JUDGMENT OF THE COURT (Second Chamber)

29 September 2011 *

In Case C-521/09 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 11 December 2009,

Elf Aquitaine SA, established in Courbevoie (France), represented by E. Morgan de Rivery, S. Thibault-Liger and E. Lagathu, avocats,

appellant,

the other party to the proceedings being:

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

defendant at first instance,

* Language of the case: French.

THE COURT (Second Chamber),

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

Advocate General: P. Mengozzi,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 25 November 2010,

after hearing the Opinion of the Advocate General at the sitting on 17 February 2011,

gives the following

Judgment

1 By its appeal, Elf Aquitaine SA ('Elf Aquitaine') requests the Court to set aside the judgment of 30 September 2009 in Case T-174/05 *Elf Aquitaine* v *Commission* ('the judgment under appeal'), by which the Court of First Instance of the European Communities ('the General Court') dismissed its action for annulment of Commission

Decision C(2004) 4876 final of 19 January 2005 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/37.773 – MCAA) ('the decision at issue') or, in the alternative, annulment or reduction of the fine imposed on it.

Background to the dispute and the decision at issue

2 According to the information set out in paragraphs 3 to 7 of the judgment under appeal, the European Commission began its investigation into a cartel concerning monochloroacetic acid ('MCAA') in late 1999, acting on a report received from one of the participants. On 14 and 15 March 2000 the Commission carried out onsite investigations, inter alia at the premises of one of Elf Aquitaine's subsidiaries. On 7 and 8 April 2004 the Commission addressed a statement of objections to 12 companies, including Elf Aquitaine and that subsidiary (formerly called Elf Atochem SA, then Atofina SA and, at the time of this appeal, Arkema SA ('Atofina' or 'Arkema')).

3 It is apparent from paragraph 8 of the judgment under appeal that, in the decision at issue, the Commission considered, in essence, that the undertakings concerned by that decision had participated in a cartel, contrary to Article 81 EC.

4 According to paragraphs 9 to 12 of the judgment under appeal, the Commission found in the decision at issue – rejecting the arguments to the contrary put forward by Elf Aquitaine – that the fact that Elf Aquitaine held 98 % of the shares in Atofina was sufficient for liability for the acts of its subsidiary to be imputed to it. The Commission also found that the fact that Elf Aquitaine had not been involved in the production

and sale of MCAA did not preclude its being considered to form an economic unit together with the operational units of the group.

5 As mentioned at paragraph 30 of the judgment under appeal, the fine imposed in the decision at issue on Elf Aquitaine and Arkema for their joint and several liability came to EUR 45 million.

The action before the General Court and the judgment under appeal

6 By the judgment under appeal, the General Court rejected all 11 pleas raised before it and ordered Elf Aquitaine to pay the costs. In doing so, the General Court expressed, in particular, the considerations set out below.

7 By its first plea in law, Elf Aquitaine claimed that the decision at issue breached its rights of defence in two ways: (i) that decision had been adopted at the close of a procedure in which there had been a breach of the principle of equality of arms (first part of the plea) and (ii) the decision had been adopted by the Commission in breach of the obligation to take into account the facts resulting from the administrative procedure (second part of the plea).

8 In paragraphs 54 to 72 of the judgment under appeal the General Court, in rejecting the first plea in its entirety, held as follows:

'…

64 The Court must also reject the complaint that the imputation to [Elf Aquitaine] of liability for the infringement committed by Arkema is insufficiently substantiated in the … decision [at issue] to justify its being held liable. It follows explicitly from … [that] decision … that the Commission referred to the principles applicable to the imputation to parent companies of liability for infringements committed by their subsidiaries. The fact that the Commission failed to carry out any investigation with respect to [Elf Aquitaine], did not address any request for information to it and did not contact it before issuing the statement of objections cannot call in question that the Commission was entitled to inform it of the objections raised against it for the first time in the statement of objections. [Elf Aquitaine] was in a position to make known its views effectively during the administrative procedure on the reality and the relevance of the facts and circumstances alleged by the Commission in the statement of objections, both in its observations in response to the statement of objections and at the hearing before the hearing officer.

…'

9 In rejecting as unfounded the second plea raised before it, alleging inadequate reasoning, the General Court held as follows:

'85 …, it follows from recital 258 to the … decision [at issue] that "[t]he Commission considers the 98 % shareholding of Elf Aquitaine in Atofina in itself sufficient to impute liability to Elf Aquitaine. The Commission does not consider that the above arguments [put forward by Elf Aquitaine] constitute sufficient evidence that the presumption, arising from the 98 % shareholding, is rebutted". The Commission states in the same recital that "[those] arguments are assertions that do not rebut the presumption that Elf Aquitaine is responsible for the acts of its subsidiary Atofina" and that it does not consider that "documents providing general or background corporate information are sufficient to rebut the presumption".

86 It must be held that, although the Commission expressly asserted in recital 258 to the … decision [at issue] that the 98 % shareholding was sufficient for liability for Atofina's actions to be imputed to Elf Aquitaine, it none the less made clear, later in the same recital, that the evidence adduced by [Elf Aquitaine] did not allow the presumption to be rebutted. Such considerations form part of the Community case-law on the imputation to the parent company of the unlawful conduct of its subsidiary. It follows that the Commission's reasoning is sufficiently explicit and allows those concerned to understand the reasons why it rejected the arguments put forward by Elf Aquitaine.

87 As for the alleged failure to state reasons with respect to the reasons by Elf Aquitaine's arguments were rejected, it must be held that the Commission mentioned, in recital 257 to the … decision [at issue], those arguments as set out by Elf Aquitaine in its response to the statement of objections. The Commission answered those arguments in recitals 258 to 261 to the … decision [at issue].

88 In particular, it should be observed that the Commission considered that Elf Aquitaine had merely made assertions and that documents which it had provided gave only a general overview of the company's business management.

89 Such a response to the arguments put forward by Elf Aquitaine, albeit succinct, makes it possible to understand the reasons why the Commission rejected those arguments. In effect, the Commission responded to the essential points of Elf Aquitaine's arguments by considering all the evidence which Elf Aquitaine adduced.

90 In any event, the Commission was not required to respond to all [Elf Aquitaine]'s complaints. The Commission is not required to adopt a position on all the arguments relied on before it by the parties concerned; rather, it is sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision …'.

10 In paragraphs 97 to 99 of the judgment under appeal the General Court rejected the third plea in law, by which it was alleged that there was a contradiction in the reasoning between the imputation of the infringement to Elf Aquitaine and the recognition that Atofina's involvement in the infringement had been at a low managerial level. In that regard, the General Court considered, in particular, in paragraph 97 of that judgment:

'… the level of responsibility of the personnel who participated in the infringement is immaterial, since it is not the existence of a relationship in which the parent company instigates the commission of the infringement by the subsidiary or, *a fortiori*, the parent company's involvement in the infringement, but the fact that they constitute a single undertaking for the purposes of Article 81 EC that allows the Commission to address the decision imposing fines to the parent company of a group of companies. Accordingly, the fact that the parent company was not aware of the infringement committed by its subsidiary cannot suffice to rule out its liability'.

11 That same statement appears, in different contexts, in paragraphs 52, 167 and 186 of the judgment under appeal.

12 As indicated in paragraph 100 of the judgment under appeal, the fourth plea raised before the General Court, alleging breach of the rules governing the imputability to a parent company of the infringements committed by its subsidiaries, was divided into three parts.

13 By the first part, Elf Aquitaine maintained, in particular, that the Commission does not have discretion to determine the relevant test for the imputability of infringements.

14 The General Court rejected this part of the plea in paragraphs 105 to 109 of the judgment under appeal. In paragraph 105 of that judgment, it stated:

> '… the Commission does not claim to have discretion to impute to one company liability for the infringements committed by another company. Although the Commission stated in recital 260 to the … decision [at issue] that it had "discretion to impute liability to a parent company in such circumstances", it did so only after having emphasised, in recital 258 to the … decision [at issue], that [Elf Aquitaine] had not succeeded in rebutting the presumption relating to its subsidiary's autonomy. Furthermore, it is clear from the … decision [at issue] that the observation set out in recital 260 was intended solely to reject the argument relating to the fact that in previous decisions addressed to Atofina the latter's conduct had not been imputed to the parent company. In addition, at the hearing and in its written pleadings, the Commission stated that it considered that its discretion applied at the stage where, when it is able to impute liability for an infringement to a number of companies in a group, it chooses to impute it to all the companies in the group or only to those that have directly participated in the infringement'.

15 In paragraphs 121 to 126 of the judgment under appeal the General Court rejected as unfounded the second part of the fourth plea raised before it, by which it was alleged that applying the presumption of imputability without specific evidence is inconsistent with the principle that a subsidiary is autonomous.

