jussila*, after noting that the use of an autonomous notion of 'criminal charge' had led to a gradual broadening of the criminal law scope of Article 6 ECHR to cover cases 'not strictly belonging to the traditional categories of criminal law', such as in fact 'administrative penalties' for infringements of 'competition law', [34] the European Court of Human Rights

32 — A question which essentially implies a preliminary objection of illegality in respect of Regulation No 1/2003.

33 — European Court of Human Rights, judgment of 23 November 2006, *Jussila* v *Finland*. The matter referred to the European Court of Human Rights concerned the compatibility with Article 6 ECHR of the lack of an oral hearing in appeal proceedings against a tax surcharge imposed by the Finnish tax authority.

34 — The list of examples provided in paragraph 43 of the judgment in *Jussila* also included administrative penalties, prison disciplinary proceedings, and penalties imposed by a court with jurisdiction in financial matters. In the case of *Société Stenuit* v *France*, the European Commission of Human Rights found that the penalties imposed by the French *Conseil de la Concurrence* for infringing the national rules safeguarding competition were of a criminal law nature; the case was removed from the register by judgment of the European Court of Human Rights of 27 February 1992. For a view opposing the extension of the exception set out in paragraph 43 of the judgment in *Jussila* to Community proceedings for the infringement of the competition rules, see Slater, Thomas, Waelbroeck, 'Competition law proceedings before the European Commission and the right to a fair trial: no need to reform?' in The Global Competition Law Centre Working Papers Series, 04/08, p. 27.

held that, in such cases, the guarantees under Article 6 'will not necessarily apply with their full stringency'.[35] That approach was already evident in the *Bendenoun* and *Janosevic* judgments in particular,[36] which are specifically cited in paragraph 43 of *Jussila*. In *Bendenoun* and *Janosevic*, the European Court of Human Rights had held that Contracting States were free to empower tax authorities – administrative bodies which did not meet the requirements of Article 6 ECHR[37] – to prosecute and impose penalties for tax offences punishable by the imposition of a tax surcharge having the nature of a criminal law penalty, so long as the taxpayer could bring any such decision affecting him before a tribunal which offered the guarantees required under Article 6 ECHR,[38] that is to say, according to the wording of paragraph 81 of *Janosevic*, which has been employed in a number of subsequent judgments, 'a judicial body that has full jurisdiction,[39] including the power to quash in all respects, on questions of fact and law, the challenged decision.'

31. Consistently with paragraph 43 of *Jussila*, the principle established in *Bendenoun* and *Janosevic* can be extended to procedures relating to suspected infringements of the competition rules laid down in Regulation No 1/2003. Consequently, the fact that the Commission acts as investigator, prosecutor and adjudicator in such procedures is not of itself incompatible with Article 6 ECHR, provided, however, that the undertakings subject to such procedures have a right to appeal the Commission's decision before a body which satisfies the requirements under Article 6. It is necessary, therefore, to determine whether the review by the Courts of the European Union of decisions adopted by the Commission satisfies the conditions laid down in paragraph 81 of *Janosevic*. Without embarking on a comprehensive analysis of that question, I shall simply highlight the aspects of such a review which are likely to prove more problematic in the light of the case-law of the European Court of Human Rights.

32. First, the Courts of the European Union review the legality of Commission decisions in anti-trust cases in a manner characteristic of that form of jurisdiction: the review comprises as comprehensive as possible an evaluation of all of the points of law and fact cited by the applicant, as well as any ground involving a question of such implications for the public at large that the court may raise it of its own motion. Other than in relation to fines, the General Court does not have jurisdiction to vary the Commission's decision

35 — The same reasoning is to be found in the judgment of the European Court of Human Rights of 4 March 2008, *Hüseyin Turan* v *Turkey*, paragraph 32.

36 — Judgments of the European Court of Human Rights of 24 February 1994, *Bendenoun* v *France*, Series A, No 284, and *Janosevic* v *Sweden*, cited in footnote 21.

37 — See the judgment in *Janosevic* v *Sweden*, cited in footnote 21, paragraph 81.

38 — See the judgments in *Bendenoun*, cited in footnote 36, paragraph 46, and *Janosevic*, cited in footnote 21, paragraph 81; to the same effect, see the judgment of 23 October 1995 in *Umlauft* v *Austria*, Series A, No 328-B, paragraphs 37 to 39. That position essentially takes up the view already expressed by the European Court of Human Rights in relation to the application of Article 6 ECHR in the non-criminal field (see, inter alia, the judgment of 10 February 1983 in *Albert and Le Compte* v *Belgium*, Series A, No 58, paragraph 29, and, in relation to minor criminal offences such as infringements of the Road Traffic Act, see the judgment of 23 October 1984 in *Öztürk* v *Germany*, paragraph 29).

39 — This footnote is relevant only to the Italian version of the present Opinion.

and can only annul it. In that regard, I would first point out that, while it is true that, in the French language version of *Janosevic*, the European Court of Human Rights employs the expression '*pouvoir de réformer*', the English text uses the more generic verb 'to quash', which actually refers to the power to annul the contested measure. Also, the European Court of Human Rights held in *Janosevic* that the administrative courts with jurisdiction under Swedish law to hear actions contesting decisions by which the tax authority imposed surcharges having the nature of criminal law penalties were courts which offered the guarantees provided for under Article 6 ECHR, even though they have jurisdiction, 'if they disagree[d] with the findings of the tax authority', only to quash the decision contested. [40] The European Court of Human Rights took the same view in a number of earlier judgments. [41]

33. The case-law is not consistent on that point, however. For instance, in *Umlauft*, referred to above, the European Court of Human Rights found that the Austrian administrative court did not offer the guarantees required under Article 6 ECHR, given that, seised of an action contesting a measure imposing on the applicant a fine for breach of the Road Traffic Act, deemed to be a criminal offence, it had jurisdiction merely to verify questions of law but was otherwise bound by the findings of fact made by the administrative authorities. In *Tsfayo*, the European Court of Human Rights did not consider that the High Court of England & Wales had 'full jurisdiction' because, although it had the power to quash the contested decision if it considered the evidence on which it was based to be insufficient or untenable, it did not have jurisdiction to re-hear the evidence or to substitute its own views for the contested views as to the applicant's credibility. [42] In *Kyprianou*, the European Court of Human Rights held that the

40 — In paragraph 82 of the judgment, the Court points out that the administrative courts 'have jurisdiction to examine all aspects of the matters before them. Their examination is not restricted to points of law but may also extend to factual issues, including the assessment of evidence...'.

41 — See, for example, the judgment of 31 August 2007 in *Bistrovic* v *Croatia*, paragraph 53, concerning the Croatian 'County Courts'; the judgment of 21 September 1993 in *Zumtobel* v *Austria*, Series A, No 268-A, paragraphs 27 to 32, concerning the power of review exercised in that case by the Austrian administrative court; and the judgment of 25 October 1995 in *Bryan* v *United Kingdom*, Series A, No 335-A, paragraphs 44 to 47. Those earlier decisions did not, however, relate to the criminal field.

