Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 18 May 2017[1]

Joined Cases C-588/15 P and C-622/15 P

LG Electronics Inc. (C-588/15 P),
Koninklijke Philips Electronics NV (C-622/15 P)
v

European Commission

(Appeal — Agreements, decisions and concerted practices — Global market for cathode ray tubes for television sets and computer monitors — Decision finding two infringements of Article 101 TFEU and Article 53 of the Agreement on the European Economic Area — Agreements and concerted practices on pricing, market sharing, and production capacity — Liability of a parent company due to an infringement committed by a subsidiary — Statement of objections sent solely to the parent company — Rights of the defence)

Introduction

1. By these appeals, the appellants ask the Court to set aside two judgments of the General Court of the European Union, of 9 September 2015, *LG Electronics* v *Commission*,[2] and of 9 September 2015, *Philips* v *Commission*,[3] whereby the General Court dismissed actions seeking the annulment of Commission Decision C(2012) 8839 final of 5 December 2012 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case COMP/39.437 — TV and Computer Monitor Tubes) ('the contested decision') and, in the alternative, reduction of the respective fines imposed on the appellants.

2. Those appeals, joined for the purpose of the oral proceedings and of the judgment,[4] raise, in particular, a novel question in relation to respect for the rights of the defence in a situation where liability for the wrongful conduct of a subsidiary is attributed to its parent company. More specifically, it is necessary to determine whether there is a breach of the rights of defence of a parent company when the European Commission sends to it the statement of objections, but does not also send that statement to the subsidiary whose conduct is at issue, particularly when that subsidiary has been declared bankrupt, with the consequence that the parent company is deprived of any access to the documents of that subsidiary.

1 Original language: French.

2 T-91/13, not published, 'the *LGE* judgment', EU:T:2015:609.

3 T-92/13, not published, 'the *Philips* judgment', EU:T:2015:605.

4 By decision of the Court of 7 February 2017.

Background to the disputes

3. The background to the proceedings, as set out in the judgments under appeal, may be summarised as follows.

4. By the contested decision, the Commission found that the main global producers of cathode ray tubes ('CRTs') had infringed Article 101 TFEU and Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) by participating in two separate infringements, related to, first the market in colour display tubes for computer monitors ('CDTs') and, second, the market in colour picture tubes for television sets ('CPTs').

5. LG Electronics Inc. ('LGE') is a supplier of consumer electronics products. Koninklijke Philips Electronics NV ('Philips') is the parent company of the Philips group, specialising in electronic products.

6. LGE and Philips produced CRTs until 1 July 2001. On that date, the two appellants transferred their entire CRT business to a joint venture, the LPD group, headed by the company LG Philips Displays Holding BV.

7. In the contested decision, the Commission held that, on the one hand, LGE and its subsidiaries and, on the other, the subsidiaries of Philips had taken part in cartels relating to CDTs and CPTs until the transfer of the CRT business to the LPD group, on 1 July 2001. Consequently, LGE and Philips were held to be liable for the two infringements to that extent.

8. Further, the Commission considered that the appellants should also be held, as parent companies, to be jointly and severally liable for the participation of the LPD group in cartels relating to CDTs and CPTs for the period from 1 July 2001 until 30 January 2006.

9. The Commission accordingly held, in points (c) and (d) respectively of Article 1(1) of the contested decision, that, as regards the cartel relating to CDTs, Philips had participated in it from 28 January 1997 until 30 January 2006 and LGE from 24 October 1996 until 30 January 2006. The Commission also held, in points (f) and (g) respectively of Article 1(2) of the contested decision, that, as regards the cartel relating to CPTs, Philips had participated in it from 21 September 1999 until 30 January 2006 and LGE from 3 December 1997 until 30 January 2006.

10. As regards the infringement relating to CDTs, the Commission, in points (c) to (e) respectively of Article 2(1) of the contested decision, imposed fines of: EUR 73 185 000 on Philips, EUR 116 536 000 on LGE and EUR 69 048 000, with joint and several liability, on those two companies. As regards the infringement relating to CPTs, the Commission imposed, in points (c) to (e) respectively of Article 2(2) of the contested decision, fines of: EUR 240 171 000 on Philips, EUR 179 061 000 on LGE and EUR 322 892 000, with joint and several liability, on those two companies.

