JUDGMENT OF THE GENERAL COURT (Sixth Chamber, Extended Composition)

16 June 2011 *

In Case T-194/06,

SNIA SpA, established in Milan (Italy), represented by A. Santa Maria, C. Biscaretti di Ruffia and E. Gambaro, lawyers,

applicant,

v

European Commission, represented initially by V. Di Bucci and F. Amato, and subsequently by V. Di Bucci and V. Bottka, acting as Agents,

defendant,

ACTION for partial annulment of Commission Decision C(2006) 1766 final of 3 May 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F/38.620 — Hydrogen peroxide and perborate), in so far as it concerns the applicant,

* Language of the case: Italian.

THE GENERAL COURT (Sixth Chamber, Extended Composition),

composed of V. Vadapalas (Rapporteur), acting for the President, A. Dittrich and L. Truchot, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 May 2010,

gives the following

Judgment

Background to the dispute

1 The applicant, SNIA SpA, is a company incorporated under Italian law. At the material time, it was the principal shareholder, with a shareholding of 53 to 59 %, of Caffaro SpA ('the former Caffaro'), which, for its part, held 100 % of the capital of the company Industrie Chimiche Caffaro SpA (which became Caffaro SpA and, subsequently, Caffaro Srl; 'Caffaro'). This latter company marketed, until 1999, sodium perborate ('PBS'). In 2000, the former Caffaro merged with the applicant, which took control of 100 % of the capital of Caffaro.

2 In November 2002, Degussa AG informed the Commission of the European Communities of the existence of a cartel in the hydrogen peroxide ('HP') and PBS markets and requested the application of the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

3 Degussa supplied to the Commission material evidence which enabled it to carry out investigations on 25 and 26 March 2003 at the premises of certain undertakings.

4 On 26 January 2005, the Commission sent a statement of objections to the applicant and the other undertakings concerned, to which the applicant replied on 25 March 2005.

5 After the hearing of the undertakings concerned, the Commission adopted Decision C(2006) 1766 final of 3 May 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement against Akzo Nobel NV, Akzo Nobel Chemicals Holding AB, EKA Chemicals AB, Degussa, Edison SpA, FMC Corp., FMC Foret SA, Kemira Oyj, L'Air liquide SA, Chemoxal SA, the applicant, Caffaro, Solvay SA, Solvay Solexis SpA, Total SA, Elf Aquitaine SA and Arkema SA (Case COMP/F/38.620 — Hydrogen peroxide and perborate) ('the contested decision'), a summary of which is published in the *Official Journal of the European Union* of 13 December 2006 (OJ 2006 L 353, p. 54). It was notified to the applicant by letter of 8 May 2006.

The contested decision

6 The Commission stated in the contested decision that the addressees thereof had participated in a single and continuous infringement of Article 81 EC and Article 53 of the Agreement on the European Economic Area (EEA), regarding HP and the downstream product, PBS (recital 2 of the contested decision).

7 The infringement found consisted mainly of competitors exchanging commercially important and confidential market and company information, limiting and controlling production as well as potential and actual production capacities, allocating market shares and customers and fixing and monitoring adherence to target prices.

8 The applicant was held to be 'jointly and severally' liable for the infringement with Caffaro (recitals 407 to 412 of the contested decision).

9 Article 1(k) of the contested decision states that the applicant infringed Article 81(1) EC and Article 53 of the EEA Agreement by participating in the infringement concerned from 29 May 1997 to 31 December 1998.

10 In Article 2(g) of the contested decision, the Commission imposed on the applicant, 'jointly and severally' with Caffaro, a fine of EUR 1.078 million.

Procedure and forms of order sought

11 By application lodged at the Registry of the Court on 18 July 2006, the applicant brought the present action.

12 The composition of the Chambers of the Court having been altered, the Judge-Rapporteur was assigned to the Sixth Chamber and, after the parties had been heard, the case was referred to the Sixth Chamber (Extended Composition).