42 — European Court of Human Rights, judgment of 14 November 2006, *Tsfayo* v *United Kingdom*, paragraph 48.

lack of impartiality of the court hearing a case at first instance, which had imposed a custodial sentence on the applicant for the offence of 'contempt of court', had not been remedied by the Supreme Court on appeal because it did not undertake a re-examination of the case *ex novo*. [43] Lastly, in *Silvester's Horeca*, the European Court of Human Rights found that the applicant company had not had access to a 'tribunal' for the purposes of Article 6 ECHR, since the Brussels Court of Appeal, before which it had contested the administrative measure imposing upon it tax penalties for breach of the VAT code did not have jurisdiction to exempt the taxable person from obligations imposed lawfully, solely on the basis of reasons of appropriateness or fairness. [44] In that connection, it must be pointed out, however, that in disputes relating to Article 101 TFEU and Article 102 TFEU, the Courts of the European Union also have jurisdiction over the merits with regard to fines, pursuant to Article 261 TFEU and Article 31 of Regulation No 1/2003, and is accordingly 'empowered in addition to carrying out a mere review of the lawfulness of the penalty, to substitute its own appraisal for the Commission's', cancelling, reducing or even increasing the fine imposed by the Commission when the issue of that fine is referred for its assessment. [45] That power means that the Courts of the European Union may legitimately vary the contested measure, even without annulling it. [46]

34. A second difficult aspect to which Elf Aquitaine draws attention is the marginal nature – restricted, that is to say, to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons is adequate and the facts have been accurately stated, as well as to check that there have been no manifest errors of appraisal or misuse of powers – of the jurisdiction of the Courts of the European Union, as defined by settled case-law, [47] to review the legality of complex economic matters appraised by the Commission. [48]

43 — European Court of Human Rights, judgment of 27 January 2004, *Kyprianou* v *Cyprus*. In particular, the Court held that '[a]s a court of appeal, the Supreme Court did not have full competence to deal *de novo* with the case, but could only review the first instance judgment for possible legal or manifest factual errors. It did not carry out an *ab initio*, independent determination of the criminal charge against the applicant for contempt of the Assize Court. Furthermore, the Supreme Court found that it could not interfere with the judgment of the Assize Court, accepting that that court had a margin of appreciation in imposing a sentence on the applicant.' However, the Court added that 'although the Supreme Court had the power to quash the impugned decision on the ground that the composition of the Assize Court had not been such as to guarantee its impartiality, it declined to do so'. Moreover, in the judgment of 15 December 2005, in the same case, the Grand Chamber, although reaching the same finding, focused more on the fact that, despite having the power, the Supreme Court did not proceed to quash the decision of the lower court.

44 — European Court of Human Rights, judgment of 4 March 2004, *Silvester's Horeca Service* v *Belgium*, paragraphs 26 and 27.

45 — *Groupe Danone* v *Commission*, cited in footnote 6, paragraphs 61 and 62. See also the Opinion of Advocate General Kokott in Case C-113/04 P *Technische Unie* v *Commission* [2006] ECR I-8831, point 132, and the Opinion of Advocate General Poiares Maduro in *Groupe Danone* v *Commission*, points 45 and 48.

46 — *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in footnote 7, paragraph 692. On that point, I take the liberty of referring to P Mengozzi, *La compétence de pleine juridiction du juge communautaire* in 'Liber amicorum en l'honneur de Bo Vesterdorf', 2007, p 219.

47 — See, to that effect, as regards Article 85 of the EC Treaty, Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 34; Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 62; and Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 78.

48 — In that connection, I would point out that, outside the criminal law field, the European Court of Human Rights seems to accept the possibility that review of administrative measures by the courts may, in certain areas, be confined to manifest errors (see the judgment in *Bryan*, cited in footnote 41, paragraphs 41 and 44 to 47. More specifically, in paragraph 47, the European Court of Human Rights finds that '[s]uch an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, especially where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6, para 1'. See also the judgment in *Tsyfayo*, cited in footnote 42, paragraph 46.

35. Thirdly and lastly, even though the Courts of the European Union are able to re-examine the incriminatory or exculpatory evidence in the administrative file, their review of the legality of a measure in the context of an action for annulment is undertaken by reference to the factual and legal situation as it stood at the time when the contested measure was adopted. [49] Accordingly, their role consists in appraising whether the evidence and other factual elements relied upon by the Commission are sufficient to establish that the suspected infringement took place. [50] If the Court remains unconvinced by the evidence, it can only annul the decision on the ground that the investigation was inadequate.

36. Notwithstanding the limits set out above, I do not rule out the possibility that, viewed overall, the review of the legality of Commission decisions which impose fines for infringement of the competition rules satisfies – consistently with the more flexible approach adopted by the Grand Chamber of the European Court of Human Rights in *Jansovic* – the requirements under Article 6(1) ECHR in the field of criminal law.

37. In the present case, however, that question can be left open. The case-law of the European Court of Human Rights permits an approach designed to verify that the requirements under Article 6(1) ECHR have been satisfied in the individual case, even independently of the more general question whether the structure from which the individual case emanates is itself compatible with that provision. [51] It is apparent from the judgment under appeal that, in relation to all of the aspects submitted to it for review, the General Court undertook a full examination

49 — To that effect, see Joined Cases 9/71 and 11/71 *Compagnie d'approvisionnement, de transport et de crédit et Grands Moulins de Paris* v *Commission* [1972] ECR 391. In particular, the compex appraisals carried out by the Commission must be examined solely in the light of the information available to the Commission when it undertook those appraisals, see Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 34; Joined Cases T-371/94 and T-394/94 *British Airways and Others and British Midland Airways* v *Commission* [1998] ECR II-2405, paragraph 81.

50 — See joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering* v *Commission* [2004] ECR II-2501, paragraphs 174 and 175, and Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 891.

51 — For a number of examples, see *Zumtobel*, cited in footnote 41, paragraph 31 et seq., and *Janosevic*, cited in footnote 21.

as to whether the pre-conditions for the application of Article 101 TFEU were met. Accordingly, the scope of its examination cannot be regarded as limited merely because the imputation of liability to Elf Aquitaine is based on a presumption. Moreover, it is clear from that judgment that the General Court examined the entire body of evidence submitted by Elf Aquitaine in an attempt to demonstrate that its subsidiary acted independently on the market, and rejected that evidence as irrelevant or inadequate for a number of reasons, some of which are additional to those adopted by the Commission in the decision at issue. Furthermore, although Elf Aquitaine generally challenges, in both its written pleadings and oral argument, the adequacy – in the light of the requirements of Article 6 ECHR – of the review undertaken by the Courts of the European Union of the legality of Commission decisions concerning infringements of the competition rules, it has nevertheless failed to adduce arguments capable of demonstrating such shortcomings in the present case. I therefore consider the argument that the administrative procedure was not impartial, given that the Commission plays the roles of investigator, prosecutor and adjudicator, to be both inadmissible and unfounded. [52]

38. On the basis of all the above considerations, I believe that the second part of the second ground of appeal should also be rejected.

