

JUDGMENT OF THE COURT (First Chamber)

20 January 2011 *

In Case C-90/09 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 27 February 2009,

General Química SA, established in Alava (Spain),

Repsol Química SA, established in Madrid (Spain),

Repsol YPF SA, established in Madrid,

represented by J.M. Jiménez-Laiglesia Oñate and J. Jiménez-Laiglesia Oñate, abogados,

appellants,

* Language of the case: Spanish.

the other party to the proceedings being:

European Commission, represented by F. Castillo de la Torre and E. Gippini Fournier, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, J.-J. Kasel, M. Ilešič, E. Levits and M. Safjan, Judges,

Advocate General: J. Mazák,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 29 April 2010,

after hearing the Opinion of the Advocate General at the sitting on 14 September 2010,

gives the following

Judgment

- 1 By their appeal, General Química SA ('GQ'), Repsol Química SA ('RQ'), and Repsol YPF SA ('RYPF') seek to have set aside the judgment of the Court of First Instance of the European Communities (now 'the General Court') of 18 December 2008 in Case T-85/06 *General Química and Others v Commission* ('the judgment under appeal'), by which the General Court dismissed their action brought against Commission Decision 2006/902/EC of 21 December 2005 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement against Flexsys NV, Bayer AG, Crompton Manufacturing Company Inc. (formerly Uniroyal Chemical Company Inc.), Crompton Europe Ltd, Chemtura Corporation (formerly Crompton Corporation), General Química SA, Repsol Química SA and Repsol YPF SA (Case No COMP/F/C.38.443 – Rubber chemicals) (OJ 2006 L 353, p. 50) ('the contested decision'), which imposed a fine on those undertakings jointly and severally for participating in a series of agreements and concerted practices.

Facts at the origin of the dispute

- 2 GQ is a company governed by Spanish law which produces certain rubber chemicals. It is a wholly owned subsidiary of RQ, which is itself wholly owned by RYPF.

- 3 On 12 April 2005, the Commission of the European Communities notified to the appellants a statement of objections relating to a proceeding pursuant to Article 81 EC and Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3).

- 4 By the contested decision, the Commission found RQ and RYPF, collectively referred to as 'Repsol', jointly and severally liable for GQ's infringement.

- 5 In that regard, the Commission stated in the contested decision that a parent company can, *a priori*, be presumed liable for the unlawful conduct of its wholly-owned subsidiaries, but that it is possible for it to rebut the presumption of actual exercise of decisive influence over those subsidiaries.

- 6 The Commission stated that such a presumption cannot be rebutted by alleging that the parent company was not directly involved in the cartel or was not aware of its existence or that it did not encourage its subsidiaries to behave unlawfully. The Commission also considered that the contention that RQ and RYPF were not entrusted with the day-to-day business or the operational management of GQ was not sufficient to rebut that presumption.

- 7 In addition, the Commission observed that, in the present case, even though the sole director of GQ had delegated his powers with regard to the operational management of the company, he still acted as a 'link' between GQ and RQ, through whom information on sales, production and financial results were passed on to the parent company. Furthermore, GQ's financial results were consolidated with those of 'Repsol', with the result that GQ's profits or losses were reflected in the profits or losses of the group.
- 8 Accordingly, the Commission found, in Article 1(f) to (h) of the contested decision, that the appellants had participated, from 31 October 1999 to 30 June 2000, in a complex of agreements and concerted practices consisting of price fixing and the exchange of confidential information on certain rubber chemical products in the European Economic Area, in infringement of Article 81 EC and Article 53 of the Agreement on the European Economic Area of 2 May 1992.
- 9 Consequently, in Article 2(d) of the contested decision, the Commission imposed a fine of EUR 3.38 million on GQ, RQ and RYPF jointly and severally.

The procedure before the General Court and the judgment under appeal

- 10 By application lodged at the Registry of the General Court on 8 March 2006, the appellants brought an action under Article 230 EC for the partial annulment of the contested decision.

- 11 They raised three pleas in law in support of that action. The first was based on a manifest error of assessment and a lack of reasoning in relation to the joint and several liability of the appellants. The second and third pleas, which will not be discussed subsequently since the appeal does not relate to them, were based respectively on several errors of law which they claimed the Commission committed in calculating the fine and an error of assessment, a lack of reasoning and an infringement of the principle of equal treatment in applying the Leniency Notice.
- 12 As regards the first plea, the General Court noted, first of all, in paragraph 58 of the judgment under appeal, the case-law of the Court of Justice in Case 107/82 *AEG-Telefunken v Commission* [1983] ECR 3151, paragraph 49, and Case C-286/98 P *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925, paragraph 26, according to which the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company, in particular where the subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.
- 13 Next, in paragraph 59 of the judgment under appeal, the General Court noted that, according to settled case-law, in the specific case where a parent company holds 100% of the shares in a subsidiary which has been found guilty of unlawful conduct, there is a rebuttable presumption that the parent company actually exerted a decisive influence over its subsidiary's conduct (by reference to Case T-314/01 *Avebe v Commission* [2006] ECR II-3085, paragraph 136 and the case-law cited), and that the two companies constitute a single undertaking for the purposes of Article 81 EC (by reference to the judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others v Commission*, 'Tokai II', paragraph 59). It is thus for a parent company which disputes before the EU courts a Commission decision fining it for the conduct of its subsidiary to rebut that presumption by adducing evidence to establish that its subsidiary was independent (in that regard, the General Court referred, inter alia, to *Stora Kopparbergs Bergslags v Commission*, paragraph 29).

