JUDGMENT OF THE COURT (Third Chamber)

10 September 2009*

In Case C-97/08 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 27 February 2008,

Akzo Nobel NV, established in Arnhem (Netherlands),

Akzo Nobel Nederland BV, established in Arnhem,

Akzo Nobel Chemicals International BV, established in Amersfoort (Netherlands),

Akzo Nobel Chemicals BV, established in Amersfoort,

Akzo Nobel Functional Chemicals BV, established in Amersfoort,

* Language of the case: English.

represented by C. Swaak, M. van der Woude and M. Mollica, avocats,

applicants,

the other party to the proceedings being:

Commission of the European Communities, represented by X. Lewis and F. Castillo de la Torre, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.N. Cunha Rodrigues, J. Klučka, P. Lindh and A. Arabadjiev (Rapporteur), Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 23 April 2009,

gives the following

Judgment

1 By their appeal, Akzo Nobel NV ('Akzo Nobel'), Akzo Nobel Nederland BV ('Akzo Nobel Nederland'), Akzo Nobel Chemicals International BV ('Akzo Nobel Chemicals International'), Akzo Nobel Chemicals BV ('Akzo Nobel Chemicals') and Akzo Nobel Functional Chemicals BV ('Akzo Nobel Functional Chemicals') ask the Court to set aside the judgment of the Court of First Instance of the European Communities in Case T-112/05 *Akzo Nobel and Others* v *Commission* [2007] ECR II-5049 ('the judgment under appeal'), by which it dismissed their action for annulment of Commission Decision of 9 December 2004 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (Case No C.37.533 — Choline Chloride) (OJ 2005 L 190, p. 22) ('the contested decision').

2 In that decision, the Commission of the European Communities accused the addressees of a single and continuous infringement of Article 81(1) EC and, as from 1 January 1994, of Article 53(1) of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3).

Community law context

3 Under Article 15(2) of Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition: 1959-1962, p. 87):

‘The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently: (a) they infringe Article [81](1) or Article [82] of the Treaty; or

…’

4 Article 23(2) of 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) provides:

‘The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article 81 or Article 82 of the Treaty

…

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

…'

The facts

5 According to the findings of the Commission, to which the Court of First Instance referred in the judgement under appeal, the facts which gave rise to the dispute are as follows.

6 After it received a leniency application in April 1999 from an American producer, the Commission initiated an investigation into the global choline chloride industry, an investigation which lasted from 1992 until the end of 1998.

7 Choline chloride is a member of the B-complex water-soluble vitamins (Vitamin B4). It is mainly used in the animal feed industry as a feed additive. In addition to producers,

the choline chloride market is made up of converters, who buy the product from producers in liquid form and convert it into choline chloride on a carrier either on behalf of the producer or on their own behalf, and distributors.

8 The appellants are five companies belonging to the Akzo Nobel group and they are among the producers of choline chloride. In the period concerned by the Commission investigation, Akzo Nobel the parent company of the group, held, directly or indirectly, all the shares in the other appellants. Akzo Nobel was the owner of all the shares in its subsidiaries Akzo Nobel Nederland and Akzo Nobel Chemicals International. Akzo Nobel Nederland owned all the shares in its subsidiary Akzo Nobel Chemicals, which itself held all the shares in Akzo Nobel Functional Chemicals.

9 The worldwide consolidated turnover declared by Akzo Nobel in 2003, which is the financial year immediately prior to the contested decision, was EUR 13 billion.

10 As regards the European Economic Area ('the EEA'), a cartel was implemented at two different but closely connected levels, the global level and the European level.

11 Globally, several North American and European companies, including the appellants, participated in anti-competitive activities between June 1992 and April 1994. Only the European companies, including the appellants, participated in meetings implementing a cartel at European level, which lasted from March 1994 until October 1998.

12 The Commission regarded the arrangements concluded at global and European levels as a complex and continuous single infringement concerning the EEA, in which the

North American producers participated for some time and the European producers during the entire period covered by the Commission's investigation.

13 On 9 December 2004, the Commission adopted the contested decision. In Article 1 thereof, it found that a number of undertakings, including the appellants, had infringed Article 81(1) EC and Article 53 of the EEA Agreement by participating in a series of agreements and concerted practices concerning price fixing, market sharing and concerted actions against competitors in the choline choloride sector in the EEA.