52 — I do not believe that a different conclusion is warranted solely by virtue of the fact that, in the judgment under appeal, the General Court ruled out the possibility of reducing the fine, as applied for by Elf Aquitaine, on the basis of the finding that Elf Aquitaine had not adduced arguments or factual evidence of a nature to justify exercise by the General Court of its substantive jurisdiction in relation to fines.

(c) Conclusions in relation to the second ground of appeal

39. In the light of my analysis, I believe that the second ground of appeal should in part be rejected as unfounded and in part declared inadmissible.

3. The third ground of appeal: errors in relation to the scope of the Commission's obligation to provide a statement of reasons and inadequacy of the grounds of the judgment under appeal

40. This ground of appeal is also composed of two parts.

(a) The first part

41. By the part of its third ground of appeal, Elf Aquitaine first contends that the General Court relied on an 'erroneous view' of the Commission's obligation to state the reasons for the statement of objections, in that the Commission maintained that it had met that obligation simply by referring to the principles governing the imputability of liability to

the parent company and by indicating the size of the parent company's shareholding in its subsidiary. In that connection, I would point out that paragraph 58 et seq of the judgment under appeal, which – according to Elf Aquitaine – reveal the error of the General Court, relate in fact to Elf Aquitaine's allegations in the context of the first plea at first instance, alleging infringement of its rights of defence and not breach of the obligation to state reasons, which is invoked under the second plea. I also note that, even though Elf Aquitaine disputes that 'all of the basic evidence on which the Commission relied to proceed against Elf Aquitaine' was set out in the statement of objections, it does not specify which evidence – other than the evidence referred to in paragraphs 58 and 59 of the judgment under appeal (account of the rules governing the imputation to the parent company of liability for its subsidiary's unlawful conduct; details of the substance of the presumption based on the parent company's virtually 100 % shareholding in its subsidiary, as well as a reference to the fact that Elf Aquitaine was more or less the sole shareholder in Atofina) – ought in fact to have been included in the statement of objections. To the extent that Elf Aquitaine has in mind evidence against it other than the evidence designed to establish the factual pre-conditions for application of the presumption on which the Commission relied, its arguments overlap with the arguments adduced to dispute the very possibility of relying on such a presumption, which I shall examine as a whole in the context of the fifth ground of appeal. It follows that Elf Aquitaine has failed to prove that the General Court misconstrued, in the manner alleged, the scope of the obligation to state the reasons for the statement of objections. On that point, the first part of the third ground of appeal must, in my view, be rejected.

42. Secondly, Elf Aquitaine claims that the General Court adopted an 'erroneous view' of the Commission's obligation to state the reasons for the decision at issue. Elf Aquitaine's arguments relate more specifically to the part of the judgment under appeal in which the General Court categorised as sufficient the reasons given by the Commission in the decision at issue for rejecting the evidence submitted by Elf Aquitaine to demonstrate that its subsidiary, Atofina, had been acting independently on the market. According to Elf Aquitaine, those reasons – which, in its view, the General Court erroneously described as 'succinct', but which were actually totally lacking – did not make it possible for Elf Aquitaine to determine whether the decision at issue was sound and prevented the General Court from reviewing its legality.

43. In that regard, I would point out that, in paragraph 79 of the judgment under appeal, the General Court refers to the case-law according to which the statement of reasons required under Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and the Court to exercise its jurisdiction to review legality. The General Court also points out, on the one hand, that the requirements to be satisfied by the statement of reasons depend on the circumstances of each case – in particular, the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations – and, on the other, that 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, but also to its context and to all the legal rules governing the matter in question. [53] Lastly, in paragraph 79 of the judgment under appeal, the General Court refers to its own case-law according to which the Commission must explicitly explain its reasoning when, in relation to its decisional practice, it adopts a decision which goes appreciably further than its previous decisions, [54] and, in paragraph 80, it points out that, where a decision implementing Article 81 EC concerns a number of addressees and raises a problem relating to the imputability of liability for the infringement, sufficient reasons must be stated in relation to each of the addressees, and particularly to those who, on the basis of the decision, will have to bear the consequences of the infringement. In paragraph 84 et seq, the General Court considers Elf Aquitaine's allegation that the decision at issue did not state sufficient reasons in the section rejecting its arguments in rebuttal of the presumption relied upon by the Commission. With that in mind, the General Court reviews paragraphs 258 to 261 of the decision at issue and points out, in particular, that the Commission rejected those arguments because they were mere 'affirmations' (unsupported by evidence) and because the documents furnished by Elf Aquitaine merely provided 'general information on the company's commercial management'. The General Court concludes, in paragraph 89, that 'a response of that nature to the arguments of Elf Aquitaine, although succinct, sheds light on the reasons that led the Commission to reject them' and that the Commission had responded 'to the fundamental points of Elf Aquitaine's arguments, taking account of all of the evidence adduced by the latter'. A reading of paragraphs 84 to 90 of the judgment under appeal, the broad lines of which I have described above, does not in my view allow of the conclusion, argued for by Elf Aquitaine, that the General Court misinterpreted the Commission's duty to state reasons, taking as the basis for its view a misconceived notion of that obligation. Moreover, it emerges from the parts of the judgment under appeal referred to above, as well as from the relevant paragraphs of the decision at issue, that – contrary to the assertions made by Elf Aquitaine – the Commission did explain the reasons why the arguments set out by Elf Aquitaine were not considered sufficient to rebut the presumption at issue (because they consisted in affirmations unsupported by evidence and in documents which were not relevant). It is not possible, therefore, to claim in relation to that point that reasons were wholly lacking, although the same reasons were generally adduced to reject all of the arguments and documents which Elf Aquitaine submitted to the Commission.

53 — See, in particular, Case C-367/95 P *Commission* v *Sytraval* and *Brink's France* [1998] ECR I-1719, paragraph 63 and the case-law cited therein, as well as Case C-501/00 *Spain* v *Commission* [2004] ECR I-6717, paragraph 73.

54 — Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 226.

44. Elf Aquitaine also submits that the General Court wrongly gauged the level of detail

with which the decision at issue had to be reasoned in the specific circumstances of the case. The statement of reasons needed to be all the more specific because: (i) Elf Aquitaine had not been informed of the steps being taken against it until the statement of objections was issued; (ii) the Commission had departed from its earlier decisional practice; and (iii) the Decision compromised a number of Elf Aquitaine's fundamental rights and imposed criminal law penalties upon it. Elf Aquitaine also contends that, since the entry into force of the Charter of Fundamental Rights of the European Union, the duty incumbent upon EU institutions under Article 41(2) of that Charter to state reasons must, on the basis of Article 52(3) thereof, be construed in accordance with the more stringent criteria adopted by the European Court of Human Rights in interpreting Article 6(3)(a) ECHR.