The proceedings before the General Court and the judgments under appeal

11. By applications lodged at the registry of the General Court on, respectively, 14 and 15 February 2013, LGE and Philips each brought an action seeking the annulment of the contested decision in so far as that decision was relevant to them or, in the alternative, for the reduction of the fines imposed on them by that decision.

12. In support of its action, LGE put forward seven pleas in law in support of annulment. The first plea in law concerned a breach of LGE's rights of defence, in that the LPD group was excluded from the procedure. In paragraphs 67 to 91 of the *LGE* judgment, the General Court examined and rejected that plea as being ineffective and, in any event, as being unfounded. The General Court also rejected the other pleas relied on by LGE and, consequently, dismissed the action in its entirety.

13. In support of its action, Philips put forward eight pleas in law in support of annulment. The second plea in law involved a claim of an infringement of Article 101 TFEU, Article 53 of the Agreement on the European Economic Area, Article 27(1) of Regulation (EC) No 1/2003,[5] breach of the rights of the defence, including the right to be heard, and of the principle of sound administration, in that the Commission did not attribute liability to the LPD group for the infringements which it was alleged to have committed. The General Court examined and rejected that plea in paragraphs 74 to 99 of the *Philips* judgment. The General Court also rejected the other pleas relied on by Philips and, consequently, dismissed the action in its entirety.

Forms of order sought by the parties

14. LGE claims (Case C-588/15 P) that the Court should:

– set aside the *LGE* judgment;

– annul Article 1(1)(d) and (2)(g) and Article 2(1)(d) and (e) and (2)(d) and (e) of the contested decision;

– reduce the fines imposed on it; and

– order the Commission to pay the costs at first instance and on appeal.

15. Philips claims (Case C-622/15 P) that the Court should:

– set aside the *Philips* judgment;

– annul Article 1(1)(c) and (2)(f) and Article 2(1)(c) and (e) and (2)(c) and (e) of the contested decision;

– reduce the fines imposed on it; and

– order the Commission to pay the costs at first instance and on appeal.

16. The Commission contends that the Court should dismiss the appeals and order the appellants to pay the costs.

Analysis

17. In support of their appeals, LGE relies on three and Phillips on four grounds of appeal, grounds which partly overlap.

5 Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1).

18. As requested by the Court, I will confine my analysis to the first ground of appeal put forward by LGE and to the second ground of appeal put forward by Philips, both grounds being based on a claimed breach of the rights of the defence due to the fact that the statement of objections was not sent to their common subsidiary, the LPD group.

The judgments under appeal

The LGE judgment

19. By the first plea relied on at first instance, LGE claimed that the Commission had infringed its rights of defence by failing to send the statement of objections and the contested decision to the LPD group.

20. The General Court examined and rejected that plea in paragraphs 67 to 91 of the *LGE* judgment.

21. First, having recalled the case-law on respect for the rights of the defence and on the attribution of liability to a parent company, the General Court held that the Commission could not be held to have committed any irregularity because of a failure to impute liability for the infringement to the LPD group and, accordingly, that the applicant's arguments to establish a breach of its rights of defence were ineffective (paragraphs 68 to 83 of the *LGE* judgment).

22. Second, in paragraphs 84 to 91 of the *LGE* judgment, the General Court rejected that plea as being unfounded, responding to LGE's argument that it had not been able to defend itself because it had no access to the documents of the LPD group. The General Court found on that point that, since those documents did not form part of those on which the Commission had relied in order to adopt the contested decision, the applicant could not maintain that the Commission had prevented it from effectively making its views known on the documents used by that institution (paragraph 85 of the *LGE* judgment).

23. Further, the General Court stated that, by virtue of a general duty of care, the applicant was required to ensure, even in the circumstances of the winding-up of the joint venture, the proper maintenance of records in its books and files of information enabling details of its activities to be retrieved, in order, in particular, to make the necessary evidence available in the event of legal or administrative proceedings (paragraphs 86 and 87 of the *LGE* judgment), regardless of complications arising from Netherlands bankruptcy law and the lack of cooperation from the LPD group's trustee in bankruptcy (paragraphs 88 and 89 of the *LGE* judgment).