- 14 In addition, the General Court stated, in paragraph 60 of the judgment under appeal, that although the Court of Justice referred, in *Stora Kopparbergs Bergslags v Commission*, to circumstances other than the holding by the parent company of 100% of the capital of the subsidiary, it did so for the sole purpose of identifying all the factors on which the General Court had based its reasoning in the judgment under appeal in that case, and not to make that presumption subject to the existence of additional factors.
- 15 The General Court therefore concluded, in paragraph 62 of the judgment under appeal, that it is sufficient for the Commission to prove that the entire capital of a subsidiary is held by its parent company for the presumption that the parent company exercises decisive influence over the conduct of the subsidiary on the market to be established. The Commission will then be able to hold the parent company jointly and severally liable for payment of the fine imposed on its subsidiary, even where it is found that the parent company did not participate directly in the agreements, unless the parent company proves that its subsidiary acts independently on the market.
- 16 The General Court therefore found, in paragraph 63 of the judgment under appeal, that, in that case, ‘the Commission did not fail to have regard to the case-law of the Court of Justice and the [General Court] by merely referring to the fact that 100% of the capital of GQ was owned by its parent companies ... in order to attribute to those companies the anti-competitive actions of GQ’.
- 17 The General Court then noted, in paragraph 65 of the judgment under appeal, that RYPF and RQ had not submitted, in its view, any evidence relating to the economic and legal organisational links between those undertakings and GQ capable of demonstrating the commercial and operational independence of that subsidiary.
- 18 On the contrary, the General Court found, in paragraph 66 of the judgment under appeal, that the fact that the sole director of GQ still acted as a ‘link’ between GQ and RQ, that RYPF consolidated GQ’s and RQ’s accounts at group level and, finally, that RQ and RYPF had replied jointly to the statement of objections, militated in favour of

the existence of a single entity, as highlighted by the Commission in recital 262 in the preamble to the contested decision.

- 19 In addition, in paragraphs 68 and 69 of the judgment under appeal, the General Court held that the fact that, on 22 October 2002, RQ had ordered GQ to cease any practice which might constitute an infringement of competition rules following the inspection which took place at GQ's place of business on 27 September 2002, was sufficient in itself to prove that RYPF and RQ exercised decisive influence over GQ's policy, not only on the market but also as regards the unlawful conduct at issue in the contested decision.
- 20 For the sake of completeness, the General Court examined in paragraphs 71 to 76 of the judgment under appeal whether, in the contested decision, the Commission had committed an error of assessment in relation to the evidence submitted by the appellants or whether it had failed to take account of that evidence, in the following terms:

'71 In that regard, it must be held that the fact that the activities of the subsidiary differ, even completely, from the activities of the group or even the fact that the parent company has tried, without success moreover, to resell its subsidiary, is not capable of rebutting the presumption that RQ and RYPF are liable. Even though groups of undertakings and holding companies frequently have different business activities and sometimes sell some of their subsidiaries, they have already been regarded as constituting a single undertaking for the purpose of Article 81 EC (see, to that effect, Case T-330/01 *Akzo Nobel v Commission* [2006] ECR II-3389, paragraphs 78 and 82).

72 Furthermore, the Commission, in reply to the request for documents made by the [appellants], submitted to the Court a document which included the minutes of RQ's board of directors of 1998 to 2000 and which set out GQ's financial results and a resolution relating to the sale of GQ's holding in Silquímica, SA and to the

sale of GQ's real property. That document substantiates in all material respects the Commission's findings in the contested decision. If RQ's board of directors plays a significant role in several essential aspects of GQ's strategy, such as the sale of real property or the sale of a holding, and reserves the power of final decision in that regard, it follows that it exerts a decisive influence on GQ's conduct.

- 73 As regards the argument relating to the lack of overlap in the membership of the organs of the applicant companies, it must be held that it is apparent from the letter of 5 April 2004 sent by GQ to the Commission and submitted by the [appellants] during the pre-litigation procedure that Mr [confidential] was both chairman of GQ's board of directors from 1996 to 2000 and a member of RQ's board of directors from 1998 to 1999. Moreover, it must be pointed out that, when questioned on that point at the hearing, the [appellants] conceded, at least implicitly, that there had been such an overlap.
- 74 Similarly, the arguments alleging that the Commission did not, in the contested decision, examine the factual evidence which showed that only GQ's executives decided on and implemented the company's commercial policy, without RQ's being informed beforehand or giving its authorisation, cannot succeed in the light of the case-law cited above. The same is true of the claims that the information given to RQ by GQ did not concern the commercial policy but the financial results of the subsidiary.
- 75 As regards the relationship between GQ and Repsol Italia, it must be held that the Commission, in the contested decision, is right to rebut the [appellants'] argument relating to an alleged conflict of interests between GQ and its parent companies by stating that RYPF consolidates the accounts of the group, which is made up of a number of subsidiaries, including GQ and Repsol Italia. Furthermore, the Commission is also right to find that that relationship is such as to strengthen the presumption that there is a single undertaking.

