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

16 June 2011 *

In Case T-185/06,

L'Air liquide, société anonyme pour l'étude et l'exploitation des procédés Georges Claude, established in Paris (France), represented by R. Saint-Esteben, M. Pittie and P. Honoré, lawyers,

applicant,

v

European Commission, represented initially by F. Arbault and O. Beynet, and subsequently by V. Bottka, P. Van Nuffel and B. Gencarelli, 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: French.

THE GENERAL COURT (Sixth Chamber, Extended Composition),

composed of V. Vadapalas (Rapporteur), acting for the President, M. Prek, A. Dittrich, L. Truchot and K. O'Higgins, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 2 September 2010,

gives the following

Judgment

Background to the dispute

1 The applicant, L'Air liquide, société anonyme pour l'étude et l'exploitation des procédés Georges Claude, is a company incorporated under French law which at the material time had a 100% shareholding in Chemoxal SA, which marketed hydrogen peroxide ('HP') and sodium perborate ('PBS').

2 In November 2002, Degussa AG informed the Commission of the European Communities of the existence of a cartel in the 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.

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, the applicant, Chemoxal, SNIA SpA, Caffaro Srl, 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 and Chemoxal were held to be 'jointly and severally' liable for the infringement (recital 406 of the contested decision).

9 Under Article 25(1)(b) 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 noted that its power to impose penalties was time-barred with regard to the applicant and to Chemoxal, whose participation in the infringement had ceased more than five years before the first investigative measures. The Commission nevertheless considered that it had a legitimate interest in making a finding of infringement with respect to those companies (recitals 366 to 369 of the contested decision).

10 Article 1(i) and (j) of the contested decision provide that the applicant and Chemoxal infringed Article 81(1) EC and Article 53 of the EEA Agreement by participating in the infringement concerned from 12 May 1995 to 31 December 1997.

11 In Article 2(f) of the contested decision, the Commission imposed a fine of EUR 0 on the applicant and on Chemoxal.

12 Article 4 of the contested decision contains a list of its addressees, which include the applicant.

Procedure and forms of order sought

13 By application lodged at the Registry of the Court on 17 July 2006, the applicant brought the present action.

14 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).

15 As two members of the extended Chamber were unable to sit in the present case, the President of the Court designated two other judges to complete the Chamber pursuant to Article 32(3) of the Rules of Procedure of the Court.

16 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 2 September 2010.

17 The applicant claims that the Court should:

— annul Article 1(i) of the contested decision, in so far as the Commission in that provision found it to have participated in the infringement;

— as a result, annul Article 2(f) and Article 4 of the contested decision, in so far as those provisions concern it;

— order the Commission to pay the costs.

18 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

19 In support of its action, the applicant puts forward four pleas in law alleging, first, infringement of Article 81 EC concerning the imputation of the infringement on the basis of the presumption linked to the 100 % shareholding in the subsidiary, secondly, infringement of the rights of the defence resulting from the application of that presumption, thirdly, infringement of the duty to state the reasons on which the decision is based concerning the rejection of the evidence adduced in order to rebut that presumption and, fourthly, the lack of a legitimate interest in making a finding of infringement taking into account the fact that the limitation period had expired.

Preliminary observations

20 Since the first three pleas put forward by the applicant are in essence directed against the finding that it is liable for the unlawful conduct of its subsidiary, it is appropriate first of all to recall the relevant case-law.

21 It is 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 Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraph 58 and the case-law cited).

22 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 Article 81 EC (*Akzo Nobel and Others* v *Commission*, paragraph 21 above, paragraph 59).

23 In the specific case of a parent company holding 100 % of the capital of a subsidiary which has infringed the European Union competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary and, secondly, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary (see *Akzo Nobel and Others* v *Commission*, paragraph 21 above, paragraph 60 and the case-law cited).

24 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 the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will then be able to regard the parent company as liable for the infringement at issue, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (see, to that effect, *Akzo Nobel and Others* v *Commission*, paragraph 21 above, paragraph 61 and the case-law cited).

25 In order to ascertain whether a subsidiary determines its conduct on the market independently, account must be taken of all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company, which may vary from case to case and cannot therefore be set out in an exhaustive list (*Akzo Nobel and Others* v *Commission*, paragraph 21 above, paragraph 74; see also, to that effect, Case T-112/05 *Akzo Nobel and Others* v *Commission* [2007] ECR II-5049, paragraph 65).

