



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 29 November 2012¹

Case C-440/11 P

European Commission

v

Stichting Administratiekantoor Portielje and Gosselin Group NV

(Appeal — Competition — Agreements, decisions and concerted practices — Article 81(1) EC and Article 53(1) EEA — Concept of an undertaking — Imputation of the infringement of the cartel rules by a trading company to a foundation which controls, directly or indirectly, all of the shares in that company, but is not economically active as such — ‘Removals cartel’ — Belgian market in international removal services)

I – Introduction

1. The present case gives the Court of Justice another opportunity to refine its case-law on the highly controversial issue of the responsibility of parent companies for infringements of the cartel rules committed by their wholly-owned subsidiaries. Essentially, the question here is whether such imputation of responsibility under antitrust law requires the parent company to engage in an economic activity itself, that is to say, that it is itself an undertaking within the meaning of European competition law, or whether it suffices for the subsidiary to engage in such an economic activity and for the parent company and the subsidiary together to form an undertaking.

2. This legal question arises in connection with the ‘removals cartel’ which the European Commission uncovered on the Belgian market in international removal services a few years ago and which it made the subject of a decision imposing fines on 11 March 2008 (‘the contested decision’).² The Commission accused Gosselin Group NV (‘Gosselin’), together with nine other undertakings or groups of undertakings, of participation in the removals cartel and fined Gosselin. The Commission also held Stichting Administratiekantoor Portielje (‘Portielje’), a family foundation which controls, directly or indirectly, all of the shares in the capital of Gosselin and is meant to ensure unity of management of Gosselin in the interests of the founding family, jointly and severally liable for part of the fine.

¹ — Original language: German.

² — Commission Decision of 11 March 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/38.543 – International removal services), notified under document number C(2008) 926 final, summarised at OJ 2009 C 188, p. 16; the full text of the decision is only available on the internet, on the website of the Commission’s Directorate-General for Competition, in a non-confidential version in French (<http://ec.europa.eu/competition/antitrust/cases/index.html>).

3. However, the General Court of the European Union considered it unlawful to hold Portielje jointly liable and, in its judgment in Joined Cases T-208/08 and T-209/08 ('the judgment of the General Court' or 'the judgment under appeal'),³ substantiated that view primarily on the ground that Portielje itself did not engage in an economic activity and was not therefore an undertaking.

4. The Commission is now appealing against that. It argues that the imputation of responsibility under antitrust law depends entirely on whether the parent company and the subsidiary – in the present case, Portielje and Gosselin – *together* form an undertaking within the meaning of European competition law and on whether that economic unit can be accused of participating in the cartel.

5. The Court of Justice will soon be required to deal with a number of further questions of law regarding the removals cartel in the other pending appeal proceedings.⁴

II – Background to the dispute

6. Gosselin is a trading company which has its registered office in Belgium, was founded in 1983 and has been operating as a removal company under its present name since 20 December 2007.⁵

7. Portielje is a foundation established in 2001 which has its registered office in the Netherlands and through which shareholding members of the founding Gosselin family are associated with a view to ensuring unity of the management of Gosselin. Portielje itself does not engage in any commercial activities.

8. Since 1 January 2002 the family foundation has had partly direct and partly indirect control over all the shares in Gosselin's capital. Specifically, 92% of the shares in Gosselin are held directly by Portielje as trustee, the remaining 8% being held by Vivet en Gosselin NV; 99.87% of the shares in the latter company are in turn held by Portielje.

A – Facts of the case and administrative proceedings

9. According to the results of the Commission's investigations, a cartel existed on the international removal services market in Belgium from 1984 to 2003, involving 10 removal companies⁶ for different periods⁷ and to different extents.

10. In the contested decision, the Commission found that the cartel was a global cartel in the form of a single and continuous infringement⁸ based on a total of three kinds of agreement:⁹

— *agreements on prices*, in which the removal undertakings involved entered into arrangements concerning the payment for their services to customers;

3 — Judgment of the General Court of 16 June 2011 in Joined Cases T-208/08 and T-209/08 *Gosselin Group and Stichting Administratiekantoor Portielje v Commission* [2011] ECR I-3639.

4 — The pending Case C-429/11 P *Gosselin Group v Commission and Stichting Administratiekantoor Portielje* also concerns an appeal against the judgment under appeal in the present case. Other judgments of the General Court on the removals cartel are the subject of pending appeals in Case C-439/11 P *Ziegler v Commission*, Case C-441/11 P *Commission v Coppens* and Case C-444/11 P *Team Relocations and Others v Commission*. I delivered an Opinion in *Commission v Coppens* on 24 May 2012.

5 — In this regard and in relation to the following, see paragraph 2 of the judgment under appeal.

6 — Allied Arthur Pierre, Compas, Coppens, Gosselin, Interdean, Mozer, Putters, Team Relocations, Transworld and Ziegler (see, for example, recital 345 of the contested decision).

7 — These periods lasted between 3 months and more than 18 years.

8 — See, in particular, recitals 307, 314 and 345 of the contested decision.

9 — In this regard, see recital 121 of the contested decision and paragraph 1 of the judgment under appeal.

- agreements on a system of financial compensation for rejected offers or for not quoting at all (*commissions*); the competitors of the company winning the contract for an international removal were intended to receive some financial compensation, whether they themselves had submitted a quote for the contract or abstained from doing so; those commissions were included in the final price for the respective removal services, unnoticed by the customers;
- agreements on sharing the market by means of a system of false quotes (*cover quotes*) submitted to the customer or the person who was moving by a removal company which did not intend to carry out the removal; to that end, a company indicated in each case to its competitors the price, the rate of insurance and the storage costs that they were to quote for the fictitious service.