24. Last, the General Court stated, furthermore, that even if the Commission had not formally involved the LPD group in the administrative procedure, the Commission had sent requests for information to various companies in the LPD group and had carried out inspections at its premises (paragraph 90 of the *LGE* judgment).

The Philips judgment

25. By the second part of its second plea in law at first instance, Philips maintained that the Commission had prevented it obtaining access to the information it required adequately to prepare its defence, by omitting to involve the LPD group in the administrative procedure.

26. The General Court examined and rejected that plea in paragraphs 90 to 99 of the *Philips* judgment.

27. Having recalled the case-law on respect for the rights of the defence and on the attribution of liability to a parent company, the General Court held that the Commission had not committed any irregularity by failing to impute liability for its conduct to the LPD group (paragraphs 91 to 97 of the *Philips* judgment).

28. Further, the General Court stated that, by virtue of a general duty of care, Philips was required to ensure, even in the circumstances of the winding-up of the joint venture, the proper maintenance of records in its books and files of information enabling details of its activities to be retrieved, in order, in particular, to make the necessary evidence available in the event of legal or administrative proceedings. In any event, the General Court stated that it was apparent from documents in the file that the Commission sent requests for information to various companies in the LPD group (paragraph 97 of the *Philips* judgment).

29. Furthermore, the General Court stated that, in order to obtain a reduction in the fine by virtue of its cooperation, Philips had provided the Commission with information on the participation of the LPD group in the cartel, which meant that it had access to substantial material on that point, which it was able to use in order to defend itself adequately (paragraph 98 of the *Philips* judgment).

Arguments of the parties

Arguments of LGE

30. LGE claims that the General Court erred in law by finding that the Commission had not infringed its rights of defence by deciding not to send the statement of objections to the LPD group.

31. First, LGE challenges the rejection of the first plea at first instance as being ineffective (paragraph 83 of the *LGE* judgment). LGE maintains that the reasons stated in paragraphs 73 to 82 of that judgment concerned a separate issue, which was not raised before the General Court, namely whether the Commission had erred in holding LGE to be liable for the infringement. In the view of LGE, a finding that the Commission could attribute liability to LGE does not make the plea in relation to a breach of the rights of the defence ineffective.

32. LGE claims that the General Court erred in allowing the Commission an unqualified discretion to decide whether the statement of objections was to be sent to the parent company or to the subsidiary.

33. According to LGE, in certain circumstances, such as those of this case, the exercise of that discretion is limited by the duty to respect the rights of the defence. It is apparent from the judgment in *Commission* v *Tomkins*[6] that, if a subsidiary brings forward exculpatory evidence from its records or from interviewing staff, that evidence will automatically benefit the parent company. Consequently, according to LGE, the ability of a parent company to exercise its rights of defence depends on its subsidiary being involved in the procedure.

34. LGE claims that, in this case, if the LPD group had been called upon to defend itself and had succeeded in putting forward exculpatory evidence, LGE would automatically have benefited. Accordingly, LGE submits, relying on the judgment in *Solvay* v *Commission*,[7] that it cannot be ruled out that, if the Commission had sent the statement of objections to the LPD group, the latter could have produced evidence that could have been of use for LGE's defence.

6 Judgment of 22 January 2013 (C-286/11 P, EU:C:2013:29, paragraph 39)

7 Judgment of 25 October 2011 (C-109/10 P, EU:C:2011:686, paragraph 62).

35. The practice of addressing both the subsidiary and the parent company is moreover apparent from the Commission's Manual of procedures for the application of Articles 101 and 102 TFEU.[8] The fact that the Commission sent questionnaires to the LPD group is irrelevant, because, as a source of exculpatory evidence, the questionnaires are not the same as a statement of objections. A defendant must know the objections if it is to be able fully to exercise its rights of defence.

36. Second, LGE criticises the reasoning of the *LGE* judgment that led to the rejection of its plea in law as being unfounded.

37. According to LGE, the fact that it was able to submit observations on the evidence adduced by the Commission and the fact that the Commission obtained information from the LPD group are not sufficient to ensure respect for its rights of defence. Further, LGE criticises the finding of the General Court that LGE was under an obligation to ensure the proper maintenance in its books and records of information to enable it to retrieve details of the activity of the joint venture (paragraph 86 of the *LGE* judgment). That duty is pertinent in cases where the parent company sells a subsidiary to a third party and it can in fact be contractually assured of continued access to the documents. LGE explains that it no longer had control over its subsidiary following the declaration of the latter's bankruptcy, the bankruptcy trustee being under no obligation to allow it continued access to the documents.

