JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

7 June 2011 *

In Case T-217/06,

Arkema France, established in Colombes (France),

Altuglas International SA, established in Puteaux (France),

Altumax Europe SAS, established in Puteaux,

represented initially by A. Winckler, S. Sorinas Jimeno and P. Geffriaud, and subsequently by S. Sorinas Jimeno and E. Jégou, lawyers,

applicants,

* Language of the case: French.

European Commission, represented initially by F. Arbault and V. Bottka, and subsequently by V. Bottka and F. Castillo de la Torre, acting as Agents,

defendant,

APPLICATION for, principally, annulment of Commission Decision C (2006) 2098 final of 31 May 2006 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F/38.645 — Methacrylates), in so far as it concerns the applicants, and, in the alternative, application for annulment or reduction of the fine imposed on the applicants by that decision,

THE GENERAL COURT (Fourth Chamber),

composed of O. Czúcz, President, I. Labucka (Rapporteur) and K. O'Higgins, Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 15 December 2009,

gives the following

Judgment

Background to the dispute

Introduction

1 By Commission Decision C (2006) 2098 final of 31 May 2006 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F/38.645 — Methacrylates) ('the contested decision'), the Commission of the European Communities imposed a fine of EUR 219 131 250 jointly and severally on Arkema SA and its subsidiaries Altuglas International SA ('Altuglas') and Altumax Europe SAS ('Altumax') (taken together, called 'Arkema') for having participated in a cartel in the methacrylates sector from 23 January 1997 to 12 September 2002 ('the cartel at issue'). Their parent companies, Total SA and Elf Aquitaine SA, were held jointly and severally liable for payment of the fine in the sum of EUR 140.4 million and EUR 181.35 million respectively (Article 2 to the contested decision).

2 Arkema (formerly Atofina SA) is a limited company incorporated under French law having three main activities: vinyl products, industrial chemistry and performance products. At the time of the events referred to in the contested decision, Arkema was owned by Elf Aquitaine, first with a 97.6 % shareholding, then, after the takeover

of the Elf group by Total Fina SA, on 17 April 2000, with a 96.48 % shareholding. From that date and during the remainder of the period of infringement concerned, Elf Aquitaine was itself 99.43 % owned by Total (formerly Total Fina and subsequently TotalFinaElf SA) (recitals 265 and 266 to the contested decision).

3 Arkema became Arkema France on 18 May 2006, when it was introduced on the stock exchange.

4 Altuglas (formerly Atohaas and Atoglas SA) and Altumax are the main subsidiaries of Arkema active in the sector of methacrylates and, in particular, of methyl polymethacrylate ('PMMA') which participated in the collusive behaviour described in the contested decision (recital 259 to the contested decision). Altumax was wholly owned by Arkema throughout the duration of the infringement. Altuglas has been wholly owned by Arkema since 1998. Before that date, Elf Atochem SA held only 50 % of its capital, but was responsible for its day-to-day management (recital 263 to the contested decision).

Administrative procedure

5 The investigation leading to the adoption of the contested decision was initiated following the submission by Degussa AG on 20 December 2002 of a request for immunity under the Commission notice of 19 February 2002 on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3) ('the Leniency Notice').

6 On 25 and 26 March 2003, the Commission carried out inspections, in particular at the premises of Arkema. After those inspections, Arkema submitted, on 3 April 2003, an application for immunity or a reduction in the amount of the fine under the Leniency Notice (recital 60 to the contested decision).

7 On 17 August 2005, the Commission adopted a statement of objections concerning an infringement in the methacrylates industry addressed to, among others, Total, Elf Aquitaine, Arkema, Altuglas and Altumax (recital 85 to the contested decision).

8 A hearing was held on 15 and 16 December 2005 and was attended by all the addressees of the statement of objections (recital 87 to the contested decision).

9 On 31 May 2006, the Commission adopted the contested decision.

The contested decision

10 Two aspects of the contested decision are particularly relevant for the purposes of these proceedings: the identification of its addressees and the calculation of the fine.

Addressees of the contested decision

11 The Commission, after stating that it was necessary to determine to which legal entities responsibility for the infringement should be imputed (recital 245 to the contested decision), considered that Altuglas, Altumax, Arkema and Elf Aquitaine were jointly and severally liable for the infringement committed by Altuglas and Altumax during the period from 23 January 1997 until 12 September 2002. Total is held jointly and severally liable for the infringement committed by Altuglas and Altumax from 1 May 2000 until 12 September 2002 (recital 277 to the contested decision).

12 More specifically, as regards the liability of Elf Aquitaine, the Commission, taking into account the fact that the members of Arkema's board of directors were appointed by Elf Aquitaine and that Elf Aquitaine had a 97.6 % shareholding in its subsidiary's capital and, after April 2000, a 96.48 % shareholding, presumed that Elf Aquitaine exercised decisive influence and effective control over the conduct of Arkema (recital 265 to the contested decision).

13 As regards Total's liability, the Commission found that, from April 2000 until the end of the infringement, that company had controlled directly or indirectly the capital of all operating companies of the group, including those that had fulfilled a direct role in the cartel at issue. Given these facts, the Commission presumed that Total exercised decisive influence over the conduct of its subsidiaries Elf Aquitaine, Arkema, Altuglas and Altumax and sent a statement of objections to all these entities (recital 267 to the contested decision).

14 Responses to the statement of objections were sent separately by Arkema, on the one hand, and by Total and Elf Aquitaine, on the other, claiming inter alia that the decision should be addressed solely to Arkema (recitals 268 and 269 to the contested

decision). The Commission rejected their arguments and confirmed its view that the five entities referred to in the previous paragraph were liable (recitals 270 to 277 to the contested decision). Hereinafter, reference will be made to all those entities as forming the 'Total group'.

Calculation of the fine

15 As regards the calculation of the fine, the Commission, in the first place, examined the gravity of the infringement and found, first of all, that, in view of the nature of the infringement and the fact that it had covered the entire territory of the EEA, the infringement in question was a very serious infringement within the meaning of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3) ('the Guidelines') (recitals 319 to 331 to the contested decision). Next, the Commission applied differential treatment to the undertakings participating in the infringement and placed the Total group, by reason of Arkema's turnover in the EEA for the three PMMA products, in the first category. On that basis, it applied a starting amount of EUR 65 million (recitals 332 to 336 to the contested decision). Finally, taking into account Total's worldwide turnover, the Commission applied a multiplication factor of 3 to the fine imposed on the Total group in order to ensure that the fine had a deterrent effect. Accordingly, the starting amount of the fine is EUR 195 million (recitals 337 to 350 to the contested decision).

16 In the second place, the Commission examined the duration of the infringement and found that, since Arkema had participated in the infringement for five years and seven months, the starting amount should be increased by 55 %. That increase was applied to Elf Aquitaine, Arkema, Altuglas and Altumax. As regards Total, which owned the capital of its subsidiaries during a shorter period, the Commission increased the fine by 20 % (recitals 351 to 353 to the contested decision). Accordingly, the basic

amount of the fine calculated for Arkema (including Elf Aquitaine) is EUR 302.25 million. Total is held jointly and severally liable for the payment of EUR 234 million of this amount (recital 354 to the contested decision).

17 In the third place, the Commission examined whether there were any aggravating circumstances. As regards Arkema, the Commission found, in the light of the fact that it had been the addressee of three previous decisions, that it had committed a repeated infringement of the same type and decided to increase the basic amount of the fine for Arkema by 50 %. The Commission stated, however, that Total and Elf Aquitaine were not recidivists and that, therefore, that increase applied only to Arkema, Altuglas and Altumax (recital 369 to the contested decision and corresponding footnote 250).

18 In the fourth place, the Commission rejected the mitigating circumstances put forward by the Total group.

19 At that stage, as a result of the aggravating or mitigating circumstances taken into account, the amount of the fine was EUR 365 218 750 for Arkema, Altuglas and Altumax. For Total, the amount of the fine remained fixed at EUR 234 million. For Elf Aquitaine, the amount of the fine remained at EUR 302.25 million (recital 397 to the contested decision). In accordance with Article 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1), the Commission considered that the fine did not exceed 10 % of the turnover of the undertaking concerned (recitals 398 and 399 to the contested decision).

20 In the fifth and last place, the Commission applied the Leniency Notice and decided, in application of the first indent of point 23(b) of that notice, to reduce by 40 % the fine that would otherwise have been imposed on the Total group (recitals 403 to 410 to the contested decision).

21 Accordingly, in Article 2(b) of the contested decision, the Commission set the final amount of the fine as follows:

'Arkema..., Altuglas... and Altumax..., jointly and severally liable: EUR 21913 125 million; of this amount Total... is jointly and severally liable for EUR 140.4 million and Elf Aquitaine SA is jointly and severally liable for EUR 181.35 million.'

Procedure and forms of order sought

22 By application lodged at the Court Registry on 10 August 2006, the applicants, Arkema France, Altuglas and Altumax, brought the present action.

23 Owing to a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Fourth Chamber, to which, in consequence, the present case was assigned.

24 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, requested the parties to produce certain documents and requested the Commission to produce a document. The parties complied with those requests within the prescribed period.

25 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 15 December 2009. At the end of the hearing, the oral procedure was closed.

26 By order of 26 November 2010, the Court decided to reopen the oral procedure in accordance with Article 62 of its Rules of Procedure in order, by way of measures of organisation of procedure, to request the parties to produce documents and reply to questions. The parties complied with those requests within the periods prescribed. The oral procedure was then closed on 9 March 2011.

27 The applicants claim that the Court should:

— principally, annul the contested decision in so far as it applies to the applicants;

— in the alternative, annul or reduce the fine imposed on them by the contested decision;

— order the Commission to pay the costs.

28 The Commission contends that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

Law

29 In support of their action, the applicants put forward, in essence, eight pleas in law. The first plea alleges infringement of the rules relating to holding a parent company liable for practices committed by its subsidiary and of the principle of non-discrimination. The second plea alleges that the Commission made errors of fact in holding Total and Elf Aquitaine liable for the infringement committed by Arkema. The third plea alleges infringement of the duty to state reasons and of the principle of sound administration in the implementation of the rules of imputability. The fourth plea alleges that the Commission failed to apply the criterion of the actual impact on the market in fixing the starting amount of the fine at EUR 65 million. The fifth plea alleges the existence of errors of law and fact in the increase in the starting amount of the fine to ensure it had a deterrent effect. The sixth plea alleges that the Commission committed errors of law by increasing the fine for repeated infringement. The seventh plea alleges that the Commission made an error of fact in that it did not grant the applicants a reduction in the fine on account of the fact that certain offending practices were not actually implemented by Arkema. The eighth plea alleges errors of law and fact constituted by the Commission's refusal to grant the applicants a reduction in the fine under 'other factors'. Furthermore, at the hearing, the applicants put forward an additional plea, contesting the increase in the fine in order to ensure that it had a sufficiently deterrent effect.

The first plea, alleging infringement of the rules relating to holding a parent company liable for practices committed by its subsidiary and of the principle of non-discrimination

30 The applicants claim that, by relying on the presumption that a parent company actually exercises a decisive influence over a subsidiary if it holds all or almost all its capital ('the presumption of exercise of a decisive influence'), and without adducing evidence of actual control, the Commission committed an error of law (first part of

this plea). By so doing, it also infringed the principle of non-discrimination, by applying to Arkema a different standard of proof from that applied to other subsidiaries which participated in the alleged practices (second part of this plea).

The first part, alleging infringement of the rules relating to holding a parent company liable for practices committed by its subsidiary

— Arguments of the parties

31 The applicants maintain that, according to settled case-law and the Commission's practice in taking decisions, where the undertaking which is the perpetrator of the infringement belongs to a group of companies, only the subsidiary in question is, as a general rule, liable for the infringement committed. Only in certain circumstances may the acts of a subsidiary be attributed to the parent company. That would be the case either where the parent company actually exercises a decisive influence over the conduct of its subsidiary, since the latter cannot determine its commercial policy independently, or where the parent company has been involved (actively or passively, simply by being aware of the facts) in the infringement committed by the subsidiary.

32 The applicants claim that, under the applicable case-law, holding 100 % of the capital (and, a fortiori, 99.43 %, 97.6 % or 96.48 %) does not, on its own, lead automatically to the conclusion that the parent company actually exercises a decisive influence over the commercial policy of its subsidiary. According to the applicants, the case-law has always required additional evidence in that regard, such as the fact that parent

company presented itself during the administrative procedure as being the Commission's only interlocutor for the group, the fact that the existence of an actual power of control over the subsidiary was not contested and the lack of any evidence of the subsidiary's independence.

33 However, in the present case, apart from the fact that almost all Arkema's capital was held directly or indirectly by its parent companies at the time, the Commission provided no evidence in the contested decision to show that Total and/or Elf Aquitaine actually exercised, during the period under consideration, a decisive influence over Arkema's commercial policy or in the implementation of the alleged practices. In particular, according to the applicants, the fact, pointed out by the Commission in the contested decision, that the members of Arkema's board of directors were appointed by Elf Aquitaine at the time the events occurred is merely the logical reflection of the fact that Elf Aquitaine held the majority shareholding in Arkema and did not prove that it exercised a decisive influence over the company.

34 The applicants therefore consider that, by relying, in order to attribute the practices referred to in the contested decision to Total and Elf Aquitaine, on the presumption of exercise of a decisive influence, solely on the basis of the fact that they held, directly or indirectly, almost all Arkema's capital, the Commission committed an error of law, which justifies annulling the contested decision.

35 Finally, when questioned by the Court about the consequences for the present case of the judgment in Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, the applicants stated, at the hearing, that the facts in that case, and especially the control exercised by the parent company over its subsidiaries which had participated in the infringement, were different from those in the present case. Moreover, the applicants pointed out that, in that case, the level of participation of the parent company in the capital of its subsidiary was 100 %, whereas, in the present case, that level is not reached (99.43 %, 97.6 % and 96.48 %). In any event, the applicants state

that, if the judgment in *Akzo Nobel and Others* v *Commission* was to be interpreted as allowing an infringement committed by a subsidiary to be attributed to its parent company without any additional evidence other than the shareholding link, that case-law should be re-examined, since it created a strict liability regime which is incompatible with Regulation No 1/2003.

36 The Commission states that it shares the applicants' view that only in certain circumstances may liability for an infringement committed by a subsidiary be attributed to the parent company. That possibility exists where the parent company actually exercises a decisive influence over the conduct of its subsidiary. However, according to the Commission, it is apparent from settled case-law that it is justified in concluding that a company which holds all or almost all the capital of its subsidiary actually exercises a decisive influence over its subsidiary, if the parent company has not rebutted the presumption of exercise of a decisive influence by adducing evidence that its subsidiary acts independently.

— Findings of the Court

37 It should be pointed out that it is apparent from recitals 245 to 252 and 259 to 277 to the contested decision that the Commission attributed the infringement at issue to Total and Elf Aquitaine on the ground that they constituted a single undertaking with Arkema and its subsidiaries Altuglas and Altumax, which had participated in the collusive conduct. In order to reach that conclusion, the Commission relied on the presumption, mentioned in the statement of objections, that Total and Elf Aquitaine exercised a decisive influence over the conduct of their subsidiaries. As regards Elf Aquitaine, the presumption of exercise of a decisive influence was based on the fact that the members of Arkema's board of directors were appointed by Elf Aquitaine and on the fact that Elf Aquitaine had a 97.6 %, and then a 96.48 % shareholding in the capital of Arkema (recital 265 to the contested decision). As regards Total, that

presumption was based on the fact that, since April 2000, Total directly or indirectly controlled the capital of all the companies in the group, including the companies which had played a direct role in the cartel at issue, on account of its 99.43 % shareholding in the capital of Elf Aquitaine (recitals 266 and 267 to the contested decision). It is apparent from the contested decision that, in their reply to the statement of objections, the companies concerned put forward a number of arguments designed to rebut the presumption of exercise of a decisive influence but that the Commission considered them to be inadequate (see inter alia recitals 272 and 274).

38 Next, it is necessary to note the case-law of the Court of Justice in this context.

39 In that regard, it should be pointed out that European Union competition law refers to the activities of undertakings and the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see *Akzo Nobel and Others* v *Commission*, paragraph 35 above, paragraph 54 and the case-law cited).

40 The Court has also stated that the concept of an undertaking, in the same context, must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (see *Akzo Nobel and Others* v *Commission*, paragraph 35 above, paragraph 55 and the case-law cited).

41 When such an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement (see *Akzo Nobel and Others* v *Commission*, paragraph 35 above, paragraph 56 and the case-law cited).

42 The infringement of European Union competition law must be imputed unequivocally to a legal person on whom fines may be imposed and the statement of objections must be addressed to that person. It is also necessary that the statement of objections indicate in which capacity a legal person is called on to answer the allegations (see *Akzo Nobel and Others* v *Commission*, paragraph 35 above, paragraph 57 and the case-law cited).

43 It is clear from settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities (see *Akzo Nobel and Others* v *Commission*, paragraph 35 above, paragraph 58 and the case-law cited).

44 That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of the case-law mentioned above. Thus, the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article 81 EC enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement (see *Akzo Nobel and Others* v *Commission*, paragraph 35 above, paragraph 59).

45 The Court has also held 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, the parent company is able to exercise decisive influence over the conduct of the subsidiary and there is a rebuttable presumption that the parent company does in fact exercise decisive influence over the conduct of its subsidiary (see *Akzo Nobel and Others* v *Commission*, paragraph 35 above, paragraph 60 and the case-law cited).