11. Whilst the agreements on commissions and cover quotes applied throughout the duration of the cartel (from 1984 to 2003), implementation of the agreements on prices could not be proved after May 1990.¹⁰

12. In the contested decision, the Commission inferred from its factual findings that the companies involved had infringed Article 81(1) EC and Article 53(1) EEA by, in different periods, ‘directly and indirectly fixing prices for international removal services in Belgium, sharing part of the market, and manipulating the procedure for the submission of tenders’.¹¹

13. The contested decision was served on 31 legal persons in total, on which the Commission also imposed fines of various amounts¹² in respect of the infringement, in some cases individually and in some cases jointly and severally.

14. According to the Commission’s findings in Article 1(c) of the contested decision, Gosselin was involved in the global cartel from 31 January 1992 to 18 September 2002, in the period from 1 January 2002 to 18 September 2002 ‘with Stichting Administratiekantoor Portielje’. For that Gosselin was fined EUR 4.5 million under Article 2(e) of the contested decision, Portielje being held jointly and severally liable for EUR 370 000 of that fine.

15. By amending decision of 24 July 2009,¹³ the Commission corrected the contested decision, reducing the fine imposed on Gosselin to EUR 3.28 million, with Portielje now held jointly and severally liable for EUR 270 000. That amendment was due to a recalculation of the turnover which, in the Commission’s view, had to be taken into account to determine the basic amount of the fine imposed on Gosselin and Portielje.

B – *Proceedings at first instance*

16. Several of the addressees of the contested decision sought redress at first instance by way of actions for annulment before the Court of First Instance (now ‘the General Court’).¹⁴

17. The actions brought by Gosselin and Portielje on 4 June 2008 were joined by the General Court for the purposes of the hearing and the judgment.

10 — In this regard, see recitals 123 to 153 of the contested decision.

11 — Article 1 of the contested decision and paragraph 1 of the judgment under appeal.

12 — The individual fines amounted to between EUR 1 500 and EUR 9 200 000.

13 — Commission Decision of 24 July 2009, notified under document number C(2009) 5810 final.

14 — See, in addition to the judgment under appeal, four further judgments of 16 June 2011, in Case T-199/08 *Ziegler v Commission* [2011] ECR II-0000 3507; Joined Cases T-204/08 and T-212/08 *Team Relocations and Others v Commission* [2011] ECR II-0000 3569; Case T-210/08 *Verhuizingen Coppens v Commission* [2011] ECR II-0000 3713; and Case T-211/08 *Putters International v Commission* [2011] ECR II-0000 3729.

18. In response to the action brought in Case T-208/08, the General Court, in the judgment under appeal,¹⁵ annulled the contested decision in so far as it found that Gosselin participated in the infringement from 30 October 1993 to 14 November 1996. The General Court accordingly reduced the fine imposed on Gosselin to EUR 2.32 million. It dismissed the action brought by Gosselin as to the remainder and ordered each party to bear its own costs.

19. In response to the action in Case T-209/08, the General Court, likewise in the judgment under appeal,¹⁶ annulled the contested decision entirely in respect of Portielje and ordered the Commission to pay the costs of the proceedings.

III – Proceedings before the Court of Justice

20. By application of 25 August 2011, the Commission lodged the present appeal against the judgment of the General Court. The appeal concerns only that part of the judgment in which the General Court upheld Portielje's action for annulment in Case T-209/08.¹⁷ The Commission claims that the General Court should:

- set aside the judgment under appeal in so far as it annuls Decision C(2008) 926, as amended by Decision C(2009) 5810, in relation to Portielje;
- dismiss the action brought by Portielje;
- order Portielje to pay the costs of the proceedings before the General Court and the Court of Justice.

21. For its part, Portielje requests the Court of Justice to:

- dismiss the Commission's appeal as unfounded; and
- order the Commission to pay the costs of both sets of proceedings.

22. The appeal was examined before the Court of Justice on the basis of the written documents and, on 24 October 2012, at a hearing.

IV – Appraisal

23. It is recognised in settled case-law on Article 81 EC (formerly Article 85 of the EEC Treaty, now Article 101 TFEU)¹⁸ that a parent company may be jointly and severally liable for infringement of the antitrust rules by its subsidiary, even if the subsidiary alone was directly involved in the cartel. Such shared liability arises in particular when the subsidiary does not act independently in the market but, in all material respects, carries out the instructions given to it by the parent company and is thus

15 — See paragraphs 1 to 3 and 5 of the operative part of the judgment under appeal.

16 — See paragraphs 4 and 6 of the operative part of the judgment under appeal.

17 — The remaining part of the judgment under appeal, which concerns Gosselin's action for annulment, is the subject of the appeal in Case C-429/11 P.

18 — As the contested decision was adopted before the Treaty of Lisbon entered into force, the prohibition of cartels laid down in Article 81 EC still applies in the present case. The following comments are, however, also fully transposable to Article 101 TFEU.

exposed to the decisive influence of the parent company.¹⁹ If, at the time at issue, a parent company holds all or almost all the shares in its subsidiary, there is furthermore a rebuttable presumption that it exercises decisive influence over the conduct of its subsidiary on the market²⁰ ('the 100% presumption'²¹ or 'the *Akzo Nobel* case-law').

24. The Commission accuses the General Court of having applied those principles erroneously in the present case. It bases that accusation on two pleas, one devoted to the scope *ratione personae* of Article 81 EC (see Section A), the other to the possibilities of rebutting the 100% presumption (see Section B).