16 The third part of the fourth plea alleged breach of the evidential rules governing the imputability of infringements within groups of companies. The General Court rejected that part in paragraphs 150 to 176 of the judgment under appeal.

17 In that context, the General Court held in paragraph 157 of the judgment under appeal that:

> '… [Elf Aquitaine]'s complaint that the Commission breached the evidential rules governing the imputability of infringements within groups of companies cannot be upheld. Since at the time of the infringement virtually all the capital was held by Elf Aquitaine, the Commission was correct to presume that there was no autonomy and to take the view that it was for Elf Aquitaine to adduce evidence showing that its subsidiary determined its course of conduct on the market autonomously'.

18 In paragraph 158 of the judgment under appeal the General Court considered that it was in those circumstances that the evidence adduced by Elf Aquitaine in order to rebut the presumption applied by the Commission should be analysed. To that end, the General Court observed, in paragraph 159 of the judgment under appeal, that:

> '… the Commission sets out, in recital 257 to the … decision [at issue], the arguments put forward by Elf Aquitaine in its response to the statement of objections, in particular the arguments that it had never directly or indirectly participated in the MCAA cartel, that it was a "pure holding company", with no operational functions, that Atofina enjoyed complete autonomy in its commercial policy and conduct on the market, and that the documents in the Commission's file referred exclusively to Atofina, with third parties also considering that Atofina alone operated on the market. The

Commission concluded in the following recital that those arguments were mere assertions that did not rebut the presumption that Elf Aquitaine was responsible for the acts of its subsidiary, and observed that documents providing general or background corporate information are not sufficient to rebut that presumption.'

19 Next, in paragraphs 160 to 176 of the judgment under appeal, the General Court rejected a number of arguments which Elf Aquitaine had raised in an attempt to rebut the presumption applied to it in the decision at issue.

20 In paragraphs 184 to 188 and 192 to 199 of the judgment under appeal, the General Court rejected the three parts of the fifth plea, by which it was alleged that the Commission had acted in breach, respectively, of the principle of liability for one's own acts, the principle of legality and the principle of the presumption of innocence.

21 In paragraphs 200 to 207 of the judgment under appeal, the General Court rejected the sixth plea raised before it, alleging breach of the principle of sound administration.

22 As is apparent from paragraph 208 of the judgment under appeal, Elf Aquitaine maintained, by its seventh plea before the General Court, that the Commission's new approach in relation to the test for the imputability to a parent company of infringements committed by the subsidiaries of the group, as applied in the decision at issue, gave rise to legal uncertainty and that the General Court should therefore annul the decision at issue to the extent that it concerned Elf Aquitaine. Elf Aquitaine argued that the criteria applied by the Commission in relation to imputability were different from those applied in the decision at issue vis-à-vis Akzo Nobel NV and Clariant AG and from those applied regarding Atofina in Decision C(2003) 4570 final of 10 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 – Organic Peroxides) (OJ 2005 L 110, p. 44; 'the Organic Peroxides decision').

23 In rejecting this plea, in paragraphs 210 to 216 of the judgment under appeal, the General Court held, in particular, in paragraph 213 of that judgment:

'In the present case, although the Commission decided to impute liability for the infringement found to the undertaking made up of the parent company and its subsidiary, whereas its previous practice had been not to do so, its decision does not breach the principle of legal certainty. … Accordingly, in so far as, in the present case, the Commission was correct to consider that Elf Aquitaine and its subsidiary Arkema together constituted an undertaking, and imposed the fine on both companies jointly and severally, it did not breach the principle of legal certainty.'

24 In paragraph 220 et seq. of the judgment under appeal, the General Court rejected, one after another, the eighth to eleventh pleas raised before it, before concluding, in paragraph 244 of that judgment, that the action before it should be dismissed in its entirety.

Forms of order sought by the parties

25 By its appeal, Elf Aquitaine claims that the Court should:

— principally, set aside the judgment under appeal in its entirety;

— grant the form of order sought at first instance;

— consequently, annul Articles 1(d), 2(c), 3 and 4(9) of the decision at issue;

— in the alternative, annul or reduce, in the exercise of its unlimited jurisdiction, the fine of EUR 45 million imposed jointly and severally on Arkema and Elf Aquitaine by Article 2(c) of the decision at issue and

— in any event, order the Commission to pay the costs, including those incurred by Elf Aquitaine before the General Court.

26 The Commission contends that the Court should:

— dismiss the appeal; and

— order Elf Aquitaine to pay the costs.

The appeal

27 Elf Aquitaine relies principally on five grounds of appeal, alleging, respectively:

— an error of law on the part of the General Court, in that it failed to draw the proper inferences from the criminal nature of penalties connected with the application of Article 101 TFEU;

— breach of the rights of the defence as a result of the misinterpretation of the principles of fairness and equality of arms;

— errors of law in relation to the obligation to state reasons;

— infringement of Article 263 TFEU owing to failure to observe the limits attaching to the review of legality, and

— breach of the rules governing the imputability of penalties in competition law.

28 In the alternative, Elf Aquitaine raises a sixth ground of appeal, alleging that the errors of law and the infringements committed by the General Court must at least result in the annulment or reduction of the fine imposed on Elf Aquitaine.

First ground of appeal: error of law on the part of the General Court in that it failed to draw the proper inferences from the criminal nature of penalties connected with the application of Article 101 TFEU

Arguments of the parties

29 Elf Aquitaine claims that the criminal nature – for the purposes of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR') – of penalties imposed under Article 101 TFEU is indisputable.

30 In those circumstances, in Elf Aquitaine's submission, the General Court – notably in paragraphs 185 to 187 of the judgment under appeal, and also in paragraphs 194 and 197 – misapplied principles guaranteed by Article 6(1) and (2) of the ECHR: the principle of liability for one's own acts, the principle that penalties should be applied solely to the offender, and the principle of the presumption of innocence.

31 Accordingly, Elf Aquitaine claims first, in general terms, that the General Court erred in applying those principles solely to the undertaking consisting of Elf Aquitaine and Arkema, that is to say, to an entity with no legal personality, and not to those two companies as separate legal persons, which alone have the necessary attributes to be able to benefit effectively and specifically from the individual rights devolving from the above principles. In so doing, the General Court rendered the effective and specific nature of the individual rights devolving from those principles meaningless by not allowing the only entities possessing the capacity to do so to claim the benefit of those rights, which ultimately enabled the General Court, according to Elf Aquitaine, to limit access to justice.

32 Secondly, and more specifically, the approach referred to above is claimed to have led the General Court to exclude Elf Aquitaine from the scope of:

— the principle of the presumption of innocence, by denying with respect to Elf Aquitaine any benefit of the preliminary investigation;

— the principle of liability for one's own acts and the principle that penalties should be applied solely to the offender, in asserting, in paragraphs 97, 152, 167 and 186 of the judgment under appeal, that the imputation of liability to a parent company is not based on 'a relationship in which the parent company instigates the commission of the infringement by the subsidiary or, *a fortiori*, the parent company's involvement in the infringement', thus rejecting the relevance of the body of indicia adduced by Elf Aquitaine to show that it had not personally committed any

infringement, that it was not aware that the infringement at issue had been committed and that its subsidiary had autonomy on the market.

33 In addition, Elf Aquitaine maintains that the General Court was not entitled to rely, in paragraphs 210 and 212 of the judgment under appeal, as against a litigant, on a principle that European Union ('EU') competition law must be effective, in order to reinforce the powers of the Commission at the expense of that person's fundamental rights.

34 The Commission contends, in particular, that the first ground of appeal does not correspond with a plea raised at first instance and that it is not specifically directed at any part of the judgment under appeal.

Findings of the Court

35 Under Article 113(2) of the Rules of Procedure of the Court of Justice, the subject-matter of the proceedings before the General Court may not be changed in the appeal. Accordingly, the appellate jurisdiction of the Court of Justice is confined to review of the findings of law on the pleas argued before the General Court. A party cannot therefore change the subject-matter of the proceedings by putting forward for the first time before the Court of Justice a plea in law which it could have raised before the General Court but did not, since that would amount to allowing it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court (see, to that effect, in particular, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59; Case C-266/97 P *VBA* v *VGB and Others* [2000] ECR I-2135, paragraph 79; and Case C-280/08 P *Deutsche Telekom* v *Commission*, [2010] ECR I-9555, paragraph 34). Such a plea must consequently be considered inadmissible in an appeal.