- 76 In those circumstances, it must be concluded, as did the Commission at recital 264 [in the preamble] to the contested decision, that the [appellants] have not managed to rebut the presumption that the parent companies are liable.’
- 21 Lastly, in paragraph 77 of the judgment under appeal, the General Court stated that none of the arguments put forward in the alternative by the appellants was capable of undermining the contested decision.
- 22 In particular, in paragraphs 78 to 83 of that judgment, the General Court held that, as can be inferred from the relevant case-law in this area, the presumption of liability deriving from the ownership of capital applies not only in cases where there is a direct relationship between the parent company and its subsidiary, but also in cases, such as the present one, where that relationship is indirect, by way of an interposed subsidiary.
- 23 On the basis of all of those considerations, the General Court rejected, in paragraph 84 of the judgment under appeal, the first plea raised in support of the action for annulment.
- 24 Since it also judged the other pleas to be unfounded, the General Court dismissed that action in its entirety, in paragraph 157 of the judgment under appeal.

Grounds of appeal of the parties

25 By their appeal, the appellants claim that the Court should:

- set aside the judgment under appeal in so far as it rejects the plea in law based on a manifest error of assessment and a failure to state sufficient reasons for the finding that the appellants were jointly and severally liable;

- annul Article 1(g) and (h) and Article 2(d) of the contested decision in so far as that decision finds RYPF and RQ jointly and severally liable for an infringement by GQ of Article 81(1) EC and, in the alternative, in so far as that decision concerns RYPF; and

- in both cases, reduce the penalty imposed as appropriate.

26 The Commission contends that the Court should:

- dismiss the appeal; and

- order the appellants to pay the costs.

The appeal

- ²⁷ The appellants raise two grounds in support of their appeal, based on errors of law concerning the attribution to RQ and RYPF respectively of liability for an infringement by GQ of Article 81(1) EC.

The first ground of appeal, based on errors of law concerning the attribution to RQ of liability for an infringement by GQ of Article 81(1) EC

- ²⁸ The first ground of appeal raised by the appellants is essentially divided into three parts.

The first part, based on a wrongful application by the General Court of the presumption of a decisive influence of a parent company over the conduct of a wholly-owned subsidiary

— Arguments of the parties

- ²⁹ According to the appellants, the General Court committed an error of law in so far as it wrongly considered that, in order to attribute to a parent company liability for the

unlawful conduct of a subsidiary which it wholly owns, the Commission could rely on a criterion which bears no relation to the infringement committed by that subsidiary.

30 It is true that Case C-97/08 P *Akzo Nobel and Others v Commission* [2009] ECR I-8237 confirms the legitimacy of applying a presumption in that regard. However, the Commission is also required to provide additional factors in order to be able to impute to such a parent company the conduct of its subsidiary.

31 Consequently, as is apparent from Case T-325/01 *DaimlerChrysler v Commission* [2005] ECR II-3319, paragraph 218, and Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré v Commission* [2007] ECR II-947, paragraph 132, and, to a certain extent, *Stora Kopparbergs Bergslags v Commission*, the Commission cannot be exempted from determining, in every case, whether that parent company actually exercised management power over its subsidiary and whether the latter carried out the instructions given.

32 In the Commission's view, that argument runs contrary to the settled case-law. In *AEG-Telefunken v Commission*, *Stora Kopparbergs Bergslags v Commission*, and *Akzo Nobel and Others v Commission*, the Court confirmed that there is a presumption that a subsidiary which is wholly owned by its parent company follows a policy laid down by the same bodies as, under its statutes, determine the parent company's policy. That makes it possible to attribute to the parent company the liability for an infringement committed by its subsidiary even if there is no evidence that the parent company was actually involved in the facts constituting the infringement committed.

33 Contrary to what the appellants claim, reliance on such a presumption does not presuppose a reversal of the burden of proof, but solely serves to establish the level of proof required to be able to attribute to the parent company liability for the collusive activity in which its subsidiary is involved.

— Findings of the Court

- 34 It should be noted, at the outset, that, according to settled case-law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see, inter alia, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paragraph 112; Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 107; and Case C-205/03 P *FENIN v Commission* [2006] ECR I-6295, paragraph 25).
- 35 The Court has also stated that, in the same context, the term ‘undertaking’ must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 40; *Akzo Nobel and Others v Commission*, paragraph 55; and Case C-407/08 P *Knauf Gips v Commission* [2010] ECR I-6375, paragraph 64).
- 36 When such an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement (*Akzo Nobel and Others v Commission*, paragraph 56 and the case-law cited).
- 37 As regards the question whether, in those circumstances, a legal person who is not the perpetrator of the infringement may none the less be penalised, it is apparent from the settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular when, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links which tie

those two legal entities (*Akzo Nobel and Others v Commission*, paragraph 58 and the case-law cited).