Arguments of Philips

38. Philips claims that the General Court erred in law when it held that the Commission, by omitting to send the statement of objections to the LPD group, did not commit a procedural irregularity (paragraphs 75 to 82 of the *Philips* judgment).

39. Philips does not dispute the ability of the Commission to attribute liability for the infringement to a parent company that exercised decisive influence over the conduct of a subsidiary. Philips states that that has no bearing on the question of whether the Commission is required to involve both entities in the administrative proceedings. Philips claims that, in this case, its liability is 'purely derivative' of that of its subsidiary and, where there is no direct attribution of liability to the LPD group, its liability as a parent company 'exceeded' the liability of the subsidiary in question, within the meaning of the judgment in *Total* v *Commission*.[9]

40. Philips states that its subsidiary was no longer part of the same undertaking during the administrative proceedings, since it had been under the control of a bankruptcy trustee since 30 January 2006. Philips states that, because its subsidiary was not involved in the administrative proceedings and did not receive, in particular, the statement of objections, the latter had no opportunity or obligation to defend itself against the Commission's allegations. Further, only the bankruptcy trustee of the LPD group was in possession of the documents relating to the group's business and had access to the relevant employees. Having regard to the bankruptcy of the subsidiary, Philips asserts that it was impossible for it to ensure access to those documents so as to have the necessary evidence to enable it to defend itself.

41. According to Philips, the Commission should have taken account of the fact that it no longer had control over its subsidiary and no longer had access to the documentation of the LPD group. Philips states that, if the Commission had included the LPD group in the administrative proceedings, the latter would have been able to defend itself and Philips would thus also have been better placed to ensure its defence. The Commission's decision to exclude the LPD group from the administrative proceedings therefore deprived Philips of the full effectiveness of its rights of defence.

8 Manual of procedures for the application of Articles 101 and 102 TFEU, 2012. See http://ec.europa.eu/competition/antitrust/information_en.html ('the Commission's Manual of procedures').

9 Judgment of 17 September 2015 (C-597/13 P, EU:C:2015:613, paragraphs 35 and 38).

Arguments of the Commission

42. The Commission contends that the grounds of appeal concerned are inadmissible in that they are directed against findings of fact and that, in any event, they are unfounded.

43. The Commission claims that, in accordance with a consistent body of case-law,[10] it has the right to impose a fine on one or other entity, parent company or subsidiary, that form an undertaking. According to the Commission, the appellants are wrong to claim that the parent company would automatically benefit from any reduction in the liability of the subsidiary. There is no basis for reducing the liability of a parent company in cases where there are procedural irregularities that affect the rights of a subsidiary, for example, the absence of a validly served statement of objections on the subsidiary.

44. Further, the Commission contends that the approach adopted in the judgment in *Solvay* v *Commission*[11] cannot be transposed to the present case. The Commission claims that that judgment concerns access to the Commission's case file and it cannot be relied on to support an argument that the Commission has to ensure access to information that is not in its possession. In this case, the Commission obtained relevant information from the LPD group, by sending it a questionnaire and carrying out an inspection. LGE had access to that material for use in its defence. The Commission is under no obligation to ensure that companies, other than the defendant, should have an incentive to produce exculpatory evidence. In response to LGE's argument based on the Commission's Manual of procedures, that manual specifies that it is not binding and that procedures may have to be adapted to the circumstances of the case at hand, and consequently any divergence in the procedure followed from the manual is insufficient to show an error in law.

45. According to the Commission, the General Court did not interpret the duty of care of parent companies, in relation to retaining access to the documents of subsidiaries, as constituting an absolute obligation. On the contrary, the General Court considered the facts of this case, stating that LGE and Philips had had close relations with the LPD group throughout the period of the infringement and could therefore have kept, in their respective archives, or by other means, records of the relevant information.

Assessment

The scope of the grounds of appeal

46. The conditions governing whether a parent company can be held to be liable for the participation of a subsidiary in a cartel are set out in settled case-law.