46 The Court therefore held that, in those circumstances, it was sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent company exercises a decisive influence over the commercial policy of the subsidiary. The Commission will then be able to regard the parent company as jointly and severally liable for 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 *Akzo Nobel and Others* v *Commission*, paragraph 35 above, paragraph 61 and the case-law cited).

47 In the light of that case-law of the Court, it must be stated that the method followed by the Commission in the present case in order to attribute the infringement at issue to the applicants' parent companies, referred to in paragraph 37 above, is correct.

48 First, contrary to what the applicants appear to suggest, that imputation is not based solely on the structure of the shareholding, but also on the finding that the presumption of exercise of a decisive influence had not been rebutted (see inter alia recitals 272 and 274 to the contested decision).

49 Second, it is apparent from that case-law (see inter alia paragraphs 45 and 46 above) that the shareholding structure of a subsidiary constitutes an adequate criterion for raising that presumption, without the Commission having to adduce additional indicia relating to the actual exercise of influence by the parent company, as the applicants claim.

50 This conclusion is not affected by the applicants' arguments that the facts in *Akzo Nobel and Others* v *Commission*, paragraph 35 above, and especially the control exercised by the parent company concerned in that case over its subsidiaries, were different from those of the present case. In particular, notwithstanding the fact that such additional indicia may have been established in that case (Case T-112/05 *Akzo Nobel and Others* v *Commission* [2007] ECR II-5049, paragraphs 13 and 54), it is apparent

without any ambiguity both from Case T-112/05 *Akzo Nobel and Others* v *Commission*, paragraphs 61 and 62, and from *Akzo Nobel and Others* v *Commission*, paragraph 35 above, paragraphs 61 and 62, that the implementation of that presumption is not conditional on the existence of such additional indicia.

51 It should also be noted that the aforementioned case-law concerns specifically the 'specific case where a parent company has a 100 % shareholding in a subsidiary' (*Akzo Nobel and Others* v *Commission*, paragraph 35 above, paragraph 60). However, in the present case, Total and Elf Aquitaine do not hold all the capital of their respective subsidiaries.

52 However, it should be noted that the applicants, while referring to that factual difference at the hearing (see paragraph 35 above), did not put forward any specific argument against the application of the same evidential regime in both situations, even though the problem area of the application of the presumption of exercise of a decisive influence to cases other than that in which the parent company holds the whole of the capital of its subsidiary was the subject of a written question from the Court to the Commission and, subsequently of a discussion at the hearing.

53 In any event, it must be stated that a parent company which holds almost all the capital of its subsidiary is, as a general rule, in a similar situation to that of a sole owner, as regards its power to exercise a decisive influence over the conduct of its subsidiary, having regard to the economic, organisational and legal links which join it to that subsidiary. Consequently, the Commission is entitled to apply to that situation the same evidential regime, namely to rely on the presumption that that parent company makes effective use of its power to exercise a decisive influence over the conduct of its subsidiary. Admittedly, it is possible that, in certain cases, minority shareholders may have, in respect of the subsidiary, rights which call the aforementioned analogy in question. However, apart from the fact that such rights are not usually attached to quite minor shareholdings, such as those at issue in the present case, no evidence

of that nature was produced by the applicants in the present case. The Commission was therefore entitled to apply the presumption of exercise of a decisive influence in respect of the applicants' parent companies.

54 Finally, with regard to the argument that, in essence, the case-law established in *Akzo Nobel and Others* v *Commission*, paragraph 35 above, should be re-examined, the General Court considers that, in the circumstances of the present case, it is not for the General Court to review a point of law which has been clearly settled by the Court of Justice in a recent judgment.

55 Accordingly, the first part of this plea must be rejected.

The second part, alleging infringement of the principle of non-discrimination

— Arguments of the parties

56 The applicants' claim that, whereas in their case the Commission relied exclusively on the presumption of exercise of a decisive influence for the purpose of attributing the infringement to the parent company, for most of the other subsidiaries which were addressees of the contested decision, it took the additional indicia into account. The applicants refer, in that regard, to the treatment reserved by the Commission, in the contested decision, for Degussa, ICI plc and Lucite International Ltd.

57 By so doing, the Commission discriminated unjustifiably when taking evidence. The applicants submit that, if the Commission had applied to Arkema the same standard of proof as to the other undertakings, it would have been bound to reach the conclusion that the infringement was attributable to Arkema alone.

58 Moreover, as regards the Commission's argument that the contested decision mentions the appointment of members of Atofina's board of directors by Elf Aquitaine, the applicants submit that that is merely the logical expression of the fact that Elf Aquitaine is the majority shareholder of Arkema and maintains that that factor is out of keeping with the indicia accepted by the Commission in respect of Degussa, for which the Commission took into account the fact that the parent company had actively participated in the infringement. In any event, the applicants claim that that evidence applies only to Elf Aquitaine, not to Total.

59 The Commission disputes those arguments

— Findings of the Court

60 It should be pointed out that the principle of equal treatment or non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see Case C-227/04 P *Lindorfer* v *Council* [2007] ECR I-6767, paragraph 63 and the case-law cited).

61 Clearly, the applicants do not establish that the Commission infringed that principle by attributing the infringement at issue to the addressees of the contested decision.

62 First of all, it must be noted that the situation of ICI Acrylics is not comparable to that of the applicants. Indeed, it is clear from the contested decision that ICI Acrylics — the entity which participated directly in the infringement at issue — was merely a commercial section of ICI, without legal personality, and not a wholly-owned or almost wholly-owned subsidiary of ICI (see inter alia recitals 280, 287 and 288). Consequently, as regards ICI, the Commission did not apply the presumption of exercise of a decisive influence (whether or not supported by other evidence), but merely identified the legal person of which, at the time of the events, the commercial section which had committed the infringement formed part (recitals 288 and 289 to the contested decision).

63 Next, with regard to Degussa, it should be pointed out that, in recital 255 to the contested decision, the Commission stated as follows:

'Röhm GmbH & Co. KG (a 100 % subsidiary of Degussa) and Para-Chemie GmbH (a 100 % subsidiary of Röhm) are independent legal entities. Due to the fact that both companies were directly or indirectly wholly owned by Degussa... and that the supervisory board of Röhm is partly composed by members of the management of Degussa..., the Commission holds Degussa liable for the infringing behaviour of Röhm... and Para-Chemie...'

64 With regard to Lucite International, the Commission stated, in recital 294 to the contested decision, the following:

'Lucite International Ltd... wholly owns Lucite International UK Ltd. Furthermore, the directors of Lucite International... were also directors of Lucite International UK Ltd during the period of the infringement.'

65 Accordingly, it is true that, in order to attribute to Degussa and Lucite International the infringing behaviour of their respective subsidiaries, the Commission relied on the presumption of exercise of a decisive influence owing to the fact that the subsidiary was wholly owned by the parent company, while referring to additional evidence, namely, respectively, the presence on the subsidiary's supervisory board of members of the parent company's management and the fact that the members of the board of directors of the two companies were the same.

66 However, it does not follow that Degussa and Lucite International, and their subsidiaries, received different treatment from that of the applicants and their parent companies, constituting an infringement of the principle of equal treatment.

67 It should be pointed out that, just as the applicants' parent companies, Degussa and Lucite International were also held liable for the infringing behaviour of their subsidiaries (recitals 258 and 296 to the contested decision). Nothing in the contested decision supports the conclusion that the Commission would have relieved them of that liability if it had been unable to find the aforementioned additional evidence.

68 In that regard, it should be pointed out that, in recitals 245 to 252 to the contested decision, the Commission set out the principles which guided it in identifying the addressees of the contested decision. It is clear that, where all or almost all the capital of a subsidiary was controlled, the Commission considered it was entitled to find that that subsidiary was not independent solely on the basis of the presumption of exercise of a decisive influence, provided that that presumption was not rebutted during the administrative procedure and, accordingly, to attribute its infringing behaviour to the parent company on the ground that the latter formed part of the same undertaking (see inter alia recitals 247 and 248 to the contested decision).

69 It must therefore be stated, as the Commission pointed out, that it was only for the sake of completeness that it drew attention to the existence of evidence other than the shareholding link, where such evidence was available. Moreover, as regards the Total group, the Commission also drew attention to the fact that the members of Arkema's board of directors had been appointed by Elf Aquitaine. However, the Commission by no means made the attribution of a wholly-owned or almost wholly-owned subsidiary's infringing conduct to its parent company subject to the existence of such additional evidence. This interpretation is confirmed, moreover, by the fact that, with regard to certain parent companies, the contested decision mentions only the shareholding link. That is the case of Total (recital 266) and companies in the Barlo group, namely Barlo Plastics Europe NV, Barlo Plastics NV and Barlo Group plc (recital 301).

70 Moreover, it should be pointed out that the method followed by the Commission in the present case in order to attribute the infringement at issue to the applicants' parent companies is correct, as is apparent from the foregoing (see paragraph 47 above).

71 The second part of this plea must therefore be rejected and, consequently, the first plea in its entirety.

The second plea, alleging errors of fact committed by the Commission in attributing the infringement committed by Arkema to Total and Elf Aquitaine

72 The applicants maintain that, even if reliance on the presumption of exercise of a decisive influence over them is valid, the Commission was wrong in fact to attribute the infringement to Total and to Elf Aquitaine. They have demonstrated, first, that the directors of Elf Aquitaine and Total had no involvement in the practices in question and, secondly, that Arkema determined its commercial policy independently.

The first part, alleging that the Commission disregarded the fact that the directors of Total and Elf Aquitaine were not involved in the practices referred to in the contested decision

— Arguments of the parties

73 The applicants point out that the Commission does not claim, in the contested decision, that the directors of Elf Aquitaine or Total were involved, in any way whatsoever, in the practices in question or that they were aware of the infringements committed. They also point out that, during the investigation, the Commission addressed no request for information to those undertakings or carried out investigations on their premises.

74 In the applicants' view, it is apparent from the Commission's practice in taking decisions that the lack of active or passive participation of the parent company in the infringement may lead it to rule out attributing the infringement committed by the subsidiary to the parent company, even where the parent company holds most or all the capital of that subsidiary.

75 Furthermore, the applicants point out, in that regard, that the group to which they belonged at the time of the events insisted on strict observance of the competition rules, which indeed led Arkema to introduce a programme for compliance with competition law from January 2001, that is only a few months after the Elf group was taken over by Total Fina, on 17 April 2000. They therefore consider that if Total and/or Elf Aquitaine could have been aware of the anti-competitive practices implemented by Arkema, they would immediately have ordered them to cease.

76 Consequently, according to the applicants, the Commission could have relied on that evidence to consider that those companies, although they held almost all Arkema's capital during the alleged period, were not liable for its infringing behaviour on the PMMA market.

77 The Commission disputes those arguments.

— Findings of the Court

78 It should be pointed out that it is apparent from recitals 245 to 252 and 259 to 277 to the contested decision that the Commission attributed the infringement at issue to Total and to Elf Aquitaine on the ground that they constituted, at the time of the events, a single economic entity and, therefore, an undertaking, within the meaning of competition law, with Arkema and its subsidiaries, Altuglas and Altumax, which had participated in the collusive conduct. In order to reach that conclusion, the Commission relied on the presumption of exercise of a decisive influence and found that this had not been rebutted during the administrative procedure. As is apparent from the examination of the first plea, it was fully entitled to use this method.

79 As is apparent from the case-law, the fact that a parent company and its subsidiary form a single undertaking for the purposes of Article 81 EC allows the Commission to address a decision imposing fines on the parent company, without having to establish the personal involvement of the latter in the infringement (*Akzo Nobel and Others* v *Commission*, paragraph 35 above, paragraph 50). Consequently, it was not necessary for the Commission to establish the direct involvement of the directors of the parent company or even their awareness of the alleged facts. Similarly, the conduct of the Commission during the administrative procedure, and in particular the fact that it did not address any request for information to the parent companies or carry out

investigations on their premises, has no bearing on the question of whether they, together with their subsidiaries, form one undertaking within the meaning of Article 81 EC.

80 As for the Commission's practice in taking decisions, to which the applicants refer, it should be stated that, even if the Commission made the attribution of the infringement to the parent company subject to the direct involvement of its directors in the infringement, that has no bearing on the legality of the contested decision in that regard, since the method used in the present case was correct. Moreover, in their reply, the applicants state that they do not claim that the lack of participation of a parent company in the infringement committed by its subsidiary is enough on its own to exclude the parent company's liability, but that it is merely evidence which the Commission may take into account for that purpose.

81 Finally, as the Commission rightly maintains, the lack of direct involvement of the directors of the parent company or their ignorance of the alleged facts, even if they may be established, is not enough to rebut the presumption of exercise of a decisive influence.

82 Accordingly, the first part of this plea must be rejected.

The second part, alleging failure to take account of the evidence establishing that Arkema did indeed determine its commercial policy independently

— Arguments of the parties

83 The applicant's claim that Arkema established, during the administrative procedure, that its commercial policy had never been defined by Elf Aquitaine or by Total during the period covered by the contested decision. Accordingly, the fact that it was legally a subsidiary of Elf Aquitaine at the time of the events and that the members of its board of directors were appointed by Elf Aquitaine had no bearing on its independence when determining its commercial policy. Consequently, by attributing the infringement implemented by Arkema to its parent companies at the time, the Commission committed an error of fact.

84 In the first place, the applicants submit that the fact that neither Total nor Elf Aquitaine define the commercial policy of their subsidiaries is apparent from the very structure of the group. Those undertakings are in fact holding companies, shareholders of several groups of companies acting independently in their respective areas of activity.

85 In the second place, the applicants claim that Arkema showed that it was wholly independent in determining its commercial policy relating to PMMA, and in particular with regard to its pricing and customer selection policy. They state that it was Arkema which was the parent company of the chemicals division and that it was Arkema which actually gave instructions to its own subsidiaries, such as Altuglas and Altumax. Above Arkema, the relationship was only that which normally prevails between the shareholder anxious to preserve its financial interests and an independent management, responsible for managing the chemicals activity. Accordingly, the role of Total and Elf Aquitaine was limited to authorising large investments and to

receiving accounting and financial information concerning the results of their subsidiary, as required by the applicable legislation. In that regard, the applicants refer to the internal memo entitled 'Internal powers and expenditure commitments', annexed to the application.

86 In that regard, the applicants distinguish between two periods: from 1992 to 2000 and from 2001 to 2004.

87 As regards the period from 1992 to 2000, they state that the commercial policy concerning the PMMA activities was defined independently by Elf Atochem, through the 'Organic synthesis intermediaries' division ('DIOS'). The broad outlines of that commercial policy, in the form of a five-year business plan, were approved each year in advance by the general management committee of Elf Atochem, which also validated the budget of the DIOS.

88 As regards the period from 2001 to 2004, the commercial policy concerning the PMMA activities was defined independently by Arkema, through Atoglas (now Altuglas). The broad outlines of that commercial policy, in the form of a five-year business plan, were approved each year in advance by the chemicals management committee, the executive body of the chemicals division. The budget for the PMMA activities was presented to Total's executive committee, as part of Atoglas' overall budget. That executive committee intervened in respect of investments, for decisions concerning an amount of more than EUR 10 million, and assessed the risk and profitability levels of those investments.

89 The applicants state, in particular, that neither Total nor Elf Aquitaine determined Arkema's commercial policy for activities such as those in the present case, which represented only a marginal part of their turnover. They point out, in that regard, that, in 2002 (the last year of the infringement), Arkema's worldwide turnover for the sale of PMMA was EUR 416 million, which represented 2.1 % of the overall turnover of the chemicals division and 0.4 % of the overall turnover of the Elf Aquitaine/Total group.

90 Moreover, the applicants state that, even if the presumption of exercise of a decisive influence is valid, the burden of proof on the undertaking concerned ought, in order to allow it to rebut such a presumption, to relate to showing lack of actual control of the parent company over the subsidiary's commercial policy on the market concerned and, therefore, in the present case, on the PMMA market. In their view, a different approach, consisting in requiring proof of full independence from the parent company, and therefore the rebuttal of the abstract possibility of the parent company exercising a decisive influence over its subsidiary, where it holds 100 % of the capital, comes under *probatio diabolica* and is tantamount to introducing an irrebuttable presumption.

91 In the third place, the applicants submit that the overall control exercised by Total and Elf Aquitaine over Arkema contrasts with the control exercised by Arkema over its subsidiaries Altuglas and Altumax, which were integrated within Arkema, at both operational and functional level. The applicants also state that Arkema intervened throughout the proceedings on its own behalf and on that of its subsidiaries and never denied, during the investigation, the existence of actual control over its subsidiaries.

92 Accordingly, first, at the operational level, unlike Elf Aquitaine and Total, which did not take part in the methacrylates production process, Arkema was active in the production of methyl methacrylate, a raw material used — in part — in a captive manner by its subsidiaries Altuglas and Altumax for the production and distribution of PMMA.

93 Secondly, at the functional level, although exercised by subsidiaries of Arkema (Altuglas and Altumax), the PMMA activity was always part of Arkema's commercial organisation, first of all within the DIOS until 2000, and then through a commercial unit specifically dedicated to PMMA, from 2001. Moreover, during the period concerned, the majority of the members of Altuglas' board of directors were representatives of Arkema's legal and financial departments. The latter had, in addition, responsibilities not only within Arkema, but also within Altuglas, which did not have its own legal and financial departments. Finally, the employees of Altuglas involved in the practices covered by the contested decision all regularly reported to a member of Arkema's management, who was, during the period of the infringement, Mr G., who was successively director of the DIOS until 2000 and a member of the chemicals management committee from 2001.