13 As a member of the Chamber was unable to sit in the present case, the President of the Court designated another judge to complete the Chamber pursuant to Article 32(3) of the Rules of Procedure of the Court.

14 On hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure. The parties presented oral argument and replied to the questions put by the Court at the hearing which took place on 19 May 2010.

15 Pursuant to Article 32 of the Rules of Procedure, since a member of the Chamber was prevented from taking part in the judicial deliberations, the most junior judge within the meaning of Article 6 of the Rules of Procedure accordingly abstained from taking part in the deliberations and the Court's deliberations were conducted by the three judges whose signatures the present judgment bears.

16 The applicant claims that the Court should:

— annul the contested decision, in so far as it includes it among its addressees and imposes on it, jointly and severally with Caffaro, a fine;

— order the Commission to pay the costs.

17 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

Arguments of the parties

18 The applicant claims that, in upholding its joint and several liability for Caffaro's unlawful conduct, the Commission erred in law and committed a manifest error of assessment, distorted the facts and failed to fulfil its duty to state the reasons on which the decision is based.

19 First, the Commission failed to demonstrate that the applicant exercised a decisive influence over Caffaro.

20 The applicant claims that it was considered to be jointly and severally liable for the infringement because it was the principal shareholder in the former Caffaro, with a shareholding of 53 to 59 % in that latter and that, therefore, it exercised an 'indirect' control over Caffaro. That control, stemming from the links between the three companies, did not suffice to impute liability for the infringement to the applicant.

21 Given that there was no relationship of a 100 % shareholding between the companies concerned, the Commission, it submits, was not able to presume that the applicant exercised a decisive influence over Caffaro's conduct. In particular, the fact that the applicant approved the contingency plan which led to Caffaro's withdrawal from the PBS market (recital 411 of the contested decision) does not demonstrate that it exercised a decisive influence over that company.

22 Secondly, the Commission failed to demonstrate that the former Caffaro exercised a decisive influence over Caffaro.

23 The mere fact of a 100 % shareholding in the subsidiary is not sufficient to prove the liability of the parent company and, in the present case, the Commission has not adduced additional evidence demonstrating the actual exercise of decisive influence.

24 Thirdly, the Commission incorrectly took into account the fact that the applicant acquired the former Caffaro.

25 According to the applicant, the Commission was not able to demonstrate that it exercised an influence over Caffaro and, therefore, changed its approach between the statement of objections and the contested decision, relying on a new argument based on the merger of the former Caffaro and the applicant. First, that merger took place after Caffaro's withdrawal from the PBS market. Secondly, the Commission did not demonstrate that the former Caffaro exercised a decisive influence over Caffaro.

26 The Commission's approach fails to apply the case-law on transfer of undertakings. The undertaking which succeeded the former Caffaro was Caffaro, a company which carried on its activity in the chemical sector. The assets corresponding to the production of PBS were transferred to Solvay in 1999. The physical element which contributed to the infringement being committed had therefore disappeared long before the merger at issue. No director or member of the board of directors of Caffaro or the former Caffaro became an employee of the applicant following the merger.

27 Having regard to those circumstances, there is no economic and functional continuity between the former Caffaro and the applicant, but, at the most, there is continuity between the former Caffaro and Caffaro. That consideration is confirmed by the previous decision-making practice of the Commission.

28 In addition, the Commission failed to give detailed enough reasons for its decision to impute the liability for the infringement to the applicant.

29 In the reply, the applicant claims that it follows from the approach adopted by the Commission during the investigation, confirmed in the contested decision, that the imputation of liability at issue is based on the decisive influence which it is alleged to have exercised over Caffaro.

30 It is apparent from recital 411 of the contested decision that the applicant's liability was upheld on the basis of its relationship with Caffaro, in particular, the links between the latter and the applicant in terms of directors and the applicant's influence over Caffaro's decision-making process.