47. I will mention that European Union competition law refers to the activities of undertakings, namely economic entities which, legally, can consist of a number of natural or legal persons. 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. The infringement must be unequivocally imputed to an entity with legal personality, to which the statement of objections and the decision of the Commission is sent.[12]

10 Judgments of 3 March 2011, *Siemens and VA Tech Transmission & Distribution* v *Commission* (T-122/07 to T-124/07, EU:T:2011:70, paragraph 151), and of 27 June 2012, *Bolloré* v *Commission* (T-372/10, EU:T:2012:325, paragraph 50).

11 Judgment of 25 October 2011 (C-109/10 P, EU:C:2011:686, paragraph 62).

12 See judgment of 10 September 2009, *Akzo Nobel and Others* v *Commission* (C-97/08 P, EU:C:2009:536, paragraphs 54 to 57 and the case-law cited).

48. In accordance with the Court's settled case-law, responsibility for the conduct of a subsidiary can be attributed to its parent company, where that subsidiary does not decide independently upon its own conduct on the market. In such a situation, the parent company and its subsidiary form a single undertaking for the purposes of Article 101 TFEU, and consequently the Commission may address a decision to the parent company without having to establish the personal involvement of the latter in the infringement. [13]

49. Until recently, that subject had nonetheless remained controversial in relation to the very conception of the rationale whereby it is possible to attribute liability to a parent company that has not itself participated in the infringement. [14] On the one hand, the Court has held that, in such circumstances, the parent company concerned 'is itself deemed to have infringed' the EU competition rules. [15] On the other hand, the Court has held that the liability of the parent company is 'purely derivative' of that of its subsidiary. [16]

50. In a recent judgment, the Court has made clear that the parent company to which the unlawful conduct of its subsidiary is attributed is held individually liable for an infringement of the EU competition rules which it is itself deemed to have infringed, because of the decisive influence which it exercised over the subsidiary and by which it was able to determine the subsidiary's conduct on the market. [17] Accordingly, where the liability of a parent company arises as a result of wrongful conduct on the part of its subsidiary, the anticompetitive activities are nonetheless regarded as having been carried out by that parent company itself, since it formed an economic unit with its subsidiary. [18]

51. It is my view that the present appeals relate, indeed, to a similar issue, but from the perspective, considerably more limited, of the effective exercise of the rights of the defence by a parent company in circumstances where it no longer has, during the administrative proceedings, any control over its former subsidiary.

52. In the present appeals, the appellant parent companies do not dispute the attribution to them of liability because of the wrongful conduct of their common subsidiary, the LPD group. The grounds of appeal put forward by the appellants are based, in both appeals, on a claimed breach of the principle of respect for the rights of the defence, due, according to the appellants, to the fact that the Commission did not send the statement of objections to the LPD group and that, consequently, the appellants had been unable to benefit from any exculpatory evidence that that subsidiary might have produced as part of its own defence. [19]

13 See judgments of 10 September 2009, *Akzo Nobel and Others* v *Commission* (C-97/08 P, EU:C:2009:536, paragraphs 58 and 59), and of 16 June 2016, *Evonik Degussa and AlzChem* v *Commission* (C-155/14 P, EU:C:2016:446, paragraph 27).

14 See the opinion of Advocate General Wahl in *Akzo Nobel and Others* v *Commission* (C-516/15 P, EU:C:2016:1004, points 52 to 69).

15 Judgments of 26 November 2013, *Kendrion* v *Commission* (C-50/12 P, EU:C:2013:771, paragraph 55), and of 10 April 2014, *Commission and Others* v *Siemens Österreich and Others* (C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 47).

16 Judgments of 22 January 2013, *Commission* v *Tomkins* (C-286/11 P, EU:C:2013:29, paragraphs 37, 39, 43 and 49), and of 17 September 2015, *Total* v *Commission* (C-597/13 P, EU:C:2015:613, paragraph 38).

17 Judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission* (C-516/15 P, EU:C:2017:314, paragraph 56 and the case-law cited).

18 See, to that effect, judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission* (C-516/15 P, EU:C:2017:314, paragraphs 72 and 73).