36 In the present case, by its first ground of appeal, Elf Aquitaine claims, not that the General Court denied the 'criminal' nature – within the meaning of the case-law based on Article 6 of the ECHR – of fines imposed under Article 81 EC, but essentially that it breached the fundamental rights accruing to Elf Aquitaine as a legal person held liable for an infringement attracting penalties which, in its view, are of a criminal nature. To the extent that, seen in that light, the present ground of appeal does not change the subject-matter of the proceedings before the General Court, it cannot be rejected as inadmissible (see, by analogy, Case C-229/05 *PKK and KNK* v *Council* [2007] ECR I-439, paragraphs 66 and 67).

37 That said, as may be seen, in particular, from paragraph 27 above and paragraphs 87 and 99 below, the specific criticisms raised by Elf Aquitaine in the context of the present ground of appeal correspond, in substance, to those raised in other grounds of appeal, in particular the second and fifth. As those criticisms are therefore not in fact distinct from those other grounds of appeal, they will not be examined here.

38 Similarly, to the extent that the first ground of appeal generally takes issue with the General Court for having wrongly applied the principle of liability for one's own acts, the principle that penalties should be applied solely to the offender and the principle of the presumption of innocence, not to Elf Aquitaine alone but to the 'undertaking' made up, in particular, of Elf Aquitaine and its subsidiary Arkema, this ground of appeal amounts to a claim that, in relation to Elf Aquitaine, there was a substantive breach of those principles and challenges the General Court's interpretation of the concept of 'undertaking' for the purposes of Article 81 EC. As those criticisms correspond to certain aspects of the second and fifth grounds of appeal, they will be addressed when the Court examines those grounds of appeal.

39 As regards the criticism set out in paragraph 33 above, it is sufficient to observe that, contrary to Elf Aquitaine's claims, the General Court did not assert, in paragraphs 210 and 212 of the judgment under appeal, that a principle that EU competition law must be effective could be invoked against a litigant in order to reduce that person's fundamental rights.

40 As that criticism is thus based on a misreading of the judgment under appeal, it must be rejected as unfounded.

41 In the light of the foregoing, the Court will address the fifth ground of appeal next.

Fifth ground of appeal: breach of the rules governing the imputability of penalties imposed under competition law

First part of the fifth ground of appeal: the criminal nature of penalties imposed under Article 101 TFEU makes it all the more impermissible under EU law to apply to Elf Aquitaine a *de facto* irrebuttable presumption of liability

— Arguments of the parties

42 Elf Aquitaine claims that the criminal nature of the penalties applied in relation to Article 101 TFEU and the institutional amalgamation of powers within the prosecuting authority ought to have operated as an absolute bar to endorsement, by the General Court, of the Commission's approach in presuming liability rather than requiring proof that Elf Aquitaine was involved in the management of its subsidiary.

43 That is said to be all the more true where such a presumption is *de facto* irrebuttable, since the rules governing the burden of proof and the presumption of innocence, in particular, are thereby deprived of any useful effect.

44 In Elf Aquitaine's submission, the irrebuttable nature of the presumption, as interpreted by the General Court, results from a combination of the following factors:

— the assertion in paragraphs 86 and 150 of the judgment under appeal that the size of a shareholding alone is sufficient to mean that the subsidiary can be presumed to lack autonomy;

— the General Court's admission, in paragraph 105 of the judgment under appeal, that the Commission enjoys a discretion to impute liability for the infringement to the parent company where that company owns 98 % or more of the capital of its subsidiary; and

— the way in which the General Court, in paragraph 160 et seq. of the judgment under appeal, assessed the body of indicia provided by Elf Aquitaine in an attempt to demonstrate that it did not interfere in the management of its subsidiary.

45 As regards that last point, in Elf Aquitaine's view, the General Court rejects the probative value of that body of indicia by requiring Elf Aquitaine to adduce proof of its non-interference, which necessarily entails 'proving a negative'. The General Court requires, it is claimed, a '*probatio diabolica*', which is generally not permissible under the EU rules on evidence. In Elf Aquitaine's submission, such a system of irrebuttable proof must be condemned, in particular, in that it constitutes a breach of the right of access to effective judicial review.

46 According to Elf Aquitaine, the General Court unlawfully reversed the burden of proof to be borne by the prosecuting authority, in particular by rejecting one after another the various indicia which Elf Aquitaine had submitted to the Commission, in accordance with the judgment in Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraph 65. Thus, in Elf Aquitaine's submission, the General Court introduced an unacceptable imbalance between Elf Aquitaine, which bore a burden that was impossible to discharge, and the Commission, which could simply rely on a presumption of liability in order to apply criminal penalties, while purportedly enjoying a discretion to apply or not to apply such a presumption.

47 Elf Aquitaine further claims that, contrary to the assertion made in paragraph 171 of the judgment under appeal, the General Court did not assess the elements of the body of indicia taken as a whole. In Elf Aquitaine's submission, in accordance with the requirements deriving from *Akzo Nobel and Others* v *Commission*, that body of indicia related to the organisational, economic and legal links between Elf Aquitaine and its subsidiary that Elf Aquitaine considers to be capable of demonstrating that it and that subsidiary do not constitute a single economic entity. It is submitted that the probative force of that body of indicia results rather from the coherent nature of all the indicia taken together and not necessarily from each of them taken on its own.

48 The Commission contends that, in paragraphs 172 and 173 of the judgment under appeal, the General Court stated that the presumption that a subsidiary has no autonomy is not irrebuttable. The Commission also maintains that the plea raised before the General Court concerning imputability was rejected because, as is said to emerge in particular from paragraphs 163 to 165, 167 and 169 of the judgment under appeal, Elf Aquitaine merely relied on assertions that were unsubstantiated by evidence. For the Commission, the mere fact of having required evidence in support of a bald assertion does not transform the presumption in question into an irrebuttable presumption.

49 According to the Commission, the fact that a parent company holds all or virtually all the capital of a subsidiary means only that it can be presumed, failing proof to the contrary, that those companies form part of the same 'undertaking' for the purposes

of Article 101(1) TFEU. In the present case, Elf Aquitaine cannot take issue with the Commission for concluding that the presumption had not been rebutted when Elf Aquitaine had merely submitted insufficiently substantiated assertions of 'autonomy' or arguments that had no bearing on the question whether the subsidiary and the parent company together formed an economic unit.

50 As regards Elf Aquitaine's argument set out in paragraph 47 above, the Commission maintains that, in reality, Elf Aquitaine appears to be calling into question the assessment of evidence by the General Court, which is inadmissible in an appeal. Moreover, the General Court is said to have carried out an overall assessment. If it did not see fit to evaluate certain alleged indicia, that – in the Commission's submission – was merely because most of those indicia were unsubstantiated.

— Findings of the Court

51 In so far as Elf Aquitaine criticises, in the first part of the fifth ground of appeal, an amalgamation of roles held by the Commission in relation to EU competition policy, it must be held that Elf Aquitaine is attempting, contrary to Article 113(2) of the Rules of Procedure, to change the subject-matter of the proceedings before the General Court. To that extent, this part of the fifth ground of appeal must therefore be held inadmissible, in application of the case-law cited in paragraph 35 above.

52 None the less, the first part of the fifth ground of appeal must be considered admissible to the extent that it is directed, independently of the considerations deriving from that amalgamation, against the application in the judgment under appeal of a presumption that, in substance, a parent company holding all or virtually all the share

capital of its subsidiary can be held liable for conduct of that subsidiary that is contrary to the EU competition rules.

53 In that regard, it should be borne in mind that, according to settled case-law, the concept of 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. On that point, the Court has stated that in this context the term 'undertaking' must be understood as designating an economic unit even if in law that economic unit consists of several natural or legal persons, and that if such an economic entity infringes the competition rules, it is for that entity, consistently with the principle of personal liability, to answer for that infringement (see Case C-90/09 P *General Química and Others* v *Commission* [2011] ECR I-1, paragraphs 34 and 35 and the case-law cited, and Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, [2011] ECR I-2239, paragraph 95).

54 It is clear from settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where that subsidiary, despite having a separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, instructions given to it by the parent company, regard being had in particular to the economic, organisational and legal links between those two legal entities (see *Akzo Nobel and Others* v *Commission*, paragraph 58, and *General Química and Others* v *Commission*, paragraph 37).

55 In such a situation, since the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of Article 81 EC, the Commission may address a decision imposing fines to the parent company,

without having to establish the personal involvement of the latter in the infringement (see *Akzo Nobel and Others* v *Commission*, paragraph 59, and *General Química and Others* v *Commission*, paragraph 38).