14 As regards the Akzo Nobel group, the Commission decided to address the contested decision jointly and severally to all the appellants. Akzo Nobel Nederland, Akzo Nobel Chemicals International and Akzo Nobel Chemicals (or their legal predecessors) directly participated in the infringement. Akzo Nobel Functional Chemicals was created as a subsidiary of Akzo Nobel Chemicals in June 1999. Therefore, the Commission found that Akzo Nobel Functional Chemicals was the legal successor to its parent company as regards the majority of the activities in the choline chloride sector previously carried out by the latter and should, therefore, also be an addressee of that decision.

15 As regards, more precisely, Akzo Nobel, the Commission found that it constituted a single economic unit with the other legal persons in the Akzo Nobel group which are addressees of the contested decision and that it is that economic unit which participated in the cartel. The Commission concluded that that company was in a position to exert decisive influence over the commercial policy of its subsidiaries, in which it held, directly or indirectly, all of the shares, and that it could be assumed that it in fact did so. The Commission therefore concluded that Akzo Nobel's subsidiaries lacked commercial autonomy, which led it to address the contested decision to Akzo Nobel, notwithstanding the fact that it had not itself participated in the cartel.

16 The Commission took the view that the lack of commercial autonomy of operating companies or business units in the Akzo Nobel group was also proved by the documents produced by Akzo Nobel during the administrative procedure.

17 By basing its decision on the market share of the appellants as a whole and, in particular, on the figure mentioned in paragraph 9 of this judgment, the Commission, in Article 2 of the contested decision, imposed on the appellants jointly and severally a fine of EUR 20.99 million for the infringements set out in Article 1 thereof.

The action before the Court of First Instance and the judgment under appeal

18 In support of their action before the Court of First Instance seeking annulment of the contested decision, the applicants relied on three pleas in law.

19 The Commission took the view that that action was inadmissible on the ground that it had not been lodged in accordance with Article 21 of the Statute of the Court of Justice and Article 44 of the Rules of Procedure of the Court of First Instance, or as manifestly unfounded, as far as concerns Akzo Nobel Nederland, Akzo Nobel Chemicals International and Akzo Nobel Chemicals, since the action, which had to be analysed as five individual actions, did not contain any pleas in law capable of justifying the annulment of the contested decision in so far as it established the liability of those companies or in so far as it fixed the amount of the fine with respect to them. The Commission submitted in the alternative that for the same reasons, it was clear that, although they were addressees of that decision, Akzo Nobel's subsidiaries had no legal interest in seeking its annulment.

20 The Court of First Instance dismissed the objection of inadmissibility raised by the Commission in paragraphs 31 and 32 of the judgment under appeal.

21 As regards the substance, the applicants' first plea in law was based on the incorrect imputation of joint liability to Akzo Nobel, the holding company of the group, holding, directly or indirectly, all of the shares in its subsidiaries.

22 The applicants submitted that the decisive influence that a parent company must exercise in order to be considered liable for activities of its subsidiary must relate to the subsidiary's commercial policy in the strict sense.

23 The Commission therefore had to show, first, that the parent company had the power to direct the conduct of the subsidiary to the point of depriving it of any independence in determining its commercial course of action and, second, that it exerted that power.

24 It was clear from Community case-law that a wholly-owned subsidiary could be presumed to have carried out the instructions of its parent company. In those circumstances, in order for the Commission to be obliged to find solely the subsidiary liable, the subsidiary must determine its commercial policy largely on its own. Where that is shown to be the case, it is once again for the Commission to show that the parent company did in fact exercise a decisive influence in a specific case.

25 It followed that the organisation into units of a group of companies such as the Akzo Nobel group did not in itself suffice to make proof of the parent company's actual involvement unnecessary.

26 The applicants took the view that they had established that Akzo Nobel's subsidiaries determined their commercial policy largely on their own and had thereby rebutted the presumption relied on by the Commission. They maintained that the Commission should have established that Akzo Nobel had exercised a decisive influence over the commercial policy of the other applicants. The Commission had not satisfied that obligation because the evidence, apart from the fact of holding all the shares, on which it based its arguments to hold Akzo Nobel jointly and severally liable for the infringement, was either irrelevant or incorrect.