- 38 In such a situation, since the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of Article 81 EC, the Commission may address a decision imposing fines on the parent company, without having to establish the personal involvement of the latter in the infringement (see, to that effect, *Akzo Nobel and Others v Commission*, paragraph 59).
- 39 In that regard, the Court has stated that, in the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed the competition rules of the European Union, first, the parent company can exercise a decisive influence over the conduct of the subsidiary and, second, there is a rebuttable presumption that the parent company does in fact exercise such a decisive influence (see *Akzo Nobel and Others v Commission*, paragraph 60 and the case-law cited).
- 40 In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to assume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will then be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (see *Stora Kopparbergs Bergslags v Commission*, paragraph 29, and *Akzo Nobel and Others v Commission*, paragraph 61).
- 41 Thus, contrary to the appellants' claims, the General Court rightly held in paragraph 60 of the judgment under appeal that, whilst it is true that at paragraphs 28 and 29 of *Stora Kopparbergs Bergslags v Commission* the Court of Justice referred, not only to the fact that the parent company owned 100% of the capital of the subsidiary, but also to other circumstances, such as the fact that it was not disputed that the

parent company exercised influence over the commercial policy of its subsidiary or that both companies were jointly represented during the administrative procedure, the fact remains that those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the information on which the General Court had based its reasoning in that case and not to make the application of the presumption mentioned above subject to the production of additional indicia relating to the actual exercise of influence by the parent company over its subsidiary (see, to that effect, *Akzo Nobel and Others v Commission*, paragraph 62).

- 42 It is apparent from all of those considerations that the General Court did not commit any error of law in finding, in paragraphs 59 to 63 of the judgment under appeal, that, where a parent company holds 100% of the capital of its subsidiary, there is a rebuttable presumption that that parent company exercises decisive influence over its subsidiary's conduct.
- 43 The first part of the first ground of appeal must therefore be dismissed as unfounded.

The second part of the first ground of appeal, claiming errors in the assessment of the existence of a decisive influence of the parent company over the conduct of its wholly-owned subsidiary

— Arguments of the parties

- 44 The appellants submit, first of all, that, even if the Commission was able to assume the parent company actually exercised decisive influence over the conduct of a subsidiary of which it owns 100% of the capital, the General Court none the less committed

an error of law in relation to the rules applicable to evidence by excessively restricting the possibilities of rebutting that presumption, thereby introducing a system of automatic responsibility which is contrary to the principle of personal responsibility.

- 45 Secondly, as regards the assessment of the evidence produced with a view to rebutting that presumption, the appellants claim that the information analysed by the General Court in paragraph 66 of the judgment under appeal does not enable the conclusion that there is a single economic entity.
- 46 Thirdly, they submit that, in paragraphs 68 and 69 of the judgment under appeal, the General Court misinterpreted the order given by RQ, following the inspection carried out by the Commission, to all of the companies in its group, including GQ, to cease any practice which might constitute an infringement, in so far as such an order did not establish that RQ was aware of the conduct alleged against GQ.
- 47 Fourthly, the same paragraphs of the judgment under appeal are also vitiated by an error of legal classification and of reasoning, in so far as that order was not sufficient to show that RQ and GQ constituted an economic unit.
- 48 For its part, the Commission contends that, as regards the rebuttal by the parent company of the presumption of the exercise of a decisive influence over its subsidiary, *Akzo Nobel and Others v Commission* provided a certain number of indications confirming the legitimacy of the General Court's reasoning. In that judgment, the Court of Justice held that, in order to ascertain whether a subsidiary determines its conduct on the market independently, all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company must be examined.

49 In the Commission's view, the appellants have not shown that the General Court erroneously assessed those factors.

– Findings of the Court

50 As regards the first complaint that the General Court committed an error of law by reducing the possibilities, for a parent company, of rebutting the presumption of decisive influence over the conduct of a subsidiary of which it holds 100% of the capital, it should be noted that, in paragraph 65 of the judgment under appeal, the General Court correctly found that it is for the parent company to put before it any evidence relating to the economic and legal organisational links between its subsidiary and itself which in its view is apt to demonstrate that they do not constitute a single economic entity.

51 It is apparent from the Court's case-law that, in order to rebut the presumption that a parent company which holds 100% of the capital of its subsidiary actually exercises a decisive influence over that subsidiary, it is for the parent company to put before the EU judicature any evidence relating to the organisational, economic and legal links between its subsidiary and itself which are apt to demonstrate that they do not constitute a single economic entity (see *Akzo Nobel and Others v Commission*, paragraph 65).

52 It should also be pointed out that, contrary to what the appellants claim, given its rebuttable nature, that presumption, which may be rebutted in an individual case by relying on the series of factors referred to by the General Court, does not lead to the automatic attribution of liability to the parent company holding 100% of the capital of its subsidiary, which would be contrary to the principle of personal responsibility on which EU competition law is based.

53 Consequently, that complaint must be dismissed.

54 As regards the second and third complaints, based, respectively, on an error on the part of the General Court in that the factors analysed in paragraph 66 of the judgment under appeal do not enable the conclusion to be drawn that there is a single economic entity and on a misinterpretation, in paragraphs 68 and 69 of that judgment, of the order which RQ gave to GQ, in so far as that order does not establish that RQ was aware of the conduct alleged against GQ, this court finds that those complaints result from a misreading of the relevant passages of that judgment.