94 The applicants point out, moreover, that this functional and operational integration between Arkema and its subsidiaries Altuglas and Altumax was confirmed in 2004, at the time of the reorganisation of the Total group's chemicals division and of the creation of Arkema, then, in May 2006, with the introduction of Arkema on the stock exchange.

95 In the fourth place, the applicants state that none of the documents collected during the proceedings shows that Arkema received, directly or indirectly, any instructions or recommendation from Elf Aquitaine or Total concerning the commercial policy to be followed on the methacrylates markets, even though hundreds of documents had been seized by the Commission at Arkema's offices.

96 In the fifth place, the applicants point out that the position adopted by the Commission in the contested decision is contrary to its own previous practice. In Commission Decision C (2003) 4570 final of 10 December 2003 relating to a procedure under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 — Organic peroxides) ('the Organic peroxides decision'), the Commission did not attribute liability for the infringement committed by Arkema to Elf Aquitaine, in spite of the shareholding link which existed between those two undertakings. By so doing,

the Commission accepted that Arkema enjoyed genuine independence when determining its commercial policy. In the applicants' opinion, since the period covered by the Organic peroxides decision coincides in part with that covered by the contested decision and since the economic and financial relations between Arkema and Elf Aquitaine were strictly identical in the two cases, the Commission was not justified in departing from the position taken in the case which gave rise to the Organic peroxides decision.

97 Moreover, the limited overall control exercised by Total and Elf Aquitaine over their subsidiaries has recently been confirmed by the French Conseil de la concurrence, which found, in a decision relating to the distribution of fuel on motorways, that Total Raffinage Distribution SA and Elf Antar France SA were sufficiently independent in the determination of their commercial policy.

98 Finally, the applicants claim that the Commission committed errors of law in the assessment of the nature and division of the burden of proof. They consider that, since the presumption of exercise of a decisive influence relied on by the Commission was not accompanied by any additional evidence establishing actual control by the parent companies over Arkema's commercial policy in relation to the PMMA market, the mere fact that Arkema, during the administrative procedure, adduced evidence to establish its genuine independence on the market was sufficient to reverse the burden of proof. They submit that it was therefore for the Commission to show that, in spite of that evidence, Total and Elf Aquitaine exercised a decisive influence over their subsidiaries, in respect of the market concerned.

99 The Commission claims that the evidence produced by the applicants during the administrative procedure, and repeated in the application, is not adequate, even when considered as a whole, to establish that Arkema acted independently of Elf Aquitaine on the market and, therefore, to rebut the presumption of exercise of a decisive influence.

— Findings of the Court

100 First of all, it should be pointed out that, contrary to what the applicants claim (see paragraphs 90 and 98 above), the Commission did not disregard, in the present case, the rules concerning the burden of proof.

101 In that regard, it should be noted that it is apparent from *Akzo Nobel and Others* v *Commission,* paragraph 35 above, paragraph 61 that, in order to rebut the presumption of exercise of a decisive influence, the onus is on the company concerned to adduce 'sufficient evidence' to show that the subsidiary acts independently on the market. As for the Commission, it has the responsibility of examining that evidence, not of producing positive evidence to establish the exercise of such an influence. Moreover, if it were enough for the interested party to contest that presumption merely by making unsubstantiated assertions, the presumption would be deprived of all its effectiveness.

102 It should be noted at the outset that, in their reply to the statement of objections, the applicants produced very little hard evidence in support of their claims regarding Arkema's independence on the market. In particular, Part III. 2 of that reply, entitled 'Arkema enjoyed [during the period of the infringement] actual independence in the determination of its commercial policy', does not refer to any document in support of the statements it contains. It therefore appears that the Commission's finding, in recital 272 to the contested decision, that the evidence presented by the applicants constituted merely assertions which are not supported by sufficient evidence is correct. As is apparent from the previous paragraph, it rightly permits the conclusion that the presumption of exercise of a decisive influence was not rebutted.

103 Moreover, contrary to what the applicants maintain, the approach taken in the contested decision does not fall within the scope of *probatio diabolica*. It is apparent from the case-law that, in order to assess whether a subsidiary decides independently upon its own conduct on the market, account must be taken of all the relevant factors relating to the economic, organisational and legal links between the subsidiary and the parent company, which may vary from case to case and which cannot, therefore, be exhaustively listed (see, to that effect, *Akzo Nobel and Others* v *Commission*, paragraph 35 above, paragraphs 73 and 74). Consequently, it was for the applicants to adduce any proof relating to the economic, organisational and legal links between that subsidiary and the parent company and which in their view was apt to demonstrate that they did not constitute a single economic entity (see, to that effect, *Akzo Nobel and Others* v *Commission*, paragraph 50 above, paragraph 65). Even if the applicants were unable to produce such evidence in the present case, that does not mean that that presumption cannot in any case be rebutted.

104 The specific arguments put forward by the applicants must be examined in the context of these general observations.

105 In the first place, they rely on the fact that Total and Elf Aquitaine are holding companies and claim that the independence of their subsidiaries is the consequence of the very structure of the group.

106 It should be pointed out, first, that the statements that Total and Elf Aquitaine are holding companies are unsupported by evidence.

107 Secondly, even if those statements were true, they are insufficient to preclude the parent companies in question exercising a decisive influence on the subsidiaries by

coordinating inter alia financial investments within the group. It has already been held that, in the context of a group of companies, a holding company is a company which seeks to regroup shareholdings in various companies and whose function is to ensure that they are run as one (Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik* v *Commission* [2008] ECR II-2567, paragraph 63). In the present case, the applicants themselves state that their parent companies intervened in the more important decisions which could have an impact at group level. Far from invalidating the argument that there was an economic entity composed of the applicants and their parent companies, those statements rather confirm that the function of the parent companies was to ensure unity of management and coordination, such as to influence the conduct of the subsidiaries on the market.

108 In the second place, the applicants claim that they have established that Arkema was wholly independent when determining its commercial policy in relation to PMMA. Arkema was the parent company of the chemicals division and gave instructions to its own subsidiaries, such as Altuglas and Altumax. As for Total and Elf Aquitaine, their role was, they claim, limited to authorising large investments and to receiving accounting and financial information concerning the results of their subsidiary, as required by the applicable legislation.

109 In that regard, it should be pointed out, first, that the applicants' statements are unsupported by evidence. However, as regards the statements relating to the organisation and structure of the Total group and to the respective powers of the different companies in the group, hard evidence could, in principle, be adduced.

110 Admittedly, the applicants produced, annexed to the application, an internal memo entitled 'Internal powers and expenses commitments', designed to support their argument that the parent company merely approved the larger investments made by Arkema. However, as the Commission states, without being contradicted by the

applicants, that document was not included in the reply to the statement of objections. Moreover, when questioned in that regard at the hearing, the applicants confirmed that the document had not been produced during the administrative procedure. It is apparent from *Akzo Nobel and Others* v *Commission*, paragraph 35 above, paragraph 61, that, where it applies the presumption of exercise of a decisive influence, the Commission is able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the company concerned, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market. Accordingly, the Commission could reasonably conclude, in recital 272 to the contested decision, that the statements in question had not been supported by adequate evidence.

111 Secondly, and in any event, even if they were established, those claims are not sufficient to rebut the presumption of exercise of a decisive influence, since they relate exclusively to the determination of the commercial policy in respect of PMMA. Contrary to what the applicants maintain, in order to determine whether a subsidiary independently decides its conduct on the market, it is necessary to take into consideration not only the evidence relating to the commercial policy in the sphere of the cartelised products, but also all the relevant evidence relating to the economic, organisational and legal links between that subsidiary and the parent company (see, to that effect, *Akzo Nobel and Others* v *Commission*, paragraph 35 above, paragraphs 67, 68, 73 and 74, and Opinion of Advocate General Kokott in that case).

112 Moreover, some of the applicants' statements indicate that they formed a single economic entity with their parent companies.

113 Accordingly, the applicants acknowledge that Total and Elf Aquitaine had to authorise the large investments made by their subsidiary. The exercise of such a power does indeed indicate that the subsidiary acts on the market taking into account the interests of the parent company (see, to that effect, judgment of 8 July 2008 in Case T-54/03 *Lafarge* v *Commission*, not published in the ECR, paragraph 547).

114 Similarly, the applicants refer, on several occasions, to the existence of a chemicals division of Total. In reply to a written question from the Court, the applicants confirmed that, from May 2000 until the end of the period of the infringement, the chemicals division included not only Arkema and its subsidiaries, but also other companies in the Total group. They explained that, following the merger between Total Fina and Elf Aquitaine, all the chemical activities were placed, from a functional point of view, under the aegis of Arkema (then Atofina). However, that functional regrouping was not automatically accompanied by a regrouping of shareholdings. That division of the group into divisions, which, furthermore, ignores the shareholding links between the companies in the group, is a strong indication that the coordination of the activities of those divisions was a matter for the parent company of the group. That function of the parent company precludes the independent action of the subsidiary on the market (see, to that effect, *Lafarge* v *Commission*, paragraph 113 above, paragraph 549, and *Schunk and Schunk Kohlenstoff-Technik* v *Commission*, paragraph 107 above, paragraph 64).

115 As for the assertions that the PMMA activity constituted only a very small part of the overall turnover of Total and Elf Aquitaine, they do not show that the parent company allowed the subsidiary full independence to define its conduct on the market. Moreover, as has been pointed out above, a subsidiary's independence of its parent company must not be assessed solely in the light of its activity in the sphere of the cartelised products. Consequently, even if such an argument were relevant, it would be necessary to assess Arkema's importance overall for its parent companies (see, to that

effect, *Schunk and Schunk Kohlenstoff-Technik* v *Commission*, paragraph 107 above, paragraph 66). However, the applicants have not presented arguments in that respect.

116 In the third place, it is necessary to reject the argument that the overall control exercised by Total and Elf Aquitaine over Arkema contrasts with the control exercised by Arkema over its subsidiaries Altuglas and Altumax. On the one hand, this is, again, an assertion which is unsupported by adequate evidence regarding the relations between the companies concerned. On the other hand, even if it were established that Total and Elf Aquitaine enjoyed less strict links with Arkema than Arkema with its own subsidiaries, that is not enough to establish that Arkema acted independently on the market.

117 In the fourth place, with regard to the argument that the reorganisation of the chemicals division of the Total group and the creation of Arkema in 2004, then its introduction on the stock market in 2006, confirmed that Arkema was independent, it need only be stated that this is evidence subsequent to the period of the infringement, which can therefore not attest to the independence of that company during that period. Furthermore, the expression 'reorganisation of the chemicals division of the Total group' suggests that Total assumed a coordinating role in respect of that chemicals division.

118 In the fifth place, with regard to the argument that no document in the file shows that Arkema received an instruction or recommendation from Elf Aquitaine or Total concerning the commercial policy on the methacrylates market, this on its own is irrelevant, since Arkema's independence must not be assessed solely with regard to that market. Moreover, as has already been held, the fact that it is not apparent from the documents in the file that the parent company gave instructions to its subsidiary cannot prove that such instructions did not exist (see, to that effect, *Lafarge* v *Commission*, paragraph 113 above, paragraph 545).

119 In the sixth and last place, it is necessary to address the argument that the position adopted in the contested decision is contrary to the Commission's previous practice, as evidenced by the Organic peroxides decision, in which it did not attribute the infringement committed by Arkema to Elf Aquitaine.

120 In that regard, it must be stated that it is apparent from the Organic peroxides decision (recitals 373 to 391), referred to by the applicants, that the Commission did not analyse therein the problem of the liability of Arkema's parent company and, in particular, that it did not rule on the question of its independence of the parent company. Therefore, even if the facts in that case were similar to those of the present case, it cannot be maintained that that decision constituted any guarantee of the way in which the Commission perceived relations between Arkema and its parent companies, nor moreover of the criterion of imputability applicable to that group of companies.

121 Furthermore, the contested decision is not the first in which the Commission has attributed liability for the infringement committed by Arkema to Elf Aquitaine. In Commission Decision C (2004) 4876 of 19 January 2005 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case C 37.773 — MCAA) ('the MCAA decision'), the Commission had already attributed liability to Elf Aquitaine, also on the basis of the presumption of exercise of a decisive influence over its subsidiary, which was not rebutted.

122 In any event, it is apparent from the case-law that the Commission is not required to establish as a matter of course whether the infringing behaviour of a subsidiary may be attributed to its parent company (see, to that effect, Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraphs 330 and 331, confirmed by 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). Consequently, even if the applicants and Elf Aquitaine also formed a single undertaking at the time of the events alleged in the

Organic peroxides decision, the mere fact that the Commission did not consider the possibility of addressing that decision to and imposing a penalty on the applicants' parent company did not preclude it from doing so in the present case, in accordance with the rules set out by the case-law in respect of imputability.

123 Moreover, even if the Commission had been required to consider the imputation of the infringement at issue in the Organic peroxides decision to Elf Aquitaine, the fact that it did not do so is evidence only of an error committed in that case and cannot therefore usefully be invoked by the applicants in the present case.

124 In the light of the foregoing, it must be concluded that the evidence adduced by the applicants, even taken as a whole, is not sufficient to rebut the presumption that Total and Elf Aquitaine actually exercised a decisive influence over the conduct of their subsidiaries.

125 The second part of this plea must therefore be rejected in its entirety and, accordingly, the second plea in its entirety.

The third plea, alleging infringement of the duty to state reasons and of the principle of sound administration in the implementation of the imputability rules

126 This plea is divided into two parts.

The first part, alleging infringement of the duty to state reasons

— Arguments of the parties

127 The applicants claim that, since the contested decision does not contain a reply to all Arkema's arguments designed to show the independence of its commercial policy, the Commission infringed its duty to state reasons. Moreover, the explanations given by the Commission in the defence do not remedy that situation.

128 First, the applicants state that the Commission did not respond to all the arguments put forward by Arkema, which are summarised in recital 269 to the contested decision. In particular, it failed to respond to the arguments that the appointment of the members of Arkema's board of directors by Elf Aquitaine did not in itself prove actual exercise of control and that Arkema enjoyed full independence in the determination of its commercial policy, the reporting duty being limited to general information given within the framework of normal functioning in a group of companies, focused mainly on accounting, financing and auditing matters.

129 Secondly, the applicants state that the Commission did not respond to certain arguments presented by Arkema in its reply to the statement of objections, and they are not even summarised in the contested decision. They are arguments according to which the directors of Total and Elf Aquitaine were never involved in the alleged practices and the control exercised by the parent companies was limited to authorising the largest investments and was too general for Arkema's independence to be restricted, inter alia as regards the fixing of prices.

130 The applicants consider that, although the Commission is not required to discuss all the points of fact and law addressed during the administrative procedure, it is nevertheless required to examine the validity of all the arguments put forward to rebut the presumption of exercise of a decisive influence, taken as a whole. Any other approach would amount to introducing an irrebuttable presumption.

131 Moreover, the failure to state reasons is all the more harmful in the present case because, first, the approach taken by the Commission is innovative, as the Commission recognises in recital 271 to the contested decision, and, secondly, with regard to the other subsidiaries implicated by the contested decision, the Commission found that there was additional evidence to support the presumption of exercise of a decisive influence by their parent companies. The applicants point out that, according to the case-law, the Commission's duty to state reasons is more onerous if its decision goes appreciably further than the previous decisions (Case C-228/99 *Silos* [2001] ECR I-8401, paragraph 28; and orders in Case T-245/03 *FNSEA and Others* v *Commission* [2004] ECR II-271, paragraph 52, and Case T-217/03 *FNCBV* v *Commission* [2004] ECR II-239, paragraph 66).

132 The Commission denies having infringed its duty to state reasons.

— Findings of the Court

133 So far as concerns the obligation on the Commission to provide reasons, it should be pointed out that it is settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power

of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. 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 Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63 and the case-law cited).

134 It has already been held that where, as in the present case, a decision taken in application of Article 81 EC relates to several addressees and raises a problem with regard to liability for the infringement, it must include an adequate statement of reasons with respect to each of the addressees, in particular those of them who, according to the decision, must bear the liability for the infringement (Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 78, and Case T-330/01 *Akzo Nobel* v *Commission* [2006] ECR II-3389, paragraph 93). Consequently, in order to contain an adequate statement of reasons in regard to the applicants' parent companies, the contested decision had to contain inter alia a detailed statement of reasons for attributing the infringement to those companies (see, to that effect, *SCA Holding* v *Commission*, paragraph 80).

135 Moreover, since that attribution has an impact on the applicants' situation, they contested that attribution during the administrative procedure and they therefore have an interest in challenging the contested decision in that regard, they must be put in a position, just as their parent companies, to know the reasons for the Commission's position.

136 It follows that, where, as in the present case, the Commission bases the attribution of the infringement on the presumption of exercise of a decisive influence and where the companies concerned have, during the administrative procedure, adduced evidence designed to rebut that presumption, the decision must contain an adequate statement of reasons justifying the view that the presumption cannot be rebutted on that evidence.

137 In the present case, in their reply to the statement of objections, the applicants maintained inter alia that, during the whole period of the infringement, Arkema had genuine independence in determining its commercial policy. In support of that statement, the applicants put forward, in essence, the same arguments as those analysed in connection with the second plea.