45. To my mind, none of the arguments adduced by Elf Aquitaine can succeed. First, it is hard to see – and Elf Aquitaine provides no clarification on the matter – what bearing the fact that Elf Aquitaine was not informed of the allegations against it until the notification of the statement of objections has on the level of detail required if the obligation to state reasons is to be met. Secondly, the Commission has stated – and Elf Aquitaine has not disputed this – that the principles applied to Elf Aquitaine in relation to parent company liability, including the presumption based on Elf Aquitaine being sole shareholder, had been an integral part of the Commission's decisional practice as from the years 2002 to 2003. Since the statement of objections was sent to Elf Aquitaine on 7 April 2004 and the decision at issue was adopted on 19 January 2005, the decision at issue is no indication of any departure from the Commission's earlier practice. Lastly, as regards the third point (see point 44(iii) above), it is sufficient to point out, on the one hand, that Elf Aquitaine's argument is predicated on the assumption that it has been shown that its fundamental rights were infringed as alleged – an infringement which the General Court, on the contrary, ruled out – and, on the other, that a more detailed statement of the reasons for the decision at issue would not, in any event, have been able to show that an infringement of that nature was justifiable, were it to be established. Moreover, the fact that the decision at issue imposed penalties of a criminal law nature on Elf Aquitaine does not require that the statement of the reasons be of a standard higher than the standard, already high, required of the EU institutions under Article 253 EC, as interpreted by the Courts of the European Union, according to which the statement of the reasons must be appropriate to the measure at issue and 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 the measure and the Court to exercise its jurisdiction to review legality. [55]

55 — See, inter alia, Case C-199/99 P *Corus UK* [2003] ECR I-11177, paragraph 145, cited by Elf Aquitaine.

46. Turning to the argument which Elf Aquitaine bases on Article 41(2) of the Charter, read in conjunction with Article 52(3) thereof, even supposing those provisions to be applicable *ratione temporis* to the decision at issue, [56], it has to be said that the case-law of the European Court of Human Rights upon which Elf Aquitaine relies is not relevant, as it concerns decisions taken by judicial bodies. In any event, as regards, first, the requirement established by the European Court of Human Rights to the effect that decisions which depart from an established line of authority must give more substantial reasons for the change, [57] it need only be pointed out that the judgment under appeal is consistent with the line of authority ultimately devolving from *Stora* [58] in 2000, and was recently confirmed by *Akzo Nobel*. [59] So far as the judgment of the European Court of Rights in *Helle* is concerned – and it, too, was cited by Elf Aquitaine [60] – I would simply observe that, as will become clearer in the context of the analysis of the second part of this ground of appeal, the General Court undertook in the judgment under appeal a comprehensive review of all of the arguments raised by Elf Aquitaine during the administrative procedure and, consequently, it did not merely espouse the views of the Commission, without considering the crucial issues raised before it. Lastly, as regards the reference to the case-law of the European Court of Human Rights disapproving, on grounds of inadequacy, statements of reasons which fail to specify the basic concepts on which the related decisions are based, [61] Elf Aquitaine has not explained which concepts the General Court has used to underpin its reasoning in the judgment under appeal without explaining their significance.

56 — I would point out that, in a recent preliminary ruling, the Court found the Charter to be applicable even with regard to facts pre-dating the entry into force of the Lisbon Treaty; see Case C-279/09 *DEB* [2010] ECR I-13849.

57 — In that connection, Elf Aquitaine cites the judgment of the European Court of Human Rights of 14 January 2010 in *Atanasovski* v *The Former Yugoslav Republic of Macedonia*.

58 — Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925.

59 — Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237.

60 — European Court of Human Rights, judgment of 19 December 1997 in *Helle* v *Finland*. I would point out, moreover, that that judgment concerns not so much the detail in which reasons must be stated as the need for a fundamental examination of the essential evidence to be reviewed by the court. In paragraph 60 of the judgment, cited by Elf Aquitaine, the European Court of Human Rights expresses itself in the following terms: '[h]aving regard to these considerations, the Court would emphasise that the notion of a fair procedure requires that a national court which has given sparse reasons for its decisions, whether by incorporating the reasons of a lower court or otherwise, did in fact address the essential issues which were submitted to its jurisdiction and did not merely endorse without further ado the findings reached by a lower court.'

61 — Elf Aquitaine refers, in particular, to the judgment of 28 October 1987 in *H* v *Belgium*, paragraph 53, and the judgment of 25 April 1997 in *Georgiadis* v *Greece*, paragraph 43.

47. On the basis of all the above considerations, the first part of the third ground of appeal must, in my view, be rejected.

(b) The second part

48. By the second part of the third ground of appeal, Elf Aquitaine submits, above all, that the judgment under appeal is contradictory and incomprehensible, and based on inadequate grounds. Elf Aquitaine refers, in particular, to the General Court's finding that Elf Aquitaine and its subsidiary constitute a single undertaking – whereas the Commission regarded them, on the contrary, as independent entities – as well as to the recurrent confusion in various passages in the judgment between 'undertakings' and 'companies'. Elf Aquitaine also maintains that there is a contradiction between the first sentence and the last sentence of paragraph 105 of the judgment under appeal.

49. In that regard, I would first point out that, as the Commission – in my view, rightly – emphasises, there is no incompatibility between, on the one hand, the finding that two companies form a single undertaking and, on the other, (i) the notification to each company of a separate statement of objections, which is necessary to inform both companies of the allegations against them, or (ii) the imposition of separate fines, the amount of which must be calculated in the light of the specific features of each company. Accordingly, contrary to the assertions made by Elf Aquitain, there is no contradiction between that finding and the fact that, in the administrative procedure, the Commission took into account, for the purposes of notifying the statement of objections and setting the fine, the fact that Elf Aquitaine and Atofina were separate legal entities. Nor, secondly, do I regard as sound the argument that the alleged confusion between the 'companies' and 'undertakings' – in paragraphs 8, 17 to 18, 107 and 123 of the judgment under appeal, in particular – renders the grounds for the judgment contradictory and incomprehensible. Paragraphs 8, 17 and 18 form part of the description of the factual background to the dispute, and merely reproduce the content of the decision at issue. Paragraph 107, on the other hand, merely contains a reference to the case-law of the Court. Lastly, in paragraph 123, the General Court finds on the basis of case-law that, when a group of companies constitutes a single undertaking, the Commission is justified in imputing liability for an infringement committed by that undertaking to the company responsible for the conduct of the group and to impose a fine on that company. Whether considered separately or together, or in relation to the overall reasoning of the General Court, those paragraphs reveal no contradiction capable, as Elf Aquitaine claims, of rendering the reasons for the judgment under appeal contradictory or incomprehensible. Thirdly, as regards the alleged contradiction in paragraph 105 of the judgment under appeal, it need only be pointed out that, in that paragraph, the General Court does no more than explain that, in the decision at issue, the

Commission does indeed lay claim to a measure of discretion in cases similar to that of Elf Aquitaine, but that this discretion is not exercised until, after demonstrating that the conditions for imputing liability to all of the companies forming part of a group are met, the Commission comes to assess whether to impute that liability to all of the companies in the group or solely to those which participated directly in the infringement. Consequently, there is no contradiction between the first and last sentences of that paragraph.