56 In that regard, the Court has stated that, in the specific case where a parent company has a 100 % shareholding in a subsidiary which has infringed the competition rules of the European Union: (i) the parent company is able to exercise a decisive influence over the conduct of the subsidiary and (ii) there is a rebuttable presumption that the parent company does in fact exercise such a decisive influence ('the presumption of actual exercise of decisive influence') (see, inter alia, Case 107/82 *AEG-Telefunken* v *Commission* [1983] ECR 3151, paragraph 50; *Akzo Nobel and Others* v *Commission*, paragraph 60; *General Química and Others* v *Commission*, paragraph 39; and *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, paragraph 97).

57 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 actually exercises decisive influence over the subsidiary's commercial policy. The Commission will then be able to regard the parent company as jointly and severally liable for 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 Case 286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraph 29; *Akzo Nobel and Others* v *Commission*, paragraph 61; *General Química and Others* v *Commission*, paragraph 40; and *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, paragraph 98).

58 It also emerges from the case-law that, in order to ascertain whether a subsidiary determines its conduct on the market independently, account must be taken of all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company, which may vary from case to case and cannot therefore

be set out in an exhaustive list (see, to that effect, *Akzo Nobel and Others* v *Commission*, paragraphs 73 and 74).

59 The purpose of the presumption of actual exercise of decisive influence is, in particular, to strike a balance between, on the one hand, the importance of the objective of combatting conduct contrary to the competition rules, in particular to Article 101 TFEU, and of preventing a repetition of such conduct, and, on the other hand, the importance of the requirements flowing from certain general principles of EU law such as the principle of the presumption of innocence, the principle that penalties should be applied solely to the offender, the principle of legal certainty and the principle of the rights of the defence, including the principle of equality of arms. It is for that reason, among others, that, as is clear from the consistent case-law cited in paragraph 56 above, the presumption is rebuttable.

60 It should be borne in mind, moreover, that that presumption is based on the fact that, save in quite exceptional circumstances, a company holding all the capital of a subsidiary can, by dint of that shareholding alone, exercise decisive influence over that subsidiary's conduct and, furthermore, that it is within the sphere of operations of those entities against whom the presumption operates that evidence of the lack of actual exercise of that power to influence is generally apt to be found.

61 In those circumstances, if, in order to rebut that presumption, it were sufficient for a party concerned to put forward mere unsubstantiated assertions, the presumption would be largely robbed of its usefulness.

62 It follows from the case-law, moreover, that a presumption, even where it is difficult to rebut, remains within acceptable limits so long as it is proportionate to the legitimate aim pursued, it is possible to adduce evidence to the contrary and the rights of the

defence are safeguarded (see, to that effect, Case C-45/08 *Spector Photo Group and Van Raemdonck* [2009] ECR I-12073, paragraphs 43 and 44, and EUR. Court H.R., the *Janosevic v. Sweden* judgment of 23 July 2002, *Reports of Judgments and Decisions 2002-VII*, § 101 et seq.).

63 In the present case, it is apparent from paragraphs 46 and 47 above that Elf Aquitaine does not challenge as such the lawfulness of the presumption of actual exercise of decisive influence as set out in paragraphs 56 and 57 above. Nor does it challenge the applicability, in the circumstances of the present case, of such a presumption where a parent company owns 98 % of the capital of its subsidiary.

64 On the other hand, Elf Aquitaine's arguments as set out in paragraphs 43 to 47 above rest on the assertion that the General Court in reality applied an irrebuttable version of that presumption.

65 Contrary to Elf Aquitaine's contention, however, the approach taken by the General Court in the judgment under appeal towards the evidence adduced by Elf Aquitaine does not, taken as a whole, constitute the imposition of a *probatio diabolica*. As stated in paragraph 58 above, it is for entities wishing to rebut the presumption that they have actually exercised decisive influence to adduce all factors relating to the economic, organisational and legal links which tie the subsidiary in question to the parent company that they consider to be capable of demonstrating that those two companies did not constitute a single economic entity.

66 In that regard, the mere fact that an entity does not, in a given case, produce evidence capable of rebutting the presumption of actual exercise of decisive influence does not mean that that presumption cannot be rebutted in any circumstances.

67 That being so, to the extent that the criticisms set out in the third indent of paragraph 44 above and also in paragraphs 45 to 47 are, in substance, that the General Court's assessment of the arguments put forward by Elf Aquitaine demonstrates, solely by virtue of its conclusion – a negative one from Elf Aquitaine's perspective – that a *probatio diabolica* was required, they must be rejected.

68 To the extent that, on the other hand, the true purpose underlying those criticisms could be to have this Court undertake a fresh appraisal of the facts found by the General Court, they must be held to be inadmissible in an appeal. It is settled law that the General Court has exclusive jurisdiction, first, to find the facts, save where the substantive inaccuracy in its findings is apparent from the documents submitted to it, and, second, to assess those facts. That appraisal does not, save where the clear sense of the evidence has been distorted, constitute a point of law which is amenable, as such, to review by the Court of Justice (see, inter alia, Case C-425/07 P *AEPI* v *Commission* [2009] ECR I-3205, paragraph 44 and the case-law cited).

69 To the extent that, in the alternative, those same criticisms may be interpreted as claiming that the General Court misconstrued the scope of its jurisdiction to review the legality of measures, they coincide with the fourth ground of appeal and, accordingly, there is no need to examine them independently in the context of the present part of the fifth ground of appeal.

70 As regards, moreover, the criticism set out in the first indent of paragraph 44 above, that the size of the shareholding in the subsidiary is in itself sufficient to trigger the presumption of actual exercise of decisive influence, it should be observed that the fact that it is difficult to adduce the evidence necessary to rebut a presumption does not in itself mean that that presumption is in fact irrebuttable, especially where the entities against which the presumption operates are those best placed to seek that evidence within their own sphere of activity.

71 As regards the second factor invoked by Elf Aquitaine to demonstrate the *de facto* irrebuttable nature of the presumption applied by the General Court, set out in the second indent of paragraph 44 above, it should be observed that, even on the assumption that the General Court accepted, in paragraph 105 of the judgment under appeal, that the Commission enjoys the discretionary power mentioned in that second indent, such an admission, or such a power, would have no bearing on the question whether the presumption applied in the judgment under appeal is irrebuttable. It follows that that line of argument cannot succeed.

72 In the light of the foregoing, the first part of the fifth ground of appeal must be rejected.

Second part of the fifth ground of appeal: the presumption of liability applied by the General Court, based on the concept of 'undertaking', renders void the principle of the autonomy of legal persons

— Arguments of the parties

73 Elf Aquitaine claims that the judgment under appeal breaches the principle of subsidiarity, as it significantly interferes with the principle of the autonomy of legal persons, one of the legal foundations of company law of the Member States.

74 In Elf Aquitaine's submission, the General Court erred in law by claiming that it was by reference to the *undertaking* that it was at liberty to decide not to apply either the principle of autonomy or the rights of the defence to the legal person forming part of that undertaking.

75 Furthermore, it is submitted that the General Court erred in law in considering that it was unnecessary to require the Commission to provide in its decision solid indicia that Elf Aquitaine's subsidiary had no autonomy on the market.

76 The Commission contends that the principle of subsidiarity was not invoked before the General Court and that breach of that principle accordingly constitutes a new plea, which is inadmissible in an appeal. In any event, as regards the merits, the principle of subsidiarity is not applicable in the present case, as the European Union has exclusive jurisdiction in the matter.

77 In addition, the concept of 'undertaking' in competition law is stated to be an autonomous concept of EU law. What is more, the 'autonomy' of a company is not, according to the Commission, incompatible with the presumption formulated in the case-law that a parent company actually controls certain of its subsidiaries.

— Findings of the Court

78 To the extent that the present part of the ground of appeal alleges breach of the principle of subsidiarity, it must be declared inadmissible, in application of the case-law cited in paragraph 35 above.

79 Next, the criticism set out in paragraph 74 above must be rejected, since it relates to a proposition that the General Court did not express, or even suggest, in the judgment under appeal.

80 As regards the argument set out in paragraph 75 above, moreover, it follows from paragraphs 56 and 57 above that the Commission is not required, in order to apply the presumption of actual exercise of decisive influence in a given case, to provide indicia over and above those demonstrating the applicability and operation of that presumption (see also, to that effect, *Akzo Nobel and Others* v *Commission*, paragraph 62). Accordingly, the General Court did not err in not requiring, independently of the evidence relating to the operation of the presumption at issue, additional solid indicia of the subsidiary's lack of autonomy on the market.

81 Furthermore, in so far as the argument set out in paragraph 75 above alleges a failure to find fault with the reasoning given in the decision at issue with respect to Elf Aquitaine, it corresponds to the third ground of appeal. There is thus no need to examine it in the context of the present part of the fifth ground of appeal.