A – Determining the scope *ratione personae* of Article 81 EC (first plea)

25. The first plea raises a number of very fundamental legal questions in connection with the concept of an undertaking as used in competition law and thus, in the final analysis, addresses the scope *ratione personae* of Article 81 EC and Article 23 of Regulation (EC) No 1/2003,²² which are directed at undertakings and associations of undertakings.²³

26. In this plea the Commission opposes paragraphs 36 to 50 of the judgment under appeal, in which the General Court found it 'not established that Portielje was an undertaking within the meaning of Article 81 EC,'²⁴ whereupon it upheld Portielje's action for the annulment of the contested decision. The General Court held that Portielje would itself have to be an undertaking if it were to be held jointly and severally liable for Gosselin's participation in the removals cartel.²⁵

1. The concept of an undertaking in the context of Article 81 EC (first part of the first plea)

27. In the first part of the first plea, the Commission complains that the General Court relied on a legally erroneous criterion. In its submission, the General Court wrongly concentrated its examination on whether Portielje *itself* is an undertaking, rather than asking itself whether Portielje and Gosselin *together* form a *single* undertaking. The General Court therefore failed to understand the concept of an undertaking as used in competition law.

28. It is not disputed that, in competition law, the concept of an undertaking encompasses any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.²⁶ Nor is it disputed that such an economic entity may consist of several natural or legal persons.²⁷

19 — Case 48/69 *Imperial Chemical Industries v Commission* ('ICI') [1972] ECR 619, paragraphs 132 and 133; Case 107/82 *AEG/Telefunken v Commission* [1983] ECR 3151, paragraph 49; Case C-97/08 P *Akzo Nobel and Others v Commission* ('Akzo Nobel') [2009] ECR I-8237, paragraphs 58 and 72; Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg v Commission* ('ArcelorMittal') [2011] ECR I-0000 2239, paragraphs 95 and 96; and Joined Cases C-628/10 P and C-14/11 P *AOI and Others v Commission and Others* ('AOI') [2012] ECR, paragraphs 42 to 44.

20 — *Akzo Nobel*, paragraphs 60 and 61; *ArcelorMittal*, paragraphs 97 and 98; and *AOI*, paragraphs 46 and 47 (all cited in footnote 19). The judgments in Case C-520/09 P *Arkema v Commission* [2011] ECR I-0000 8901, paragraphs 40 and 42, and Case C-521/09 P *Elf Aquitaine v Commission* ('Elf Aquitaine') [2011] ECR I-0000 8947, paragraphs 56, 63 and 95, both concern 98% owned subsidiaries.

21 — See, in this regard, my Opinion in *AOI* (cited in footnote 19), in particular point 33.

22 — 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).

23 — 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 59; Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 38; Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraph 20; and *Akzo Nobel* (cited in footnote 19), paragraph 54.

24 — Paragraph 50 of the judgment under appeal.

25 — Paragraphs 42 and 43 of the judgment under appeal.

26 — Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; Case C-273/04 *Enirisorse* [2006] ECR I-2843, paragraph 28; *ETI and Others* (cited in footnote 23), paragraph 38; *MOTOE* (cited in footnote 23), paragraph 21; *Akzo Nobel* (cited in footnote 19), paragraph 54; *ArcelorMittal* (cited in footnote 19), paragraph 95; and *AOI* (cited in footnote 19), paragraph 42.

27 — Case 170/83 *Hydrotherm Gerätebau* [1984] ECR 2999, paragraph 11; *Akzo Nobel* (cited in footnote 19), paragraph 55; *ArcelorMittal* (cited in footnote 19), paragraph 95; and *AOI* (cited in footnote 19), paragraph 42.

29. The General Court also took that definition as its starting point in the judgment under appeal.²⁸ However, it immediately added that ‘the parent company of an undertaking which has infringed Article 81 EC cannot be penalised by a decision implementing Article 81 EC, if it is not an undertaking itself’.²⁹

30. That reveals a fundamental misunderstanding of the concept of an undertaking in the context of the responsibility of parent companies for their subsidiaries’ infringement of the cartel rules.

31. The joint and several liability of a parent company and a subsidiary is based on the fact that the two companies together act as principals of a single undertaking within the meaning of competition law if the subsidiary does not enjoy sufficient autonomy from the parent company.³⁰ The two then form an economic unit and, in their internal relationship with one another, can take advantage of the ‘group privilege’, which means that the prohibition of cartels does not apply to agreements between them.³¹ Conversely, as a parent company and subsidiary also form an economic unit outwardly, they must jointly answer for any infringement of the cartel rules by the undertaking which they together form.³²

32. The General Court was therefore wrong to find that the concept of an undertaking within the meaning of competition law and the imputation of the conduct of a subsidiary to its parent company are ‘two different concepts’.³³ In fact, the concept of an undertaking and the imputation of responsibility under competition law are two sides of the same coin. As has already been said, the joint and several liability of the parent company and the subsidiary for infringements of the cartel rules reflects the fact that both are principals of a single undertaking. The formation of that very economic unit by the parent company and the subsidiary is a necessary and also sufficient prerequisite for the parent company to be held jointly and severally liable for infringements of the cartel rules by its subsidiary.

33. The legal view expressed in the judgment under appeal that the parent company itself must also be an undertaking if it is to be held jointly liable for its subsidiary’s infringement of the cartel rules would ultimately amount to making the imputation of responsibility under antitrust law as between the parent company and the subsidiary subject to an additional requirement never previously recognised in that form.

34. To my mind, it is completely impossible to infer such an additional requirement from current case-law. If it existed, it would not, for example, have been permissible, in *Akzo Nobel*, the leading case in recent years as regards the issue here under discussion, for Akzo Nobel NV, a pure holding company,³⁴ to be an addressee of the decision imposing fines.

28 — Paragraph 40 of the judgment under appeal; see also paragraph 44 of that judgment.

29 — Paragraph 42 of the judgment under appeal.

30 — *Akzo Nobel*, paragraph 59; *ArcelorMittal*, paragraph 101; and *AOI*, paragraph 44 (all cited in footnote 19); see also my Opinions in *AOI* (cited in footnote 19), point 173, and in *Akzo Nobel* (cited in footnote 19), point 97.