50. Secondly, Elf Aquitaine submits that the reasoning of the General Court is circular because, in its view, the General Court starts from the assumption that Elf Aquitaine and Atofina constitute a single undertaking and, on the basis of that assumption, rejects as irrelevant evidence which case-law would in fact have regarded as indicia pointing to the existence of separate undertakings (for example, the fact that the parent company was unaware of the infringement). As the Commission rightly states, the General Court did not start from any assumption, but merely found that the Commission could legitimately rely on the presumption enabling it to impute to Elf Aquitaine liability for the infringement committed by the subsidiary, even though Elf Aquitaine had neither instigated nor been directly involved in the infringement, and confirmed that the factual pre-conditions for legitimately relying on a presumption of that nature were satisfied. In those circumstances, it is entirely logical to take the view – as did the General Court – that even the fact that Elf Aquitaine may have been unaware of the infringement could not cast doubt on the soundness of the view that it was liable. The alleged circularity of the General Court's reasoning is no more than a consequence of the fact that it endorsed reliance on that presumption and in no way indicates that the grounds are flawed.

51. On the basis of the above considerations, I consider that the second part of the third ground of appeal should be rejected.

(c) Conclusions in relation to the third ground of appeal

52. In the light of the observations set out above, I propose that the Court should reject the third ground of appeal in its entirety.

4. The fourth ground of appeal: infringement of Article 263 TFEU

53. Elf Aquitaine claims that the General Court exceeded the limits of its jurisdiction to review the legality of the decision at issue by substituting its own reasons for the – inadequate – reasons given by the Commission, particularly as regards the Commission's rejection of the indicia furnished by Elf Aquitaine in an attempt to rebut the presumption which enabled liability for the infringement committed by its subsidiary to be imputed to Elf Aquitaine.

54. In that regard, I would first point out that Elf Aquitaine's arguments are based on the assumption that the statement of reasons for the decision at issue is inadequate. However, such inadequacy did not emerge from the analysis of the first part of the third ground of appeal (see points 42 to 46 above). I would also point out that in *DIR International*, after recalling the fact that, in reviewing the legality of measures under Article 230 EC (now Article 263 TFEU), the Court of the European Union may not substitute its own reasons for those of the body responsible for adopting the contested measure, the Court of Justice went on to state that 'in proceedings for annulment, the [General Court] may be led to interpret the reasons for the contested measure in a manner which differs from that of its author, and even, in certain circumstances, to reject the latter's formal statement of reasons', although it cannot do so 'where there is no material factor to justify such a course of action.'[62] The margin for manoeuvre conferred on the General Court, within the limits of its jurisdiction to review legality, is more generous, therefore, than Elf Aquitaine claims. Moreover, in rejecting, in paragraph 160 et seq of the judgment under appeal, the evidence adduced by Elf Aquitaine to demonstrate its subsidiary's market autonomy, the General Court merely set out a statement of reasons, which is admittedly more detailed than the statement of reasons in the decision at issue, but nonetheless consistent with it. It follows that the General Court did not substitute its own reasons.

55. On the basis of the foregoing, the fourth ground of appeal, alleging infringement of Article 263 TFEU, must in my view be rejected.

5. The fifth ground of appeal: breach of the rules governing the imputability of liability

56. Before I consider the submissions made in the context of this ground of appeal, I would point out that Elf Aquitaine was held responsible for the infringement committed by its subsidiary Atofina on the basis of a presumption on which the Commission has increasingly relied, in recent years, in order to act against cartels involving companies belonging to big industrial groups. That presumption is based in essence on the idea that,

62 — Case C-164/98 P *DIR International Film and Others* v *Commission* [2000] ECR I-447, paragraphs 38 and 42.

given that, if the parent company holds all (or, as in the present case, almost all) the shares in a subsidiary, it is able as a rule to exercise decisive influence over that subsidiary's commercial policy, [63] it is legitimate to assume, in the absence of evidence to the contrary, that such influence was actually exercised and that, in consequence, the subsidiary did not determine its conduct on the market autonomously. In *Stora*, the Court of Justice found – as had the General Court earlier – that reliance on a presumption of that nature was legitimate, pointing out that, in such circumstances, the liability of the parent company is not to be inferred simply from the fact that it has a 100 % shareholding in the subsidiary, but from the combination of that fact with a lack of evidence to refute the possibility that the parent company was in a position to exert decisive influence on its subsidiary's commercial policy or to show that the subsidiary acted autonomously on the market. [64] Despite that clarification, *Stora* could be construed as meaning that the presumption of actual control, combined with the lack of evidence to the contrary, is not of itself sufficient to allow liability for the infringement committed by a subsidiary to be imputed to the parent company, but must be borne out by further evidence to establish common purpose between the two companies (in *Stora*, the Court of Justice specifically referred to the fact that, during the administrative procedure, the parent company had presented itself as being the Commission's sole interlocutor as regards companies in the Stora Group). [65] The Court rejected that interpretation in *Akzo Nobel*, [66] which I shall discuss in greater detail below. The scope of the presumption at issue has recently been widened to cover situations in which control is exercised by a company which is in turn 100 % controlled. [67]

57. Although the Courts of the European Union have repeatedly confirmed that it is legitimate to rely on the presumption at issue [68] which, moreover, finds its origins in a much

63 — To that effect, see Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, paragraphs 136 and 137.

64 — Paragraph 28. See also, to that effect, Case T-325/01 *Daimler Chrysler* v *Commission* [2005] ECR II-3319, paragraphs 218 to 220.

65 — Paragraph 29. That approach was taken in *Stora* by Advocate General Mischo, points 17 to 62. See, to the same effect, Joined Cases T-109/02, T-118/02, T-122/02, T-125/02 and T-126/02, T-128/02 and T-129/02, T-132/02 and T-136/02 *Bolloré* v *Commission* [2007] ECR II-947, paragraph 132.

66 — Paragraph 62.

67 — See Case T-85/06 *General Quimica and Others* v *Commission* [2008] ECR II-338, upheld on appeal in Case C-90/09 P *General Quimica and Others* v *Commission*.

68 — In addition to the abovementioned judgments of the Court of Justice in *Stora*, *AkzoNobel* and *General Quimica*, see Case T-112/05 *Akzo Nobel and Others* v *Commission* [2007] ECR II-5049.

earlier judgment of the Court of Justice,[69] companies which are held liable by operation of that presumption increasingly contest decisions imposing fines on them for the anti-competitive conduct of their subsidiaries, criticising, for largely convergent reasons, the method used by the Commission to impute liability.[70] In the present case, Elf Aquitaine's fifth ground of appeal comprises four heads of claim.