82 The second part of the fifth ground of appeal must therefore be rejected.

Third part of the fifth ground of appeal: the discretion conferred on the Commission to apply the presumption of liability is inconsistent with the principles of legality and legal certainty

— Arguments of the parties

83 Elf Aquitaine claims that the judgment under appeal fails to satisfy the requirements of clarity of the law and of foreseeability, entailed by both the principle of legality and the principle of legal certainty. In Elf Aquitaine's submission, it emerges from

paragraphs 97, 152, 167, 186 and 194 of the judgment under appeal that, according to the General Court, there are two systems of liability in relation to infringements of competition law. Under the first, the parent company is penalised, as co-author, for direct participation in an infringement of competition law, such participation being 'the manifestation of [its] own will'. Under the second, the parent company is penalised, as an accomplice, for the unlawful conduct of its wholly-owned subsidiaries, but without any need for an actual act of participation establishing the parent company's complicity – a factor which leads that regime to resemble a system of liability for the acts of others.

84 According to Elf Aquitaine, if such a system of liability for the acts of others existed under EU competition law, which it does not, it would have to be perfectly defined, and applied in a clear and consistent manner by the institutions; yet the discretion recognised by the General Court in paragraph 105 of the judgment under appeal is irreconcilable with that requirement for clarity and consistency.

85 In that regard, Elf Aquitaine takes issue with what it describes as the 'double confusion' introduced by the General Court in paragraph 213 of the judgment under appeal, that is to say: (i) between the imputation of liability to the parent company and that company's liability for the payment of the fine and (ii) between the imputation of liability and the setting of fines, in that the General Court is claimed to use the Commission's discretion in relation to fines to justify its purported discretion to impute liability.

86 The Commission contends that in the judgment under appeal the General Court does not leave any margin of discretion to the Commission for the purposes of assessing whether the conditions for imputing liability for an infringement to a parent company are satisfied. 'Discretion', it submits, does not come into play until the stage at which, if the Commission is in a position to impute liability for an infringement to several companies in a group, it chooses to impute liability to all the companies in the group or only to some of them.

— Findings of the Court

87 Contrary to the assertions made by Elf Aquitaine, both in the context of the present part of the fifth ground of appeal and in the context of the first ground of appeal submitted to this Court, the General Court did not, in paragraphs 97, 152, 167, 186 and 194 of the judgment under appeal, establish 'a system of liability for the acts of others' under EU competition law.

88 In that regard, it should be borne in mind – as the General Court indicated in substance in paragraphs 97, 152, 167 and 186 of the judgment under appeal and as follows, moreover, from paragraphs 53 to 55 above – that, where a parent company and its subsidiary form part of a single 'undertaking' for the purposes of Article 101 TFEU, the factor which entitles the Commission to address the decision imposing fines to the parent company is not necessarily a parent-subsidiary relationship in which the parent company instigates the infringement; nor, *a fortiori*, is it because of the parent company's involvement in the infringement; rather, it is because the companies concerned constitute a single undertaking for the purposes of Article 101 TFEU.

89 Nor, furthermore – as can be seen from paragraph 105 of the judgment under appeal – did the General Court recognise a 'discretion to impute to a company liability for the infringements committed by another company', as asserted by Elf Aquitaine in the line of criticism set out in paragraph 84 above. In paragraph 105 of the judgment under appeal, the General Court pointed out in essence that the observation set out in recital 260 to the decision at issue was intended solely to refute the argument based on the fact that, in earlier decisions addressed to Atofina, Atofina's conduct had not been imputed to its parent company. By merely observing, in substance, that the Commission did not claim to enjoy a discretion in the terms with which Elf Aquitaine took issue before it, the General Court – contrary to the suggestion made by Elf Aquitaine in the present part of the fifth ground of appeal – did not assert that there exists in EU competition law a 'system of liability for the acts of others'.

90 Accordingly, the argument set out in paragraphs 83 and 84 above rests on incorrect premisses and must be rejected.

91 Similarly, it follows that, to the extent that the criticism set out in paragraph 85 above is not inadmissible for want of clarity, it should in any event be rejected, as it goes hand in hand with the argument set out in paragraphs 83 and 84 above.

92 The third part of the fifth ground of appeal must therefore be rejected.

Fourth part of the fifth ground of appeal: the presumption of liability is incompatible with the principle of equal treatment

Arguments of the parties

93 Elf Aquitaine claims that there has been a breach of the principle of equal treatment, in that the General Court asserted that Elf Aquitaine had been treated in the same way as the other parent companies referred to in the decision at issue.

94 In the Commission's submission, the mere fact that, as well as referring to the presumption that a parent company exercises control over its wholly-owned subsidiaries,

the decision at issue set out further indicia against the parent company of the Akzo Nobel group does not mean that the Commission or the General Court discriminated against Elf Aquitaine. For the Commission, it means simply that the indicia on which liability for an infringement could be imputed to Akzo Nobel NV were 'stronger', but that does not mean that the evidence on which liability for the unlawful conduct of Atofina could be imputed to Elf Aquitaine was insufficient.

— Findings of the Court

95 As stated in paragraph 63 above, Elf Aquitaine does not challenge, as such, in the present case either the lawfulness of the presumption of actual exercise of decisive influence, set out in paragraphs 56 and 57 above, or the applicability of such a presumption in a case in which a parent company owns 98 % of the capital of its subsidiary.

96 Yet it follows from paragraphs 56, 57 and 80 above that the implementation of the presumption of actual exercise of decisive influence is not conditional upon the production of additional indicia relating to the actual exercise of influence by the parent company (see also, to that effect, *Akzo Nobel and Others* v *Commission*, paragraph 62).

97 In those circumstances, the mere fact that, in the case of some parent companies, but not all, the Commission had such additional indicia in its possession and mentioned them in the decision at issue does not constitute a legal error with which the General Court was required to find fault in the judgment under appeal.

98 It follows that the fourth part of the fifth ground of appeal, and in consequence the fifth ground of appeal in its entirety, must be rejected.

Second ground of appeal: breach of the rights of the defence as a result of the misinterpretation of the principles of fairness and equality of arms

99 By its second ground of appeal, Elf Aquitaine claims that paragraph 64 of the judgment under appeal is vitiated by an error of law in that the General Court fails at that point to observe the principle of equality of arms. As expressly indicated in the appeal itself, this part is thus associated with the complaint, raised in the context of the first ground of appeal, which is set out in the first indent of paragraph 32 above.

100 In substance, the second ground of appeal is divided into two parts, which fall to be examined together.

Arguments of the parties

101 The first part of the second ground of appeal alleges breach of Elf Aquitaine's rights of defence from the very first stage of the procedure.

102 In Elf Aquitaine's submission, the General Court denied, with regard to its rights of defence, any benefit of the investigation carried out prior to the issue of the statement of objections. Elf Aquitaine takes issue with the General Court for accepting that the principle of equality of arms had been observed even though Elf Aquitaine had first been informed of the suspicions against it when the statement of objections was issued.

103 According to Elf Aquitaine, there are three reasons why such a failure to uphold its rights of defence at the very first stage of the administrative procedure is impermissible:

— first of all, the criminal nature of penalties connected with the application of Article 101 TFEU does not permit the General Court to consider it sufficient for the guarantees flowing from Article 6 of the ECHR to apply with effect from the issue of the statement of objections and not during the preliminary investigation stage;

— next, the right to be informed and be heard at the beginning of the investigation was, according to Elf Aquitaine, all the more pressing given that Elf Aquitaine had not been involved in the infringement and that it was unaware of the infringement's very existence at the time when it was committed; and

— lastly, as Elf Aquitaine was not advised of the investigation and was not informed of the suspicions against it until the stage of the statement of objections, it was not in a position to take the necessary measures to prepare its defence properly. In that regard, the General Court did not respond to the arguments put forward during the hearing, whereby Elf Aquitaine claimed that it might have allowed possible proof of the autonomy of its subsidiary to disappear during the four years of investigation that preceded the statement of objections, which would have irremediably compromised its rights of defence.

104 The Commission contends that, as it did not, in the present case, undertake any investigative action with respect to Elf Aquitaine, it was not required to communicate its suspicions to Elf Aquitaine during the preliminary investigation.

105 Furthermore, the Commission contends in particular that, in any event, even if the alleged irregularity on which Elf Aquitaine relies were made out, it would still be necessary to determine whether such an irregularity was capable of actually affecting Elf Aquitaine's rights of defence in the procedure at issue. As it is, the possibility open to Elf Aquitaine to attempt to rebut the presumption at issue, or to maintain that that presumption was not applicable to it, was wholly unaffected by the fact that it was only upon receiving the statement of objections that Elf Aquitaine became aware that it was under suspicion. According to the Commission, as the purported loss of the evidence of its subsidiary's autonomy during that period was not mentioned until the hearing, the argument based on that loss is inadmissible. Nor is such a claim supported by any evidence.