26 In the present case, in recitals 370 to 379 of the contested decision, the Commission observed that a parent company could be considered to be liable for the illegal conduct of a subsidiary in so far as the latter does not decide independently upon its own conduct on the market. It stated that it was correct in presuming that a wholly-owned subsidiary carries out, in all material respects, the instructions of its parent company, that latter company being able to rebut the presumption by evidence to the contrary.

27 Concerning the imputation of the infringement to the applicant, the Commission stated, first, in recital 403 of the contested decision, that, at the time of the infringement, that undertaking had a 100 % shareholding in Chemoxal and the power to appoint members of the board of directors, which was sufficient to apply the presumption of the actual exercise of its decisive influence over the conduct of its subsidiary.

28 In recital 404 of the contested decision, it referred to the arguments used by the applicant to challenge that imputation.

29 In recital 405 of the contested decision, the Commission stated that, contrary to the arguments submitted by the applicant, a 100 % shareholding in a subsidiary gave rise to a presumption which may be rebutted by the evidence that 'the subsidiary enjoys a degree of independence'. It held, subsequently, that the evidence submitted by the

applicant was inadequate to rebut the presumption, first, mentioning that its power to appoint members of the subsidiary's board of directors was reason to believe that it exercised a decisive influence over the current management of that subsidiary. Secondly, it referred to some evidence indicating that the companies concerned were perceived by third parties as being part of the same undertaking, namely particulars of the Air Liquide name in some documents relating to the cartel, and the use by Chemoxal of the Air Liquide trade mark.

30 Lastly, the Commission stated, in recital 406 of the contested decision, that it maintained its finding relating to the imputation of the infringement in question to the applicant and its subsidiary Chemoxal, which were part of the same undertaking involved in the infringement.

The first and second pleas in law, alleging infringement of Article 81 EC and the applicant's rights of defence as regards the application of the presumption linked to the 100 % shareholding in the subsidiary

Arguments of the parties

31 In the first plea, the applicant claims that a 100 % shareholding in the subsidiary by the parent company does not in itself give grounds for presuming that the parent company exercises a decisive influence over the subsidiary, and for imputing the unlawful conduct of the latter to the parent company. At least one other item of evidence to substantiate the lack of independence of the subsidiary must be provided. By relying

merely on the 100 % shareholding in the subsidiary to plead the presumption, the Commission infringed Article 81 EC.

32 Moreover, it submits, other matters pointed out by the Commission, such as the power to appoint members of Chemoxal's board of directors and the use by that company of the applicant's name (recitals 403 and 405 of the contested decision) do not prove that the applicant exercises a decisive influence over its subsidiary. In particular, the Commission's decision-making practice shows that the use by a subsidiary of the parent company's trade name does not indicate that they form a single economic entity. Many documents in the file indeed refer to Chemoxal and not to the applicant.

33 In the second plea, the applicant claims that recourse to the presumption at issue has led to a reversal of the burden of proof, infringing its rights of defence.

34 The Commission disputes the applicant's arguments.

Findings of the Court

35 It is apparent from recitals 403 to 406 of the contested decision that the imputation to the applicant of the unlawful conduct of its subsidiary is based on the finding that it exercised actual decisive influence over Chemoxal, stemming from a presumption linked to its complete control of that subsidiary, that presumption not having been rebutted by the applicant, according to the Commission.

36 Having regard to the case-law cited in paragraphs 21 to 24 above, the Commission was legitimately able to presume that the applicant exercised a decisive influence over Chemoxal, taking account of the undisputed link of a 100 % shareholding between those two companies.

37 In this connection, the applicant's arguments concerning the matters set out in recitals 403 and 405 of the contested decision, relating to the power to appoint members of Chemoxal's board of directors and the fact that the applicant's name was referred to in the sector concerned by the infringement, must be rejected as irrelevant.

38 Since those factors were relied upon by the Commission in addition to the finding that the applicant had a 100 % shareholding in Chemoxal, their irrelevance as claimed by the applicant cannot affect the Commission's right to rely on the presumption at issue.