31 In point 350 of the statement of objections, it submits, the Commission pointed out that the applicant had a majority shareholding in the former Caffaro at the time of the infringment and that Caffaro was dependent on the applicant in its decision-making process and concluded that the applicant exercised a decisive influence over the conduct of 'its subsidiary Caffaro'. In the contested decision, the Commission examined and rejected the arguments raised by the applicant in response to the statement of objections, in essence alleging that it did not exercise a decisive influence over Caffaro.

32 According to the applicant, the Commission cannot claim that in the contested decision it merely repeated some of the evidence in the statement of objections, even though only some of the evidence set out in recital 411 of the contested decision was relevant for the purposes of upholding the applicant's liability. The fact that the Commission listed, in the statement of objections, a series of allegations, reserving the ability to ascertain which among them must be regarded as decisive after the contrary arguments of the undertakings involved, infringes those undertakings' rights of defence.

33 The fact that the Commission changed its approach after sending the statement of objections warrants the annulment of the contested decision. The contested decision should also be annulled because it is 'illogical' and fails to state sufficient reasons.

34 The only matters taken into account at the stage of the statement of objections (point 350 of the statement of objections) were the former Caffaro's 100 % shareholding in Caffaro, the applicant's majority shareholding in the former Caffaro and the applicant's influence over Caffaro's decision-making process. The reference to the merger at issue, in point 349 of the statement of objections, was made as a 'simple statement of the facts', and had nothing to do with the legal assessment relating to the imputability of the infringement. That reference was so 'general and remote' in relation to the legal reasoning that the applicant was not alerted to the fact that there was a need to respond to that point.

35 The Commission stated for the first time in the contested decision that the applicant's liability for the infringement followed from its merger with the former Caffaro. On account of that discrepancy between the statement of objections and the contested decision, the applicant was not able to submit its comments in relation to the allegation at issue, which resulted in an infringement of its rights of defence and of Article 27 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).

36 The Commission challenges the applicant's arguments.

Findings of the Court

37 First of all, it is appropriate to set out the considerations which led the Commission to find the applicant liable.

38 In recitals 370 to 379 of the contested decision, the Commission summarised, referring to European Union case-law, the principles which it intended to apply in order to identify the companies liable for the infringement.

39 First, it noted that a parent company could be regarded as liable for the unlawful conduct of a subsidiary in so far as that subsidiary had not determined its conduct on the market independently, but had carried out, in all material respects, the instructions given by its parent. It stated that it could, in essence, presume that a wholly-owned subsidiary in all material respects carries out the instructions of its parent company and that the parent company may rebut the presumption by adducing evidence to the contrary (recital 374 of the contested decision).

40 Secondly, it observed, referring in the alternative to the considerations upheld by the Court of Justice in Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraphs 78 and 79, that, where the legal entity initially liable for the infringement ceases to exist and loses its legal personality, by being simply acquired by another legal entity, that latter entity must be deemed to be liable for the infringement committed by the entity taken over (recital 378 of the contested decision).

41 Concerning the applicant's liability, the Commission first observed that it controlled 'its subsidiary [the former Caffaro] throughout the entire duration of the infringement and, through [the former Caffaro], it also controlled [Caffaro] at the time when activities in the PBS sector were resumed by that latter company' (recital 408 of the contested decision). In the same recital of the contested decision, it noted that there were some shareholding links and links in terms of employees between the three companies concerned.

42 The Commission then pointed out that, in the summer of 1999, Caffaro withdrew from the PBS market and that, in 2000, the former Caffaro was acquired by the applicant (recital 409 of the contested decision).

43 In recital 410 of the contested decision, the Commission set out the arguments by which the applicant disputed its joint and several liability, regarding, inter alia, the fact that its shareholding in the former Caffaro at the time of the infringement was only 53 to 59 %, which was, the applicant submitted, insufficient for the purposes of finding it liable.