138 However, it is apparent from the foregoing that the Commission replied to those arguments in recital 272 to the contested decision, by stating that '[t]he other arguments [were] assertions which [were not] supported by evidence to a sufficient degree to rebut the presumption that Total and Elf Aquitaine [were] responsible for the acts of their subsidiary Atofina'. The applicants are therefore wrong to argue that the Commission did not reply to their argument, reproduced in recital 269(c) to the contested decision, that Arkema enjoyed complete autonomy in its commercial policy and conduct on the market.

139 Moreover, it must be considered that, in the circumstances of this case, that statement in recital 272 to the contested decision fulfils the requirements laid down by the case-law.

140 The Commission accordingly set out the reason why it had considered that the evidence produced by the applicants and their parent companies was not sufficient to rebut the presumption of exercise of a decisive influence. The contested decision therefore gave them the information necessary to defend their rights. In particular, the applicants were able either to contest the accuracy of that statement, by claiming

that they had supported their assertions with adequate evidence, or to contest its relevance, by claiming that the assertions at issue, even if unsupported, were in the present case sufficient to rebut that presumption. That reasoning becomes fully apparent when considered alongside the relevant passage in the reply to the statement of objections, of which the applicants are aware, which does not refer to any document in support of the statements it contains (see paragraph 102 et seq. above).

141 Furthermore, as the Commission rightly points out, it is apparent from the case-law that, although, under Article 253 EC, it is obliged to state the reasons on which its decisions are based, mentioning the factual and legal elements which provide the legal basis for the measure and the considerations which have led it to adopt its decision, it is not required to discuss all the issues of fact and law raised by every party during the administrative proceedings (Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraph 88, and Case T-3/89 *Atochem* v *Commission* [1991] ECR II-1177, paragraph 222). Therefore, although the Commission must reveal, in its decision, the reasons why it considers that the evidence adduced is insufficient to rebut the presumption of exercise of a decisive influence, it does not follow that it is required, in each case, to discuss specifically each of the pieces of evidence put forward by the undertakings concerned. A general reply, such as that given in the present case, may, depending on the circumstances of the case, suffice for the undertaking concerned properly to defend its rights and for the Court to exercise its review.

142 The fact that recital 269 to the contested decision does not reproduce all Arkema's arguments is not decisive.

143 First, with regard to the argument that the control exercised by the parent companies was limited to authorising the largest investments and was too general for Arkema's autonomy to be restricted, particularly with regard to the fixing of prices, it overlaps with the argument that 'Atofina enjoy[ed] complete autonomy in its commercial

policy and conduct on the market', which is reproduced in recital 269(c) to the contested decision and responded to in recital 272 to the decision. Moreover, paragraphs 115 and 117 of the applicants' reply to the statement of objections, in which that argument appears, do not refer to any document in support. The applicants could therefore see that the Commission's statement in recital 272 to the contested decision also constituted a response to that argument.

144 Secondly, with regard to the argument that the directors of Total and Elf Aquitaine had never been involved in the alleged practices, it is apparent from the applicants' reply to the statement of objections (see in particular paragraphs 91 to 105) that they raised that argument, in paragraphs 99 to 101 of that document, not to rebut the presumption of exercise of a decisive influence, but to show that 'Elf Aquitaine and Total cannot be accused of having participated, either directly or indirectly, in the alleged practices'. However, it is apparent from the foregoing that the Commission did not base its attribution of the infringement at issue to the applicants' parent companies on that factor. Therefore, the fact that it did not mention that argument in the contested decision can in no way constitute an infringement of the duty to state reasons.

145 As for the fact that the Commission did not expressly reply to the argument, reproduced in recital 269 to the contested decision, that the appointment of Arkema's board of directors by Elf Aquitaine did not prove actual exercise of control, it should be pointed out that the Commission did not claim in the contested decision that that evidence was sufficient to justify the attribution of the infringement at issue to the applicants' parent companies. Admittedly, the Commission stated, in recital 264 to the contested decision, that 'the members of the board of Arkema... were appointed by Elf Aquitaine...' and that that fact, as well as the shareholding link between those two companies, permitted it to presume that Elf Aquitaine had a decisive influence and actual control over the conduct of its subsidiary Arkema. However, as stated in paragraphs 68 and 69 above, it is apparent from the broad logic of the contested decision that that evidence was mentioned only for the sake of completeness and that it was not a requirement for the attribution of the infringement at issue to the applicants'

parent companies. Consequently, the absence of an express reply to that argument did not prevent the applicants knowing the justifications for that attribution or contesting it before the Court.

146 Moreover, as regards the argument relating to the wording of recital 271 to the contested decision, it should be pointed out that the Commission stated as follows:

'[T]he fact that in a previous case the Commission addressed its decision to Atofina alone does not, as such, prevent the Commission from addressing its decision in this case to both Atofina and Total/Elf Aquitaine. The Commission has discretion to impute liability to a parent company in circumstances such as those in the present case... and the fact that it has not done so in a previous decision does not prevent it from doing so in this case.'

147 Clearly, that passage in no way amounts to an admission that the Commission adopted an innovative approach in the present case, as the applicants claim. The Commission's statement is intended merely to reject the argument, in recital 268 to the contested decision, that, in a previous decision addressed to Arkema, Arkema's conduct was not attributed to its parent company (Organic peroxides decision). Moreover, it should be pointed out that, prior to the contested decision, the presumption of exercise of a decisive influence, based only on the shareholding link, had already been applied by the Commission in the MCAA decision, in which it had attributed the infringement committed by Arkema to Elf Aquitaine.

148 In any event, the case-law cited by the applicants only requires the Commission to give an explicit account of its reasoning if, in the course of its practice in taking decisions, it takes a decision which goes appreciably further than the previous decisions. It is therefore not sufficient, in such a case, to give cursory reasons, in particular by

reference to established practice in taking decisions (see, to that effect, *Silos*, paragraph 131 above, paragraph 28). However, as is apparent from the foregoing, the Commission, in the contested decision, replied explicitly to Arkema's arguments seeking to demonstrate the autonomy of its commercial policy.

149 Finally, the fact that, with regard to other subsidiaries sanctioned by the contested decision, the Commission pointed out that there was additional evidence supporting the presumption of exercise of a decisive influence by their parent companies does not affect the adequacy of the reasoning in respect of the applicants. Moreover, it is apparent from the foregoing (see paragraphs 68 and 69 above) that such additional evidence was noted only for the sake of completeness.

150 It follows that the first part of this plea must be rejected.

The second part, alleging infringement of the principle of sound administration

— Arguments of the parties

151 The applicants point out that, according to the case-law, under the principle of sound administration, the Commission has the obligation to examine carefully and impartially all the relevant aspects of the individual case. That obligation has fundamental

importance in administrative procedures, such as competition procedures, in which the institutions have a power of appraisal in order to be able to fulfil their tasks.

152 In the present case, by basing its arguments merely on the presumption of control and by failing, as stated above, to reply to the arguments put forward by Arkema to rebut that presumption (in particular those which related to the irrelevance of the appointment of the members of the board of directors by Elf Aquitaine and Arkema's commercial autonomy), the Commission did not examine carefully the relevant evidence in the present case and infringed the principle of sound administration.

153 Moreover, the applicants reject the Commission's arguments according to which this complaint is interchangeable with the complaint concerning the lack of reasoning. They point out that the principle of sound administration is different from the duty to state reasons and pursues a different aim.

154 The Commission disputes those arguments.

— Findings of the Court

155 It should be pointed out that, according to settled case-law, where the European Union institutions have a power of appraisal in order to be able to fulfil their tasks, respect for the rights guaranteed by the European Union legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Case C-269/90 *Technische Universität*

München [1991] ECR I-5469, paragraph 14, and Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 86). That obligation arises under the principle of sound administration (see, to that effect, Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 269).

156 In support of this complaint, the applicants merely maintain that the Commission based its arguments on a mere presumption of a decisive influence exercised over them by their parent companies and failed to reply to the arguments put forward by Arkema to rebut that presumption, in particular the arguments relating to the irrelevance of the appointment of members of the board of directors by Elf Aquitaine and to Arkema's commercial autonomy.

157 However, it is apparent from the foregoing, first of all, that recourse to that presumption is completely lawful. As is apparent from the examination of the first part of this plea, a reading of the relevant passages of the reply to the statement of objections and of the contested decision reveal that the Commission replied to the relevant arguments raised by the applicants and in particular those concerning Arkema's commercial autonomy (argument reproduced in recital 269(c) to the contested decision to which a reply is given in recital 272 to the decision). In that regard it should be pointed out that the succinct nature of the reasoning therein, according to which '[t]he other arguments are assertions... not supported by evidence to a sufficient degree to rebut the presumption', does not on its own permit the finding that there has been an infringement of the obligation to examine carefully and impartially the relevant aspects arising from the administrative procedure. Moreover, it is apparent from the foregoing (see paragraph 102 et seq. above) that the assertion mentioned in recital 272 to the contested decision is correct, which presupposes that there was a careful and impartial examination carried out by the Commission.

158 Finally, with regard to the argument that the appointment of the members of Arkema's board of directors by Elf Aquitaine does not in itself prove the actual exercise of

control, it need only be said that the Commission did not claim the contrary in the contested decision. The decisive influence exercised by the applicants' parent companies over the applicants was established on the basis of a presumption which was not rebutted during the administrative procedure. As has just been stated, the appointment of the members of Arkema's board of directors by Elf Aquitaine was mentioned in that context for the sake of completeness. In those circumstances, the fact that the Commission did not specifically reply to that argument does not constitute an infringement of the obligation of sound administration.

159 Furthermore, it should be pointed out that, apart from the wording of the contested decision, the applicants do not produce any other evidence in support of their complaint.

160 Accordingly, the second part of this plea must be rejected and the third plea must therefore be rejected in its entirety.

The fourth plea, alleging failure to apply the criterion of the actual impact on the market in fixing the starting amount of the fine at EUR 65 million

Arguments of the parties

161 In this plea, the applicants argue that, by fixing the starting amount of the fine in their respect at EUR 65 million, the Commission failed to apply the criterion of the actual impact on the market, set out in the first paragraph of Section 1.A of the Guidelines.

162 In the first place, the applicants claim that the starting amount of the fine, namely EUR 65 million, is excessive since the infringement had only a very limited impact on the product market at issue.

163 In that regard, they maintain, first, that, contrary to what the Commission states in recital 329 to the contested decision, the impact of the infringement on the market could be measured. Consequently, it should have been taken into account in the determination of the gravity of the infringement, in accordance with the case-law and the Guidelines.

164 According to settled case-law, in order to assess the actual impact of an infringement on the market, the Commission must refer to the competition which would normally have existed without the infringement. That therefore involves being aware of the development of competition on the market concerned during the commission of the infringement and being able to compare that development with the exogenous market data.

165 In their reply to the statement of objections, the applicants provided the Commission with the data necessary for that purpose, namely detailed information concerning the development of the prices of the three PMMA products concerned from 1995 to 2003, including in relation to the development of the price of their raw materials. Moreover, the impact of the infringement could also be measured on the basis of the information concerning the development of the market shares of the various producers during the infringement, which was in the Commission's possession, as is evidenced by the wording of the statement of objections.

166 Secondly, the applicants argue that, if the Commission had quantified the impact of the infringement on the market, it would have been bound to conclude that that impact was limited and it would then have fixed the starting amount of Arkema's fine at a level lower than EUR 65 million.

167 In that regard, the applicants claim that the actual impact of the infringement was necessarily negligible, since the development of the prices of the products in question was closely related to that of the prices of the raw materials used in their manufacture and for which no infringement was found, as is apparent from the schedules provided by Arkema and annexed to its reply to the statement of objections.

168 Moreover, the Commission itself acknowledged, in the contested decision, that the infringement had had only an extremely limited impact on the markets in question. Accordingly, in recital 104 to the contested decision, relating to the general description of the implementation of the agreements, it acknowledged that it had not always been possible to implement the agreed price increases. Similarly, it is apparent from several recitals to the contested decision, devoted respectively to the three products concerned, that the price increases agreed at various meetings could not be implemented or had only a very limited effect.

169 Moreover, replying to the Commission's arguments, the applicants state that they do not deny that the implementation, even in part, of an agreement may indicate the existence of an actual impact of such an agreement on the market, or even that the cartel in question may have had a certain impact on the PMMA market. They maintain, however, that that impact could be measured and, if the Commission had quantified that impact, it would have been bound to conclude that it was limited.

170 In the second place, the applicants maintain that the Commission infringed the duty to state reasons and the principle of sound administration in that it considered that the actual impact of the infringement did not have to be taken into consideration for the determination of the starting amount of the fine.

171 First, the applicants point out that the Commission merely stated that the impact of the infringement could not be measured, without adducing any evidence in support of that statement, in spite of the numerous pieces of evidence on the development of prices provided by Arkema during the course of the administrative procedure.

172 According to the applicants, it is for the Commission to show whether or not the impact of the infringement can be measured, in particular where, as in the present case, the parties to the administrative procedure adduce evidence relating to the effects of the infringement on the markets concerned. Otherwise, the Commission would need only to state that the impact of the infringement cannot be measured to avoid taking that impact into account when determining the starting amount of the fine.

173 Secondly, the applicants maintain that the Commission also infringed its duty to state reasons and the principle of sound administration in that it did not reply to the arguments, put forward by Arkema in response to the statement of objections, to show that the impact of the infringement on the market concerned was limited.

174 In conclusion, the applicants ask the Court to annul the disputed provisions of the contested decision and, in the exercise of its unlimited jurisdiction, to set the starting amount of their fine at a level lower than that imposed by the Commission, in the light of the limited impact of the infringement on the markets at issue.

175 The Commission disputes those arguments.

Findings of the Court

176 Section 1.A of the Guidelines states that '[i]n assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market'.

177 In this plea, the applicants claim, in essence, that, contrary to what the Commission states in the contested decision, the impact of the cartel at issue on the market could be measured. According to the applicants, if the Commission had quantified that impact, it would have been bound to conclude that it was limited and it would then have set the starting amount of Arkema's fine at a level lower than EUR 65 million. Moreover, the applicants allege infringement of the duty to state reasons and of the principle of sound administration, in that the Commission did not substantiate its statement that the impact could not be measured and did not respond to the arguments put forward by Arkema in response to the statement of objections.

178 In that regard, it must be borne in mind that, according to the case-law of the Court of Justice, the gravity of infringements must be assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up. The factors capable of affecting the assessment of the gravity of the infringements include the conduct of each of the undertakings, the role played by each of them in the establishment of the concerted practices, the profit which they were able to derive from those practices, their size, the value of the goods concerned and the threat that infringements of that type pose to the objectives of the Union (see Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 241 and 242 and the case-law cited; see also, to that effect, Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraph 96).

179 It follows from this that the effect of an anti-competitive practice is not, in itself, a conclusive criterion for assessing the proper amount of a fine. In particular, factors relating to intention may be more significant than those relating to that effect, particularly where the infringements are intrinsically serious (see *Prym and Prym Consumer* v *Commission*, paragraph 178 above, paragraph 96 and the case-law cited).

180 In that regard, it has consistently been held that, by reason of their very nature, cartels merit the severest fines. Their possible concrete impact on the market, particularly the question to what extent the restriction of competition resulted in a market price higher than would have obtained without the cartel, is not a decisive factor for determining the level of fines (Case T-127/04 *KME Germany and Others* v *Commission* [2009] ECR II-1167, paragraph 64). The three aspects of the assessment of the gravity of the infringement do not carry the same weight in the context of an overall examination. The nature of the infringement plays a primary role, in particular, for classifying infringements as 'very serious' (Case T-73/04 *Carbone-Lorraine* v *Commission* [2008] ECR II-2661, paragraph 91).

181 Accordingly, as the Court of Justice has held, it is apparent from the Guidelines that the Commission may classify horizontal price or market-sharing agreements as very serious infringements solely on account of their nature, without being required to demonstrate an actual impact of the infringement on the market. In that case, the actual impact of the infringement is only one among a number of factors which, if it can be measured, may allow the Commission to increase the starting amount of the fine beyond the minimum likely amount of EUR 20 million (*Prym and Prym Consumer* v *Commission*, paragraph 178 above, paragraph 75, and *Erste Group Bank and Others* v *Commission*, paragraph 122 above, paragraph 103). The Court therefore emphasised that the actual impact of the infringement on the market was an optional element which the Commission could take into account for the purposes of calculating the fine, if it considered it appropriate (see, to that effect, *Prym and Prym Consumer* v *Commission*, paragraph 178 above, paragraph 82).

182 Furthermore, it has been held that the fact that, in the Guidelines, the Commission set out its approach to assessment of the gravity of an infringement does not prevent it from assessing infringements as a whole by reference to all the relevant circumstances of the case, including factors that are not expressly mentioned in the Guidelines (*Raiffeisen Zentralbank Österreich and Others* v *Commission*, paragraph 122 above, paragraph 237).

183 In the light of that case-law, the arguments presented by the applicants do not affect the legality of the contested decision in so far as concerns the determination of the starting amount.

184 First, it follows that, even if, as the applicants maintain, the impact of the infringement at issue on the development of prices was limited, its classification as a very serious infringement is still appropriate in the light of its very nature and of its geographic extent (namely the territory of the EEA). Moreover, it should be pointed out that, in its conclusion on the gravity of the infringement, in recital 331 to the contested decision, the Commission classified the infringement as very serious '[i]n view of the nature of the infringement and the fact that it covered the entire territory of the EEA'. Accordingly, the criterion of the actual impact on the market played no part in the classification of the infringement.

185 Secondly, there is nothing in the contested decision to indicate that, if the Commission had concluded that the impact of the cartel at issue on the market was limited, it would have set the starting amount of Arkema's fine at a level lower than EUR 65 million.