39 Moreover, since it has been found that the Commission did not err in law by relying on the presumption that the applicant could rebut by contrary evidence the plea alleging a reversal of the burden of proof, allegedly incompatible with the principle of the observance of the rights of the defence, must also be disregarded.

40 In the light of all the foregoing, the first and second pleas cannot be upheld.

The third plea, alleging infringement of the duty to state reasons as regards rejection of the evidence adduced in order to rebut the presumption at issue

Arguments of the parties

41 The applicant claims that the Commission has infringed its duty to state the reasons on which the decision is based, in so far as it has not adopted a position on the evidence which the applicant adduced in order to rebut the presumption linked to its 100 % shareholding in Chemoxal.

42 It states that it provided, in its reply to the statement of objections, a number of items of evidence relating to Chemoxal's structural and decision-making independence.

43 In recital 404 of the contested decision, the Commission made incomplete reference to that evidence. Moreover, it did not respond to it, merely asserting, inter alia, that, 'seen from the outside, it was clear [that the applicant] controlled Chemoxal's activity' and 'both customers and competitors referred to the undertaking "Air Liquide" in respect of the [HP] sector' (recital 405 of the contested decision). No evidence put forward by the applicant was therefore examined in the contested decision.

44 The applicant submits that the Commission cannot remedy the inadequacy of the reasons given for the contested decision by relying on supplementary evidence before the Court, concerning, in particular, the fact that Chemoxal marketed goods manufactured by Oxysynthèse SA. In the contested decision, the Commission did not prove that the applicant exercised actual control over that undertaking owned jointly

by the applicant and Atochem SA, managed, as regards the applicant's shareholding, by Chemoxal.

45 The arguments developed by the Commission for the first time in the defence confirm the failure to state reasons in the contested decision regarding this issue.

46 The Commission replies that, applying the presumption at issue, the burden of establishing Chemoxal's independence lay exclusively with the applicant. So far as concerns the evidence submitted by the applicant, the Commission maintains that it explained adequately, in recitals 403 to 405 of the contested decision, why that presumption had not been rebutted.

47 The Commission, indeed, is not required to respond to all the arguments put forward in reply to the statement of objections. It needs merely to produce a detailed statement of reasons for imputing the infringement to the undertaking concerned. The applicant does not allege that the Commission failed to produce such a statement of reasons.

48 Moreover, the arguments put forward by the applicant, which were very general and unsubstantiated by specific evidence, were in no way capable of rebutting the presumption at issue.

49 As regards the alleged structural independence of the applicant's subsidiary, first, the fact that the directors of Chemoxal were not part of the applicant's governing bodies did not in any way preclude the latter from having given instructions to its subsidiary and closely controlled its conduct. In any event, even if that fact is not stated in the contested decision, the evidence attached by the applicant in reply to the statement

of objections shows that at least one of Chemoxal's executive directors became, after his resignation, one of the applicant's directors.

50 Secondly, the fact that the chairman and managing director (CMD) of Chemoxal had very wide powers is only an illustration of the power normally conferred on the chairman of a company and does not constitute any evidence of the independence of the applicant's subsidiary.

51 Thirdly, the fact that Chemoxal had its own departments is merely an attribute of an entity with legal personality. Furthermore, the evidence put forward by the applicant shows that Chemoxal used a number of departments of the parent company and that its headquarters was indeed located in the same buildings as the headquarters of the group.

52 Fourthly, as regards the arguments concerning Chemoxal's management of shareholdings in other subsidiaries in the group, in particular Oxysynthèse, the applicant acknowledged that it was also directly involved in the management of those shareholdings.

53 Moreover, the Commission observed that Chemoxal marketed HP manufactured by Oxysynthèse, a company jointly controlled by the applicant and by Atochem (recitals 42 and 52 of the contested decision). Even if this ground is not included in the part of the contested decision relating to the imputability of the infringement, it is nevertheless of some relevance. It is hardly conceivable that the applicant exercised no control over Chemoxal, which was responsible for marketing the production of another subsidiary of the group, controlled jointly.

54 As regards the alleged decision-making independence of the applicant's subsidiary, first, the applicant has not adduced evidence proving Chemoxal's alleged independence as regards price. Concerning the powers of the managing director of Chemoxal, the applicant submitted a short letter in which that director briefly indicated his agreement on a price, which does not in any way prove that he decided alone on pricing policy. Other evidence merely consists of customer visit reports.