44 Lastly, in recital 411 of the contested decision, the Commission stated as follows:

'… [C]ontrary to [the applicant's] claim, its liability does not derive from its 53-59 % ownership of [the former Caffaro] in the period of infringement, but from the fact that [it] merged with the former Caffaro, which was the 100 % parent company of [Caffaro], the entity that was directly involved in the infringement. Thus the question of the control between [the applicant] and [the former Caffaro] is not the issue in this regard. What is to be analysed is the control relationship between the SNIA[-]Caffaro entity (renamed SNIA after the merger) and the subsidiary [Caffaro …]. Given the 100 % shareholding that existed at the time of the infringement between [the former Caffaro] (today merged with [the applicant]) and [Caffaro], as well as the proven dependence in the decision-taking process of [the former Caffaro] and [the applicant], and … the links in terms of managing personnel between the entities, the Commission takes the view that [the former Caffaro] exercised decisive influence over the conduct of its subsidiary and that the elements presented by [the applicant …] cannot rebut the presumption expressed in the Statement of Objections.'

45 Although the applicant raises three claims in the application concerning, in essence, the alleged lack of relevant links between the three companies concerned, it is nevertheless evident from its arguments and its submissions at the hearing that in actual fact it is advancing three pleas in law, concerning, first, an error of law and of assessment allegedly vitiating the finding of its joint and several liability, secondly, inconsistency between the statement of objections and the grounds of the contested decision and, thirdly, an infringement of the duty to state the reasons on which the decision is based.

The alleged error of law and of assessment

46 The applicant pleads that the Commission erred in the imputation of liability for the infringement at issue, maintaining that it has not established, first, that the former Caffaro exercised a decisive influence over Caffaro, secondly, that the applicant exercised such an influence over Caffaro and, thirdly, that the merger between the former Caffaro and the applicant was relevant.

47 It is apparent from the abovementioned grounds of the contested decision, in particular recital 411 thereof (see paragraph 44 above), that the finding relating to the applicant's liability for the infringement is based on the fact that it acquired the former Caffaro, a company which, at the material time, held a 100 % shareholding in Caffaro, a direct participant in the cartel.

48 That finding cannot be altered by the fact that, in recitals 408 and 411 of the contested decision, the Commission also pointed out some evidence relating to the links between the companies concerned at the time of the infringement, inter alia, 'Caffaro's dependence, as regards its decision-making process, on [the applicant], and the links between the entities in terms of employee management'. The fact that that evidence was supplementary is clearly shown by recital 411 of the contested decision, which

states that the 'issue of the control between [the applicant] and [the former Caffaro] is … not the relevant issue'.

49 In that regard, concerning, first, the applicant's arguments relating to the link between the former Caffaro and Caffaro, it is settled case-law that in the specific case of a parent company holding 100 % of the capital of a subsidiary which has committed an infringement there is a simple presumption that the parent company exercises actual decisive influence over the conduct of its subsidiary.

50 In those circumstances, it is sufficient for the Commission to prove that the entire capital of a subsidiary is held by the parent company in order to presume that that parent company exercises a decisive influence over that subsidiary's commercial policy. The Commission will then be able to regard the parent company as jointly and severally liable for payment of the fine imposed on its subsidiary, unless that parent company, which bears the burden of rebutting that presumption, adduces evidence to establish that its subsidiary acts independently on the market (see Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraphs 60 and 61 and the case-law cited).

51 In the light of that case-law, the Commission was therefore able, in the present case, to find that the former Caffaro exercised a decisive influence over Caffaro, on the basis of a presumption stemming from the relationship of a 100 % shareholding between those two companies.

52 The applicant's argument that the Commission could not rely on a mere presumption, but was required to submit concrete evidence of influence, must therefore be rejected. It was for the applicant, in order to rebut the presumption at issue, to adduce sufficient evidence to establish that Caffaro acted independently on the market with regard to its parent company, the former Caffaro.