27 As regards the first plea in law relied on by the applicants in support of their action, the Court of First Instance examined, as a preliminary point, the question as to whether the unlawful conduct of a subsidiary could be imputed to the parent company and held as follows:

'57. It must be borne in mind, first of all, that the concept of undertaking within the meaning of Article 81 EC includes economic entities which consist of a unitary organisation of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision (see Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 54 and the case-law cited).

58. It is therefore not because of a relationship between the parent company and its subsidiary in instigating the infringement or, a fortiori, because the parent company is involved in the infringement, but because they constitute a single undertaking in the sense described above that the Commission is able to address the decision imposing fines to the parent company of a group of companies. It must be borne in mind that Community competition law recognises that different companies belonging to the same group form an economic entity and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not determine independently their own conduct on the market (Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 290).

59. It should also be noted that, for the purpose of applying and enforcing Commission competition law decisions, it is necessary to identify, as addressee, an entity having legal personality (see, to that effect, Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Maatschappij and Others* v *Commission* ('PVC II') [1999] ECR II-931, paragraph 978).

60. In the specific case of a parent company holding 100% of the capital of a subsidiary which has committed an infringement, there is a simple presumption that the parent company exercises decisive influence over the conduct of its subsidiary (see, to that effect, Case 107/82 *AEG[-Telefunken]* v *Commission* [1983] ECR 3151, paragraph 50, and PVC II, paragraph 59 above, paragraphs 961 and 984), and that they therefore constitute a single undertaking within the meaning of Article 81 EC (Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission* …, paragraph 59). It is thus for a parent company which disputes before the Community judicature a Commission decision fining it for the conduct of its subsidiary to rebut that presumption by adducing evidence to establish that its subsidiary was independent (Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 136; see also, to that effect, Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925 ('Stora'), paragraph 29).

61. In that regard, it must be made clear that, while it is true that at paragraphs 28 and 29 of *Stora*, paragraph 60 above, the Court of Justice referred, as well as to the fact that the parent company owned 100% of the capital of the subsidiary, to other circumstances, such as the fact that it was not disputed 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 elements on which the Court of First Instance had based its reasoning before concluding that that reasoning was not based solely on the fact that the parent company held the entire capital of its subsidiary. Accordingly, the fact that the Court of Justice upheld the findings of the Court of First Instance in that case cannot have the consequence that the principle laid down in paragraph 50 of *AEG[-Telefunken]* v *Commission*, paragraph 60 above, is amended.

62. That being so, it is sufficient for the Commission to show that the entire capital of a subsidiary is held by the parent company in order to conclude that the parent company exercises decisive influence over its commercial policy. The Commission will then be able to hold the parent company jointly and severally liable for payment of the fine imposed on the subsidiary, unless the parent company proves that the subsidiary does not, in essence, comply with the instructions which it issues and, as a consequence, acts autonomously on the market.

63. The Court must also examine, in the context of these preliminary observations, the argument central to the applicants' pleadings that the influence which the parent company is presumed to exercise because it holds the entire capital of its subsidiary relates to the latter's commercial policy in the strict sense... That policy, in the applicants' submission, includes, for example, distribution and pricing strategy. Accordingly, so the argument goes, the parent company could rebut the presumption by showing that it is the subsidiary that manages those specific aspects of its commercial policy, without receiving instructions.

64. On that point, it should be noted that, when analysing the existence of a single economic entity among a number of companies forming part of a group, the Community judicature has examined whether the parent company was able to influence pricing policy (see, to that effect, Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, paragraph 137, and Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraph 45), production and distribution activities (see, to that effect, Joined Cases 6/73 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223, paragraphs 37 and 39 to 41), sales objectives, gross margins, sales costs, cash flow, stocks and marketing (Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraph 48). However, it cannot be inferred that it is only those aspects that are covered by the concept of the commercial policy of a subsidiary for the purposes of the application of Articles 81 EC and 82 EC with respect to the parent company.

65. On the contrary, it follows from that case-law, read together with the considerations set out at paragraphs 57 and 58 above, that it is for the parent company to put before the Court any evidence relating to the economic and legal

organisational links between its subsidiary and itself which in its view are apt to demonstrate that they do not constitute a single economic entity. It also follows that when making its assessment the Court must take into account all the evidence adduced by the parties, the nature and importance of which may vary according to the specific features of each case.

66. It is by reference to those considerations that the Court must ascertain whether Akzo Nobel and its subsidiaries to which the contested decision was addressed constitute a single economic entity.'