55 Secondly, Chemoxal's alleged independence in the development of strategic commercial projects was raised only by reference to the '"on-site" [HP] solution' project, the assignment of which to Chemoxal was indeed unsubstantiated by any evidence. In addition, it is apparent from the evidence attached to the application that that project drew on techniques developed by the group and that its promoter came from the parent company.

56 Thirdly, the arguments relating to the preparation of the budget, the management of relationships with customers and the participation of Chemoxal employees only in the European Chemical Industry Council (CEFIC) do not in any way prove that the applicant did not effectively exercise a decisive influence over its subsidiary.

57 Thus, since none of the arguments put forward by the applicant has been such as to rebut the presumption, the Commission was not obliged to state in detail the reasons for their rejection. The Commission complied with its duty to state reasons, setting out detailed reasons for attributing the infringement to the applicant.

58 The Commission carefully examined the arguments submitted by the applicant and, after having recalled those matters (recital 404 of the contested decision), concluded that they were inadequate to rebut the presumption (recital 405 of the contested decision). The arguments put forward by the applicant were extremely general and unsubstantiated by any specific evidence.

59 Since the undertaking in question bears the burden of adducing evidence of the independence of its subsidiary, where it does not adduce any evidence but merely makes general and unsubstantiated assertions the Commission is not infringing its duty to state reasons by merely drawing attention to the fact that the evidence adduced is inadequate to rebut the presumption.

60 In any event, according to the Commission, even if it did not adequately explain why the evidence submitted by the applicant in order to rebut the presumption did not suffice to attain that objective, the fact remains that the contested decision contains sufficient reasons, in so far as in it the Commission mentioned two supplementary matters which in themselves suggested that Chemoxal and the applicant formed one economic unit. These were, first, the applicant's power to appoint members of Chemoxal's board of directors and, secondly, the fact that 'from the outside', from the point of view of customers and competitors, Chemoxal's commercial activity was perceived as being that of the applicant. In particular, Chemoxal was often referred to as 'Air Liquide' in the context of the cartel and Chemoxal used the Air Liquide trade mark in conducting its commercial activities.

61 In addition, in the contested decision the Commission also mentioned the fact that Chemoxal marketed HP manufactured by Oxysynthèse, jointly controlled by the applicant and by Atochem. This was highlighted as a relevant criterion for the purposes of imputing the infringement in point 344 of the statement of objections. It is hardly conceivable that the applicant did not exercise any control over a company which was

responsible for marketing the production of another of its subsidiaries over which the applicant effectively exercised joint control.

62 Lastly, in the further alternative, the Commission submits that, even were there to be a finding of a failure to give sufficient reasons in the present case, that should not lead to the annulment of the contested decision, since the evidence submitted by the applicant consisted only in general assertions and does not in any way constitute evidence capable of rebutting the presumption at issue.

Findings of the Court

63 According to settled case-law, 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. 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).

64 The Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned and it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision. In particular, it is not required to define its position on matters which are manifestly irrelevant or insignificant or plainly of secondary importance (Case T-349/03 *Corsica Ferries France* v

Commission [2005] ECR II-2197, paragraph 64; see also, to that effect, *Commission* v *Sytraval and Brink's France*, paragraph 63 above, paragraph 64).

65 Where, as in the present case, a decision taken in application of Article 81 EC relates to several addressees and raises a problem of imputing 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. Thus, with regard to a parent company held liable for the offending behaviour of its subsidiary, such a decision must contain a detailed statement of reasons for imputing the infringement to that company (see, to that effect, Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraphs 78 to 80).

66 In the present case, the applicant claims that in the contested decision the Commission did not set out sufficient reasons as regards the finding of its liability, in particular in so far as the Commission did not clarify the reasons for the rejection of the evidence which it had adduced in order to rebut the presumption stemming from its 100 % shareholding in Chemoxal.