53 The applicant did not submit any evidence to that effect either during the administrative procedure or before the Court and, on the one hand, merely challenged the legality of the presumption at issue and, on the other hand, argued that there were no relevant links between Caffaro and itself. Therefore, it must be held that the Commission was able, on the basis of the unrefuted presumption, to find that at the time of the infringement the former Caffaro exercised a decisive influence over Caffaro, those two companies therefore having constituted one economic entity liable for the infringement.

54 As regards, secondly, the link between the economic entity at issue and the applicant, it is apparent from recital 411 of the contested decision that the finding of the applicant's joint and several liability is based on the fact that it acquired the former Caffaro, a company which exercised a decisive influence over Caffaro, and not on a decisive influence which the applicant was able to exercise over Caffaro at the time of the infringement.

55 Therefore, the applicant's arguments according to which the Commission did not establish that it had exercised a decisive influence over Caffaro must be rejected as irrelevant.

56 As regards, thirdly, the applicant's arguments that the merger at issue does not constitute a matter capable of giving rise to its liability for the infringement and that, in any event, it is not the economic successor to the former Caffaro, it is settled case-law that, when an entity that has committed an infringement of the competition rules is subject to a legal or organisational change, this change does not necessarily create a new undertaking free of liability for the infringement, when, from an economic point of view, the two entities are identical (see Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 42 and the case-law cited).

57 For the effective enforcement of competition law, it may become necessary to impute liability to the new operator of the undertaking which committed the infringment if the new operator may in fact be regarded as the successor to the original operator (Case T-161/05 *Hoechst* v *Commission* [2009] ECR II-3555, paragraph 51).

58 That 'economic continuity' test applies in specific circumstances, such as, inter alia, where the legal person responsible for operating the undertaking has ceased to exist in law after the infringement has been committed (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 145) or in cases of internal restructuring of an undertaking, in view of the structural links between the initial operator and the new operator of the undertaking, where the initial operator has not necessarily ceased to have a legal existence but no longer carries out an appreciable economic activity on the relevant market (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 359).

59 Contrary to what the applicant submits, such specific circumstances exist in the present case.

60 As is apparent from paragraph 53 above, the infringement at issue was committed by the entity constituted, at the material time, by the companies Caffaro and the former Caffaro, that latter having ceased to exist in law after the infringement was committed because of its merger with the applicant.

61 In this connection, the applicant cannot legitimately rely on the fact that, despite its merger with the former Caffaro, it had not, in actual fact, taken on the physical and human elements which contributed to the infringement.

62 According to settled case-law, when the undertaking in question ceases to exist, upon being merged with an acquirer, the latter takes on its assets and liabilities for infringements of European Union law. In such cases, the liability for the infringement committed by the undertaking taken over may be imputed to the acquirer (see Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraph 326 and the case-law cited).

63 It is immaterial in that regard that the subsidiary which took part in the infringement, Caffaro, continues to exist in law. Concerning one of the two legal persons responsible for the operation of the economic entity at issue, the power to impose sanctions on the subsidiary has no effect on the imputation of liability for the infringement to its parent company, the former Caffaro and, therefore, the applicant.

64 Furthermore, those considerations are given added weight by the fact that the merger between the former Caffaro and the applicant occurred within a group of companies which already existed at the time of the infringement.

65 As is apparent from the facts set out in recitals 408 and 411 of the contested decision, which have not been called into question by the applicant, at the time of the infringement not only was the applicant the main shareholder in the former Caffaro, with a shareholding of 53 to 59 %, but it also appointed all the members of the former Caffaro's board of directors, one of whom was also a member of its board of directors. There is also evidence of the applicant's involvement in the decision-making process of the former Caffaro and Caffaro, which is apparent from the fact that the decision that the latter company would withdraw from the PBS market was annexed to the minutes of the applicant's directors' meeting of 19 January 1999 (recital 411 of the contested decision).