28 The Court of First Instance, in paragraphs 67 to 85, of the judgment under appeal, then examined the various pieces of evidence in the file and held that the applicants had not succeeded in rebutting the presumption that Akzo Nobel, the parent company holding 100% of the capital in its subsidiaries who were the addressees of the contested decision, exercised a decisive influence over their policies. It concluded that that company constituted, together with the other applicants, an undertaking within the meaning of Article 81 EC, and that there was no need to determine whether it had exercised an influence over their conduct. It dismissed the first plea in law relied on by the applicants in support of their action.

29 As regards the second and third pleas in law, alleging infringement of Article 23(2) of Regulation No 1/2003, in so far as the amount of the fine exceeds 10% of the turnover in 2003 by Akzo Nobel Functional Chemicals, and infringement of the obligation to state reasons concerning the attribution of joint and several liability to Akzo Nobel, the Court of First Instance dismissed them in paragraphs 90 and 91 and 94 to 96 respectively in the judgment under appeal. In paragraph 97 thereof, it therefore dismissed the action in its entirety.

Forms of order sought

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

— set aside the judgment under appeal, in so far as it rejected the plea that responsibility was wrongfully imputed jointly and severally to Akzo Nobel;

— annul the contested decision, in so far as it imputes liability to Akzo Nobel, and

— order the Commission to pay all the costs of this appeal and of the proceedings before the Court of First Instance, in so far as they concern the plea raised in the appeal.

31 The Commission contends that the Court should dismiss the appeal and order the appellants to pay the costs.

The appeal

Admissibility

The appellants' legal interest in bringing proceedings (with the exception of Akzo Nobel)

32 The Commission submits essentially that, in so far as the single plea in law concerns exclusively the liability of Akzo Nobel, the latter is the only appellant with a legal interest in the annulment of the judgment under appeal. The appeal is inadmissible as regards the other appellants, since neither their liability nor the fine imposed on them is challenged.

33 In that connection, it must be observed that for an appellant to have an interest in bringing proceedings the appeal must be capable, if successful, of procuring an advantage to the party bringing it (see, to that effect, order in Case C-503/07 P *Saint-Gobain Glass Deutschland* v *Commission* [2008] ECR I-2217, paragraph 48 and the case-law cited).

34 In this case, the judgment under appeal upheld the contested decision, which imposes on all the applicants joint and several liability to pay the fine of EUR 20.99 million set by the Commission. It follows that Akzo Nobel Nederland, Akzo Nobel Chemicals International, Akzo Nobel Chemicals and Akzo Nobel Functional Chemicals have an interest in having the judgment under appeal set aside (see, by analogy, order in case T-111/01 R *Saxonia Edelmetalle* v *Commission* [2001] ECR II-2335, paragraph 17).

35 If the judgment under appeal were to be set aside as regards the liability of Akzo Nobel, the position of its subsidiaries would change, in particular with regard to the implications arising from the rules of joint and several liability.

36 Therefore, the objection of admissibility raised by the Commission relating to the interest in bringing proceedings of Akzo Nobel Nederland, Akzo Nobel Chemicals International, Akzo Nobel Chemicals and Akzo Nobel Functional Chemicals must be dismissed.

The existence of a new plea in law, submitted for the first time in the appeal

37 The Commission also submits that the single plea in law constitutes a new plea, submitted for the first time in the appeal, and is therefore inadmissible in so far as it contains points that the appellants did not raise before the Court of First Instance. By that plea, the appellants challenge the very existence of the presumption that a parent company exercises a decisive influence over a subsidiary where it holds 100% of its capital, whereas before the Court of First Instance they never challenged the existence of that presumption and, by attempting to rebut it, acknowledged that it was applicable to the present case. The appellants' arguments relating to the relevant object of a subsidiary's activities over which the parent company exercises decisive influence must also be rejected as inadmissible.

38 According to Article 118 of the Rules of Procedure of the Court of Justice, Article 42(2) thereof, which generally prohibits the introduction of new pleas in law in the course of the procedure, applies to the procedure before the Court of Justice on appeal from a decision of the Court of First Instance. In an appeal, the Court's jurisdiction is thus confined to review of the assessment by the Court of First Instance of the pleas argued before it (see, in particular, Case C-229/05 P *PKK and KNK* v *Council* [2007] ECR I-439, paragraph 61). To allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would in effect allow that party to bring before the Court a wider case than that heard by the

Court of First Instance (see, to that effect, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 165).