55 First, contrary to what the appellants claim, the General Court concluded that there was an economic entity by taking account of the factors analysed in paragraph 66 of the judgment under appeal. It merely limited itself to noting that those factors, which were already taken into account by the Commission in recital 262 in the preamble to the contested decision, pointed to the existence of a single entity and, therefore, did not enable the presumption weighing on RQ to be rebutted.

56 Second, in paragraphs 68 and 69 of the judgment under appeal, the General Court did not infer from the order given by RQ to GQ that RQ knew for certain of the unlawful conduct alleged against GQ, but considered that the appellants' statement, confirming that such an order was given to GQ, was sufficient in itself to prove that RQ exercised a decisive influence over GQ's policy.

57 In those circumstances, the second and third complaints must also be dismissed as unfounded.

58 By their fourth complaint, the appellants essentially accuse the General Court of failing to give reasons in that it did not sufficiently set out the reasons why, in

paragraph 69 of the judgment under appeal, it considered that that statement by the appellants concerning the order given by RQ to GQ was sufficient, in itself, to prove that RQ exercised a decisive influence over GQ's policy.

- 59 It should be noted in that regard that, according to settled case-law, the statement of the reasons on which a judgment is based must clearly and unequivocally disclose the General Court's thinking, so that the persons concerned can be apprised of the justification for the decision taken and the Court of Justice can exercise its power of review (see Case C-202/07 P *France Télécom v Commission* [2009] ECR I-2369, paragraph 29 and the case-law cited).
- 60 In the present case, the General Court simply found, in paragraph 69 of the judgment under appeal, that RQ's order to GQ to cease any practice which might constitute an infringement of the competition rules, following the inspection which had taken place at GQ's place of business on 27 September 2002, was sufficient in itself to prove that RQ exercised a decisive influence over GQ's policy, not only on the market but also as regards the unlawful conduct at issue in the contested decision.
- 61 In doing that, the General Court limited itself to merely asserting a principle, without setting out in a clear and unequivocal manner the grounds which led it to that conclusion.
- 62 It follows that the judgment under appeal is vitiated by a lack of reasoning in so far as the General Court did not set out the reasons on which that conclusion was based.
- 63 Consequently, that complaint is well founded, while the second part of the first ground of appeal must be dismissed as to the remainder.

The third part of the first ground of appeal, claiming errors of law and of reasoning in the examination of the evidence submitted by the appellants with a view to rebutting the presumption of RQ's decisive influence over GQ's conduct

— Arguments of the parties

- ⁶⁴ The appellants raise several complaints against the findings made by the General Court for the sake of completeness in paragraphs 71 to 75 of the judgment under appeal.
- ⁶⁵ First, the General Court misinterpreted, in paragraph 71 of that judgment, the fact that GQ carried out different activities from those of RQ, and wrongly gave no importance to the various attempts on the part of RQ to sell off GQ to third parties between 1993 and 2004. Those factors constitute clear evidence of RQ's lack of interest in GQ's activities.
- ⁶⁶ Second, contrary to the assessments of the General Court in paragraph 72 of the judgment under appeal, the fact that the minutes of the meetings of RQ's board of directors mentioned GQ on only two occasions, over an eight-year period between 1998 and 2005, shows the complete lack of influence and intervention of RQ in GQ's activities.
- ⁶⁷ Third, according to the appellants, the overlap between the administrative organs of RQ and GQ, noted by the General Court in paragraph 73 of the judgment under appeal, concerned only one person and was thus purely marginal in nature.

- 68 Fourth, in paragraph 74 of the judgment under appeal, the General Court wrongly rejected without analysis, first, the evidence showing that only the executives of GQ determined and implemented that company's commercial policy and, second, the claims that the information which GQ provided to RQ concerned only GQ's financial results.
- 69 Fifth, as regards the relationship between GQ and Repsol Italia, the General Court also committed an error of law by considering, in paragraph 75 of the judgment under appeal, that the consolidation of accounts by RYPF at group level supported the Commission's argument, whereas the non-exclusive agency relationship between GQ and that company proves that GQ is commercially independent.
- 70 The Commission contends that the appellants have not shown the existence of exceptional circumstances capable of rebutting the presumption of a decisive influence of the parent company over its subsidiary, circumstances which the General Court either wrongly failed to analyse or misinterpreted. The arguments raised by the appellants in that regard are of a very general nature and are unfounded.

— Findings of the Court

- 71 It should be noted at the outset that, according to settled case-law, it is clear from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice that the General Court has exclusive jurisdiction, first to find the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the General Court has found or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them (see, inter alia, Case C-551/03 P *General Motors v Commission* [2006] ECR I-3173, paragraph 51; judgment of 22 May 2008 in Case

C-266/06 P *Evonik Degussa v Commission*, paragraph 72; and Case C-535/06 P *Moser Baer India v Council* [2009] ECR I-7051, paragraph 31).