19 LGE states, for example, in its reply, that its complaint concerning the Commission is not that the Commission committed an irregularity by not attributing liability to its subsidiary, but that the Commission infringed LGE's rights of defence by not sending the statement of objections to that subsidiary.

The alleged breach of the rights of defence

53. In accordance with the Court's settled case-law, applied in this case by the General Court,[20] respect for the rights of the defence in the conduct of administrative procedures relating to competition constitutes a general principle of EU law.[21]

54. Observance of the rights of the defence requires that the person concerned must have been afforded the opportunity, during the administrative proceedings, of being heard on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement.[22]

55. The present appeals raise the question of whether those requirements have been observed, in relation to a parent company, in the event that the Commission decides not to send the statement of objections to the subsidiary that participated in the cartel, although that subsidiary has been declared bankrupt, with the result that the documents in its possession and its employees are no longer accessible to the parent company.

56. I will observe that the statement of objections, which is the subject of Article 27(1) of Regulation No 1/2003,[23] constitutes an essential procedural safeguard to give effect to the principle of respect for the rights of the defence, in that it enables the person to whom it is addressed effectively to submit its arguments in the proceedings brought against it.[24] The statement of objections must identify unequivocally the natural or legal person on whom fines might be imposed and it must be sent to that person, stating in which capacity that person is called on to answer the allegations.[25]

57. The statement of objections is thus designed to ensure the exercise of the rights of the defence, individually, by each natural or legal person concerned by the administrative proceedings in relation to the competition rules.

58. Consequently, compliance with that procedural guarantee with respect to a parent company that has received a statement of objections cannot be called into question by the mere fact that the statement of objections was not sent to another legal entity, namely the subsidiary of that company which directly participated in the infringement.

59. That consideration, to my mind, holds good notwithstanding the fact that any exculpatory evidence provided by the subsidiary in its response to the statement of objections is likely to benefit the parent company.

20 See paragraphs 68 to 70 of the *LGE* judgment and paragraphs 91 to 93 of the *Philips* judgment.

21 Judgment of 13 February 1979, *Hoffmann-La Roche* v *Commission* (85/76, EU:C:1979:36, paragraph 9). See also the judgment of 3 September 2009, *Prym and Prym Consumer* v *Commission* (C-534/07 P, EU:C:2009:505, paragraph 26 and the case-law cited).

22 See judgment of 9 July 2009, *Archer Daniels Midland* v *Commission* (C-511/06 P, EU:C:2009:433, paragraph 88 and the case-law cited).

23 That provision states that, before it takes certain decisions, including the decision finding the infringement, the Commission is to give to the persons who are the subjects of the proceedings the opportunity of being heard on the matters to which it has taken objection.

24 Judgments of 3 September 2009, *Papierfabrik August Koehler and Others* v *Commission* (C-322/07 P, C-327/07 P and C-338/07 P, EU:C:2009:500, paragraphs 38 and 39), and of 10 September 2009, *Akzo Nobel and Others* v *Commission* (C-97/08 P, EU:C:2009:536, paragraph 57).

25 Judgment of 10 September 2009, *Akzo Nobel and Others* v *Commission* (C-97/08 P, EU:C:2009:536, paragraph 57). That requirement is also expressly stated in the Commission's Manual of procedures for the application of Articles 101 and 102 TFEU [Section 5.1, p. 116], to which the appellants refer: 'While the subject of the competition rules is an "undertaking", each legal entity that may be liable for the infringement within the undertakings must individually receive, as an addressee, [a Statement of Objections] … It is therefore important to make sure that the [Statement of Objections] is addressed to all possible legal entities (parent companies and subsidiaries) that may be held jointly and severally liable for the infringement … The final decision cannot be addressed to legal entities which, although they may be considered to be responsible for the infringements, were not an addressee of the [Statement of Objections].'

60. Even if one takes into consideration the particular features of a situation where the same infringement can be imputed to a number of legal entities who constitute one and the same economic entity, I do not think that the bringing of proceedings against one legal entity can be analysed as being a means of defence for other legal entities who exercise their rights of defence independently.

61. As is apparent from Article 27(1) of Regulation No 1/2003, the sending of the statement of objections constitutes a mandatory procedural requirement that is designed to ensure that the addressee of a decision finding an infringement can exercise its rights of defence. [26] However, if the Commission lawfully decides not to hold a subsidiary to be liable — as is not disputed in the present appeals [27] — it cannot be under any obligation to send the statement of objections to that subsidiary.