31 — Case 32/65 *Italy v Council and Commission* [1966] ECR 389, at 407 et seq.; *ICI* (cited in footnote 19), paragraph 134; Case C-73/95 P *Viho v Commission* [1996] ECR I-5457, paragraph 16; and Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 44.

32 — *Akzo Nobel*, paragraphs 56 and 59; *ArcelorMittal*, paragraphs 95 and 101; and *AOI*, paragraphs 42 to 44 (all cited in footnote 19).

33 — Paragraph 39 of the judgment under appeal.

34 — See, in this regard, my Opinion in *Akzo Nobel* (cited in footnote 19), point 11.

35. The General Court does not consider the judgment in *Akzo Nobel*³⁵ in that context, nor does it otherwise give any justification for its assertion that that additional requirement exists. It confines itself to quoting three more or less randomly chosen judgments of the Court of Justice³⁶ in which it states that it was ‘established’ that ‘the parent company was an undertaking.’³⁷

36. For the penalisation of an undertaking for infringing the cartel rules, on the basis of Article 81 EC (now Article 101 TFEU) in conjunction with Article 23(2)(a) of Regulation No 1/2003, it is, however, irrelevant whether all the natural or legal persons who legally comprise that undertaking are themselves economically active and are therefore each to be regarded as undertakings individually.

37. The only decisive factor is that – viewed as a whole – *one undertaking* has committed the infringement and that all natural or legal persons on whom a fine is imposed as the penalty for the infringement are principals of that joint undertaking, since the aim of the penalties imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 is to ensure that those persons who have a decisive influence on the undertaking involved in a cartel are called to account in accordance with the principle of personal responsibility and that *the undertaking* does not commit such infringements again.³⁸ In terms of that objective, it is irrelevant whether the aforementioned natural or legal persons are engaged in an economic activity otherwise – that is to say, irrespective of their influence over the undertaking involved in the cartel.

38. To summarise, it can thus be said that the General Court erred in law when it stated that the parent company of an undertaking could not be penalised if it was not itself an undertaking and subsequently considered whether Portielje itself was an undertaking.³⁹

39. The first part of the first plea is therefore well founded.

2. The applicability of the 100% presumption to Portielje’s relationship with Gosselin (second part of the first plea)

40. For the sake of completeness, I will also comment now on the second part of the first plea, advanced by the Commission in the alternative. It essentially concerns the question whether the 100% presumption emanating from the *Akzo Nobel* case-law⁴⁰ can be applied to Portielje’s relationship with Gosselin. The Commission considers that the General Court was wrong in the present case to deny the applicability of the 100% presumption.

41. That criticism concerns the General Court’s statements in paragraphs 46 to 49 of the judgment under appeal, which proceed on the basis of the finding that ‘Portielje is not engaged in any direct economic activity’.⁴¹ In these circumstances, Portielje’s status as an undertaking could, in the General Court’s view, ensue at most from its ‘indirect’ participation in Gosselin’s economic activity. For this

35 — Cited in footnote 19.

36 — *Hydrotherm Gerätebau* (cited in footnote 27); *ICI* (cited in footnote 19); and Case C-286/98 P *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925.

37 — Paragraphs 40 and 41 of the judgment under appeal.

38 — See, in this regard, my Opinion in *ETI* (cited in footnote 23), points 71 and 72, and also my Opinion in *Akzo Nobel* (cited in footnote 19), paragraphs 39 and 41.

39 — Paragraphs 42, 43 and 50 of the judgment under appeal.

40 — See, in particular, *Akzo Nobel*, paragraphs 60 and 61; *ArcelorMittal*, paragraphs 97 and 98; and *AOI*, paragraphs 46 and 47 (all cited in footnote 19).

41 — Paragraph 46 of the judgment under appeal.

purpose, the General Court, referring to paragraphs 111 to 113 of the judgment in *Cassa di Risparmio di Firenze*,⁴² which concerned State aid law, calls on the Commission to provide hard evidence of Portielje's being 'involved in the management' of Gosselin and does not permit the application of the 100% presumption.⁴³

42. Specifically, the General Court relies in this context on wording in *Cassa di Risparmio di Firenze* to the effect that the mere fact of holding shares, even controlling shareholdings, does not in itself constitute an economic activity.⁴⁴ Rather, a foundation which owns controlling shareholdings in a company must be regarded as taking part in the economic activity carried on by the controlled 'undertaking' only if it actually exercises that control by 'involving' itself directly or indirectly in the management of the company.⁴⁵

43. The General Court concluded from that passage of the judgment in *Cassa di Risparmio di Firenze* that the burden of proving the involvement of an economically inactive foundation, such as Portielje, in a trading company operating on the market, such as Gosselin, lies with the Commission and that the Commission could not discharge that burden of proof by referring – in application of the *Akzo Nobel* case-law – to the foundation's (almost) 100% control over the company.⁴⁶

44. That assessment by the General Court is legally erroneous.

45. Contrary to what appears to be the General Court's view, there is agreement between the judgment in *Cassa di Risparmio di Firenze* and the *Akzo Nobel* case-law. In both instances the Court of Justice makes the finding of an economic unit and, consequently, of the existence of a single undertaking comprising a 'parent company' and its 'subsidiary' dependent on whether the parent company actually exercises decisive influence on the subsidiary.⁴⁷

46. It is true that the *Akzo Nobel* case-law also recognises a rebuttable 'presumption of actual exercise of decisive influence' by a parent company on the conduct of the subsidiary (the 100% presumption) 'in the specific case' in which the parent company holds all or almost all the shares in its subsidiary,⁴⁸ whereas the judgment in *Cassa di Risparmio di Firenze*⁴⁹ makes no mention of such a presumption.