- 72 The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (*General Motors v Commission*, paragraph 52; Case C-113/04 P *Technische Unie v Commission* [2006] ECR I-8831, paragraph 83; and judgment of 31 January 2008 in Case C-103/07 P *Angelidis v Parliament*, paragraph 46).
- 73 In the present case, as regards, first of all, the complaints alleging a misinterpretation, in paragraph 71 of the judgment under appeal, of the carrying out by GQ, already prior to joining the RQ group, of activities different from those of RQ and attempts on the part of RQ to sell GQ between 1993 and 2004, on the one hand, and alleged errors of legal classification of the facts analysed in paragraphs 72, 73 and 75 of that judgment, on the other, it should be noted that, by those complaints, the appellants seek solely to call into question the assessment of the evidence made by the General Court by challenging the value which that court attributed to the factors which it took into account in its analysis.
- 74 In those circumstances, since the appellants are not really claiming a distortion of the facts on which the General Court relied in reaching its conclusions or an erroneous legal classification of those facts, in the light of the case-law cited in paragraphs 71 and 72 above, those complaints must be rejected as inadmissible.
- 75 Next, in respect of the complaint by which the appellants seek to demonstrate the insufficient or contradictory nature of the General Court's reasoning and the error of

law which that court is accused of having committed in the grounds of the judgment under appeal in relation to the rejection of the evidence submitted by the appellants to demonstrate the commercial and operational independence of GQ in relation to RQ, it should be noted that, in paragraph 74 of the judgment under appeal, the General Court did not examine that evidence in detail, but rejected the arguments of those companies by mere reference to the aforecited case-law in the judgment under appeal.

- 76 It must be noted, however, that, far from providing factors capable of dismissing such arguments without proceeding to analyse those arguments specifically, the case-law referred to in paragraphs 58 to 60 of the judgment under appeal, in reality, required the General Court, as it pointed out itself in paragraph 65 of that judgment, to assess any evidence relating to the economic and legal organisational links between RQ and GQ apt to demonstrate that GQ operated independently of its parent company and that those two companies thus did not constitute a single economic entity.
- 77 Such verification is required all the more since GQ's independence in implementing its commercial policy forms part, as is apparent from the Court's case-law, of the set of relevant factors enabling the appellants to rebut the presumption of RQ's decisive influence over GQ's conduct, factors whose character and importance may vary depending on the specific characteristics of each individual case (see, to that effect, *Akzo Nobel and Others v Commission*, paragraphs 73 and 74).
- 78 The General Court was therefore required to take account of and to conduct a concrete examination of the factors which were raised by the appellants to show that GQ implemented its commercial policy independently, in order to ascertain whether the Commission had made a manifest error of assessment in regarding that evidence as insufficient to demonstrate that, in this case, that subsidiary did not constitute a single economic entity with RQ.

- 79 It is apparent from the above that, as pointed out by the Advocate General in point 51 of his Opinion, the General Court committed an error of law in affirming, in paragraph 74 of the judgment under appeal, that the arguments raised in order to establish such independence could not succeed ‘in the light of the case-law cited’, without carrying out a concrete examination of the factors raised by the appellants.
- 80 It is therefore necessary to uphold this complaint and reject the third part of the first ground of appeal as to the remainder.

The second ground of appeal, alleging an error of law concerning the attribution to RYPF of liability for an infringement of Article 81(1) EC committed by GQ

— Arguments of the parties

- 81 By their second ground of appeal, the appellants submit that the General Court committed an error of law by automatically extending the liability of the subsidiary which committed the infringement to the company at the head of the group to which that subsidiary belongs.
- 82 By taking the view of the matter which it did, the General Court made RYPF responsible for RQ’s inability to disclaim liability for GQ’s conduct. The result is that liability for infringements committed by a subsidiary are systematically imputed to the parent company at the head of the group to which that subsidiary belongs, without taking account of the individual circumstances of each case, in particular of the number of interposed companies, the nature or activities of those companies and their legal and economic links.

83 In the Commission's view, the recent case-law of the General Court confirms that the presumption of the exercise of decisive influence over the subsidiary is applicable to the company at the head of the group, even if the nature of its control over that subsidiary is 'remote' and 'indirect'.

— Findings of the Court

84 The answer to this ground of appeal requires it to be determined whether, and possibly in what circumstances, the Commission may impute to the company at the head of a group ('a holding company'), in this case RYPE, joint and several liability for an infringement of EU competition law committed by a company, in this case GQ, whose entire capital is held by an intermediary company of the same group, in this case RQ, which is in turn wholly controlled by the holding company.

85 In that regard, it should be noted that, in accordance with the settled case-law noted in paragraphs 34 to 38 above, the Commission may, in certain circumstances, adopt a decision imposing a fine for an infringement of EU competition law on a company without its being necessary to establish direct involvement in that infringement, in particular where a subsidiary, although having distinct legal personality, does not determine its conduct on the market independently, but essentially acts in accordance with the instructions given to it by its parent company.

86 In the light of those considerations, it cannot therefore be excluded that a holding company may be held jointly and severally liable for the infringements of EU competition law committed by a subsidiary of its group whose capital it does not hold directly, in so far as that holding company exercises decisive influence over that subsidiary, even indirectly via an interposed company. That is the case, in particular, where the subsidiary does not determine its conduct independently on the market in relation to that interposed company, which does not operate autonomously on the market

either, but essentially acts in accordance with the instructions given to it by the holding company.