186 In that regard, although the Commission stated that the cartel at issue did indeed have an impact on the market owing to the implementation of the price agreements and practices (see recitals 321 and 329 to the contested decision), it also stated that '[i]n this proceeding, it [was] not possible to measure the actual impact [of the

infringement] on the market... and therefore the Commission does not rely specifically on a particular impact, in line with the Guidelines according to which the actual impact should be taken into account when it can be measured' (recital 321) and that the 'impact [of the cartel at issue on the market could] not be measured with precision'. Moreover, as pointed out above, its conclusion on the gravity of the infringement, in recital 331 to the contested decision, does not mention the criterion of the actual impact on the market.

187 Clearly, that factor was not taken into account for the purposes of calculating the fine.

188 Moreover, it should be pointed out that the applicants do not claim that, on the basis of the information in its possession, the Commission should have found that the cartel at issue had no impact on the market. They accept that the infringement could have had a certain impact on the market, while maintaining that that impact was limited (see paragraph 169 above). However, even if the Commission did take into account, for the purposes of calculating the fine, its finding that the cartel had had an impact on the market, there is nothing to indicate that it exaggerated its effects.

189 Similarly, it cannot be maintained that the starting amount applied to the applicants' fine was necessarily based on the taking into account of a significant impact of the cartel at issue on the market because that starting amount is significantly higher than the minimum amount envisaged by the Guidelines for very serious infringements (that is to say, EUR 20 million). Indeed, as is apparent from the foregoing, the actual impact of the infringement is only one of several aspects which may allow the Commission to increase the starting amount of the fine beyond that amount.

190 Accordingly, in the present case, the starting amount is based inter alia on the nature of the infringement, established in the light of its principal characteristics set out in

Section 4.2 of the contested decision (see recital 320 to the contested decision), on the size of the relevant geographic market, namely the territory of the EEA (see recital 330 to the contested decision), and on the application of differential treatment to those undertakings, in order to take account of their effective economic capacity to cause significant damage to competition, assessed in the light of turnover achieved with the PMMA products, for which they participated in the cartel at issue (see recitals 332 to 334 to the contested decision). In this last context, the Commission also mentioned the overall size of the market for PMMA products in 2000 and 2002, expressed in volume and in value (see recital 333 to the contested decision).

191 In this plea, the applicants mention the excessive nature of the starting amount of the fine solely in relation to the criterion of the actual impact on the market. As is apparent from the foregoing, those arguments are in themselves ineffective for challenging the starting amount of the fine applied to the applicants.

192 It also follows that the fact that the wording of the contested decision does not state in sufficient detail the reasons why the Commission considered that it was not possible, on the basis of the information it had, to measure the actual impact of the infringement at issue on the market is irrelevant. That fact has no bearing on the classification of the infringement as very serious or on the starting amount applied to the applicants' fine.

193 Moreover, it is apparent from the foregoing that the arguments relating to the limited nature of the impact of the cartel at issue on the market cannot justify the reduction of the fine in the exercise of the Court's exclusive jurisdiction.

194 Therefore, it is necessary to reject the present plea and the request for a reduction of the fine made on that ground by the applicants.

The fifth plea, alleging the existence of errors of law and fact in the increase in the starting amount of the fine for deterrent effect

195 In this plea, the applicants contest the increase in the starting amount of the fine as a deterrent and ask the Court to annul the contested decision in that respect or, in the alternative, to reduce substantially the increase made in that respect.

196 This plea is divided into three parts. Moreover, at the hearing, the applicants raised an additional plea seeking to contest the increase in question.

The first part, alleging that the Commission was not justified in increasing the starting amount of the fine as a deterrent on the basis of Total's turnover, since the infringement was not attributable to that company

— Arguments of the parties

197 The applicants claim that, by applying a multiplier of 3 as a deterrent on the basis of Total's turnover, even though the infringement was not attributable to that company, the Commission committed an error of law. In their opinion, any increase in the fine as a deterrent, even if it were necessary, could have been based only on the size and resources of Arkema.

198 The Commission expressly acknowledged that a multiplier of 3 is excessive in such a situation. The applicants point out, in fact, that, in order to determine the fraction

of the fine attributable only to Arkema in respect of repeat infringement, the Commission stated that it would have applied 'a multiplier of 1.25' if Arkema had been the only addressee of the contested decision (footnote 250 to the contested decision).

199 The Commission disputes those arguments.

— Findings of the Court

200 Suffice it to say that this part of the present plea rests entirely on the premiss that the infringement at issue could not be attributed to Arkema's parent companies. However, it is apparent from the foregoing that that premiss is misconceived.

201 Consequently, the first part of this plea must be rejected.

The second part, alleging infringement of the principles of proportionality and equal treatment

— Arguments of the parties

202 The applicants claim that, even if the infringement were attributable to Total (or to Elf Aquitaine), the Commission infringed the principles of proportionality and equal treatment in that it took Total's turnover into account in order to increase the amount of Arkema's fine as a deterrent.

203 According to the applicants, even if the presumption of exercise of a decisive influence may be enough to attribute the infringement to their parent companies, it is not sufficient for applying the increase as a deterrent on the basis of the turnover made by those parent companies. They consider that the deterrent nature of the fine must be assessed according to the circumstances likely to influence the conduct of the perpetrator of an infringement on the market and, in particular, of the extent of the resources made available to the subsidiary which has committed the infringement on the market concerned. In their opinion, for the increase as a deterrent to be calculated on the basis of the turnover at group level, membership of a group of companies must be accompanied by additional evidence showing that the subsidiary actually used the group's resources in the commission of the infringement, owing to the participation of the directors of the parent company in the infringement and/or owing to the existence of actual control by the parent company of the subsidiary. Otherwise, the taking into account of the parent company's turnover constitutes a disproportionate and discriminatory application of the concept of deterrent effect.

204 Moreover, the applicants point out that, in its practice in taking decisions, the Commission has itself considered that the participation of the parent company in the infringement committed by its subsidiary and the use of the group's resources in the commission of the infringement were relevant criteria for the purposes of applying deterrent effect (Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691/E-4 — Pre-Insulated Pipe Cartel) (OJ 1999 L 24. p. 1;'the Pre-insulated pipes decision')).

205 The Commission disputes those arguments.

206 It points out, in particular, that, since the undertaking which is to be held liable for the infringement has been defined sufficiently, the need or otherwise to apply a multiplying factor and, if appropriate, the determination of the appropriate nature of its level depend on the overall resources of that undertaking. Those resources are adequately reflected by the overall turnover of the undertaking during the year preceding that of

the adoption of the decision imposing the penalty and none of the points raised by the applicants can be taken into account.

— Findings of the Court

207 It should be pointed out that, in recital 337 to the contested decision, the Commission stated that, in the category of very serious infringements, the scale of fines that can be imposed also makes it possible to set the amount of the fines at a level which ensures that they have sufficient deterrent effect 'having regard to the size and economic power of each undertaking'. In order to assess the size and economic power of the undertaking to which the applicants belong, the Commission took into account the worldwide turnover of Total in 2005, the last financial year preceding that during which the contested decision was adopted (EUR 143 168 million) and decided to apply a multiplier of 3 to the fine imposed on Arkema (see inter alia recitals 338 and 349 to the contested decision).

208 In this part of the fifth plea, the applicants contest this approach by stating, in essence, that, for the increase imposed as a deterrent to be able to be calculated on the basis of the turnover at group level, membership of a group of companies must be accompanied by additional evidence showing that the subsidiary actually used the group's resources. Consequently, the attribution of liability to parent companies on the basis of the presumption of exercise of a decisive influence over their subsidiary, which is not rebutted, does not suffice in that regard.

209 That argument cannot succeed.

210 Deterrence is one of the aspects to be taken into account in the calculation of the amount of the fine. It is settled case-law that the fines imposed for infringements of Article 81 EC, as laid down in Article 23(2) of Regulation No 1/2003, are designed to penalise the unlawful acts of the undertakings concerned and to deter both the undertakings in question and other economic operators from infringing, in future, the rules of European Union competition law. Accordingly, when the Commission calculates the amount of the fine it may take into consideration, inter alia, the size and the economic power of the undertaking concerned (see, to that effect, Case C-289/04 P *Showa Denko* v *Commission* [2006] ECR I-5859, paragraph 16 and the case-law cited).

211 Moreover, the Court of Justice has consistently held that the total turnover of the undertaking gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power (see *Dansk Rørindustri and Others* v *Commission*, paragraph 178 above, paragraph 243 and the case-law cited). Thus, it has already been held that the Commission, in order to determine the amount of the fine at a level which ensures that it has a sufficiently deterrent effect, was entitled to have regard to the total turnover of the undertaking concerned (*Showa Denko* v *Commission*, paragraph 210 above, paragraphs 15 to 18; judgment of 22 May 2008 in Case C-266/06 P *Evonik Degussa* v *Commission and Council*, not published in the ECR, paragraph 120; and Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 96).

212 In that context, it should be noted that, according to the contested decision, Total and Elf Aquitaine form with the applicants a single undertaking, which committed the infringement at issue. In those circumstances, the applicants' arguments amount to requiring that, for the purposes of determining the sufficiently deterrent level of the fine, the Commission should take into account not the size and economic power of that undertaking, as reflected by its overall turnover, but only part of its resources, namely those 'made available to the subsidiary which has committed the infringement on the market concerned'. Clearly, however, that argument is incompatible with the objective of deterrence pursued by the Commission.

213 As the General Court has already held, the need to ensure that the fine has a sufficient deterrent effect, where it is not found to justify raising the general level of fines in the context of the implementation of competition policy, requires that the amount of the fine be adjusted in order to take account of the desired impact on the undertaking on which it is imposed, so that the fine is not rendered negligible, or on the other hand excessive, in particular in the light of the financial capacity of the undertaking in question, in accordance with the requirements arising from, on the one hand, the need to ensure effectiveness of the fine and, on the other, compliance with the principle of proportionality (Case T-279/02 *Degussa* v *Commission* [2006] ECR II-897, paragraph 283, and Case T-410/03 *Hoechst* v *Commission* [2008] ECR II-881, paragraph 379). Consequently, it is inter alia the possibility that the undertaking concerned may find it easier to mobilise the funds necessary to pay its fine, which, in order to ensure that the fine has a sufficient deterrent effect, may justify the application of a multiplier (see, to that effect, *Showa Denko* v *Commission*, paragraph 210 above, paragraph 18; *Degussa* v *Commission*, paragraph 284; and *Hoechst* v *Commission*, paragraph 379).

214 It follows that the Commission cannot be required to establish an additional link between the use of the undertaking's resources and the infringement committed by it in order for those resources to be taken into account in determining the sufficient deterrent level of the fine, since what is important, in that context, is the size and economic power of the infringing undertaking as such.

215 Finally, as regards the reference to the Pre-insulated pipes decision, it need only be pointed out that the Commission's previous decision-making practice does not serve as a legal framework for fines in competition matters (see Case T-116/04 *Wieland-Werke* v *Commission* [2009] ECR II-1087, paragraph 85 and the case-law cited). Accordingly, the arguments relating to the content of that decision are in themselves irrelevant.

216 Consequently, the second part of this plea must be rejected.

The third part, alleging that it is inappropriate to apply a deterrent effect to the fine in the present case

— Arguments of the parties

217 The applicants point out that, under the Guidelines, the fine must be set at a sufficiently deterrent level and, therefore, the Commission may increase the fine if it does not attain that level. According to the applicants, the need to increase the fine in that respect can only be determined after the calculation of the final amount of the fine taking into account, if necessary, recent fines imposed on the undertaking. They consider that the fact of applying an increase in the fine in order to give it a deterrent effect *ab initio* and *in abstracto*, without taking into account the factual considerations of the undertaking concerned and, in particular, the fines it has previously paid, is contrary to the Guidelines.

218 In that regard, the applicants point out that Arkema was ordered, during a period of less than three years, to pay substantial fines of a total amount of approximately EUR 180 million, in respect of its participation in cartels carried on simultaneously, at least partly, with the practices sanctioned in the contested decision. Those fines were imposed by the Commission in the Organic peroxides decision and the MCAA decision, and in Commission Decision C (2006) 1766 of 3 May 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case

COMP/F/C.38.620 — Hydrogen peroxide and perborate) ('the Hydrogen peroxide and perborate decision'). In each of those three decisions, the Commission applied an increase in the fine imposed on Arkema as a deterrent, by gradually increasing the applicable multiplier.

219 The applicants take the view that the Commission should therefore have considered that the previous fines for matters which were contemporaneous with the cartel at issue had a sufficiently deterrent nature to prevent Arkema committing further infringements in the future and that it was therefore inappropriate to apply an additional increase to the fine as a deterrent.

220 Moreover, they point out that Arkema's adoption of a programme for compliance with competition law, a short time after the acquisition of Elf by Total Fina, is evidence that it was already sufficiently dissuaded from committing further infringements.

221 The Commission disputes those arguments.

— Findings of the Court

222 It should be pointed out, at the outset, that the Commission has a margin of discretion when fixing the amount of fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules (see Case T-68/04 *SGL Carbon* v *Commission* [2008] ECR II-2511, paragraph 49 and the case-law cited).

223 In the first place, it is necessary to reject the argument that the Commission, in the present case, increased the fine as a deterrent *ab initio*, even though, according to the applicants, the need to increase the fine as a deterrent can only be determined after the calculation of the final amount of the fine.

224 As has already been held, the need to ensure a deterrent effect is a general requirement which must be a reference point for the Commission throughout the calculation of the fine and does not necessarily require that there be a specific step in that calculation in which an overall assessment is made of all relevant circumstances for the purposes of attaining that objective (see *Carbone-Lorraine* v *Commission*, paragraph 180 above, paragraph 131 and the case-law cited). Therefore, the applicants cannot claim that the Commission should not determine the deterrent effect until after the calculation of the final amount of the fine.

225 Moreover, it must be stated that, in recitals 337 to 350 to the contested decision, the Commission, when evaluating the gravity of the infringement, only increased the starting amount of the fine in order to ensure 'sufficient deterrent effect, having regard to the size and economic power of each undertaking' (recital 337 to the contested decision). That stage in the calculation of the fine is the result of the need to adjust the starting amount so that the fine is sufficiently deterrent in the light of the undertaking's overall resources and of its ability to mobilise the funds needed to pay the fine. However, that step is not tantamount, as the applicants maintain, to an assessment, *ab initio*, of the deterrent nature of the fine as such. As is clear from the previous paragraph, that consideration must be a reference point for the Commission throughout the calculation of the fine.

226 In the second place, it is also necessary to rule out the argument that the Commission increased the fine as a deterrent *in abstracto*, without taking account of the factual considerations specific to the infringing undertaking.

227 That argument is factually incorrect. Indeed, the taking into account of the size of the undertaking to which the applicants belonged, in recitals 337 to 350 to the contested decision, and the resulting increase in the starting amount constitute a factor designed to adjust the fine according to aspects of that undertaking (see, to that effect, *Degussa* v *Commission*, paragraph 213 above, paragraph 362).

228 In the third place, it is necessary to address the argument that the Commission should have taken account of fines previously paid by Arkema, in that it should have considered that the three previous fines imposed on it for matters contemporaneous with the cartel at issue were a sufficient deterrent to prevent it committing further infringements in the future and that it was therefore inappropriate to apply an additional increase to the fine as a deterrent.

229 First of all, it should be pointed out that the Commission could lawfully impose four separate fines on Arkema, each fine respecting the limits set out in Article 23(2) of Regulation No 1/2003, so long as it had committed four separate infringements of the provisions of Article 81 EC (see, to that effect, *Carbone-Lorraine* v *Commission*, paragraph 180 above, paragraph 56). Each of those fines would have to be based on an assessment of the duration and gravity of the infringement it penalised.

230 However, the imposition of a fine on Arkema for various anti-competitive activities concerning other products cannot affect the reality of the infringement committed in the present case (see, to that effect, Joined Cases T-101/05 and T-111/05 *BASF and UCB* v *Commission* [2007] ECR II-4949, paragraph 52). It should be pointed out, in that regard, that the approach advocated by the applicants would prevent the Commission from setting a given fine by taking into account all those aspects which would enable an assessment of the gravity of the infringement and, in particular, the need to ensure a sufficiently deterrent level of that fine, in the light of the size and economic power of the undertaking concerned.

231 Moreover, the approach advocated by the applicants is contrary to the objective of deterrence pursued by the Commission concerning its policy in respect of fines. As the Commission has rightly pointed out, that approach would lead to a paradoxical situation, in which an undertaking participating in several cartels would see the marginal cost of each sanction gradually reduced.

232 Moreover, it should be pointed out that the applicants' arguments are based on the premise that the Commission should have set the amount of the fine according to the likelihood of Arkema committing further infringements in the future, a likelihood which it should have assessed in the light of the total amount of the fines imposed on that undertaking during a certain period of time. Such a premise is incompatible with the concept of deterrence in competition law.

233 In that regard, it should be pointed out that, according to the case-law, the Commission's power to impose fines on undertakings which intentionally or negligently commit an infringement of Articles 81(1) EC or 82 EC is one of the means conferred on the Commission with which to carry out the task of supervision conferred on it by European Union law. That task certainly includes the duty to investigate and punish individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 105, and *SGL Carbon* v *Commission*, paragraph 222 above, paragraph 53).