47. The absence of a reference to the 100% presumption in the judgment in *Cassa di Risparmio di Firenze* is, however, likely to be due primarily to the type of proceedings in that case, preliminary ruling proceedings which did not in any way concern questions of evidence. It should also be borne in mind that in *Cassa di Risparmio di Firenze* the Court of Justice was called upon to consider not the specific case of 100% or almost 100% control, but, quite generally, 'controlling shareholdings', which include shareholdings well below the 100% threshold.

48. That being the case, the General Court attached excessive importance to the fact that, in its judgment in *Cassa di Risparmio di Firenze*, the Court of Justice '[did] not [establish] a rebuttable presumption of "involvement"',⁵⁰ as familiar from the *Akzo Nobel* case-law.

42 — Case C-222/04 *Cassa di Risparmio di Firenze and Others* ('*Cassa di Risparmio di Firenze*') [2006] ECR I-289.

43 — Paragraphs 47 to 49 of the judgment under appeal.

44 — *Cassa di Risparmio di Firenze* (cited in footnote 42), paragraph 111.

45 — *Cassa di Risparmio di Firenze* (cited in footnote 42), paragraph 112. To be precise, the Court of Justice refers in that passage of the judgment not to a foundation, but more generally to an 'entity' owning controlling shareholdings in a company. From the overall context of that judgment it can, however, be inferred that foundations and, more specifically, banking foundations under Italian law were at issue there.

46 — See, to this effect, paragraphs 48 and 49 of the judgment under appeal.

47 — For antitrust law see the case-law cited in footnote 19 and my Opinion in *AOI* (cited in footnote 19), point 144; for State aid law see *Cassa di Risparmio di Firenze* (cited in footnote 42), paragraph 112.

48 — In this regard, see point 23 of this Opinion and the case-law cited in footnote 20.

49 — Cited in footnote 42, especially paragraphs 110 to 113.

50 — Paragraph 48 of the judgment under appeal.

49. In particular, there are no indications that the Court of Justice refrained from accepting a 100% presumption in *Cassa di Risparmio di Firenze* specifically because the ‘parent companies’ themselves could not be regarded as undertakings or because they were foundations.

50. Although, in more recent times, the Court of Justice may not have completely ruled out the possibility of the concept of an economic unit in State aid matters differing from that applicable in other areas of competition law,⁵¹ it has hitherto always been intent on an absolutely uniform interpretation of the concept of an undertaking in all areas of competition law,⁵² not least in its judgment in *Cassa di Risparmio di Firenze*.⁵³ The Court of Justice should adhere to that line in the present case too.

51. The fact that the Court of Justice proceeds on the basis of the same concept of an undertaking specifically in the judgment in *Cassa di Risparmio di Firenze* and in the *Akzo Nobel* case-law is proved, moreover, by a number of cross-references between those two lines of case-law.⁵⁴ The Commission has correctly pointed this out in the present proceedings.

52. All in all, then, the judgment in *Cassa di Risparmio di Firenze* does not obstruct the application of the 100% presumption to the relationship between a foundation such as Portielje and a trading company such as Gosselin.

53. Furthermore, the 100% presumption does not, contrary to Portielje’s view, result in a reversal of the burden of proof. On the contrary, it merely lays down rules for the assessment of evidence in the context of the attribution of responsibility under antitrust law as between a parent company and its subsidiary. Since the parent company’s 100% (or almost 100%) shareholding in its subsidiary *prima facie* allows the conclusion that decisive influence is actually being exercised, it is for the parent company to rebut precisely that conclusion, adducing cogent evidence to the contrary; failing this, that conclusion is adequate to discharge the burden of proof. In other words, there is an interplay of the respective burdens of adducing proof prior to consideration of the objective burden of proof.⁵⁵

54. Contrary to Portielje’s view, the scope of the 100% presumption is in no way overextended by its application to a case such as the present one, the aim of that presumption being to facilitate the effective enforcement of the competition rules under the Treaties, while upholding the principle of personal responsibility, and to create legal certainty.⁵⁶ Seen from that perspective, the situation of a foundation such as Portielje, whose function is to guarantee ‘the unity of management’ of a trading company controlled by it, is not to be assessed differently from that of a ‘classical’ parent company in relation to its subsidiary or that of a holding company in relation to the group companies controlled by it. All such parent companies have an eminently economic interest in the specific activities of their respective subsidiaries on the market. To make a distinction between them in terms of responsibility under antitrust law would be contrary to the principle of equal treatment.

51 — Case C-480/09 P *AceaElectrabel v Commission* [2010] ECR I-13355, paragraph 66.

52 — See, in this regard, the case-law cited in footnote 26.

53 — Cited in footnote 42, paragraph 107; also *Enirisorse* (cited in footnote 26), paragraph 28.

54 — In *Akzo Nobel* (cited in footnote 19), paragraph 54, the Court of Justice refers to *Cassa di Risparmio di Firenze* (cited in footnote 42). In Case C-90/09 P *General Química and Others v Commission* (*‘General Química’*) [2011] ECR I-1, paragraphs 34 and 35, reference is made both to *Akzo Nobel* and to *Cassa di Risparmio di Firenze*.

55 — See, in this regard, my Opinions in *Akzo Nobel* (cited in footnote 19), point 74, and *AOI* (cited in footnote 19), point 170.

56 — See, in this regard, my Opinion in *Akzo Nobel* (cited in footnote 19), point 71 in conjunction with points 40 and 41.