106 By the second part of the second ground of appeal, it is alleged that the need for an impartial investigation was denied.

107 Elf Aquitaine submits in that regard that the General Court ruled out even the necessity for a preliminary investigation to be undertaken impartially by the Commission.

108 In Elf Aquitaine's submission, such a denial is unacceptable, since, in the first place, an impartial investigation is the preliminary step deemed necessary in order to enable the Commission, where appropriate, to issue a procedural measure such as a statement of objections.

109 In the second place, by denying the need for such an investigation, the General Court – in Elf Aquitaine's submission – disregarded the requirement that the investigation be conducted impartially, a requirement flowing from, among others, the principle of equality of arms. By taking that position, the General Court – in breach of the right to a fair hearing and of the principle of equality – abrogated responsibility for undertaking any check that the investigation had been conducted impartially. The fact that the impartiality of the Commission's investigation did not come under any scrutiny from the General Court resulted, according to Elf Aquitaine, from the General

Court's endorsement of the decision to apply the presumption of liability against Elf Aquitaine from the very beginning of the investigation, indeed from the time when the infringement was first reported to the Commission.

110 In that regard, Elf Aquitaine claims that the necessarily biased nature of the investigation against it stems from the concentration, within the Commission's Directorate-General for Competition, of the three separate powers of investigation, prosecution and decision. According to Elf Aquitaine, such an amalgamation of powers within the Commission is unacceptable, given what is now clearly the criminal nature of penalties connected with the application of Article 101 TFEU.

111 For its part, the Commission contends that Elf Aquitaine has not succeeded in showing that the General Court refused to review the impartiality of the Commission's investigation. As regards Elf Aquitaine's argument based on the concentration of powers within the Commission (see paragraph 110 above), the Commission claims, primarily, that it is inadmissible and, in the alternative, that it is in any event unfounded.

Findings of the Court

112 According to consistent case-law, and as confirmed in Article 6(3) TEU, fundamental rights are an integral part of the general principles of law whose observance the Court ensures. The Court has thus repeatedly held that respect for the rights of the defence in the conduct of administrative procedures relating to competition policy

constitutes a general principle of EU law (see, inter alia, Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraph 26 and the case-law cited).

113 As regards a proceeding pursuant to Article 81 EC, it follows from the case-law that the administrative procedure before the Commission is divided into two distinct and successive stages, each having its own internal logic, namely a preliminary investigation stage and an inter partes stage. The preliminary investigation stage, covering the period up to notification of the statement of objections, is intended to enable the Commission to gather all the relevant evidence confirming that there has or has not been an infringement of the competition rules and to adopt an initial position on the course which the procedure is to follow. The inter partes stage, which covers the period from notification of the statement of objections to adoption of the final decision, must enable the Commission to reach a final decision on the alleged infringement (see, inter alia, to that effect, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraphs 181 to 183, and *Prym and Prym Consumer* v *Commission*, paragraph 27).

114 As regards the preliminary investigation stage, the Court has stated that the starting point of that stage is the date on which the Commission, in exercise of the powers conferred on it by the EU legislature, takes measures that suggest that an infringement has been committed and that have a significant impact on the situation of the undertakings suspected (see *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 182, and Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraph 38).

115 It is not until the beginning of the administrative inter partes stage that the entity concerned is informed, via the statement of objections, of all the essential elements on which the Commission is relying at that stage of the procedure. Consequently, it is only after the statement of objections has been issued that the undertaking concerned can rely in full on its rights of defence (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraphs 315 and 316; *Nederlandse*

Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v *Commission*, paragraph 47; and Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 59).

116 That said, the measures of inquiry adopted by the Commission during the preliminary investigation stage – in particular, the measures of investigation and requests for information – may in certain situations suggest, by their very nature, the allegation that an infringement of the EC competition rules has been committed and can have a significant impact on the situation of the undertakings concerned.

117 It is therefore important to ensure that the rights of the defence are not irremediably impaired during that stage of the administrative procedure since the measures of inquiry adopted may be decisive in assembling evidence of the unlawful nature of conduct engaged in by undertakings, for which they may be liable (see, to that effect, Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 15, and Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/99 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 63).

118 Accordingly, as regards compliance with the 'reasonable time' requirement, the Court has held, in substance, that the appraisal of the source of any interference with the effective exercise of the rights of the defence must not be confined to the inter partes stage of the administrative procedure, but must extend to the entire procedure and be carried out by reference to its total duration (see, to that effect, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, paragraphs 49 and 50, and Case C-113/04 P *Technische Unie* v *Commission* [2006] ECR I-8831, paragraphs 54 and 55).

119 Similar considerations apply to the question whether – and, if so, to what extent – the Commission is required to provide the undertaking concerned, as of the preliminary investigation stage, with certain information on the subject-matter and purpose of the investigation, which would enable its defence in the inter partes stage to be effective.

120 That does not mean, however, that, before the first measure is taken against a given entity, the Commission is under a duty, as a matter of routine, to warn that entity even of the mere possibility of measures of investigation or of proceedings based on EU competition law, especially if, by such a warning, the effectiveness of the Commission's investigation might be unduly compromised (see, to that effect, *Dalmine* v *Commission*, paragraph 60).

121 In addition, the Court has held that the principle of personal liability does not prevent the Commission from considering first of all the possibility of penalising the company which infringed the competition rules before considering the possibility that the infringement might be imputed to the parent company (see Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraph 82).

122 Thus, provided that the entity to which a statement of objections is addressed is put in a position to submit its views effectively during the administrative inter partes procedure as to the reality and the relevance of the facts and circumstances alleged by the Commission, the Commission – contrary to Elf Aquitaine's contention – is not required as a matter of principle to address a measure of investigation to that entity before issuing the statement of objections.

123 That conclusion cannot be called into question in the present case by the arguments set out in paragraphs 109 and 110 above.

124 Indeed, the argument set out in paragraph 110 above must be considered inadmissible, for the same reasons as those stated in paragraphs 35 and 51 above.

125 Similarly, so far as the argument set out in paragraph 109 above is concerned, while it is true that it emerges from the file presented to the General Court that Elf Aquitaine claimed at first instance that no preliminary measure of investigation had been adopted directly in its regard, it does not emerge from that file that Elf Aquitaine claimed that the General Court should find fault with an alleged lack of impartiality in the Commission's investigation of the case or the absence of a measure of investigation as such.

126 It follows that the argument set out in paragraph 109 above must be rejected as inadmissible, in application of the case-law cited in paragraph 35 above.

127 As regards the argument set out at the first indent of paragraph 103 above, it is sufficient to observe that it relates to a consideration which the General Court did not express or suggest in the judgment under appeal and that it must therefore be rejected.

128 Next, as regards the argument set out at the second indent of paragraph 103 above, it follows from paragraphs 88 and 121 above that the principle of personal liability does not prevent the Commission, after it has initially considered penalising the company that committed an infringement of the competition rules, from considering the possibility that the infringement might be imputed to the parent company.

129 As regards, lastly, the argument set out at the third indent of paragraph 103 above, even on the assumption that – notwithstanding the case-law cited in paragraph 35 above – that argument is admissible in that it is the consequence of a plea set out in the application at first instance being enlarged upon at the hearing before the General Court, it must be held that it consists of mere assertions that are unsupported by any specific evidence.

130 That general, abstract and vague argument cannot ultimately be capable of establishing in the present case the reality of a breach of the rights of the defence, which must be examined by reference to the specific circumstances of each case (see, by analogy, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, paragraphs 52 to 61).

131 In the light of the foregoing, the second ground of appeal must be rejected.

Third ground of appeal: errors of law in relation to the obligation to state reasons

First part of the third ground of appeal: an error of law relating to the concept of a statement of reasons and to a material inaccuracy in the findings of the General Court, in that it considered that the terse reasoning of the decision at issue to be sufficient

Arguments of the parties

132 By the first part of its third ground of appeal, Elf Aquitaine claims, in the first place, that the General Court wrongly relied on a misconception of the obligation to state reasons.

133 Elf Aquitaine submits that the General Court ought to have found that the grounds given for the decision at issue concerning the imputability to Elf Aquitaine of the infringement at issue were insufficient to enable it to ascertain whether that decision was well founded or whether it might be vitiated by substantive or procedural defects.

134 Elf Aquitaine submits that, contrary to the General Court's findings in paragraphs 81, 82 and 89 of the judgment under appeal, it was not sufficient in the present case that Elf Aquitaine might be able to understand from the decision at issue simply that the Commission was claiming that Elf Aquitaine had exercised decisive influence over Atofina's business policy. On the contrary, as the decision – unlike the statement of objections – was not a preparatory act, the grounds given ought to have been sufficiently precise to enable Elf Aquitaine to know the reasons why that decision had been adopted and to evaluate the arguments set out therein in order to decide whether or not to bring an action, and also to enable the General Court to exercise its review of legality should the decision at issue be brought before it.