(a) The first head of claim

58. Under the first head of claim, Elf Aquitaine argues, first, that reliance on the presumption at issue infringes the rules governing the burden of proof and, more specifically, Article 2 of Regulation No 1/2003, under which 'the burden of proving an infringement of Article[101] (1) or Article [102] of the Treaty shall rest on the party or the authority alleging the infringement'. I do not consider this to be an argument that can succeed. Allowing the Commission to adopt an empirical approach (a manifestation of '*id quod plerumque accidit*') – the justification for which in terms of the accuracy and probability of the steps in the deduction is not, of itself, disputed by Elf Aquitaine – does not constitute a distortion of the rules governing the allocation of the burden of proof, but, at most, enables a particular means of proof to be used in specific circumstances.[71]

59. Secondly, Elf Aquitaine claims that the criminal law nature of the penalties imposed for infringing Article 101 TFEU, as well as the combination of roles performed by the Commission, should have led the General Court to declare that it was not legitimate to rely on the presumption applied to Elf Aquitaine, because to do so would be in breach of the principle of the presumption of innocence laid down in Article 6(2) ECHR.

60. In that connection, I would first point out that the ECHR does not, in criminal law matters, prohibit presumptions of fact or of law, but requires that they be confined within 'reasonable limits' which take into account the importance of what is at stake and the need to safeguard the rights of the defence.[72]

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

70 — See, for example, Case T-185/06 *Air Liquide* v *Commission*, pending before the General Court.

71 — On the other hand, since the infringement alleged by Elf Aquitaine seems to be linked more to the circumstantial nature of proof by presumption than to the degree of reliability to be attributed to the inference based on the presumption that Elf Aquitaine had exerted decisive influence, it would not be sufficient, as Elf Aquitaine suggests, for the purposes of curing the alleged infringement, to require the Commission to 'reinforce' that presumption by producing further evidence of the actual exercise of such influence, since that would not alter the merely circumstantial nature of the evidentiary framework on which the parent company's liability is based in circumstances such as those of the present case.

72 — See, in particular, European Court of Human Rights, judgment of 7 October 1988 in *Salabiaku* v *France*, paragraph 28. That case-law was taken up by the Court of Justice in Case C-45/08 *Spector Photo Group and Van Raemdonck* [2009] ECR I-12073, paragraph 43.

It is apparent from the case-law of the European Court of Human Rights that those limits are, in principle, deemed to have been respected where the person against whom the presumption operates is given the opportunity to adduce evidence to the contrary, including in the context of what that court defines as the 'hard core' of criminal law. In *Pham Hoang*, for example, the Strasbourg Court found to be compatible with the principle of the presumption of innocence and, more generally, with the rules regarding due process, the presumption of liability linked to the possession of drugs under the French Customs Code, since the defendant was, in any event, given the opportunity of proving that he had acted from necessity or as a result of unavoidable mistake.[73] Similarly, neither the presumption of liability linked to the defendant's role as publishing director in *Radio France*,[74] nor the presumption that the property acquired by an individual convicted under the UK drugs legislation in force during the six years prior to the commission of the offence, constituted the proceeds of drug trafficking and could accordingly be confiscated[75] was found to be in breach of the principle of the presumption of innocence: in both cases, the presumptions were open to rebuttal through the production of evidence to the contrary. More generally, in *Janosevic*, after explaining that the use of presumptions in criminal law must be proportionate to the aims pursued, the European Court of Human Rights held that a presumption which is difficult to rebut, but which can be rebutted through the production of evidence to the contrary, lies within the limits of what may be regarded as reasonable.[76]

61. That said, I would point out that both the Court of Justice and the General Court have repeatedly stated that the presumption that the parent company actually exercises decisive influence over its subsidiary's commercial policy is a 'simple' presumption, which is open to rebuttal through the production of evidence to the contrary.[77] Elf Aquitaine contends, however, that such a presumption is *de facto* irrebuttable. In support of its argument, Elf Aquitaine relies on three factors: (i) the fact that the amount of the capital held in the subsidiary is sufficient to trigger the presumption; (ii) the finding of the General Court, in paragraph 105 of the judgment under appeal, that where the shareholding in the subsidiary is 98 % or more, the Commission retains a power of discretion to impute liability to the parent company even where it does not wholly own the subsidiary; and (iii) the assessment by the General Court of the evidence adduced by Elf Aquitaine.

73 — European Court of Human Rights, judgment of 25 September 1992 in *Pham Hoang* v *France*, paragraph 34; to the same effect, see the earlier judgment in *Salabiaku,* cited in footnote 72.

74 — European Court of Human Rights, judgment of 30 March 2004 in *Radio France and Others* v *France*, paragraph 24.

75 — See European Court of Human Rights, judgment of 12 December 2001 in *Phillips* v *United Kingdom*, paragraph 43, and judgment of 23 December 2008 in *Grayson and Barnham* v *United Kingdom*, paragraphs 46 to 49. In both cases, however, the presumption at issue was applied not to enable the applicant to be charged but solely to make it possible to establish the substance of the confiscation order.

76 — Paragraphs 101 to 105.

77 — See, inter alia, *Akzo Nobel*, cited in footnote 59, paragraph 60.

62. As regards the first factor, while it is true that being the sole or more or less the sole shareholder is sufficient to trigger the presumption at issue, that presumption relates to the actual exercise of control – a power which that shareholding confers – in ways which affect the subsidiary's market conduct. It is open, therefore, to a parent company proceeded against on the basis of that presumption to challenge its application by showing, for example, that, despite the size of its shareholding, it is unable – because of legal or practical obstacles – to exert actual control over its subsidiary's commercial policy; or that, although possible, such control has not in fact been exercised; or again that, despite the parent company's attempts to influence its subsidiary's market conduct, the latter acted independently (perhaps against the parent company's instructions). [78] As the Commission rightly points out, the fact that it is difficult to adduce the evidence needed to rebut a presumption does not of itself mean that the presumption is *de facto* irrebuttable. Moreover, as the European Court of Human Rights has held (see point 60 above), a presumption, albeit difficult to rebut, remains within reasonable limits so long as it is possible to adduce evidence to the contrary.

63. As regards the second factor cited by Elf Aquitaine in support of its contention that the presumption at issue is irrebuttable, I would point out that the fact that the Commission retains a margin of discretion in deciding whether to impute liability for the infringement also to the parent company – where it is the sole or more or less the sole shareholder in the subsidiary – has no effect on the relative nature of that presumption, at least not in so far as it is common ground that this presumption cannot be relied upon if it is demonstrated that the parent company has not actually exercised decisive influence over the subsidiary's commercial policy. For the rest, I shall merely point out that, in principle, as the European Court of Human Rights stated, the fact that a presumption does not take effect automatically helps to keep its application within reasonable limits. [79]

64. Lastly, as regards the assessment of the evidence by the General Court, Elf Aquitaine contends that the General Court basically requires proof of a negative, that is to say, proof that there was no interference with the subsidiary's market conduct, which is a *probatio diabolica* incompatible with the right of access to a court and to effective review by the courts. In that connection, I would point

78 — See, to that effect, *Akzo Nobel and Others* v *Commission*, cited in footnote 68, paragraph 62.