66 Having regard to those circumstances, the merger between the companies concerned, which occurred after the infringement was committed, was part of an internal restructuring within a group of companies joined by a structural link, bearing out the fact that there was economic continuity between the former Caffaro and the applicant (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 58 above, paragraphs 344 and 359).

67 Furthermore, those considerations distinguish the present case from those which gave rise to Commission Decision 85/74/EEC of 23 November 1984 relating to a proceeding under Article [81 EC] (Case IV/30.907 — Peroxygen products) (OJ 1985 L 35, p. 1), Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article [81 EC] (Case IV/31.149 — Polypropylene) (OJ 1986 L 230, p. 1), and Commission Decision 89/191/EEC of 21 December 1988 relating to a proceeding pursuant to Article [81 EC] (Case IV/31.866, LdPE) (OJ 1989 L 74, p. 21) respectively. Those decisions relied upon by the applicant concern situations where there was a transfer of activities affected by the infringement between groups of undertakings without structural links and therefore do not bear any similarity with the present case.

68 In the light of the foregoing, according to the case-law recalled in paragraphs 56 to 58 above, the Commission was correct to impute to the applicant, as the new operator of the economic entity at issue, joint and several liability for the infringement committed by the entity constituted by Caffaro and the former Caffaro, the latter having been acquired by the applicant after the infringement was committed. That consideration is indeed given weight by the fact that the merger at issue was part of an internal restructuring of the group.

69 As a result, this plea must be rejected.

The alleged inconsistency between the statement of objections and the grounds of the contested decision

70 The applicant claims, in essence, that the factor which led the Commission to find it liable for the infringement, namely its merger with the former Caffaro, was not adequately set out in the statement of objections.

71 It submits, inter alia, that by relying in the contested decision on the merger at issue the Commission changed the reasoning set out in the statement of objections, which was based on the decisive influence exercised by the applicant over the conduct of 'its subsidiary Caffaro' (point 350 of the statement of objections). This inconsistency between the statement of objections and the contested decision constitutes, according to the applicant, an infringement of Article 27 of Regulation No 1/2003 and of its rights of defence.

72 The Commission argues that this line of argument is inadmissible, contending that it is a new plea, raised for the first time at the stage of the applicant's reply.

73 Under Article 48(2) of the Rules of Procedure, new pleas in law may not be introduced in the course of proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. Nevertheless, a plea which may be regarded as amplifying a plea put forward previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible (see Case T-252/97 *Dürbeck* v *Commission* [2000] ECR II-3031, paragraph 39 and the case-law cited).

74 In the present case, the applicant submits in the application that the Commission 'changed its legal reasoning regarding the relationship between [the applicant] and Caffaro as against the statement of objections and relied on a new argument relating … to an [application of the presumption of decisive influence]' and on the fact that '[its] liability … stems less from [its] actual participation … in the infringement … than from [its] merger with [the former Caffaro]'.

75 It must be held that by those arguments the applicant set out, from the stage of the application, reasoning relating to the alleged inconsistency between the statement of objections and the contested decision. Moreover, the Commission itself responded to that reasoning in the defence, stating inter alia that the statement of objections referred to all the relevant facts and the principles of law applied subsequently in the contested decision.

76 In those circumstances, the line of argument developed by the applicant in the reply, alleging infringement of Article 27 of Regulation No 1/2003 and of its rights of defence, stemming from the alleged inconsistency at issue, must be regarded as merely amplifying a plea set out implicitly in the application.

77 That plea must, therefore, be held to be admissible.

78 As to the substance of the plea, under Article 27(1) of Regulation No 1/2003, before taking a decision, the Commission must give the undertakings concerned the opportunity of being heard on the matters to which it has taken objection. It must base its decisions only on objections on which the parties concerned have been able to comment.