55. As regards their responsibility for the commercial conduct of their subsidiary companies, it is irrelevant whether the controlling entities – be they foundations, holding companies or any other kind of parent company – are engaged in an economic activity themselves. On the contrary, it would enable the principal company in a group to circumvent effective joint liability for infringements of the cartel rules by its subsidiary companies if foundations or holding companies which were not themselves economically active were to be generally excluded from the scope of the 100% presumption, even though they ‘pull the strings’ in the background within the group.⁵⁷

56. Nor, finally, is Portielje successful with its argument that the application of the 100% presumption to a case such as the present one would produce absurd results in cases in which the State is involved in a trading company, since this refers to a purely hypothetical problem which does not arise at all in the present case. Portielje’s situation is nothing like that of the State as investor, its activities being, after all, confined – as far as is known – to ensuring the unity of the management of a single family undertaking. Moreover, the Court of Justice has already made it clear that it takes full account of the special situation of the State in connection with responsibility for any infringements of antitrust law by undertakings which it controls.⁵⁸ There is thus no cause for the concern expressed by Portielje.

57. All in all, the second part of the first plea is therefore also well founded.

B – Rebuttal of the presumption of the exercise of decisive influence (second plea)

58. The second plea is directed at paragraphs 51 to 59 of the judgment under appeal, in which the General Court came to the conclusion that, by ‘adducing evidence’, Portielje had succeeded in rebutting the 100% presumption in the present case.⁵⁹ The General Court held that Portielje did not exercise a decisive influence over Gosselin and was not even in a position to exercise such influence.

59. It is true that that passage of the judgment under appeal appears in a section in which the General Court considers only ‘for the sake of completeness’ whether Gosselin’s conduct can be imputed to Portielje.⁶⁰ However, since the first section of the judgment under appeal, which focuses on the concept of an undertaking, cannot be upheld,⁶¹ the outcome of the present dispute very much depends on the review of the second section.

60. It is not disputed that the presumption of actual exercise of decisive influence by a parent company on its wholly or almost wholly owned subsidiary (the 100% presumption) is, pursuant to the *Akzo Nobel* case-law, a *rebuttable presumption*.⁶²

61. In its second plea, however, the Commission complains that, when assessing the arguments put forward by Portielje to rebut that presumption, the General Court committed an error in law. The Commission complains, in essence, that the General Court did not pay sufficient attention to the personal links between Portielje and Gosselin. In this respect, it voices a total of three criticisms, to which the three parts of its second plea are devoted. I consider those three parts below, taking the second and third parts together.

57 — For a number of instances in which it is conceivable none the less that the 100% presumption is rebutted, see the comments in footnote 67 of my Opinion in *Akzo Nobel* (cited in footnote 19).

58 — See, in this regard, *ETI and Others* (cited in footnote 23), paragraphs 47 to 50.

59 — Paragraph 58 of the judgment under appeal.

60 — Paragraph 51 of the judgment under appeal.

61 — See above, points 25 to 57 of this Opinion.

62 — See, in particular, *Akzo Nobel*, paragraphs 60 and 63; *ArcelorMittal*, paragraph 97; *AOI*, paragraphs 46 and 48 (all cited in footnote 19); *General Química* (cited in footnote 54), paragraphs 39, 42 and 50; and *Elf Aquitaine* (cited in footnote 20), paragraphs 56 and 59.

62. It should first be recalled that, although the Court of Justice does not have jurisdiction to question the General Court's appraisal of the facts or the evidence during the appeal proceedings, except in the event of distortion,⁶³ the tasks of the Court of Justice in such proceedings include the legal characterisation of facts by the General Court.⁶⁴ That includes assessment of the question whether the General Court has taken the right legal criteria as the basis for its appraisal of the facts and the evidence.⁶⁵

1. The allegation of distortion of the sense of the evidence relating to the nature and scale of the personal links between Portielje and Gosselin (first part of the second plea)

63. In the first part of the second plea, the Commission accuses the General Court of a 'manifest distortion of the sense of the evidence' regarding the position and influence of the three members of Gosselin's board of directors, who also sat on Portielje's board of directors.

64. In that respect, the Commission specifically attacks the General Court's statement that '[o]f the six persons constituting Portielje's board of directors, only half also sat on Gosselin's board of directors'⁶⁶ and, conversely, that 'the three persons who constitute Gosselin's board of directors ... represent only half of Portielje's board of directors'.⁶⁷ The Commission submits that the General Court thus incorrectly implied that those three members of Gosselin's board could 'not together determine Portielje's policy'.

65. A distortion of the sense of the evidence exists, however, only where, without recourse to new evidence, the assessment of the existing evidence is manifestly incorrect.⁶⁸

66. In the present case, at no point in the judgment under appeal, and particularly not in paragraphs 56 and 57, does the General Court draw the conclusion implied by the Commission that those three members of Gosselin's board of directors 'could not together determine Portielje's policy'. The accusation of distortion of the sense of the evidence to that effect must therefore be rejected.

67. Consequently, the first part of the second plea is unfounded.

2. The absence of formal decisions by Portielje's and Gosselin's organs (second and third parts of the second plea)

68. In the second and third parts of the second plea, the Commission essentially complains that the General Court assessed the possibilities of Portielje's bringing influence to bear on Gosselin solely from company law perspectives.

63 — Order in Case C-19/95 P *San Marco v Commission* [1996] ECR I-4435, paragraph 39; Case C-136/92 P *Commission v Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 49; *Elf Aquitaine* (cited in footnote 20), paragraph 68; Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' v Commission* [2011] ECR I-0000 4727, paragraph 149; and *AOI* (cited in footnote 19), paragraph 85.

64 — Order in *San Marco v Commission* (cited in footnote 63), paragraph 39; *Commission v Brazzelli Lualdi and Others* (cited in footnote 63), paragraph 49; and *Comitato 'Venezia vuole vivere' v Commission* (cited in footnote 63), paragraph 149.

65 — Case C-109/10 P *Solvay v Commission* [2011] ECR I-0000 10329, paragraph 51, and Case C-110/10 P *Solvay v Commission* [2011] ECR I-0000 10439, paragraph 46.

66 — Paragraph 56 of the judgment under appeal.