39 It must be recalled, in that connection, that the appellants relied, before the Court of First Instance, on a plea in law alleging that joint and several liability was wrongly imputed to Akzo Nobel, by which they submitted that it did not exercise a decisive influence over the commercial conduct of its subsidiaries and that it did not form an economic unit with them. Therefore, the arguments relating to the presumption that a parent company exercises a decisive influence over a subsidiary where it holds 100% of the capital which the appellants have put forward before the Court of Justice must be regarded as an elaboration of that plea. In so far as those arguments, and the arguments relating to the relevant object of a subsidiary's activities over which the parent company exercises decisive influence, constitute additional arguments concerning the application of the rules on the imputability to Akzo Nobel of the conduct of its subsidiaries, the appellants have not altered the subject of the dispute before the Court of First Instance.

40 Accordingly, the appeal must be declared admissible.

Substance of the case

41 The appellants rely on a single plea in support of their appeal, claiming that, by rejecting the plea alleging that liability for the infringement had been wrongfully imputed to Akzo Nobel, the Court of First Instance incorrectly applied the definition of 'undertaking' within the meaning of Article 81 EC and Article 23(2) of Regulation No 1/2003. That plea consists of two separate parts.

The first part of the single plea: incorrect definition of the burden of proof on the Commission as regards the lack of autonomy of the subsidiary

— Arguments of the parties

42 The appellants submit that the Court of First Instance applied the wrong legal test in order to determine whether or not Akzo Nobel's subsidiaries acted autonomously on the market.

43 According to the appellants, it is normally for the Commission to adduce evidence of actual exercise of decisive commercial influence by the parent company on its subsidiary. However, in order to alleviate that burden of proof, the Court of Justice has established a rebuttable presumption.

44 In *Stora*, the Court expressly stated that merely holding 100% of the capital in a subsidiary does not suffice per se to establish the liability of a parent company if the exercise of decisive commercial influence over that subsidiary is disputed. In that judgment the Court thus followed the reasoning of Advocate General Mischo, set out in point 48 of his Opinion in that case, according to which, although the burden on the Commission of proving that the parent company in fact exercised decisive influence over its subsidiary's conduct is alleviated where it owns 100% of the capital in that subsidiary, something more than the extent of the shareholding must be shown, but it may be in the form of indicia.

45 Therefore, full ownership of the shareholding of the subsidiary together with the existence of additional indicia gives rise to a presumption that the subsidiary did not act autonomously on the market. The Commission cannot therefore discharge the burden of proof on it by simply referring to the fact that the parent company has a 100% shareholding in its subsidiary. It must also produce other evidence showing that the parent company in fact exercises a decisive influence over its subsidiary. The Court of

First Instance has violated that principle by holding that it was sufficient for the Commission to establish that all the shareholding in the subsidiary is held by the parent company to conclude that the latter exercises a decisive influence over its commercial policy.

46 Furthermore, in two other judgments, namely Case T-325/01 *DaimlerChrysler* v *Commission* [2005] ECR II-3319 and Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others* v *Commission* [2007] ECR II-947, the Court of First Instance correctly applied the principle set out in the preceding paragraph, holding that although a 100% shareholding in its subsidiary provides a strong indication that the parent company is able to exercise a decisive influence over the subsidiary's conduct on the market, this is not in itself sufficient to impute liability to the parent company for the conduct of its subsidiary and something more than the extent of the shareholding must be shown, but this may be in the form of indicia.

47 The appellants also criticise the Court of First Instance for having alleviated the burden of proof on the Commission and having thereby adopted a conception of the burden of proof which infringes their rights of defence. The Commission is required to adduce what they consider to be further indicia, within the meaning of the *Stora* judgment, as it is interpreted by them, at the stage of the statement of objections and not only at the decision stage. In the statement of objections the Commission's intention to hold Akzo Nobel jointly and severally liable was based solely on the fact that that company had a 100% shareholding in the companies which participated in the infringement. On the other hand, in the contested decision it was also based on alleged further indicia, within the meaning of the *Stora* judgment, which had been artificially formulated by distorting the evidence relied on by the appellants in their response to the statement of objections.

48 Finally, the appellants criticise paragraph 62 of the judgment under appeal, in which, by holding that in order to rebut the presumption concerned it must be proved that the subsidiary does not, in essence, comply with the instructions issued by the parent

company, the Court of First Instance adopted an approach which means that the presumption may be rebutted only where instructions have been issued by the parent company.