79 The procedural guarantee to which that provision relates applies the principle of respect for the rights of the defence, which requires, in particular, that the statement of objections which the Commission sends to an undertaking on which it envisages imposing a penalty for an infringement of the competition rules contain the essential matters used against it, such as the facts, the characterisation of those facts and the evidence on which the Commission relies, so that the undertaking may submit its arguments effectively in the administrative procedure brought against it (see, to that effect, Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 26, and Joined Cases C-322/07 P, C-327/07 P and C-388/07 P *Papierfabrik August Koehler and Others* v *Commission* [2009] ECR I-7191, paragraph 36).

80 Nevertheless, the legal characterisation of the facts made in the statement of objections can, by definition, be only provisional, and a subsequent Commission decision cannot be annulled on the sole ground that the definitive conclusions drawn from those facts do not correspond precisely with that intermediate characterisation. The Commission is required to hear the addressees of a statement of objections and, where necessary, to take account of any observations made in response to the objections by amending its analysis specifically in order to respect their rights of defence (Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraph 100, and judgment of 8 July 2008 in Case T-54/03 *Lafarge* v *Commission*, not published in the ECR, paragraph 97).

81 A decision based on essential matters in respect of which the undertaking concerned has not been able to defend itself must be annulled, regardless of whether the liability of the undertaking can be upheld in the light of other matters (see, to that effect, *Papierfabrik August Koehler and Others* v *Commission*, paragraph 79 above, paragraphs 43 and 44).

82 In the present case, in points 326 to 328 of the statement of objections, the Commission set out the legal principles and the case-law according to which, when the legal person which committed the infringement has ceased to exist in law, its liability may be transferred to its successor, referring in particular to the situation where the company liable for the infringement has been acquired by another company.

83 In addition, in its assessment relating to the applicant's liability, in point 349 of the statement of objections, the Commission observed, inter alia, that 'as explained above, in 2000 [the former] Caffaro merged with [the applicant] and [Industrie Chimiche Caffaro] changed its name to become Caffaro.'

84 The fact that those matters were set out in the statement of objections alerted the applicant to the relevance of the merger at issue, in the light of its liability, and thus enabled it to understand the content of the objection upheld by the Commission.

85 That finding is not affected by the fact that, although it referred to the merger at issue in point 349 of the statement of objections, the Commission did not specifically include that matter in the legal characterisation of the applicant's conduct in the light of the principles set out in points 326 to 328 of that statement.

86 In particular, it must be observed that, despite the reference made to that merger in point 349 of the statement of objections, the Commission stated, in the following point, that it presumed that the applicant exercised a decisive influence over the conduct of 'its subsidiary Caffaro', taking account of the links between the companies concerned at the time of the infringement.

87 Nevertheless, as the case-law cited in paragraphs 79 and 80 above shows, the legal characterisation of the facts upheld in the statement of objections is only provisional. In clarifying, in law, that characterisation in its final decision, the Commission must be able to grant a greater importance to matters which had previously been regarded as secondary, provided however that it relies only on facts on which those concerned have had an opportunity to make known their views and provided that, in the course of the administrative procedure, it has made available the evidence necessary for the defence (see, to that effect, Opinion of Advocate General Bot in *Papierfabrik August Koehler and Others* v *Commission*, paragraph 79 above, ECR I-7196, point 93).

88 In the present case, in so far as the legal principles and the factual matters at issue were mentioned in the statement of objections, the fact that the Commission did not clarify the specific characterisation given to one of those factual matters did not prevent the applicant from defending itself effectively.

89 That conclusion is supported by the fact, apparent from the file, that the applicant, both in its reply to the statement of objections and at the hearing, submitted specific arguments concerning the consequences of the merger at issue for its liability for the infringement.

90 It follows that the statement of objections alerted the applicant to the relevance of its merger with the former Caffaro, in the context of the objection relating to its joint and several liability for the infringement, and enabled it to submit its point of view on that matter.

91 In the light of those observations, it must be held that the statement of objections is not vitiated by any defect which might have adversely affected the applicant's ability to defend itself.

92 Consequently, the present plea cannot be upheld.

The alleged infringement of the duty to state reasons

93 The applicant argues that the grounds given in the contested decision relating to its joint and several liability for the infringement are inadequate and inconsistent.