⁸⁷ In such a situation, the holding company, the interposed company and the last subsidiary in the group form part of the same economic unit and, therefore, constitute a single undertaking for the purposes of EU competition law.

⁸⁸ It follows that, as pointed out by the Advocate General in points 62 and 63 of his Opinion, in the specific case where a holding company holds 100 % of the capital of an interposed company which, in turn, holds the entire capital of a subsidiary of its group which has committed an infringement of EU competition law, there is a rebuttable presumption that that holding company exercises decisive influence over the conduct of the interposed company and also indirectly, via that company, over the conduct of that subsidiary.

⁸⁹ Consequently, in that specific situation, the Commission is entitled to require the holding company to pay the fine imposed on the last subsidiary of the group jointly and severally, unless the holding company can rebut that presumption by demonstrating that either the interposed company or the subsidiary operate independently on the market (see, by analogy, *Stora Kopparbergs Bergslags v Commission*, paragraph 29, and *Akzo Nobel and Others v Commission*, paragraph 61).

⁹⁰ It follows from the above that the General Court did not commit an error of law in finding, in paragraph 81 of the judgment under appeal, that the presumption of liability based on the holding, by a company, of the entire share capital of another company, applies not only in the case where there is a direct relationship between the parent company and its subsidiary, but also in the case where, as in the present case, that relationship is indirect due to the interposition of another company. The General Court was therefore right to find in essence, in paragraphs 64 and 80 of that judgment, that the appellants could be held jointly and severally liable by the Commission,

in particular as a result of RQ's 100% shareholding in GQ and RYPF's 100% shareholding in RQ.

- 91 The second ground of appeal must therefore be dismissed as unfounded.
- 92 It follows from all of the above that the judgment under appeal must be set aside in so far as it dismisses the action brought by the appellants seeking the annulment of the contested decision, since, first, the General Court did not set out the reasons behind its conclusion that RQ's order to GQ to cease any practice which might constitute an infringement of the competition rules was sufficient, in itself, to prove that RQ exercised a decisive influence over GQ's policy, not only on the market but also as regards the unlawful conduct at issue in the contested decision and, second, the General Court failed to conduct a concrete examination of the evidence submitted by the appellants to demonstrate GQ's independence in determining and implementing its commercial policy.
- 93 The remainder of the appeal must be dismissed.

The action before the General Court

- 94 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, if the decision of the General Court is quashed the Court of Justice may give final judgment in the matter, where the state of the proceedings so permits. That is the case here.

Arguments of the parties

- ⁹⁵ First, the appellants submit that, following the inspection of 27 September 2002 of GQ's place of business, on 22 October 2002, RQ ordered all the companies in its group, including GQ, to cease any practice which might constitute an infringement of the EU competition rules.
- ⁹⁶ Such a fact shows that RQ and RYPF did not participate in the infringements which are alleged against GQ, were not in contact with any of the undertakings involved in the concerted practice at issue, did not participate in the elaboration of GQ's decisions, nor in their application, nor the supervision of their implementation, were not informed by other undertakings of the facts at issue and, finally, were also not informed by GQ of such conduct.
- ⁹⁷ Second, the appellants submit that RYPF and RQ had provided the Commission, during the pre-litigation procedure, with a set of documents with a view to rebutting the presumption of liability on them in respect of that conduct by providing evidence of GQ's commercial and operational independence. However, that evidence was wrongly examined, or not taken account of, by the Commission.
- ⁹⁸ In particular, the Commission committed a manifest error in assessing the material evidence that GQ enjoyed total independence operating on the market, since the executives of that company benefited from full delegation of powers and full authority to exercise all the functions of management and administration. Furthermore, the Commission also did not state that the provision of information by GQ to RQ was limited to informing it of its budgetary results and the strategic or commercial plans decided on by GQ's executives.

- 99 For its part, the Commission contends that the appellants have not succeeded in rebutting the presumption of liability on RQ.

Findings of the Court

- 100 In order to examine the present complaints, it needs to be determined whether the Commission committed an error of assessment by not considering, first, that the order given by RQ to GQ shows that RQ had no knowledge of the infringement at issue and did not participate in that infringement or encourage its subsidiary to commit it and, second, that the evidence provided concerning the independence of GQ's executives in determining and implementing the commercial policy of that company show that it determined its conduct on the market independently.
- 101 In that regard, concerning, first, the order given by RQ to GQ, it should be noted that, as is apparent from the file, that order was of a general nature, was not given exclusively to GQ, but to all the companies in the group, and that it was given two and a half years after the anti-competitive conduct alleged against GQ had been brought to an end.
- 102 It is true that such factors militate in favour of a lack of knowledge of the infringement alleged against GQ, an absence of participation in that infringement and non-instigation to commit that infringement. However, contrary to what the appellants submit, what counts is not whether the parent company encouraged its subsidiary to commit an infringement of the EU competition rules, or whether it was directly involved in the infringement committed by its subsidiary, but the fact that those two companies constitute a single economic unit and thus a single undertaking for the purposes of Article 81 EC which enables the Commission to impose a fine on the parent company (see, to that effect, *Akzo Nobel and Others v Commission*, paragraphs 59 and 77).