67 — Paragraph 57 of the judgment under appeal.

68 — Case C-229/05 *PKK and KNK v Commission* [2007] ECR I-439, paragraph 37; Case C-260/05 P *Sniace v Commission* [2007] ECR I-10005, paragraph 37; and *Comitato 'Venezia vuole vivere' v Commission* (cited in footnote 63), paragraph 153.

69. The General Court does in fact base its conclusion that the 100% presumption is rebutted very largely on the fact that Portielje's board of directors did not take any formal decisions until after the infringement; the exertion by Portielje of a decisive influence over the conduct of Gosselin was, according to the General Court, 'ruled out on that ground alone'.⁶⁹ The General Court also points out that, during the period from 1 January 2002 to 18 September 2002, in which the infringement of the cartel rules was imputed to Portielje under the contested decision, no general meeting of Gosselin's shareholders, at which Portielje might have exerted influence on Gosselin's commercial policy, took place.⁷⁰ It also states that Portielje had no influence over the composition of Gosselin's board of directors during the period in question, nor did its composition change at Portielje's instigation.⁷¹

70. Those statements by the General Court reveal a fundamental misunderstanding of the 100% presumption and the legal requirements for its rebuttal.

71. The question whether a subsidiary can determine its conduct on the market autonomously or is exposed to the decisive influence of its parent company cannot be assessed solely on the basis of the relevant company law. Otherwise, it would be easy for the parent companies concerned to evade responsibility for infringements of the cartel rules committed by their wholly owned subsidiaries by relying on events falling entirely under company law.

72. Although the powers of the participating companies' organs, whether and when they took decisions and the content of such decisions are factors that must certainly be taken into account, the decisive factor is ultimately economic reality, since competition law is guided not by technicalities, but by the actual conduct of undertakings.

73. As the Commission rightly points out, it would be excessively formalistic and in no way conform to economic reality if questions about influence as between a parent company and a subsidiary were to be appraised solely on the basis of actions governed by company law.

74. It is, however, just such formalism to which the General Court succumbed when – following the arguments presented by the applicant at first instance – it considered the company law perspective to be the sole determining factor in the question of Portielje's decisive influence over Gosselin. By narrowing down its criteria to standards based solely on company law, the General Court erred in law. In particular, the General Court failed to appreciate that a finding that the parent company and subsidiary form an economic unit does not necessarily presuppose formal decisions by company organs: that unit may also have an informal basis, consisting in particular in personal links between the two companies.

75. Although the General Court also considers the personal links between Gosselin and Portielje in passing, it again focuses entirely on company law aspects in this regard. Moreover, the two questions discussed appear to be comparatively theoretical: first, whether 'Portielje's principal directors [exerted], through Gosselin's general meeting, an influence over its board of directors' and, second, whether 'all the undertakings in which the three members of Gosselin's board of directors are also represented in that capacity are therefore to be regarded as parent companies of Gosselin'.⁷²

76. It would, however, have been of decisive importance, leaving aside all the formal deliberations on company law, to examine the actual effects of the personal links between Portielje and Gosselin on everyday business activities and to assess purely on the basis of the facts whether Gosselin – contrary to the 100% presumption – really determined its commercial policy independently. Regrettably, not a word on this is to be found in the judgment under appeal.

69 — Paragraph 54 of the judgment under appeal.

70 — Paragraph 55 of the judgment under appeal.

71 — Paragraph 56 of the judgment under appeal.

72 — Paragraph 57 of the judgment under appeal.

77. Finally, it is also necessary to reject Portielje's objection that the 100% presumption would become 'unrebuttable' if means of exercising influence outside the organs of the legal persons involved were to be taken into account. First, Portielje has not in any way substantiated that objection. Second, it is clear that evidence can indeed be produced of sequences of everyday commercial events, and of events outside the organs of legal persons, in the form, for instance, of internal exchanges of correspondence and internal documents, notes of discussions and witness statements.⁷³ Depending on its actual content, such evidence can lead either to rebuttal or to corroboration of the 100% presumption.

78. The second and third parts of the second plea are therefore well founded.

C – Interim conclusion

79. All in all, it can thus be held that both parts of the first plea and the second and third parts of the second plea are well founded.

80. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, if the appeal is well founded, that court must set aside the General Court's decision. Consequently, paragraphs 4 and 6 of the operative part of the judgment under appeal, in which the General Court ruled on Portielje's action in Case T-209/08, must be set aside. The remaining part of the judgment under appeal, which does not form the subject of the present appeal proceedings, is unaffected.

V – Decision on Portielje's action for annulment

81. Under the first paragraph of Article 61 of its Statute, the Court of Justice may, furthermore, itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

82. In the present case, the General Court thoroughly examined in its judgment the pleas put forward by Portielje in the proceedings at first instance in Case T-209/08. During the proceedings before the General Court, the parties also had an opportunity to exchange views on all aspects of relevance to the judgment in the case. Nor do the facts need any further clarification. The state of proceedings is therefore such that judgment can be delivered.

A – Portielje's first plea in Case T-209/08

83. By its first plea in Case T-209/08, Portielje maintains that, as it is not an undertaking within the meaning of competition law, there is no parent company/subsidiary relationship between itself and Gosselin.⁷⁴

84. That plea must be dismissed for the aforementioned⁷⁵ reasons.

B – Portielje's second plea in Case T-209/08

85. By its second plea in Case T-209/08, Portielje argues that it cannot be held responsible for the acts committed by Gosselin, since it does not exercise any decisive influence over that company.⁷⁶

73 — See in this regard, for example, the assessment of evidence undertaken by the Court of Justice in *General Química* (cited in footnote 54), paragraph 104.

74 — Paragraphs 28 and 29 of the judgment under appeal.

75 — See points 27 to 57 of this Opinion.