79 — See, to that effect, European Court of Human Rights, judgment in *Phillips* v *United Kingdom*, cited in footnote 75, paragraph 43, in which it was pointed out that the court had a discretion not to apply the presumption if it considered that applying it would give rise to a serious risk of injustice.

out that, given the nature of a presumption, which makes it possible, through a process of logical deduction, to infer from a known fact proof of an unknown fact, it seems logical that, as a general rule, the person against whom the presumption operates should have to prove a negative in order to disprove the fact established merely by way of presumption. The simple fact that proof of that nature is required does not allow of the conclusion, reached by Elf Aquitaine, that the presumption is irrebuttable, particularly where – as in the present case – that proof has to be sought within the sphere of activity of the person against whom the presumption operates. Moreover, in the light of the case-law both of the Court of Justice [80] and of the European Court of Human Rights, [81] that circumstance does not of itself appear to be incompatible with the principle of the presumption of innocence.

65. In its reply, Elf Aquitaine cites in support of its contentions the recent judgment handed down in *Spector Photo Group*. [82] In that judgment, the Court of Justice held that the principle of the presumption of innocence does not preclude the presumption under Article 2(1) of Directive 2003/6/EC [83] that the intention of the author of insider dealing can be inferred implicitly from the constituent material elements of that infringement, 'since that presumption is open to rebuttal and the rights of the defence are guaranteed.' [84] That finding accords with the analysis set out so far and does not provide arguments to support Elf Aquitaine's contention.

66. However, according to Elf Aquitaine, in paragraph 55 et seq of *Spector Photo Group*, the Court of Justice specified the limits attaching to the application of presumptions in economic law, ruling out their automatic application and confirming the need for the competent authority to carry out a thorough examination of the factual circumstances, an examination which – in Elf Aquitaine's view – the General Court failed to carry out in the case of Elf Aquitaine. In that regard, it seems to me that Elf Aquitaine attributes to those paragraphs in *Spector Photo Group* general

80 — See Case C-344/08 *Rubach* [2009] ECR I-7033, paragraphs 31 to 33.

81 — See, for example, *Phillips* v *United Kingdom*, cited in footnote 75, paragraph 43, and *Grayson and Barnham* v *United Kingdom*, cited in footnote 75, paragraph 49.

82 — Cited in footnote 72.

83 — Directive of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ 2003 L 96, p. 16).

84 — Paragraph 44.

implications which they do not entail. Moreover, contrary to the way in which Elf Aquitaine construes those paragraphs, in that part of the judgment the Court merely interprets the concept of 'use of inside information' for the purposes of Article 2(1) of Directive 2003/6 in the light of the objectives of that directive, by requiring the competent authorities to determine whether the use of such information is actually unfair and accordingly prohibited by the directive for the sake of the integrity of financial markets and investor confidence: [85] if such unfairness cannot be established because the use made of the inside information is not contrary to the purposes of the directive, [86] the constituent elements of insider dealing are not present and, *consequently*, the psychological element of that offence cannot be presumed. In other words, the obligation on the competent authorities to make a thorough examination of the factual circumstances of the operation does not concern the individual against whom the presumption opertes – that is to say, it does not concern intention – but simply the material elements of the offence from which intention is inferred. Accordingly, *Spector Photo Group* in no way bears out Elf Aquitaine's argument that the presumption upon which the Commission relied in order to impute to it liability for the infringement committed by its subsidiary ought to have been supported by additional evidence. In any event, as the Commission has rightly emphasised, the General Court did in fact examine all the evidence submitted by Elf Aquitaine in an attempt to rebut the presumption applied in its regard.

67. For the rest, the arguments relied upon by Elf Aquitaine in relation to the head of claim under consideration echo some of the arguments already discussed in connection with the third plea. In that regard, it is sufficient to point out that – contrary to the assertions made by Elf Aquitaine – the General Court did not establish any 'standard of evidentiary requirement' by rejecting the relevance or adequacy of the evidence adduced by Elf Aquitaine, but examined that evidence both as individual items and as a whole (paragraphs 160 to 173 of the judgment under appeal). To take the analysis further would risk calling into question the evaluation of the evidence at first instance, without any evidence being adduced by Elf Aquitaine to show that its true nature had been distorted.

(b) The second head of claim

68. By the second head of claim of the fifth ground of appeal, Elf Aquitaine claims that, by finding it legitimate to use the presumption on which the Commission had relied, the General Court acted – contrary to the principle of subsidiarity – in breach of the principle of the autonomy of legal persons, the foundation of company law in the Member States. This deprives legal persons of their rights of defence, of the right to the presumption of innocence and of the right of respect for the principle that penalties must be specific to the offender and to the offence.

69. In that regard, I would point out that – contrary to the assertions made by Elf Aquitaine – the presumption on the basis of which

85 — See paragraph 55.
86 — See paragraph 61.

it was held liable for the infringement committed by its subsidiary Atofina is not of itself inconsistent with the principle of the autonomy of the legal persons within a group of companies, as recognised under French law. In fact, as we have seen above, that presumption relates to the exercise by the parent company of decisive influence over its subsidiary's commercial policy, made possible because the parent company is the sole – or, more or less, the sole – shareholder in its subsidiary, a situation from which it is inferred, save evidence to the contrary, that such influence was actually exerted. Consequently, it is not the presumption at issue which, of itself, affects the principle of the autonomy of legal persons but, if anything, the notion that, where such influence is established, whether or not on the basis of a presumption, the parent company and the subsidiary constitute a single economic unit, hence a single undertaking, for the purposes of the Treaty rules on competition. That interpretation, which has long been accepted by the Courts of the European Union, [87] has made it possible to widen the notion of 'undertaking', on which those rules are based, to cover persons which do not act directly on the market, and to impose fines on them, even though they have not personally taken part in the infringement. That said, even an interpretation of that nature does not appear to be incompatible with the principle relied upon by Elf Aquitaine.