- 103 It must therefore be noted that, in the present case, the mere fact, first, that RQ was made aware of the infringement only after the inspection on 27 September 2002 of the place of business of GQ and, second, that it did not participate directly in that infringement or encourage it to be committed is not such as to show that those two companies do not constitute a single economic unit. Such a fact is not sufficient to rebut the presumption that RQ actually exercised decisive influence over GQ's conduct.
- 104 Second, as regards the arguments relating to the alleged independence of GQ's executives in determining and implementing the commercial policy of that company, it should be noted that the factors raised in that regard by the appellants do not show that GQ determined its conduct on the market independently, and therefore, that it did not constitute an economic unit with RQ. Although it is true that certain documents submitted by the appellants show that many of GQ's management and administrative competencies had been delegated to the executives of that company, other evidence in the file shows, by contrast, the existence of significant interference on the part of RQ in several aspects of GQ's strategy and commercial policy.
- 105 In that regard, reference should be made, first of all, to the declaration of the secretary of RQ's board of directors of 7 June 2005 containing extracts of minutes of the board of directors of that company taken from 1998 to 2005. It is apparent from that document that RQ's board of directors intervened significantly, between 1998 and 2000, in certain essential aspects of GQ's policy, in particular in order to authorise, on 17 April 1998, the sale of GQ's shareholding in Silquímica SA and, on 28 January 1999, the sale of GQ's real property.
- 106 Next, in the present case, as noted by the Commission in recital 262 in the preamble to the contested decision without actually being contradicted on that point by the appellants, GQ's sole director designated by RQ constituted, as a result of his consistent pattern of behaviour, a link between those two companies, by which the information concerning sales, production and financial results were communicated to RQ.

107 Finally, again in relation to the exchanges between GQ's executives and those of RQ, the fact, confirmed by the appellants themselves, of providing information on the implementation stage of strategic and commercial plans constitutes an additional indication that RQ exercised control over the decisions drawn up and executed by GQ's executives.

108 In that context, it is, on the other hand, irrelevant that some of that information concerned the financial results in respect of GQ's annual budgets since every parent company is required to consolidate the accounts of its group.

109 In the light of those considerations, it must be concluded that the Commission did not commit an error of assessment in considering that the evidence submitted by the appellants concerning, first, the fact that RQ was not aware of the infringement at issue and did not participate in that infringement or encourage its subsidiary to commit it, and, secondly, the detailed rules for determining and implementing GQ's commercial policy, taken together with the other relevant evidence in the file, does not show that GQ determined its conduct on the market independently and, therefore, does not make it possible to rebut the presumption that RQ exercised decisive influence over GQ's conduct.

110 Consequently, the complaints raised in that regard by the appellants in support of the action for annulment must be dismissed.

111 The action for annulment must therefore be dismissed.

Costs

- ¹¹² Under the first paragraph of Article 122 of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, it is to make a decision as to costs.
- ¹¹³ Under Article 69(2) of those rules which, under Article 118 thereof, applies to appeals, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under the first subparagraph of Article 69(3) of those rules, the Court may, where each party succeeds on some and fails on other heads of claim, order that each party shall bear its own costs.
- ¹¹⁴ In this case, since the appellants have been largely successful in their appeal, but have been unsuccessful in their form of order sought in their action for annulment, it is appropriate to decide that each of the parties shall bear its own costs relating to the appeal, and that the appellants shall bear all the costs relating to the proceedings at first instance.

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

- 1. Sets aside the judgment of the Court of First Instance of the European Communities of 18 December 2008 in Case T-85/06 *General Química and Others v Commission*, in so far as it dismisses the action brought by General Química SA, Repsol Química SA and Repsol YPF SA seeking annulment of Commission Decision 2006/902/EC of 21 December 2005 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement against Flexsys NV, Bayer AG, Crompton Manufacturing Company Inc. (formerly Uniroyal Chemical Company Inc.), Crompton Europe Ltd,**

Chemtura Corporation (formerly Crompton Corporation), General Química SA, Repsol Química SA and Repsol YPF SA (Case No COMP/F/C.38.443 – Rubber chemicals), in so far as, first, the Court of First Instance did not set out the reasons behind its conclusion that the order given by Repsol Química SA to General Química SA to cease any practice which might constitute an infringement of the competition rules was sufficient, in itself, to prove that Repsol Química SA exercised a decisive influence over General Química SA's policy not only on the market but also as regards the unlawful conduct at issue in Decision 2006/902 and, second, the Court of First Instance failed to conduct a concrete examination of the evidence submitted by General Química SA, Repsol Química SA and Repsol YPF SA to demonstrate General Química SA's independence in determining and implementing its commercial policy;

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

- 3. Dismisses the action brought by General Química SA, Repsol Química SA and Repsol YPF SA before the Court of First Instance of the European Communities;**

- 4. Orders each party to bear its own costs relating to the appeal and orders General Química SA, Repsol Química SA and Repsol YPF SA to pay all of the costs at first instance.**

[Signatures]