49 The Commission contends that the fact that the subsidiary has a legal personality separate from that of the parent company 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 conduct on the market but carries out, in all material respects, the instructions which are given to it by the parent company. There is no need to ascertain whether the parent company has in fact used its power to influence the commercial policy of its subsidiary in a decisive manner where the parent company has a 100% shareholding in it.

50 The Court did not call that principle into question in *Stora*. It acknowledged that, where a subsidiary is wholly owned by the parent company, the latter is presumed to have exercised its power to influence the conduct of its subsidiary. According to the Commission, although the Court of Justice held, in paragraph 29 of the *Stora* judgment, that it was legitimate for the Court of First Instance to base its findings on that presumption, particularly after finding that the parent company had presented itself during the administrative procedure as the Commission's sole interlocutor concerning the infringement in question, the Court of Justice referred to that factor as a subsidiary point, as an additional argument in favour of imputing the infringement to the parent company.

51 A series of judgments of the Court of First Instance has applied that presumption, by referring to the judgment in *Stora*, without making the application of the presumption subject to the production of additional indicia. The judgments in *DaimlerChrysler* v *Commission* and *Bolloré and Others* v *Commission* do not call into question the application of that presumption. In those two judgments, the Court of First Instance conflated the concept of control over the subsidiary with that of exercising control, only the latter being presumed where all the shareholding in the subsidiary is held by the parent company. Furthermore, the additional indicia were examined when evidence adduced in order to rebut the presumption was analysed.

52 As to the argument relating to the infringement of the rights of defence, the Commission takes the view that the existence of presumptions in Community competition law is not unusual. By informing the undertaking concerned that it intended to rely on a presumption, the Commission offered that undertaking the opportunity to comment on that point and to provide it with all documents capable of supporting its position. As it is the undertaking which has all the information relating to its internal functioning, that apportionment of the burden of proof is completely logical.

53 As regards the criticism of paragraph 62 of the judgment under appeal, the Commission contends that it is based on an incorrect reading of a sentence taken out of its context. The Court of First Instance meant that a subsidiary is an independent economic entity if it does not follow the instructions of its parent company. That is because either no instructions have been given or because the instructions have not been followed.

— Findings of the Court

54 It must be observed, as a preliminary point, that Community competition law refers to the activities of undertakings (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), and that the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see, in particular, *Dansk Rørindustri and Others* v *Commission*, 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).

55 The Court has also stated that the concept of an undertaking, in the same context, must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 40).

56 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 (see, to that effect, Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 145; Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 78; and Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 39).

57 The infringement of Community competition law must be imputed unequivocally to a legal person on whom fines may be imposed and the statement of objections must be addressed to that person (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 60, and judgment of 3 September 2009 in Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *August Koehler and Others* v *Commission*, paragraph 38). It is also necessary that the statement of objections indicate in which capacity a legal person is called on to answer the allegations.

58 It is clear from settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (see, to that effect, *Imperial Chemical Industries* v *Commission*, paragraphs 132 and 133; *Geigy* v *Commission*, paragraph 44; Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 15; and *Stora*, paragraph 26), having regard in particular to the economic, organisational and legal links between those two legal entities (see, by analogy, *Dansk Rørindustri and Others* v *Commission*, paragraph 117, and *ETI and Others*, paragraph 49).

59 That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of the case-law mentioned in paragraphs 54 and 55 of this judgment. Thus, the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article 81 EC enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement.

60 In the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary (see, to that effect, *Imperial Chemical Industries* v *Commission*, paragraphs 136 and 137) and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary (see, to that effect, *AEG-Telefunken* v *Commission*, paragraph 50, and *Stora*, paragraph 29).

61 In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (see, to that effect, *Stora*, paragraph 29).

62 As the Court of First Instance rightly held in paragraph 61 of the judgment under appeal, while it is true that at paragraphs 28 and 29 of *Stora* 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 elements on which the Court of First Instance had based its reasoning and not to make the application of the presumption mentioned in paragraph 60 of this judgment subject to the production of additional indicia relating to the actual exercise of influence by the parent company.

63 It is clear from all those considerations that the Court of First Instance did not commit any error of law in holding that where a parent company has a 100% shareholding in its subsidiary there is a rebuttable presumption that that parent company exercises a decisive influence over the conduct of its subsidiary.