234 Accordingly, the fines imposed for infringements of Article 81 EC, as laid down in Article 23(2) of Regulation No 1/2003, are designed to sanction the unlawful acts of the undertakings concerned and to deter both the undertakings in question and other economic operators from infringing, in future, the rules of European Union competition law (*Showa Denko* v *Commission*, paragraph 210 above, paragraph 16). Therefore, deterrence is assessed by taking into account a large number of factors

and not merely the particular situation of the undertaking concerned (*Showa Denko* v *Commission*, paragraph 210 above, paragraph 23, and Case T-13/03 *Nintendo and Nintendo of Europe* v *Commission* [2009] ECR II-947, paragraph 71). Thus when assessing the need to increase the amount of fines in order to ensure that they have deterrent effect the Commission is in no way required to evaluate the likelihood that the undertakings in question will reoffend (*Nintendo and Nintendo of Europe* v *Commission*, paragraph 72).

235 Consequently, that step in the calculation of the fine consists in raising the starting amount of the fine in the light of objective elements, such as the size and economic power of the undertaking concerned, and not subjective elements relating to the assessment of the likelihood of committing a further infringement in the future. It follows that the fact that the Commission has already applied, in the decisions invoked by the applicants, increases in their respect as a deterrent and has gradually increased the multiplication factors applied is irrelevant.

236 Finally, it is also necessary to reject the argument that the adoption by Arkema of a programme for compliance with competition law shows that it was already sufficiently deterred from committing further infringements, since that information is irrelevant, in the context of the increase in the fine, to the taking into account of the size and economic power of the undertaking concerned. In any event, it has already been held that the mere adoption by an undertaking of a programme for compliance with the competition rules cannot constitute a valid and definite guarantee of future and continuing compliance by that undertaking with those rules, with the result that such a programme cannot require the Commission to reduce the fine on the ground that the objective of prevention pursued by it has already been at least partly achieved (*Degussa* v *Commission*, paragraph 213 above, paragraph 361; see also *BASF and UCB* v *Commission*, paragraph 230 above, paragraph 52).

237 Therefore, the third part of this plea must be rejected.

The plea, raised at the hearing, alleging that, on the day of the adoption of the contested decision, the applicants were no longer controlled by Total and Elf Aquitaine

— Arguments of the parties

238 At the hearing, the applicants maintain that, in any event, the Commission could not increase their fine as a deterrent in order to take into account the size of the Total group, since Arkema was no longer controlled by that group at the time of the adoption of the contested decision. However, new evidence, adduced by the Commission since the end of the written procedure, suggests that the existence of such control at the time of the adoption of the contested decision was a prerequisite for applying an increase to Arkema as a deterrent, in the light of the size of the Total group.

239 That new evidence emerges from the Commission's reply to the questions posed by the Court, by way of measures of organisation of procedure relating to Case T-206/06 *Total and Elf Aquitaine* v *Commission*, concerning the application brought by the applicants' parent companies against the contested decision. In that reply, the Commission explained that it had not applied deterrent multipliers to Arkema in more recent decisions (Commission Decision C (2008) 2626 final of 11 June 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.695 — Sodium chlorate) ('the Sodium chlorate decision') and Commission Decision C (2009) 8682 final of 11 November 2009 relating to a proceeding under

Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.589 — Heat stabilisers) ('the Heat stabilisers decision')) because Arkema was no longer a part of the Total group at the date of those decisions.

240 However, the applicants point out that Arkema was introduced on the stock exchange on 18 May 2006 and that, from that date, almost two weeks before the adoption of the contested decision on 31 May 2006, Arkema was no longer controlled by Total.

241 To the Commission's arguments that this is a new plea, which is inadmissible under Article 48 of the Rules of Procedure of the General Court, the applicants reply that their arguments are based on evidence disclosed after the end of the written procedure, namely the Commission's reply to the questions posed by the Court in Case T-206/06 and the Sodium chlorate and Heat stabilisers decisions. In any event, the applicants request the Court to examine of its own motion whether there is a lack of reasoning in the contested decision, since the Commission does not state therein why it was necessary to increase their fine as a deterrent having regard to the size of the Total group even though, at the date of the contested decision, Arkema was no longer part of that group.

242 Finally, in reply to a question from the Court in that regard, the applicants conceded that, in the present case, they had not specifically informed the Commission of the fact that, since 18 May 2006, they were no longer controlled by Total and Elf Aquitaine. However, they maintained that, during the administrative procedure, the Commission had been kept informed of the introduction on the stock exchange, which was carried out according to a prearranged schedule. They note, moreover, that the Commission presented, annexed to its defence, a prospectus relating to that introduction on the stock exchange, so that it cannot claim that it had not been informed of it.

243 The Commission claims that the plea alleging that Arkema was no longer part of the Total group at the time of the adoption of the contested decision is new and should be rejected as inadmissible, pursuant to Article 48 of the Rules of Procedure. In its view, the applicants cannot claim that this plea is based on new evidence, since, specifically, Arkema was introduced on the stock market prior to the adoption of the contested decision, so that this plea could have been raised in the application.

244 In any event, the Commission considers that this plea must be rejected as unfounded. It acknowledges that, where it takes into account an undertaking's global resources, these must be evaluated, in order properly to achieve the objective of deterrence, on the day on which the fine is imposed (*Degussa* v *Commission*, paragraph 213 above, paragraph 285). However, according to the case-law and in accordance with the Guidelines, the Commission, when determining the amount of the fine, may also take account of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law. However, that factor must be assessed at the time of the infringement (*Degussa* v *Commission*, paragraph 213 above, paragraphs 289 and 290). In particular, where there is a group of companies constituting an economic unit, the subsidiaries benefit from the fact that their parent company has such resources.

245 While admitting that the criterion of legal and economic infrastructures is not expressly mentioned in the contested decision, the Commission stresses the fact that it does appear in the Guidelines. Consequently, that criterion was necessarily applied by the Commission in the contested decision. In any event, the Commission considers that there is at most a lack of reasoning in that regard, which the Court may supplement of its own motion, by reaching the same conclusion as regards the amount of the fine.

246 Finally, as regards the Sodium chlorate and Heat stabilisers decisions, referred to by the applicants, the Commission points out that those decisions apply the Guidelines for the calculation of the fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2) ('the new Guidelines'), which no longer refer to the criterion of legal and economic infrastructures. That therefore explains a different approach in these later decisions.

— Findings of the Court

247 In the first place, it should be pointed out that, in their application, the applicants formulated a plea, divided into three parts, alleging the existence of errors of law and fact in the increase in the starting amount of the fine as a deterrent, examined above. Moreover, they also pointed out that, since Arkema was introduced on the stock exchange on 18 May 2006, it had become an entity wholly independent of the Total group, since its capital is no longer controlled by Total. However, the arguments contesting the increase in the starting amount of the fine as a deterrent, on the specific ground that the applicants were no longer controlled by the Total group at the time of the adoption of the contested decision, were not expressly raised in their pleadings. As the Commission rightly states, those arguments are based, by definition, on a fact dating from before the application and could therefore have been raised at that stage.

248 However, it is not necessary to examine, in the present case, whether those arguments constitute a new plea, which is inadmissible under Article 48 of the Rules of Procedure, or, on the contrary, merely the amplification of a plea put forward in the originating application and which is closely connected therewith, which must therefore be declared admissible under that provision (see, to that effect, order of the President of the Third Chamber of the Court of Justice in Case C-430/00 P *Dürbeck* v *Commission*

[2001] ECR I-8547, paragraph 17; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 278; and Case T-231/99 *Joynson* v *Commission* [2002] ECR II-2085, paragraph 156).

249 Even though, in their reply to the statement of objections, the applicants expressly stated that 'an increase in the amount of [Arkema's] fine to ensure its "deterrent effect", to take account of the size and resources of the Elf Aquitaine/Total group would be unjustified particularly because the undertaking will become independent of the Total group in [s]pring 2006, the date on which it is planned to introduce it on the stock exchange', as they accepted at the hearing, they did not inform the Commission of the specific fact that, from 18 May 2006, they were no longer controlled by the Total group. Accordingly, the contested decision is not marred by any illegality in that regard, since the Commission was able to take as its basis the facts stated in the statement of objections, showing that the applicants formed a single undertaking with their parent companies, facts which have not been expressly challenged by the parties concerned.

250 Consequently, the plea raised at the hearing is, in any event, unfounded in so far as it seeks to support the application for partial annulment of the contested decision.

251 Nevertheless, it should be pointed out that, in the present case, the applicants have claimed, on the basis of Article 229 EC, that the Court should annul or reduce the fine imposed on them by the contested decision. Moreover, they have specifically asked the Court to 'substantially reduce the increase of the fine imposed on Arkema as a deterrent'. Accordingly they have asked the Court to exercise its unlimited jurisdiction under Article 31 of Regulation No 1/2003, pursuant to Article 229 EC, specifically as regards the increase in the fine as a deterrent.

252 As has already been held, that unlimited jurisdiction authorises the Court to vary the contested measure, even without annulling it, by taking into account all the factual circumstances, so as to amend, for example, the amount of the fine (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, paragraph 692; *Prym and Prym Consumer* v *Commission*, paragraph 178 above, paragraph 86; and Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 577).

253 Consequently, in the circumstances of the present case, the provisions of Article 48 of the Rules of Procedure cannot preclude the Court taking into consideration, in the exercise of its unlimited jurisdiction, the arguments raised by the applicants at the hearing, in order to consider whether the increase as a deterrent was justified in the light of the matter invoked (see, to that effect and by analogy, with regard to the pleadings presented at the hearing, *JFE Engineering and Others* v *Commission*, paragraph 252 above, paragraphs 575 and 578), given moreover that the Commission has had the opportunity to present its comments on that matter (see, to that effect and by analogy, Case C-197/09 RX-II *Review M* v *EMEA* [2009] ECR I-12033, paragraphs 40 to 42 and 57 and 58).

254 In the second place, it should be pointed out that the Commission has not contested the accuracy of the applicants' statements according to which, from 18 May 2006, they were no longer controlled by Total and Elf Aquitaine. As stated above, that fact already appeared in the application. Moreover, it should be pointed out that the accuracy of that statement is confirmed by the content of the Heat stabilisers decision, discussed at the hearing, and produced subsequently by the applicants (see paragraph 26 above). According to that decision, '[s]ince 18 May 2006, Arkema France is no longer part of the Total/Elf Aquitaine group' (recital 27) and 'no longer belong[s] to the same undertaking as Elf Aquitaine...' (recital 740).

255 Moreover, at the request of the Court (see paragraph 26 above), the applicants produced evidence to substantiate their statements. The Commission did not contest that evidence and expressly acknowledged, in reply to the question from the Court, that, from 18 May 2006, the applicants were not part of the same undertaking as Total and Elf Aquitaine.

256 It must therefore be held that, on the day of the adoption of the contested decision, the applicants were no longer part of the same undertaking as Total and Elf Aquitaine.

257 In the third place, it is necessary to consider the possible impact of that finding on the amount of the fine which the applicants are required to pay under the contested decision.

258 In that regard, it should be pointed out that the need to ensure that the fine has a sufficient deterrent effect, where it is not found to justify raising the general level of fines in the context of the implementation of a competition policy, requires that the amount of the fine be adjusted in order to take account of the desired impact on the undertaking on which it is imposed, so that the fine is not rendered negligible, or on the other hand excessive, in particular in the light of the financial capacity of the undertaking in question, in accordance with the requirements arising from, on the one hand, the need to ensure effectiveness of the fine and, on the other, compliance with the principle of proportionality (*Degussa* v *Commission*, paragraph 213 above, paragraph 283, and *Hoechst* v *Commission*, paragraph 213 above, paragraph 379). Consequently, it is inter alia the possibility that the undertaking concerned may find it easier to mobilise the funds necessary to pay its fine, which, in order to ensure that the fine has a sufficient deterrent effect, may justify the application of a multiplier (see, to that effect, *Showa Denko* v *Commission*, paragraph 210 above, paragraph 18, *Degussa* v *Commission*, paragraph 213 above, paragraph 284, and *Hoechst* v *Commission*, paragraph 213 above, paragraph 379; see also paragraphs 210 to 213 above).

259 Therefore, the reason why the size and global resources of the undertaking in question are taken into consideration in order to ensure that the fine has sufficient deterrent effect resides in the desired impact on that undertaking, and the sanction must not be negligible in the light, particularly, of its financial capacity (Case C-413/08 P *Lafarge* v *Commission* [2010] ECR I-5361, paragraph 104).

260 It is for that reason, therefore, that it has been held that the objective of deterrence which the Commission is entitled to pursue when setting the amount of a fine can be properly achieved only if regard is had to the situation of the undertaking at the time when the fine is imposed (*Degussa* v *Commission*, paragraph 213 above, paragraph 278). Accordingly, an undertaking's overall resources, which may vary, decreasing or increasing significantly within a relatively short space of time, in particular between the end of the infringement and the adoption of the decision imposing the fine, must therefore be valued, so as properly to achieve the objective of deterrence, in accordance with the principle of proportionality, at the time when the fine is imposed (see, to that effect, *Degussa* v *Commission*, paragraph 213 above, paragraphs 285 and 288).

261 Moreover, those considerations are not contested by the Commission. However, it maintains that, when determining the amount of the fine, it may also take account of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law, a factor which is assessed at the time of the infringement.

262 In that regard, it should be pointed out that the gravity of the infringements must be assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (*Dansk Rørindustri and Others* v *Commission*, paragraph 178 above, paragraph 241 and the case-law cited).

263 Moreover, although it is permissible for the Commission, for the purpose of fixing the fine at a level which ensures that it has a sufficient deterrent effect, to have regard to the turnover of the undertaking concerned, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, it is important not to confer on that figure an importance disproportionate in relation to the other factors and, consequently, the fixing of an appropriate fine cannot be the result of a simple arithmetical calculation based on turnover (see, to that effect, *Musique Diffusion française and Others* v *Commission*, paragraph 233 above, paragraph 121; *Dansk Rørindustri and Others* v *Commission*, paragraph 178 above, paragraph 243; and *Evonik Degussa* v *Commission and Council*, paragraph 211 above, paragraph 120).

264 Accordingly, as the Commission rightly maintains, it may take account inter alia, in determining the amount of the fine, of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law (see also, to that effect, *Evonik Degussa* v *Commission and Council*, paragraph 211 above, paragraph 121), as moreover is provided by the fifth paragraph of Section 1.A of the Guidelines.

265 The aim of taking that factor into account is to punish large undertakings more severely since they are presumed to have sufficient knowledge and structural resources to be aware that their conduct constitutes an infringement and to assess the potential benefits of it. Consequently, on that assumption, the turnover on the basis of which the Commission determines the size of the undertakings in question, and therefore their capacity to determine the character and consequences of their conduct, must relate to their situation at the time of the infringement, not at the time of the adoption of the contested decision (*Degussa* v *Commission*, paragraph 213 above, paragraphs 289 and 290).

266 However, in the present case, it is by no means clear from the contested decision that considerations relating to the legal and economic infrastructures contributed to determining the multiplier of 3 applied to the fine imposed on the applicants.

267 It should be pointed out that that factor is not mentioned in recitals 337 to 350 to the contested decision, in which the Commission gives reasons for applying the multiplier. On the other hand, the Commission clearly states that it is necessary to fix the amount of the fines 'at a level which ensures that they have sufficient deterrent effect, having regard to the size and economic power of each undertaking' (recital 337 to the contested decision) and that it is appropriate to apply a multiplication factor 'to set the amount of the fine at a level which ensures that it has sufficient deterrent effect' (recital 349 to the contested decision). Similarly, in recital 346 to the contested decision, the Commission states that 'while differential treatment is based on the turnover of each participant in the cartelised market, which gives a proper indication of their respective weight during the infringement, the multiplier is based on the total turnover of the undertaking, which reflects the need to increase the level of the fine for deterrence purposes'.

268 The justification for the multiplier is clearly based on the considerations set out in paragraphs 258 to 260 above, namely, in essence, on the desired impact of the fines on the undertakings concerned.

269 Moreover, that conclusion is confirmed by the fact that the multipliers applied to the undertakings concerned are based on their total turnovers in 2005, that is the last financial year preceding the contested decision, irrespective of the date on which their respective periods of infringement ended. Thus, for example, in the case of ICI, to which a multiplier of 1.5 was applied, more than five years separate the end of the period of infringement (1 November 1999, according to the contested decision) from the financial year 2005. On the other hand, the analysed section of the contested decision does not contain details of the size of those undertakings during their respective

periods of infringement. Furthermore, it is pointed out that Total, whose turnover is taken into account for application of the multiplier, did not take control of the group until April 2000, although the applicants' period of infringement ran from 23 January 1997 to 12 September 2002.

270 The present case is therefore clearly different from *Degussa* v *Commission*, paragraph 213 above, cited by the Commission at the hearing. In the decision at issue in that case, the Commission expressly referred to the aspect relating to the legal and economic infrastructures (*Degussa* v *Commission*, paragraph 213 above, especially paragraph 275). Moreover, it is apparent from that judgment that the need to take account of the fact that large undertakings have legal and economic infrastructures constitutes, in the context of the increase of the fine, a different consideration from the need to ensure that the fine has a sufficient deterrent effect, which pursues different objectives (*Degussa* v *Commission*, paragraph 213 above, especially paragraphs 277, 278 and 289). Therefore, it cannot be maintained that it necessarily underlies the Commission's reasoning in the contested decision.