67 The file shows that, in its reply to the statement of objections, the applicant put forward specific arguments to demonstrate Chemoxal's independence, drawing attention to the following matters:

— first, as regards Chemoxal's structural independence, unlike what might be observed in respect of some of the other undertakings concerned, none of

Chemoxal's directors was a member of the applicant's management board, or of its governing bodies; this is demonstrated by the examples of payslips provided to the Commission and by the evidence adduced in response to the application for information of 18 March 2004; none of Chemoxal's directors or employees had been simultaneously an employee of the applicant;

— the minutes of Chemoxal's board of directors of 12 May and 25 October 1995, provided to the Commission, show that its CMD had an unlimited term of office, being vested with 'the widest powers within the legal boundaries to act on [Chemoxal's] behalf in any circumstances' and that its managing director also had widely defined powers; according to a circular from the managing director of Chemoxal, dating from the period of the infringement, he was entrusted with responsibilities relating to defining the logistics policy and the conduct of the general commercial policy while a commercial director was seconded to Asia;

— Chemoxal had its own departments, namely a commercial department, a marketing department, a human resources department, an IT department and an accounts department, allowing it to control its commercial policy completely by itself, and it even had a research centre, managed separately, even if it was located on the same premises as that of the applicant; in respect of the departments not directly possessed by Chemoxal, such as, inter alia, a legal, tax and 'insurance' department, it used the departments of its parent company, for which it provided remuneration; although Chemoxal's headquarters was indeed located in the same buildings as the headquarters of the group, its premises were leased from its parent company, which was demonstrated by a lease provided to the Commission;

— Chemoxal independently managed the shareholdings of the group in Oxysynthèse and Oxysynthèse Deutschland GmbH, companies manufacturing HP; although a representative of the applicant also had a seat on the board of directors of Oxysynthèse, only one of Chemoxal's representatives sat on the management board of that company and managed it at high level;

— Chemoxal independently managed the shareholding of the group in Chemoxal Chemie GmbH, a company legally attached to the applicant for tax purposes; documents attached to the Commission's file show that the representatives on the board of directors of that subsidiary were in actual fact Chemoxal employees;

— secondly, as regards Chemoxal's decision-making independence, its activity was very far removed from the other activities of the group, focused on the provision of industrial and medical gases; the definition and conduct of Chemoxal's commercial policy were exclusively entrusted to that company's management;

— directives and broad guidelines concerning price were issued exclusively by Chemoxal's directors, decisions on a price offered to a specific customer were taken by operatives, under the sole control of their directors, which has been demonstrated by internal correspondence and customer visit reports provided to the Commission;

— only Chemoxal staff could initiate the development of large-scale strategic commercial projects, which was demonstrated by a project relating to the 'onsite' production solution for HP developed by Chemoxal in 1996, based on tech-

niques which were developed by the group for other products; for that purpose, Chemoxal took on a technician from its parent company, which was moreover not involved;

— the preparation of Chemoxal's budget was the responsibility of its management, which is demonstrated by a circular from its managing director, provided to the Commission, which sets out the allocation of the tasks in question;

— Chemoxal or its local agents were directly responsible for its customer relations, as the correspondence and customer visit reports show;

— Chemoxal was considered to be an independent company so far as concerns its relationship with CEFIC, which is shown by the minutes of meetings with the latter, included in the Commission's file;

— although Chemoxal used the trade name Air Liquide Chimie, it did so with a legitimate aim, which was to benefit from the reputation of an internationally active group, that fact not affecting its independence with regard to the parent company with a similar company name; Chemoxal's official commercial documents, inter alia, are drawn up in its company name;

— none of the people who participated in the cartel meetings at issue was employed by the applicant and there is no indication in the Commission's file of any instructions given by the applicant to Chemoxal.

68 In recital 404 of the contested decision, the Commission reviewed the arguments put forward by the applicant.

69 It then stated, in recital 405 of the contested decision, that the matters submitted by the applicant were inadequate to rebut the presumption at issue, mentioning that the finding of the applicant's decisive influence over Chemoxal was corroborated, first, by its power to appoint members of its subsidiary's board of directors and, secondly, by the evidence relating to third parties' perception of the companies concerned. Lastly, in recital 406 of the contested decision it maintained its finding that the applicant and Chemoxal constituted the same undertaking.

70 That reasoning does not address the arguments put forward by the applicant, but merely refers to certain additional items of evidence of the applicant's exercise of a decisive influence over its subsidiary. Consequently, the abovementioned grounds for the contested decision do not set out the reasons why the Commission is of the view that the matters submitted by the applicant were inadequate to rebut the presumption at issue.