64 Accordingly, since the Commission is not required, as regards the imputability of the infringement, to submit, at the stage of the statement of objections, evidence other than proof relating to the shareholding of the parent company in its subsidiaries, the appellants' argument relating to the infringement of the rights of defence cannot be accepted.

65 As regards the criticism of paragraph 62 of the judgment under appeal, it is sufficient to observe that there is nothing in that paragraph which suggests that the Court of First Instance limited the possibility of rebutting the presumption mentioned in paragraph 60 of this judgment solely to cases where instructions have been issued by the parent company. On the contrary, it is clear from paragraphs 60 and 65 of the judgment under appeal that the Court of First Instance adopted a relatively open position in that respect, holding, in particular, that it is for the parent company to put before the Court 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.

66 It follows that the first part of the single plea relied on by the appellants in support of their appeal must be dismissed as unfounded.

The second part of the single plea in law: incorrect definition of the concept of the commercial policy of the subsidiary

— Arguments of the parties

67 According to the appellants, the Court of First Instance wrongly held that aspects other than those mentioned in paragraph 64 of the judgment under appeal were covered by the commercial policy of the subsidiary over which the parent company exercises a decisive influence, and that the evidence relating to the organisational, economic and

legal links between the parent company and its subsidiary are relevant in order to establish the independence of the latter.

68 Commercial policy relates to the conduct on the market and is limited to the production of goods and services that an undertaking sells on certain conditions to consumers in a given territory and at a given time. It does not include other aspects.

69 According to the appellants, extending the concept of commercial policy beyond the conduct of the subsidiary on the market would amount to introducing a strict liability regime, which is contrary to the principle of personal responsibility guaranteed by the case-law of the Court.

70 The Commission submits that the question whether the concept of commercial policy should be given a broad or narrow definition is irrelevant with regard to the issue of determining the existence of a single undertaking, for which the Court of Justice should have regard more to the economic and organisational links existing between the companies.

71 As regards the argument relating to the introduction of a strict liability regime, the Commission takes the view that there is no principle of strict liability in Community competition law, since the Commission's decisions do not impute liability to companies without its proof being established. It is not contrary to the principle of personal responsibility to hold a parent company liable for the actions of its wholly-owned subsidiary.

— Findings of the Court

72 As noted in paragraph 58 of this judgment, the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.

73 It is clear, as the Advocate General pointed out in paragraphs 87 to 94 of her Opinion, that the conduct of the subsidiary on the market cannot be the only factor which enables the liability of the parent company to be established, but is only one of the signs of the existence of an economic unit.

74 It also follows from paragraph 58 of this judgment that, in order to ascertain whether a subsidiary determines its conduct on the market independently, account must be taken not only of the factors set out in paragraph 64 of the judgment under appeal, but also of all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company, which may vary from case to case and cannot therefore be set out in an exhaustive list.

75 It follows that the Court of First Instance has not committed an error of law as regards the sphere in which the parent company exercises influence over its subsidiary.

76 That conclusion is not affected by the appellants' argument relating to strict liability.

77 It must be observed in that connection that, as it is clear from paragraph 56 of this judgment, Community competition law is based on the principle of the personal responsibility of the economic entity which has committed the infringement. If the parent company is part of that economic unit, which, as stated in paragraph 55 of this judgment, may consist of several legal persons, the parent company is regarded as jointly and severally liable with the other legal persons making up that unit for infringements of competition law. Even if the parent company does not participate directly in the infringement, it exercises, in such a case, a decisive influence over the subsidiaries which have participated in it. It follows that, in that context, the liability of the parent company cannot be regarded as strict liability.

78 Therefore, the second part of the single plea in law relied on by the appellants in support of their appeal cannot be upheld and the appeal must be dismissed in its entirety as unfounded.

Costs

79 Under Article 69(2) of the Rules of Procedure of the Court of Justice, which is applicable to appeals by virtue of Article 118 thereof, 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 costs and the appellants have been unsuccessful, they must be ordered to pay the costs.

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

1. **Dismisses the appeal;**

2. **Orders Akzo Nobel NV, Akzo Nobel Nederland BV, Akzo Nobel Chemicals International BV, Akzo Nobel Chemicals BV and Akzo Nobel Functional Chemicals BV to pay the costs.**

[Signatures]