271 Similarly, it is necessary to reject the Commission's argument that it was bound to take account of the aspect of the legal and economic infrastructures, since it is laid down in the Guidelines. It need only be pointed out, in that regard, that the fifth paragraph of Section 1.A of the Guidelines does not provide that that aspect must automatically be taken into account, but only that the Commission may do so ('Generally speaking, account may also be taken of the fact …'). Therefore, since that matter is not made mandatory, the Commission is not required to take it into account in every case (see, to that effect, Case T-26/02 *Daiichi Pharmaceutical* v *Commission* [2006] ECR II-713, paragraph 49).

272 It follows that the size and economic power of the applicants had to be assessed, for the purposes of applying the multiplier, at the date of the contested decision, taking into account Arkema's global turnover. In particular, since, as has just been stated, the reason for the taking into consideration of those elements resided, in the present case, in the desired impact of the fine on the undertaking concerned, and since the economic unity which linked Arkema to Total was broken before the date of adoption of the contested decision, Total's resources could not be taken into account for determining the multiplier applicable to Arkema (see, to that effect and by analogy, with regard to the 10% ceiling, judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, not published in the ECR, paragraph 390).

273 Moreover, having regard to the considerations set out in paragraph 260 above, that conclusion is unaffected by the fact that that economic unity was broken only a few days before the adoption of the contested decision.

274 Similarly, even if the error of taking into account Total's turnover in determining the multiplication coefficient were attributable to the applicants (see paragraph 249 above), that circumstance cannot justify maintaining the amount of the fine imposed on them, since it is the result of taking into account a factually incorrect matter (see, to that effect, Case T-156/94 *Aristrain* v *Commission* [1999] ECR II-645, paragraph 586, and Case T-322/01 *Roquette Frères* v *Commission* [2006] ECR II-3137, paragraph 293).

275 Moreover, although the Court may not take account of the Commission's reply to its questions in Case T-206/06, which is not part of the file in the present case, it should be pointed out that this procedure is part of the decision-making practice of the Commission discussed at the hearing (see the Sodium chlorate and Heat stabilisers decisions). For example, in the Heat stabilisers decision, the Commission stated that the 'multiplication factor [based on Elf Aquitaine's worldwide turnover] should

not be applied for Arkema France and CECA SA owing to the fact that they no longer belong[ed] to the same undertaking as Elf Aquitaine' (see recital 740 to that decision). The argument that those decisions applied the new Guidelines and that those guidelines do not expressly provide for the criterion relating to legal and economic infrastructures is irrelevant, since that criterion has not been applied in this case either, as has just been pointed out. Moreover, the same approach is also apparent in the Hydrogen peroxide and perborate decision, which is contemporaneous with the contested decision and applies the same Guidelines, a decision which the Commission itself referred to at the hearing by way of comparison with the contested decision, with regard to the level of fines (see, as regards another group of companies, recitals 31 and 463 to the Hydrogen peroxide and perborate decision).

276 The conclusion in paragraph 272 above is unaffected by the fact that, under the contested decision, Arkema's responsibility for paying the fine, since it is based on the application of the multiplication coefficient of 3 in the light of Total's turnover, is shared jointly and severally with its former parent companies. The fact remains that Article 2(b) of the contested decision gives the Commission complete freedom to recover the fine from one or other of the legal persons concerned, up to the amounts stated therein. Accordingly, the Commission may decide to recover the whole of the fine from the applicants (see, to that effect, Case T-40/06 *Trioplast Industrier* v *Commission* [2010] ECR II-4893, paragraph 165).

277 It is apparent from the contested decision that the Commission itself considers that the multiplication factor of 3 is not appropriate in relation to the turnover of Arkema alone (approximately EUR 5 700 million in 2005, according to recital 14 to the contested decision). In footnote 233, relating to recital 349 to the contested decision, the Commission states that, '[a]s regards Arkema, Altuglas and Altumax..., a separate multiplier of 1.25 will be applied to their own starting amount of EUR 65 million

against which their duration uplift of 55 % is applied before the recidivist uplift of 50 % can be calculated...'. It is pointed out, in that regard, that the Commission did not consider Total and Elf Aquitaine to be recidivist (recital 369 to the contested decision) and that it therefore called for a 'hypothetical' multiplier of 1.25 in order to ensure that the increase for recidivism applied only to the parts of the calculation of the fine applicable to Arkema and its subsidiaries.

278 Furthermore, it should be pointed out that ICI and Degussa, with turnovers of more than EUR 8 000 million and more than EUR 11 000 million in 2005 respectively, have had applied to them multipliers of 1.5 and 1.75 respectively (see recital 349 to the contested decision). In those circumstances, the multiplier of 3 in respect of Arkema was justified only by the fact that, according to the information used by the Commission in the contested decision, Arkema formed part of the Total group, which had a far higher turnover than the other undertakings concerned, and that it could therefore count on its resources on the day on which the fine was imposed. Since it is now clear that this condition is not fulfilled, the multiplier of 3 is excessive by comparison with the factors applied in respect of the other addressees of the contested decision.

279 It should be pointed out that, in setting fines pursuant to Article 23(2) of Regulation No 1/2003, the Commission is bound by the general principles of law, particularly the principles of equal treatment and proportionality, as recognised by the Court of Justice and the General Court (*Degussa* v *Commission*, paragraph 213 above, paragraph 77).

280 Consequently, the Court considers, in the circumstances of this case, that the multiplier of 3 is not justified as far as concerns the applicants. The consequences of this analysis for the determination of the amount of the fine for which the applicants are held liable will be examined below.

The sixth plea, alleging errors of law committed by the Commission in increasing the fine for repeated infringement

281 This plea is divided into two parts.

The first part, alleging infringement of the principles of lawful punishment and legal certainty

282 In the application, the applicants claim that, by relying on infringements dating from 1984, 1986 and 1994, relating to events going back more than 20 years, even almost 30 years before the adoption of the contested decision, the Commission infringed the principles of lawful punishment and legal certainty. The Commission's approach means, in fact, that an undertaking which has already had an order for infringement made against it remains under the perpetual threat of an application of the rules on repeat infringement.

283 However, in their reply, the applicants stated that they had acquainted themselves with the judgment in Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, pronounced after the application was lodged, and that they considered it 'unnecessary, in the light of that judgment, to alter the [aforementioned] arguments'. Questioned in that regard in connection with measures of organisation of procedure and at the hearing, the applicants confirmed that they withdrew this part of the sixth plea, but retained the arguments put forward in the second part of that plea, alleging infringement of the *non bis in idem* principle and the principle of proportionality.

284 In the light of that withdrawal, there is no longer any need to examine the first part of the sixth plea.

The second part, alleging infringement of the *non bis in idem* principle and the principle of proportionality

— Arguments of the parties

285 The applicants point out that, in order to justify the increase in the fine for repeat infringement, the Commission relies, in the contested decision, on previous infringements which had already justified the application of an increase in Arkema's fine for repeat infringement in the Organic peroxides, MCAA and Hydrogen peroxide and perborate decisions. By so doing, the Commission found against Arkema four times for the same infringement and therefore infringed the *non bis in idem* principle.

286 The applicants note, in that regard, that repeat infringement applies where a person, after being subject to a definitive finding in respect of a first infringement, commits a further infringement in the circumstances defined by the law and, usually, within a certain period. Liability for repeat infringement is therefore in the nature of probation from the time of the first infringement. However, according to the applicants, that probation cannot be perpetual and continue beyond the second infringement. According to the applicants, if the person found to have committed two infringements commits a third infringement in spite of the increase in its fine for repeat infringement, the fine can only be increased again for repeat infringement on the basis of the second infringement. In their view, any other interpretation would be tantamount to increasing the penalty twice for one and the same infringement.

287 Consequently, the applicants consider that, in the present case, the Commission should have held that the infringements dating from 1984, 1986, 1988 and 1994 had already been taken into account for the purposes of determining the fine in the Organic peroxides decision, so that Arkema's position as a repeat offender could no longer be invoked in the subsequent cases on the basis of those infringements. On the other hand, according to the applicants, the Commission could possibly have declared

Arkema to be a repeat offender on the basis of the Organic peroxides, MCAA or Hydrogen peroxide and perborate decisions. They maintain, however, that, since the period of the infringement covered by the contested decision was prior to the infringement decisions adopted in those three cases, the repeat infringement rule was not applicable to the present case.

288 Moreover, to the Commission's argument that the application of the aggravating circumstance of repeat infringement was justified by the need to ensure that the fines had a deterrent effect, the applicants reply that the Commission had already taken that consideration into account by increasing the starting amount of Arkema's fine because it belongs to a large group. They therefore consider that, by twice increasing the amount of the fine for the same reason, the Commission again infringed the *non bis in idem* principle.

289 Moreover, by increasing the fine for repeat infringement on the basis of the same infringements in four different cases, the Commission also infringed the principle of proportionality. According to the applicants, the objective of deterrence reflected by the increase was adequately satisfied by the 50 % increase applied in the Organic peroxides decision and, a fortiori, by the further 50 % increases applied in the MCAA decision, in 2005, and the Hydrogen peroxide and perborate decision, in 2006. They maintain that it was therefore not necessary to impose again a similar increase in the contested decision, particularly because the facts which led to the four decisions are contemporaneous, so that Arkema did not have the opportunity to alter its conduct to take account of the three previous findings of infringement of 2003, 2005 and 2006.

290 In their reply, the applicants submit that, since the increase in Arkema's fine for repeat infringement was based on the Organic peroxides, MCAA and Hydrogen peroxide and perborate decisions, as is apparent from the Commission's arguments, that increase is clearly contrary to the principle of proportionality. Such an increase is

inappropriate and disproportionate where the infringements giving rise to several decisions are contemporaneous, so that the undertaking was unable to alter its conduct to take account of the previous findings of infringement.

291 The Commission disputes those arguments.

— Findings of the Court

292 It should be noted that the *non bis in idem* principle, which is a fundamental principle of European Union law also enshrined in Article 50 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1), precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 252 above, paragraph 59). The application of the *non bis in idem* principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 338).

293 It must be stated that that principle is by no means infringed by the fact that the contested decision is based on previous findings of infringement which had already justified the application of an increase in Arkema's fine for repeat infringement in the Organic peroxides, MCAA and Hydrogen peroxide and perborate decisions. The fact that the Commission, in four decisions, based the finding of repeat infringement on the same previous findings by no means indicates that the Commission 'found against Arkema four times for the same infringement', as the applicants claim.

294 It is pointed out, in that regard, that any repeat infringement is among the factors to be taken into consideration in the analysis of the gravity of the infringement in question (*Groupe Danone* v *Commission*, paragraph 283 above, paragraph 26). The purpose of taking repeat infringement into account is to induce undertakings which have demonstrated a tendency towards infringing the competition rules to change their conduct. The Commission may therefore, in each individual case, take into consideration the indicia which confirm such a tendency, including, for example, the time that has elapsed between the infringements in question (*Groupe Danone* v *Commission*, paragraph 283 above, paragraph 39).

295 By committing each of the infringements referred to by the applicants, Arkema committed a repeat infringement, which justifies taking that element into account when analysing the gravity of each of those infringements. In particular, each of those infringements constituted, independently, a repetition of the conduct which infringed the competition rules, as found in the 1984, 1986 and 1994 decisions, showing a tendency on Arkema's part not to draw the appropriate conclusions from those findings of infringement (see, to that effect, *Groupe Danone* v *Commission*, paragraph 283 above, paragraph 40).

296 Consequently, the taking into consideration of the factor of repeat infringement in connection with the cases invoked by the applicants was necessarily connected with the analysis of the gravity of each of the infringements concerned. Accordingly, contrary to what the applicants claim, the Commission found that Arkema had committed four different infringements and the condition relating to the identity of the facts (see paragraph 292 above) is clearly not fulfilled in the present case.

297 Moreover, the approach advocated by the applicants would result in the Commission not being authorised to take repeat infringement into account, in a given decision, solely on the ground that the undertaking concerned had committed other infringements of competition law at the same time. Such an approach would be contrary to the objective pursued by taking repeat infringement into consideration when determining the fine.

298 Furthermore, it is also necessary to reject the argument that the Commission infringed the *non bis in idem* principle by justifying the application of the aggravating circumstance of repeat infringement by the need to ensure that the fines had a deterrent effect, since that consideration had already been taken into account. In fact, in setting the fine, the Commission did no more than take into account a number of factual considerations which were considered to be relevant for the purposes of setting the fine at a level which would ensure that it would have a sufficiently deterrent effect and by no means found against the applicants twice for the same infringement (see, to that effect, Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 358). It should be pointed out, in that regard, that the need to ensure deterrence is a general requirement which must be a reference point for the Commission throughout the calculation of the fine (*Carbone-Lorraine* v *Commission*, paragraph 180 above, paragraph 131).

299 In any event, each of those criteria for assessing the gravity of the infringement was taken into account for different reasons. Thus the taking into account of the global turnover of the undertaking concerned is justified by the need to set the fine at a level which has a sufficiently deterrent effect having regard to its size and economic power. The fact that this was a repeat infringement was taken into account owing to the need to ensure a higher level of deterrence, as demonstrated by the fact that three previous findings of infringement had not been sufficient to prevent the commission of a fourth (see, to that effect, *Groupe Danone* v *Commission*, paragraph 298 above, paragraph 358).

300 As for the complaint that the Commission infringed the principle of proportionality, the applicants appear to maintain that the Commission should have taken account of the deterrent effect on the applicant of the increases made in the Organic peroxides, MCAA and Hydrogen peroxide and perborate decisions. However, it should be pointed out that, for the reasons set out in paragraphs 228 to 235 above, in its examination of the deterrent effect of the fine the Commission is not required to take account of the fines which it has imposed on the same undertaking in other cases. That conclusion is also valid with regard to the increases made for repeat infringement. In particular, it is contrary to the objective of deterrence not to take account of the fact that the undertaking in question has committed a repeat infringement, solely on the

ground that, at the same time as the infringement at issue, it was also engaged in other infringing conduct, which was also sanctioned by the Commission.

301 Moreover, in the circumstances of the present case, the rate of increase of 50 % is not disproportionate in relation to that objective.

302 Finally, contrary to what the applicants suggest (see paragraph 290 above), it is clear from recitals 358 and 369 to the contested decision that the finding of repeat infringement was not based, in the present case, on the Organic peroxides, MCAA and Hydrogen peroxide and perborate decisions.

303 Accordingly, the second part of the sixth plea, the only one remaining at issue, must be rejected.

The seventh plea, alleging an error of fact in that the Commission did not grant the applicants a reduction in the fine in respect of Arkema's 'non-implementation in practice' of certain alleged practices

Arguments of the parties

304 The applicants submit that Arkema established, during the administrative procedure, that it had only partially applied certain contested agreements, as the Commission itself acknowledged in the contested decision. They therefore consider that, in accordance with the Guidelines and the case-law, the Commission should have taken

account of that attenuating circumstance when determining the amount of the fine. They therefore ask the Court to reduce substantially the amount of the fine, in order to take account of the 'non-implementation in practice' by Arkema of certain alleged practices.

305 In that regard, the applicants point out that, on several occasions, Degussa complained that Arkema had failed to comply with the price increase agreements concluded between producers, as is evidenced by the description of several meetings in the contested decision (recitals 123, 128 and 133 to the decision).

306 The applicants also point out that, according to the Commission's previous practice in taking decisions, a reduction in the fine may be granted on the ground of the partial non-implementation of the infringing agreements. They consider, therefore, that, contrary to what the Commission states in the defence, the mere fact that an undertaking has only implemented certain alleged practices does not in itself preclude the benefit of attenuating circumstances.

307 The Commission disputes those arguments.

Findings of the Court

308 As is apparent from the case-law, what matters for the purposes of granting the benefit of mitigating circumstances on the basis of the non-implementation in practice of offending agreements is to determine whether the circumstances put forward are capable of showing that, during the period in which the undertaking concerned was party to those agreements, it actually avoided implementing them by adopting competitive conduct on the market or, at the very least, whether it clearly and substantially

breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation (*Daiichi Pharmaceutical* v *Commission*, paragraph 271 above, paragraph 113, and *Carbone-Lorraine* v *Commission*, paragraph 180 above, paragraph 196).

309 Accordingly, in the present case, contrary to what the Commission maintained in its pleadings, the fact that the applicants admit partially implementing certain of the agreements at issue is not in itself enough to justify the refusal to grant them the benefit of mitigating circumstances invoked (see, to that effect, *Daiichi Pharmaceutical* v *Commission*, paragraph 271 above, paragraphs 102 and 116, and *Carbone-Lorraine* v *Commission*, paragraph 180 above, paragraphs 197 and 223). It is still necessary to ascertain whether the applicants have established that they had clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation.

310 It should be pointed out that, in their application, the applicants base their claims on three specific facts, which seek to demonstrate that Degussa complained several times that Arkema had failed to comply with the price increase agreements concluded between producers.

311 First, they point out that, in recital 123 to the contested decision, the Commission found that the aim of the meeting held during the summer of 1999 was to 'restore Degussa's trust in the reliability of the conduct on the market of [Arkema] and ICI, which had been undermined in the past when the pricing objectives had not been implemented, or only in part' by those two undertakings.

312 Secondly, the applicants refer to recital 128 to the contested decision, in which the Commission found that the meeting of 24 February 2000, concerning moulding compounds, had been convened by Degussa in response to Arkema's conduct with regard

to certain customers in the automobile sector. The Commission states that, at that meeting, '[Degussa] criticised [Arkema] indirectly for failing to comply with the price rises in the automobile sector'.