135 Indeed, according to Elf Aquitaine, there was all the more reason for the grounds stated to be precise, given that (i) Elf Aquitaine had not, before receiving the statement of objections, been alerted to the proceedings brought against it; (ii) those proceedings were based exclusively on a presumption of liability that was wholly uncorroborated by specific factual considerations and proved impossible to rebut; (iii) the Commission departed from its normal decisional practice; and (iv) the decision at issue had the effect of undermining several of Elf Aquitaine's fundamental rights.

136 As regards the argument listed under (iii) in paragraph 135 above, Elf Aquitaine claims, in particular, that the Commission recognised, in recital 574 to its Decision of 1 October 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/C.39181 – Candle Waxes) (summary published in OJ 2009 C 295, p. 17), that the decision at issue marks a departure from its previous

decisional practice, in particular with respect to Elf Aquitaine. In that regard, Elf Aquitaine also refers to the Organic Peroxides decision (cited in paragraph 22 above), in which – in circumstances very similar to those of the present case – no objection was addressed to it for the collusive conduct of its Atofina subsidiary.

137 Elf Aquitaine claims, in the second place, that the General Court's finding that the reasons given for the decision at issue were sufficient is based on materially inaccurate findings of fact, inasmuch as those reasons are not only succinct but, in Elf Aquitaine's submission, insufficient, if not totally absent.

138 First, the decision at issue wholly failed to address certain specific arguments raised in response to the statement of objections.

139 Secondly, in the decision at issue the Commission merely rejected en bloc and without explanation Elf Aquitaine's remaining arguments, generally and indiscriminately. For example, the Commission does not state which documents, from among those submitted to it, provided in its view merely 'general or background corporate information [on Elf Aquitaine]'.

140 Accordingly, in Elf Aquitaine's submission, the General Court ought to have annulled the decision at issue for failure to provide an adequate statement of reasons.

141 The Commission contends, first of all, that the present part of the ground of appeal must be declared inadmissible, since it does not precisely identify the contested elements of the judgment under appeal or the legal arguments relied on in support of this part.

142 The Commission maintains, next, that the case-law and the Commission's decisional practice as regards the liability of parent companies were well known at the outset of the procedure that culminated in the decision at issue.

143 According to the Commission, although, in terms of relevant facts, there do not seem to have been any significant objective differences between the procedure culminating in the decision at issue and the procedure leading up to the Organic Peroxides decision, the difference in the Commission's approach in the decision at issue can be explained, first, by the fact that the judgment of the General Court in Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071 was delivered between the date on which the statement of objections relating to the Organic Peroxides decision was sent and the date on which the statement of objections relating to the decision at issue was sent and, second, by a change of approach on the Commission's part at some time around the years 2002 and 2003.

Findings of the Court

144 According to settled case-law, it follows from Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 112(1)(c) of the Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (see, inter alia, Case C-407/08 P *Knauf Gips* v *Commission* [2010] ECR I-6375, paragraph 43 and the case-law cited).

145 Contrary to the Commission's assertion set out in paragraph 141 above, the present part satisfies the requirements of that case-law and is admissible.

146 As to the merits, it should be borne in mind at the outset that the obligation laid down in Article 253 EC to state adequate reasons is an essential procedural requirement that must be distinguished from the question whether the reasoning is well founded, which goes to the substantive legality of the measure at issue (see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67, and Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 35).

147 In that vein, the statement of reasons required under Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Court of the European Union to exercise its jurisdiction to review legality (see *France* v *Commission*, paragraph 35, and *Deutsche Telekom* v *Commission*, paragraph 130).

148 Thus, in the context of individual decisions, it is settled case-law that the purpose of the obligation to state the reasons on which an individual decision is based is, in addition to permitting review by the Courts, to provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged (see, inter alia, to that effect, Case C-199/99 P *Corus UK* v *Commission* [2003] ECR I-11177, paragraph 145, and 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 Rørhindistri and Others* v *Commission* [2005] ECR I-5425, paragraph 462).

149 Accordingly, the statement of reasons must, in principle, be notified to the person concerned at the same time as the decision adversely affecting him. The absence of reasoning cannot be legitimised by the fact that the person concerned becomes aware of the reasons for the decision during the procedure before the Courts of the European Union (see Case 195/80 *Michel* v *Parliament* [1981] ECR 2861, paragraph 22; Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031, paragraph 84; Joined Cases C-199/01 P and C-200/01 P *IPK-München and Commission* [2004] ECR I-4627, paragraph 66; and *Dansk Rørhindistri and Others* v *Commission*, paragraph 463).

150 It is settled case-law that the requirement to state reasons must be assessed by reference to the circumstances of the case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, inter alia, *Commission* v *Sytraval and Brink's France*, paragraph 63; Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraphs 166 and 178; and *Deutsche Telekom* v *Commission*, paragraph 131).

151 It is also settled case-law that the statement of the reasons for a measure must be logical and contain no internal inconsistency that would prevent a proper understanding of the reasons underlying the measure (see, by analogy, *Bertelsmann and Sony Corporation of America* v *Impala*, paragraph 169 and the case-law cited).

152 Where, as in the present case, a decision taken in application of the EU competition law rules relates to several addressees and raises a problem with regard to the imputability of the infringement, it must include an adequate statement of reasons with respect to each of its addressees, in particular those of them who, according to the decision, must bear the liability for the infringement. Accordingly, in respect of a parent company held jointly and severally liable for the infringement committed by its subsidiary, such a decision must in principle contain a detailed statement of reasons for imputing the infringement to that company (see, by analogy, Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11005, paragraphs 93 to 101).

153 As regards, more specifically, a Commission decision which relies exclusively, with respect to certain addressees, on the presumption that they actually exercised decisive influence, the Commission is in any event required – if it is not to render that

presumption in reality irrebuttable – to explain adequately to those addressees the reasons why the elements of fact and of law put forward did not suffice to rebut that presumption. The Commission's duty to state reasons for its findings on that point flows primarily from the fact that that presumption is open to rebuttal, for the purposes of which it is necessary for those concerned to produce evidence relating to the economic, organisational and legal links between the companies concerned.

154 That said, it should be borne in mind that the Commission is not required in such a context to adopt a position on factors which are manifestly irrelevant, unimportant or clearly ancillary (see, by analogy, *Commission* v *Sytraval and Brink's France*, paragraph 64; Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others* [2008] ECR I-4777, paragraph 89; and *Bertelsmann and Sony Corporation of America* v *Impala*, paragraph 167).

155 It is also apparent from the case-law that, although a decision of the Commission which fits into a well-established line of decisions may be reasoned in a summary manner (for example by a reference to those decisions), the Commission must, if a decision goes appreciably further than the previous decisions, provide a fuller account of its reasoning (see, inter alia, Case 73/74 *Groupement des fabricants de papiers peints de Belgique and Others* v *Commission* [1975] ECR 1491, paragraph 31, and Case C-295/07 P *Commission* v *Département du Loiret* [2008] ECR I-9363, paragraph 44).

156 By the present part of the third ground of appeal, Elf Aquitaine maintains, in essence, that the General Court ought to have found fault with the inadequacy of the statement of reasons that vitiates the decision at issue in so far as it concerns Elf Aquitaine.

157 As is clear from paragraph 87 of the judgment under appeal and from the material in the General Court file, the arguments put forward by Elf Aquitaine in response to the statement of objections in order to rebut the presumption applied by the Commission

are listed succinctly in recital 257 to the decision at issue. The position which the Commission adopted in respect of those matters is set out in recitals 258 to 271 to that decision.

158 With respect to those recitals, the General Court – after setting out the essence of recital 258 to that decision in paragraph 85 of the judgment under appeal – states, in paragraph 86, that 'although the Commission expressly asserted, [in that recital], that the 98 % shareholding was sufficient for liability for Atofina's acts to be imputed to Elf Aquitaine, it none the less made clear, later in that recital, that the evidence adduced by [Elf Aquitaine] did not allow that presumption to be rebutted'.

159 While it is true that in recitals 259 to 271 to the decision at issue the Commission responds to some of the arguments raised before it by Elf Aquitaine, the fact remains that those recitals fail to respond to several other arguments, in respect of which the only position taken in the decision at issue is to be found in recital 258. In accordance with the case-law set out in paragraphs 54 to 58 above, those arguments related in particular to economic, organisational and legal aspects with a view to demonstrating that, at the time of the facts at issue, Atofina determined its conduct on the market autonomously and did not carry out, in all material respects, instructions given to it by its parent company.