94 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 European Union Court to exercise its power of review (see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63 and the case-law cited).

95 In the present case, as paragraphs 37 to 44 above show, in the contested decision the Commission set out both the legal principles and the factual considerations on which it based the finding relating to the applicant's liability.

96 In particular, first, it is apparent from recital 411 of the contested decision that the Commission found that the former Caffaro exercised a decisive influence over Caffaro, having regard inter alia to the 100 % shareholding which linked those companies at the time of the infringement, creating a presumption that has not been rebutted by the applicant.

97 Secondly, it is also apparent from that recital that the Commission upheld the applicant's liability, as the acquiring company, in view of its merger with the former Caffaro, which was the parent company of Caffaro, the company directly involved in the cartel.

98 The conclusion which emerges from those considerations is not in any way inconsistent with the other factors put forward by the Commission, namely the fact that, at the time of the infringement, the applicant was the main shareholder in the former Caffaro and that there were certain links in terms of employees between the companies concerned (recital 408 of the contested decision) as well as evidence that the applicant intervened in Caffaro's decision-making process (recital 411 of the contested decision). That other evidence supports the fact that there was economic continuity between the former Caffaro and the applicant, demonstrating that the merger at issue took place within a group of companies joined by a structural link which already existed at the time of the infringement (see paragraphs 64 to 66 above).

99 It must therefore be observed that there is no inconsistency in the grounds, as alleged by the applicant, relating to the fact that the Commission found that the applicant controlled its subsidiary for the entire duration of the infringement (recital 408 of the contested decision) before stating that that same matter was 'not the relevant issue' (recital 411 of the contested decision). It is apparent from recital 411 of the contested decision that the control exercised by the applicant on its subsidiary at the time of the infringement does not constitute the basis for the finding of its liability, which is founded on its capacity as an acquiring company, but forms part of the reasoning at issue only as evidence of the fact that the merger at issue took place within a pre-existing group of companies.

100 Moreover, the applicant incorrectly maintains that it is apparent from the contested decision that the Commission wished to adhere to the view, set out in the statement of objections, that its liability was evident, to the requisite legal standard, from the influence it exercised over Caffaro and the former Caffaro at the time of the infringement.

101 The applicant infers that consideration from the fact that, in recitals 410 and 411 of the contested decision, the Commission examined the arguments by which it attempted to establish that it had not exercised influence over Caffaro. However, it was

in response to the arguments at issue that the Commission stated that 'contrary to [the applicant's] claim, its liability does not derive from its … ownership of Caffaro … but from the fact that [the applicant] merged with the former Caffaro, which was the 100 % parent company of [Caffaro]' (recital 411 of the contested decision).

102 Lastly, the applicant criticises the Commission in respect of its 'attempt to split up the reasoning into several elements, favouring only some of them', maintaining that, even if recital 411 of the contested decision was assessed as a 'conglomeration of distinct circumstances', the Commission 'could not, after the event, seek to attribute to only some of them the nature of a decision' (point 42 of the reply).

103 In those criticisms, the applicant fails to take into account the fact that reasoning set out in the contested decision may, in addition to the main considerations, contain evidence bearing out those considerations.

104 Since it is apparent from all the grounds at issue that the applicant's joint and several liability was upheld in its capacity as a company which acquired one of the companies responsible for the operation of the entity which committed the infringement, the description of the links between the companies concerned at the time of the infringement can only bear out that consideration, demonstrating that the merger at issue took place within a group of companies joined by a structural link.

105 In the light of all those observations, the plea alleging an infringement of the duty to state the reasons on which the decision is based must be rejected as must, consequently, the present action in its entirety.

Costs

106 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. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Sixth Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders SNIA SpA to pay the costs.

Vadapalas Dittrich Truchot

Delivered in open court in Luxembourg on 16 June 2011.

[Signatures]