71 Furthermore, it must be held that, although the Commission is not obliged to adopt a position on all the matters relied on by the party concerned, in particular where those are manifestly irrelevant or insignificant or plainly of secondary importance (see paragraph 64 above), in the present case, in contrast to what is maintained by the Commission, the matters put forward by the applicant cannot be regarded as insignificant in the light of the assessment of Chemoxal's independence.

72 In its reply to the statement of objections, the applicant relied on all the circumstances characterising the links between itself and Chemoxal at the time of the infringement

at issue, pleading, inter alia, the fact that Chemoxal's activity had been very specific in relation to the other activities of the group, the lack of overlap in the directors and employees of the companies concerned, the widely defined powers of the subsidiary's directors, the fact that it had its own departments relating to commercial activities, and the fact that it acted independently in the preparation of strategic projects.

73 The matters submitted by the applicant furthermore are not mere contention, but contain a series of concrete items of evidence annexed to the statement of objections (see paragraph 67 above).

74 In those circumstances, the Commission was required to adopt a position on the applicant's contrary arguments, examining whether, in the light of all the relevant matters relating to economic, organisational and legal links between the companies concerned, the applicant had demonstrated that its subsidiary acted independently on the market.

75 The Commission's duty to state reasons for its decision on this issue is clearly evident from the rebuttable nature of the presumption at issue, in order to rebut which the applicant was required to produce evidence of all the economic, organisational and legal links between itself and its subsidiary.

76 Moreover, the failure to state reasons at issue cannot be remedied by the reference made to the evidence set out in recital 405 of the contested decision, concerning the power to appoint members of the subsidiary's board of directors, and third parties' perception of the companies concerned.

77 Although these matters may be taken into account in the assessment of the links between the companies concerned, they are not intended to be relied on to call into question the relevance of the applicant's arguments concerning Chemoxal's independence and, therefore, do not constitute sufficient reason to reject those arguments.

78 Concerning the Commission's argument relating to the existence of other evidence of the influence exerted by the applicant over Chemoxal, namely the fact that Chemoxal marketed HP manufactured by Oxysynthèse, jointly controlled by the applicant and by Atochem (recital 401 of the contested decision), the contested decision does not show that the Commission put forward that factor as a reason for its finding that the applicant exercised a decisive influence over Chemoxal. Moreover, merely referring to this additional evidence of the links between the companies concerned cannot, in any event, remedy the inadequacy of the reasons for the rejection of the contrary arguments relied on by the applicant.

79 Having regard to the foregoing, it must be held that the Commission did not adopt a position on the basis of detailed reasons on the evidence adduced by the applicant in order to rebut the presumption following from its shareholding in Chemoxal and, thus, has not given sufficient reasons for its finding as regards the imputation of the infringement at issue to the applicant.

80 Inasmuch as the Commission contends, in the defence, that the contrary evidence relied on by the applicant was, in any event, inadequate to demonstrate Chemoxal's independence, no assessment by the Commission of the evidence at issue is apparent from the grounds of the contested decision. This impedes the review of the validity of the contested decision on this aspect.

81 In addition, the statement of reasons must in principle be notified to the party concerned at the same time as the decision adversely affecting it and a failure to state the reasons cannot be remedied by the fact that the party concerned learns the reasons for the decision during the proceedings (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 463, and Case T-25/04 *González y Díez* v *Commission* [2007] ECR II-3121, paragraph 220).

82 Therefore, the failure to state reasons at issue cannot be remedied in the course of the proceedings.

83 In the light of all the foregoing, the plea alleging infringement of the duty to state the reasons on which the decision is based must be upheld and the application for annulment of the contested decision, in so far as it concerns the applicant, must be granted.

84 Consequently, it is not necessary to rule on the fourth plea.

Costs

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

On those grounds,

THE GENERAL COURT (Sixth Chamber, Extended Composition)

hereby:

1. **Annuls 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 L'Air liquide, société anonyme pour l'étude et l'exploitation des procédés Georges Claude;**

2. **Orders the European Commission to pay the costs.**

Vadapalas Prek Dittrich

Truchot O'Higgins

Delivered in open court in Luxembourg on 16 June 2011.

[Signatures]