160 The arguments in question went, in substance, as follows:

— Elf Aquitaine is merely a 'pure holding company' without operational functions, within a group characterised by the decentralised management of its subsidiaries;

— the management of Atofina's activities on the market was not subject to instructions from Elf Aquitaine;

— Atofina did not inform Elf Aquitaine of its actions on the market;

— Atofina had the power to enter into contracts without Elf Aquitaine's prior authorisation;

— Atofina was financially independent of Elf Aquitaine;

— Atofina always defined its legal strategy autonomously; and

— third parties perceived Atofina as being distinct from Elf Aquitaine.

161 Admittedly, as is apparent from paragraphs 150 and 154 above, and also as the General Court states in paragraph 90 of the judgment under appeal, the Commission is not necessarily required to adopt a position on all the arguments raised before it by interested parties.

162 However, it is apparent, too, from paragraph 150 above that the requirement to state reasons must be assessed by reference to the circumstances of the case.

163 According to Elf Aquitaine, the decision at issue and the procedure of which it forms part are characterised, in particular, by the fact that that decision – notably by relying with respect to Elf Aquitaine solely on a presumption of liability for the actions of its subsidiary, without adducing further evidence to show that Elf Aquitaine was involved in the business conduct of that subsidiary – departed from the Commission's usual decisional practice.

164 In that regard, the Commission contends that the case-law and its own decisional practice in relation to the liability of parent companies were well known at the outset of the procedure leading to the adoption of the decision at issue. However, in its pleadings it states that 'the Commission's practice as to the use of the presumption based on ownership of all the capital was not always the same'. Furthermore, although the Commission asserts that it decided, 'around 2002 - 2003', to apply such a presumption more systematically, it does not refer to any decision or other document revealing such a change in approach. Nor does it directly address Elf Aquitaine's assertion that recital 574 to the decision of 1 October 2008 cited in paragraph 136 above recognised that the decision at issue marks a departure from previous decisional practice, in particular with respect to Elf Aquitaine.

165 It is in any event common ground in the present case, as is clear in particular from paragraphs 136 and 143 above, that, in the Organic Peroxides decision, Elf Aquitaine was not fined jointly and severally with its subsidiary for the subsidiary's unlawful conduct, even though there do not appear to be any objective differences – at least from the Elf Aquitaine perspective – regarding the links between it and its subsidiary in the two cases.

166 The decision at issue and the procedure of which it forms part are also characterised by the following circumstances:

— since the fine in respect of Atofina's unlawful conduct is imposed jointly and severally on Atofina and Elf Aquitaine, a larger multiplier is used for calculating the starting amount of the fine, which means that the final amount of the fine is liable to be much higher than if the subsidiary alone were fined;

— the fine is imposed on Elf Aquitaine solely on the basis of a 'presumption that Elf Aquitaine is liable for the acts of its subsidiary Atofina'; that presumption is not necessarily the same in its application as the presumption of actual exercise of decisive influence set out in paragraphs 56 and 57 above;

— as can be seen from the part of the present judgment in which the second ground of appeal is considered, Elf Aquitaine was not formally advised of the possibility that it would be held liable for the unlawful conduct of its subsidiary until the stage of the statement of objections, four years after the Commission's investigation had begun;

— in response to the statement of objections, Elf Aquitaine – as is clear from the General Court case-file – put forward a series of arguments, relying in particular on EU case-law, on the Commission's decisional practice and on certain documents enclosed as annexes.

167 In those circumstances, as follows from paragraphs 146 to 155 above and, in particular, from paragraphs 148, 152, 153 and 155, it was for the General Court – in the

light of all the circumstances of the case and, in particular, the change in approach (not disputed in the present proceedings) with respect to Elf Aquitaine between the Organic Peroxides decision and the decision at issue – to pay particular attention to the question whether the latter decision contains a detailed statement of the reasons why the Commission found that the evidence submitted by Elf Aquitaine was not sufficient to rebut the presumption applied in that decision.

168 Indeed, as is apparent from paragraph 85 of the judgment under appeal, recital 258 to the decision at issue, which sets out the only position adopted by the Commission in relation to the arguments set out in paragraph 160 above, consists merely of a repetitive and by no means detailed series of bald assertions and denials. In the particular circumstances of the present case, that set of assertions and denials is incapable, in the absence of further information, of enabling those concerned to ascertain the reasons for the measure or the competent Court to exercise its power of review. For example, owing to the formulation of recital 258, it appears very difficult – impossible even – to ascertain in particular whether the body of indicia submitted by Elf Aquitaine in an attempt to rebut the presumption applied to it by the Commission was rejected because it failed to convince or because, in the Commission's eyes, the mere fact that Elf Aquitaine held 98 % of Atofina's capital was sufficient for liability for Atofina's actions to be imputed to it, whatever the indicia that might have been provided by Elf Aquitaine in response to the statement of objections.

169 Accordingly, recital 258 to the decision at issue cannot be interpreted as stating to the requisite legal standard the reasons for the Commission's position on several detailed arguments put forward by Elf Aquitaine.

170 In the light of the foregoing, it must be held that, in the particular circumstances of the present case and in the light of the case-law set out in paragraphs 147 to 155 above, the General Court erred in law in finding, in paragraph 91 of the judgment

under appeal, that the decision at issue was in conformity with Article 253 EC and in not finding fault with an inadequate statement of reasons that vitiated the decision at issue to the extent that the fine imposed on Elf Aquitaine was concerned.

171 It follows that the first part of the third ground of appeal is well founded.

Second part of the third ground of appeal and the fourth and fifth grounds of appeal

172 The second part of the third ground of appeal alleges, in essence, that certain elements of the General Court's reasoning are incomprehensible and circular.

173 By its fourth ground of appeal, Elf Aquitaine claims that, in paragraph 160 et seq. of the judgment under appeal, the General Court went beyond the limits of its jurisdiction to review legality, by substituting its own reasoning for the inadequate statement of reasons of the Commission.

174 As stated in paragraph 27 above, the sixth ground of appeal is raised in the alternative.

175 In the light of the finding made with respect to the first part of the third ground of appeal, there is no need to consider the second part of that ground of appeal or the fourth or sixth grounds of appeal.

176 In the light of all the foregoing, the appeal must be allowed and the judgment under appeal set aside.

The action before the General Court

177 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, if the decision of the General Court is set aside, the Court of Justice may give final judgment in the matter where the state of the proceedings so permits. That is the situation in the present case.

178 As stated in paragraph 9 above, the second plea raised before the General Court alleges an inadequate statement of reasons. By that plea, Elf Aquitaine claims, in substance, that the decision at issue was vitiated by failure to provide an adequate statement of reasons in that it imputes to Elf Aquitaine liability for the unlawful conduct of its subsidiary solely on the basis of the size of Elf Aquitaine's shareholding in the subsidiary, without further explanation.

179 In the light of the reasoning set out in paragraphs 144 to 171 above in the context of the first part of the third ground of appeal, the second plea raised before the General Court must be held to be well founded.

180 The decision at issue must therefore be annulled in that, without providing a statement of reasons appropriate to the particular circumstances of the case, it imputes the infringement at issue to and imposes a fine on Elf Aquitaine.

181 In those circumstances, there is no need to address the other pleas put forward before the General Court.

Costs

182 The first paragraph of Article 122 of the Rules of Procedure provides that, where the appeal is unfounded or where the appeal is well founded and the Court of Justice itself gives final judgment in the case, it is to make a decision as to costs.

183 Under Article 69(2) of the Rules of Procedure, which is applicable to the proceedings on appeal pursuant to Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under the first subparagraph of Article 69(3) of those Rules, however, where each of the parties succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the parties bear their own costs.

184 As both Elf Aquitaine and the Commission have been unsuccessful in part on some heads in the appeal, they must be ordered to bear their own costs in relation to that procedure.

185 As regards the costs of the action at first instance, on the other hand, as the Commission has ultimately been unsuccessful, it must be ordered to pay the costs of the proceedings at first instance, since Elf Aquitaine applied for costs.

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

1. **Sets aside the judgment of the Court of First Instance of the European Communities of 30 September 2009 in Case T-174/05 *Elf Aquitaine* v *Commission*;**

2. **Annuls Commission Decision C(2004) 4876 final of 19 January 2005 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/37.773 – MCAA) in so far as it imputes the infringement in question to and imposes a fine on Elf Aquitaine SA;**

3. **Orders Elf Aquitaine SA and the European Commission to bear their own costs in relation to the present appeal;**

4. **Orders the European Commission to pay the costs of the proceedings at first instance.**

[Signatures]