313 Thirdly, the applicants rely on the wording of recital 129 to the contested decision, in which reference is made to the meeting of 27 June 2000, concerning moulding compounds, following the conclusion by Arkema of a long-term supply contract with the principal customer on the market, at a price level lower than the price objectives which had been agreed between competitors at the Dublin (Ireland) meeting and in October 1999. The Commission states therein that 'the fact that Arkema deliberately refrained from applying the price objectives was regarded as a serious breach of trust by Degussa'. Similarly, in recital 133 to the contested decision, the Commission also referred to the 'significant dispute' between Degussa and Arkema at that meeting.

314 However, it must be held that the mere invocation of those passages of the contested decision is not enough to establish that the conditions set out in paragraph 308 above are satisfied.

315 First of all, it should be pointed out that the above passages all concern meetings relating to PMMA-moulding compounds, that is to say, only one of the three products which are the subject of the single infringement proceeded against by the Commission in the contested decision. However, the applicants have produced no objective evidence enabling the Court to assess the impact of failure to comply with the agreements concerning that product on the operation of the whole of the cartel at issue. Furthermore, as is apparent from recital 5 to the contested decision, the PMMA-moulding compounds constitute only 36 % of the total PMMA market, in the distribution of methyl methacrylate between the three PMMA products.

316 Also, with regard more particularly to the statement made in recital 123 to the contested decision, according to which 'in the past... the price objectives had not been implemented, or only in part' by Arkema and ICI, it must be stated that the applicants adduce no evidence to establish their specific substance or duration.

317 First, it should be pointed out that it is apparent from recital 123 to the contested decision that the price objectives were partially implemented. However, the applicants do not state the extent of that 'partial non-implementation'. In particular, they do not claim that it reached a level such that the very operation of the cartel at issue was disrupted. Moreover, it is apparent from the contested decision that, at that same meeting, the participants did indeed implement one part of the cartel at issue, concerning the exchange of commercially sensitive information (see the last sentence of recital 123 to the contested decision and recital 117 to the decision, to which it refers).

318 Secondly, the applicants do not state which period is concerned. Although the meeting in question took place during the summer of 1999, the infringement began on 23 January 1997 (see recital 109 to the contested decision). In the meantime, Arkema had participated in several anti-competitive meetings, the description of which in the contested decision does not refer to disruptions in particular with regard to the operation of the cartel at issue (see recitals 111 to 119).

319 As for the applicants' arguments relating to recitals 128, 129 and 133 to the contested decision, these are based in essence on a long-term supply contract concluded at a price level lower than the pricing objectives which had been agreed between competitors at the Dublin meeting held in the month of October 1999. Even though the Commission classifies that undertaking as a 'large customer' (recital 129 to the contested decision) and mentions that the contract is for '5 000 T/year' (footnote 131 to the contested decision), the applicants adduce no hard evidence which would make it possible to assess the size of that contract in the light of the cooperation between

the participants in the cartel at issue in the PMMA-moulding compounds sector, or, a fortiori, in the context of the single infringement relating to the three PMMA products.

320 Moreover, it should be pointed out that the contract was signed during the first half of the year 2000 (see recitals 128 and 129 to the contested decision) and does not comply with the price increases decided only in October 1999, even though Arkema participated in the cartel from 23 January 1997 to 12 September 2002. Similarly, it should be pointed out that, even though the contested decision refers to a 'significant dispute' (recital 133) and a 'serious breach of trust' (recital 129), it is clear that the cooperation between Atofina and the other participants continued in spite of that dispute (see in particular recitals 131 and 134 to the contested decision) and even involved, at the meeting of 9 February 2001, an exchange of information on the prices concerning that same customer (see recital 131 to the contested decision, regarding the meeting of 9 February 2001).

321 In the light of the foregoing, it must be held that the facts put forward by the applicants established, at most, certain deficiencies in the effectiveness of the cartel at issue as regards the PMMA-moulding compounds and a case of non-application to the customer, by Arkema, of the price objectives agreed in relation to that product. Moreover, the Commission itself recognised that there had been periods during which the participants in the cartel at issue deviated from the agreements concluded (see recital 329 to the contested decision) and that certain decisions had not been fully carried out (recital 379 to the decision). However, in view of the fact that the infringement at issue constitutes, according to the contested decision, a single infringement concerning three products, that the infringement lasted from 23 January 1997 to 12 September 2002 and that it was made up of several parts, including an exchange of confidential information on the markets and on undertakings (see recital 3 to the contested decision), those facts are not enough to satisfy the conditions referred to in paragraph 308 above. Moreover, the applicants do not claim to have breached the

obligations relating to the implementation of the cartel to the point of disrupting its very operation, as the case-law requires.

322 It must therefore be concluded, on the one hand, that the Commission was right not to accept the mitigating circumstance relating to the non-implementation in practice of the infringing agreements and, on the other, that the reduction in the amount of the fine in that regard is no longer justified in the context of the Court's unlimited jurisdiction.

323 Accordingly, it is necessary to reject this plea and the request for the reduction in the fine made in that respect by the applicants.

The eighth plea, alleging errors of law and fact constituted by the Commission's refusal to grant the applicants a reduction in the fine under 'other factors'

Arguments of the parties

324 The applicants point out that, in its reply to the statement of objections, Arkema asked to benefit from a reduction in the fine likely to be imposed on it under 'other factors', within the meaning of the Guidelines, in order to take account of the large fines which had recently been imposed upon it by the Commission. By refusing to grant that reduction on the ground that Arkema had not 'submitted any argument that it finds itself in a serious adverse financial situation' (recital 396 to the contested decision), the Commission committed errors of law and fact.

325 The applicants point out that in two recent decisions the Commission reduced the final amount of the fine, pursuant to Section 5(b) of the Guidelines, on the ground that the undertaking in question had already been ordered, a short time previously, to pay substantial fines. These decisions are Commission Decision C (2002) 5083 final of 17 December 2002 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.667 — Specialty graphite) ('the Speciality graphite decision') and Commission Decision C (2003) 4457 of 3 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case C.38.359 — Electrical and mechanical carbon and graphite products) ('the Carbon and graphite products decision'). According to the applicants, although, in each of those decisions, the Commission appeared to indicate that the reduction was based also on the financial situation of the undertaking concerned, in actual fact the reduction in the fine could only be the result of taking into account the recent order to pay large fines.

326 It is apparent from those same decisions that the Commission considered that taking into account an undertaking's financial situation in order to reduce the amount of its fine would amount to conferring an unjustified competitive advantage on the undertakings which were the least well adapted to market conditions and could culminate in discrimination against other undertakings included in the proceeding. Therefore, the applicants consider that the Commission was wrong to invoke the financial situation of the undertaking concerned, including together with other factors, to grant it a reduction in the fine.

327 The applicants state that Arkema has recently had substantial fines imposed upon it by the Commission, totalling approximately EUR 180 million, in respect of its participation in collusive activities, which were conducted, at least in part, simultaneously with the practices sanctioned in the contested decision. These are the Organic peroxides, MCAA and Hydrogen peroxide and perborate decisions.

328 In view of those findings of infringement, the applicants consider that it is not necessary to impose on them the whole of the final amount of the fine (EUR 21 913 125 million) to ensure that the fine has a deterrent effect. In their view, the Commission should therefore have taken those fines into account under 'other factors'. Consequently, they ask the Court to reduce the amount of their fine in order to take account of the fines recently paid by Arkema.

329 The Commission disputes those arguments.

Findings of the Court

330 First of all, it should be borne in mind that the Commission's practice in previous decisions cannot serve as a legal framework for the fines imposed in competition matters. The Commission enjoys a wide discretion in setting the amount of fines and is not bound by assessments made by it in the past (see Case T-329/01 *Archer Daniels Midland* v *Commission* [2006] ECR II-3255, paragraphs 108 to 110 and the case-law cited). Therefore, the mere reference by the applicants to the Speciality graphite and Carbon and graphite products decisions are in themselves irrelevant, since the Commission was not required to appraise the present case in the same way (see, to that effect, *Archer Daniels Midland* v *Commission*, paragraph 111).

331 Moreover, it should be stated that, in those two decisions, the Commission reduced the amount of the fine imposed on the company in question owing to its serious financial difficulties combined, respectively, with one, and then two recent orders against it to pay fines for simultaneous infringements of competition law. However,

the applicants do not claim that they are in a comparable situation to that company, in particular with regard to their financial health (see recitals 556 to 559 to the Speciality graphite decision and recital 360 to the Carbon and graphite products decision).

332 As for the argument that the reduction in the amount of the fine could be based only on recent findings of infringement against that undertaking, because the Commission was not entitled, in the light of the case-law and according to the wording of those decisions, to take into account, alone or with other factors, the financial situation of the undertaking concerned, it should be pointed out that this conflicts with the very wording of those decisions. Moreover, it is necessary to refer, in that regard, to *Carbone-Lorraine* v *Commission*, paragraph 180 above, paragraphs 311 to 317, in which the same argument, raised by one of the addressees of the Carbon and graphite products decision, had been rejected.

333 Consequently, the Commission committed no error, in recital 396 to the contested decision, in rejecting the applicants' argument invoked in the 'Other factors' section, on the ground that Arkema had not put forward any argument to show that it was in a serious adverse financial situation.

334 Furthermore, the Court should not exercise its unlimited jurisdiction to reduce the fine as requested by the applicants.

335 The mere fact that the applicants have recently been ordered to pay three other fines for partly simultaneous infringements cannot justify reducing the fine imposed in the present case. Moreover, if the fact of having already been fined justified the reduction of a subsequent fine, that would lead to a paradoxical situation in which an undertaking repeating its participation in cartels would have the marginal cost of each fine gradually reduced. Such a situation is clearly contrary to the objective of deterrence pursued by those fines.

336 The applicants do not put forward any evidence to show that the imposition of the fine in the present case, combined with other recent fines, would have placed them in a particular situation. Moreover, it should be pointed out that, with the exception of the fine imposed in the Organic peroxides decision, Arkema's liability for payment of those fines is, to a large extent, jointly and severally shared with Elf Aquitaine and Total. In any event, the combined amount of the fines imposed on Arkema under those four decisions is still beneath the 10 % threshold of Arkema's turnover in 2005, stated in recital 14 to the contested decision, which is established by Regulation No 1/2003 for a single fine.

337 Consequently, it is necessary to reject this plea and the applicants' request for a reduction in the fine in that respect.

Conclusion

338 It is apparent from all the foregoing that the application must be rejected in its entirety, with the exception of the applicants' request for a reduction in the increase of the fine applied to them as a deterrent.

339 In the light of the foregoing considerations (see paragraphs 247 to 280 above), the Court considers that it is appropriate, in the exercise of its unlimited jurisdiction, to reduce the amount of the fine for which the applicants are held liable, in order to take account of the fact that, on the day on which the fine was imposed on them, they were no longer controlled by the Total group.

340 In order to recalculate that amount, the Court considers it appropriate to follow the methodology applied in the contested decision, replacing the multiplier of 3 applied in respect of the applicants, in recital 349 to the contested decision, by a multiplier of 1.25. In the circumstances of the present case, and in view particularly of the increases applied in respect of the other addressees of the contested decision, the Court considers that such an increase is adequate to ensure that the fine imposed on the applicants has a sufficiently deterrent effect.

341 In particular, there is no need to accede to the Commission's request made at the hearing for the Court, in essence, to take into account the aspect relating to the legal and economic structures of the undertaking in question at the time of the infringement to maintain the multiplier of 3 applied to the applicants.

342 It should be pointed out that, when the amount of the fine to be imposed on them is determined, the exercise of unlimited jurisdiction cannot result in discrimination between undertakings which have participated in an agreement or concerted practice contrary to Article 81(1) EC (Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraph 97, and Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 152). Since that factor has not been taken into account with regard to the other addressees of the contested decision (see paragraphs 266 to 271 above), it would not be justified to increase the amount of the fine attributable to the applicants on that basis.

343 In any event, even if it were necessary to take account of that aspect in the determination of the amount of the fine, it cannot justify applying a multiplier of 3 in order to ensure that the fine has a sufficiently deterrent effect with regard to the applicants. That would in effect apply to the applicants the same multiplier as that applicable to their former parent companies, although they are in a manifestly different situation with regard to the essential objectives pursued by the imposition of that increase (see also, to that effect, *Degussa* v *Commission*, paragraph 213 above, paragraph 340).

344 Moreover, it has been held that there was no need to distinguish between two undertakings whose turnovers in any event justify their classification as large undertakings having legal and economic knowledge and infrastructures which enabled them more easily to recognise that their conduct constituted an infringement and to be aware of the consequences stemming from it (*Degussa* v *Commission*, paragraph 213 above, paragraph 340). In the present case, all the undertakings referred to in recital 349 to the contested decision, and, indeed, also Arkema in the light of its own turnover, could be regarded as large undertakings with legal and economic infrastructures which enabled them more easily to recognise that their conduct constituted an infringement (see, to that effect, *Degussa* v *Commission*, paragraph 213 above, paragraph 294). Consequently, in the present case, in the light of the multipliers applied to other undertakings (1.75 to Degussa, 1.5 to ICI and the 'hypothetical' factor of 1.25 to Arkema), the multiplier of 3 is justified only in the light of Total's very large turnover on the day on which the fine was imposed.

345 As regards the new calculation of the amount of the fine for which the applicants are held liable, it is necessary to point out the wording of Article 2 of the contested decision, under which '[f]or the infringements referred to in Article 1, the following fines are imposed:... b) Arkema …, Altuglas International... and Altumax Europe..., jointly and severally liable: EUR [219 131 250]; of this amount Total... is jointly and severally liable for EUR 140.4 million and Elf Aquitaine is jointly and severally liable for EUR 181.35 million'.

346 In the light of that wording, and of the grounds of the contested decision devoted to the calculation of the fine, it is necessary to distinguish between two parts of the fine.

347 In the first place, the applicants are held jointly and severally liable for payment of an amount of EUR 37 781 250, and the liability of Elf Aquitaine and Total does not relate to that amount.

348 As is apparent from the contested decision, this is the amount which is the result of the increase for repeat infringement for which Elf Aquitaine and Total were not held liable, to which the Commission then applied a 40 % reduction under the Leniency Notice. It should be pointed out that, in order to determine the amount of the increase for repeat infringement, the Commission itself used a 'hypothetical' factor of 1.25 to ensure a sufficiently deterrent effect (see footnote 233, relating to recital 349 to the contested decision). Accordingly, the considerations mentioned in paragraphs 247 to 280 above do not affect the amount and, therefore, that amount of EUR 37 781 250, for which the applicants are liable but not their former parent companies, must remain unchanged.

349 In the second place, the applicants were held jointly and severally liable with Elf Aquitaine for the payment of EUR 181.35 million, of which amount Total was held jointly and severally liable for EUR 140.4 million. That is therefore the amount of the fine which is not the result of taking into account the repeat infringement.

350 That amount of EUR 181.35 million is the result in particular of the application of the multiplier of 3. Since the application of that factor to the applicants is unjustified, that amount must therefore be recalculated in so far as they are concerned on the basis of the multiplier of 1.25 and following the methodology employed by the Commission in the contested decision.

351 Consequently, the applicants' joint and several liability for the payment of that part of the fine is EUR 75 562 500.

352 Finally, it should be pointed out that Article 23(2) of Regulation No 1/2003 provides that for each undertaking and association of undertakings participating in the infringement the fine shall not exceed 10 % of its total turnover in the preceding business year. According to the case-law, it is only if it subsequently transpires that several addressees constitute the 'undertaking', that is the economic entity responsible for the

infringement penalised — at the date when the decision is adopted — that the ceiling can be calculated on the basis of the overall turnover of that undertaking, that is to say, of all its constituent parts taken together. By contrast, if that economic unit has subsequently broken up, each addressee of the decision is entitled to have the ceiling in question applied individually to it (*Tokai Carbon and Others* v *Commission*, paragraph 272 above, paragraph 390).

353 Therefore, it is still necessary to verify that the amount of the fine which the applicants are liable to pay does not exceed 10 % of Arkema's global turnover in 2005. The applicants are now held jointly and severally liable for payment of the fine in the amount of EUR 113 343 750 (the amount of EUR 37 781 250 referred to in paragraph 348 above plus the amount of EUR 75 562 500 referred to in paragraph 351 above). It must therefore be stated that that amount does not exceed 10 % of Arkema's turnover in 2005, as is apparent from recital 14 to the contested decision. Moreover, the same is true of the intermediate amount fixed before application of the reduction under the Leniency Notice.

Costs

354 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. According to Article 87(3) of the Rules of Procedure, the Court may order that the costs be shared or decide that each party is to bear its own costs where each party succeeds on some and fails on other heads of claim.

355 In the present case, the form of order sought by the applicants has been granted in part. However, since the arguments which led to the reduction in the amount of the fine were raised only at the hearing stage, even though they could have been raised in the application (see paragraph 247 above), a fair appraisal of the circumstances of

the case will be to decide that the applicants shall bear their own costs and the costs incurred by the Commission.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Reduces the fine for which Arkema SA (now Arkema France), Altuglas International SA and Altumax Europe SAS were held jointly and severally liable under Article 2(b) of Commission Decision C (2006) 2098 final of 31 May 2006 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F/38.645 — Methacrylates) to EUR 113 343 750;**

2. **Dismisses the action as to the remainder;**

3. **Orders Arkema France, Altuglas International and Altumax Europe to pay the costs.**

Czúcz Labucka O'Higgins

Delivered in open court in Luxembourg on 7 June 2011.

[Signatures]

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