70. First, the finding, for the purposes of applying the rules on competition, that the parent company exercises decisive influence over its subsidiary's commercial policy, such that the market conduct of the subsidiary can no longer be regarded as autonomous – whether that finding is arrived at simply because the two are linked by capital holdings or is borne out by specific evidence – does not call into question the legal autonomy of those persons, in so far as, as we have seen, they are regarded as separate in relation both to the exercise of their rights of defence (notification of the statement of objections, the opportunity to submit observations, the right to a hearing, the right to bring an action before the courts) and to the setting of the fine. In that connection, contrary to the assertions made by Elf Aquitaine, the parent company's liability for the conduct of its subsidiaries does not constitute a case of liability for the actions of others, but is based on the – presumed or established – involvement of the parent company in the determination of its subsidiary's commercial policy guidelines and market conduct. [88] Secondly, it is possible – even under French law – to derogate from the principle of the autonomy of legal persons within a group, since it is accepted, in specific circumstances – for instance, the commingling of assets – and in specific sectors, particularly

87 — See, for example, the case-law cited in paragraphs 58 and 59 of *Akzo Nobel* (Case C-97/08 P), cited in footnote 59.

88 — See, to that effect, *Akzo Nobel*, cited in footnote 59, paragraph 77.

in tax and accountancy law, that such autonomy can exist side by side with the idea that the group constitutes an economic unit. [89]

71. In the context of the head of claim at issue, Elf Aquitaine also contends that, by stating that the Commission did not need to provide specific evidence of Atofina's lack of market autonomy, the General Court was out of step with settled case-law, under which there must be a link at least between the presumption and the subject-matter of the arrangement or the relevant market. In that regard, I shall merely refer back to the considerations set out in point 56 above on the judgment of the Court of Justice in *Akzo Nobel* and its interpretation of the earlier case-law.

72. On the basis of all the above considerations, I believe that the second head of claim of the fourth ground of appeal must be rejected as unfounded.

(c) The third head of claim

73. According to Elf Aquitaine, the General Court recognised that the Commission had a measure of discretion for the purposes of imputing to parent companies liability for infringements committed by their subsidiaries. In Elf Aquitaine's view, that kind of discretion undermines the principles of legality and legal certainty. The Commission's practice in this area is inconsistent, Elf Aquitaine contends, and that inconsistency derives, in particular, from the fact that Elf Aquitaine was held liable for the conduct of its subsidiary Atofina in the present case but not in an earlier infringement proceeding.

74. It emerges, in particular, from paragraph 105 of the judgment under appeal that the General Court ruled out the possibility that the measure of discretion to which the Commission laid claim in paragraph 260 of the decision at issue related to the imputation to one company of liability for infringements committed by another. According to the findings of the General Court in that paragraph, the Commission itself explained, at the hearing and in its written observations, that the measure of discretion related only to the decision whether or not to penalise all the companies belonging to a group, once the conditions for imputing liability to each of them had been established. This head of claim therefore has no basis in fact and must be rejected.

(d) The fourth head of claim

75. By the fourth head of claim of its fifth ground of appeal, Elf Aquitaine maintains, lastly, that the principle of equality has been

89 — On the limits to that principle, see, inter alia, the Opinion of Advocate-General Warner in Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents Corporation* v *Commission* [1974] ECR 223.

breached. It directs its complaint against paragraph 175 of the judgment under appeal, in which the General Court is alleged to have endorsed the different treatment accorded by the Commission to Elf Aquitaine – Elf Aquitaine's capital links with Atofina alone were regarded as sufficient to impute liability to it – as compared with the other parent companies involved in the arrangement, in particular those belonging to the Akzo Nobel and di Clariant group, with regard to which the Commission in fact produced further evidence of the lack of autonomy of their respective subsidiaries. In that regard, the Commission notes that in the case of those companies, it possessed that evidence and therefore referred to it extensively in the decision at issue. I agree with the Commission that a circumstance of that nature does not, of itself, allow of the conclusion that there has been a breach of the principle of equal treatment. Consequently, in my view, the fourth head of claim of the fifth ground of appeal must also be rejected.

(e) Conclusions concerning the fifth ground of appeal

76. It follows from all the foregoing considerations that the fifth ground of appeal must be rejected in its entirety.

6. The sixth ground of appeal

77. By its sixth ground of appeal, submitted by way of an alternative, Elf Aquitaine claims that the errors of law and infringements of EU law which flaw the judgment under appeal must at least lead to the fine being cancelled or reduced. Since, on the basis of the above analysis, I have arrived at the conclusion that all the grounds of appeal submitted by Elf Aquitaine are unfounded, I believe that this ground of appeal – leaving aside the question of its opaque wording, to which the Commission has drawn attention – must in any event be rejected on the merits. In the reply, Elf Aquitaine also relies, in relation to this plea, on breach of the principle of the proportionality of penalties. Aside from the doubts as to admissibility which that objection raises, in particular given its tardiness, [90] I consider that the elements referred to by Elf

90 — The entry into force of the Lisbon Treaty, on which Elf Aquitaine bases the present complaint, pre-dates – albeit only just – the lodging of the appeal. I would also point out that Elf Aquitaine submitted no plea or argument at first instance concerning an alleged breach of the principle of proportionality. As the Commission has rightly pointed out, both the General Court and the Court of Justice verified compliance with that principle in relation to fines even before the Lisbon Treaty entered into force. The admissibility of that claim is, therefore, also doubtful in so far as it is a plea submitted to the court for the first time at the appeal stage (see, most recently, Case C-413/08 P *Lafarge* v *Commission* [2010] ECR I-5361, paragraph 52).

Aquitaine, especially the fact that it did not take part in the infringement, the fact that it was unaware of it and the fact that it could not have gained any advantage from it, as it was not directly active on the market at issue, are no more than general affirmations – once again designed to call into question the legitimacy of the evidence on the basis of which liability is imputed to Elf Aquitaine – which do not make it possible seriously to challenge the proportionality of the fine imposed by the Commission.

78. To the extent that, in the context of that ground of appeal, Elf Aquitaine refers to the exercise by the Court of Justice of its unlimited jurisdiction under Article 261 TFEU, I would point out that, according to settled case-law, it is not for the Court, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the General Court, which, in the exercise of its unlimited jurisdiction in relation also to the merits, makes a ruling concerning the level of fines imposed on undertakings for infringements of Community law. [91] Moreover, Elf Aquitaine has not challenged the legitimacy of the conditions to which, in the judgment under appeal, the General Court deemed the exercise (or the non-exercise) of its jurisdiction to consider the merits to be subject. [92]

79. Consequently, the sixth ground of appeal, submitted by way of alternative, must also, in my view, be rejected in its entirety.

B — *Costs*

80. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since I am proposing that the appeal be dismissed and since the Commission has applied for costs, I consider that Elf Aquitaine must be ordered to pay the costs of the present proceedings.

91 — See, inter alia, Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 31; Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 129; and *Technische Unie* v *Commission*, cited in footnote 45, paragraph 210.

92 — As mentioned in footnote 52 above, in the present case, the General Court found that Elf Aquitaine had not adduced evidence of such a nature that the Court, in the exercise of its unlimited jurisdiction, could call into question the amount of the fine imposed (paragraph 242 of the judgment under appeal).

## III — Conclusion

81. On the basis of all the foregoing considerations, I propose that the Court should dismiss the appeal and order Elf Aquitaine to pay the costs.