76 — Paragraphs 28 and 30 to 32 of the judgment under appeal.

86. It should be pointed out in that regard that Portielje indisputably controls all or almost all the shares in Gosselin.⁷⁷ According to the *Akzo Nobel* case-law,⁷⁸ there is consequently a rebuttable presumption that Portielje does exercise decisive influence over Gosselin.

87. To rebut that presumption, the applicant argues in purely formal terms by referring to the provisions of foundation or company law concerning Portielje's and Gosselin's organs. It alludes to the statutory obligation on the members of Gosselin's board of directors to act solely in the interests of that company and emphasises that Portielje's and Gosselin's boards of directors are collective organs whose membership is only partly identical.

88. As stated above,⁷⁹ however, such an argument on its own is not meaningful, since the actual circumstances and economic reality are the decisive factors. That is all the more true in a situation like the present one, in which, although the members of Portielje's and Gosselin's boards of directors were not absolutely identical, considerable personal links undoubtedly existed between the two legal persons in the shape of three board members common to them both. Those links reinforce further the initial impression of Gosselin's lack of independence from Portielje and of parallel respective interests.

89. It would have been for the applicant⁸⁰ to explain that in the present case the 'parent company' Portielje exercised restraint in its relationship with its 'subsidiary' Gosselin, so that the latter determined its conduct on the market independently, despite being wholly controlled by the former.⁸¹

90. That is in no way a *probatio diabolica* requiring the parent company to prove negative facts.⁸² Rather, as already mentioned,⁸³ recourse to specific pointers from everyday business activities enables it to be explained whether and to what extent the subsidiary itself determined its commercial policy and its conduct on the market and so acted autonomously, that is, independently from its parent company.

91. However, since Portielje – apart from dwelling on the foundation law and company law context – has submitted nothing concrete to rebut the 100% presumption and, in particular, has failed to deal with the practical implications of its personal links with Gosselin, its second plea is likewise unfounded.

C – Other factors

92. The other pleas put forward by Portielje in Case T-209/08 have already all been held unfounded by the General Court. I have myself examined those pleas and also consider them unfounded, essentially on the same grounds as those set out by the General Court in the judgment under appeal.

77 — The General Court's wording is that Portielje 'holds almost all Gosselin's shares' (paragraphs 49 and 53 of the judgment under appeal). To my mind, it would be more accurate to state that Portielje *has all the shares* in Gosselin *under its control*, since it holds 92% of those shares in trust for the members of the founding family and in addition holds almost all the shares (99.87%) in Vivet en Gosselin NV, to which the remaining 8% of Gosselin belongs. For the application of the 100% presumption, however, this question of the wording makes no difference.

78 — See, in particular, *Akzo Nobel*, paragraphs 60 and 61; *ArcelorMittal*, paragraphs 97 and 98; and *AOI*, paragraphs 46 and 47 (all cited in footnote 19).

79 — See points 68 to 78 of this Opinion.

80 — *General Química* (cited in footnote 54), paragraph 104, and *Elf Aquitaine* (cited in footnote 20), paragraph 61.

81 — See, to this effect, my Opinions in *AOI* (cited in footnote 19), point 171, and *Akzo Nobel* (cited in footnote 19), point 75.

82 — To this effect, see also *Elf Aquitaine* (cited in footnote 20), paragraph 65.

83 — See point 77 of this Opinion.

93. Nor can the General Court's reduction of the fine in Gosselin's favour have any effect on Portielje, since that reduction of the penalty concerns the period from 30 October 1993 until 14 November 1996, whereas Portielje, according to the contested decision, was jointly and severally liable only for the period from 1 January 2002 until 18 September 2002.

94. I cannot, moreover, identify anything which indicates that the fine imposed on Portielje was calculated incorrectly or that it was disproportionate or simply inappropriate. Consequently, there is no reason for that fine to be set aside or recalculated in the present case, even though the Court of Justice has unlimited jurisdiction (Article 261 TFEU in conjunction with Article 31 of Regulation No 1/2003).

D – *Interim conclusion*

95. All things considered, Portielje's action for annulment in Case T-209/08 should therefore be dismissed in its entirety as unfounded.

VI – Costs

96. Under Article 184(2) of its Rules of Procedure, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, the Court of Justice itself is to make a decision as to costs.⁸⁴

97. Under Article 138(1), in conjunction with Article 184(1), of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for Portielje to be ordered to pay the costs and Portielje has been unsuccessful with its claims at both instances, it must be ordered to pay the costs relating to both sets of proceedings.

VII – Conclusion

98. In the light of the foregoing considerations, I propose that the Court of Justice should:

- (1) set aside paragraphs 4 and 6 of the operative part of the judgment of the General Court of the European Union of 16 June 2011 in Joined Cases T-208/08 and T-209/08 *Gosselin Group and Stichting Administratiekantoor Portielje v Commission*;
- (2) dismiss the action for annulment brought by Stichting Administratiekantoor Portielje in Case T-209/08;
- (3) order Stichting Administratiekantoor Portielje to pay the costs of the proceedings at first instance in Case T-209/08 and the costs of the present appeal proceedings.

⁸⁴ — Pursuant to the general principle that new procedural rules apply to all proceedings pending at the time when those rules enter into force (settled case-law; see, for example, Joined Cases 212/80 to 217/80 *Meridionale Industria Salumi and Others* [1981] ECR 2735, paragraph 9), the decision on costs in the present case is based on the Rules of Procedure of the Court of Justice of 25 September 2012, which entered into force on 1 November 2012 (to this effect, also Case C-417/11 P *Council v Bamba* [2012] ECR, paragraphs 91 and 92). There is, however, no substantive difference from Article 69(2), in conjunction with Article 118 and Article 122(1), of the Rules of Procedure of the Court of Justice of 19 June 1991.