62. It follows that, as the General Court correctly held, in this case (paragraph 83 of the *LGE* judgment and the first sentence of paragraph 97 of the *Philips* judgment), the decisions not formally to attribute liability for the infringement to the subsidiary, and not to send the statement of objections to that subsidiary, do not constitute an irregularity capable of undermining the rights of defence of the parent companies of the LGE group.

63. The appellants contend nonetheless that the situation is different where the documents of the subsidiary that directly participated in the cartel are no longer accessible to its parent companies. They assert, on that point, that, in such a situation, the breach of the rights of the defence resides in the fact that they have been unable to obtain the benefit of any exculpatory evidence that might have been provided by the subsidiary.

64. I am not persuaded by that argument.

65. In my view, the reference by the appellants to the Court's case-law on the disclosure of exculpatory evidence, relying in particular on the judgment in *Solvay* v *Commission*, [28] is misconceived.

66. That case-law [29] concerns access to exculpatory evidence to be found in the Commission's case file. The argument of the appellants in the present appeals does not however relate to access to the Commission's case file, nor indeed to other material obtained by the Commission in the course of the administrative proceedings, [30] but access to material that the Commission might potentially have had in its possession if the LPD group had submitted it.

67. I will observe that the procedures in relation to the competition rules provide means for the Commission to obtain evidence, and rules governing access to the case file that enable the parties concerned to become acquainted with the material in the possession of the Commission. [31]

26 See, to that effect judgments of 7 June 1983, *Musique Diffusion française and Others* v *Commission* (100/80 to 103/80, EU:C:1983:158, paragraph 10), and of 3 September 2009, *Papierfabrik August Koehler and Others* v *Commission* (C-322/07 P, C-327/07 P and C-338/07 P, EU:C:2009:500, paragraph 36).

27 See point 52 of this Opinion.

28 Judgment of 25 October 2011 (C-109/10 P, EU:C:2011:686, paragraphs 62 and 64 and the case-law cited). In accordance with that case-law, where exculpatory documents are not disclosed, it is a sufficient ground for finding a breach of the rights of the defence that the person concerned establish that he could have used those exculpatory documents for his defence.

29 The judgment of 25 October 2011, *Solvay* v *Commission* (C-109/10 P, EU:C:2011:686), concerned documents that were missing from the Commission's case file, to which Solvay had had no access and which — as the Commission had itself recognised — could contain relevant information for the defence.

30 See, as regards possible exculpatory evidence contained in responses to the statement of objections to other parties concerned by the same proceedings, the judgments of 16 June 2011, *Solvay* v *Commission* (T-186/06, EU:T:2011:276, paragraph 225), and of 16 June 2011, *Bavaria* v *Commission* (T-235/07, EU:T:2011:283, paragraphs 119 and 249 to 251),

31 Respectively, Articles 18 to 21 and 27(2) of Regulation No 1/2003.

68. In this case, as is stated in paragraph 92 of the *LGE* judgment and paragraph 97 of the *Philips* judgment, the Commission sent requests for information to companies in the LPD group and carried out inspections at the premises of that group. In those circumstances, if the appellants had considered that the investigation undertaken by the Commission with respect to the LPD group was not adequate, they ought to have taken the initiative by asking the Commission to adopt other measures suitable for obtaining relevant information in the possession of the LPD group.

69. In the light of all the foregoing, the General Court was correct, for the reasons stated in paragraphs 68 to 83 of the *LGE* judgment and in paragraphs 91 to 97 of the *Philips* judgment, to reject the argument, made by each of appellants, that the Commission infringed their rights of defence by failing to send the statement of objections to the LPD group.

70. Further, even if one were to be uncertain whether the statement of reasons set out in paragraphs 68 to 83 of the *LGE* judgment and in paragraphs 91 to 97 of the *Philips* judgment fully responds to the arguments of the appellants at first instance, and whether in paragraph 83 of the *LGE* judgment it was correct to reject the plea in law at first instance as being ineffective, as opposed to being unfounded, any such objection, which affects the statement of reasons in the judgments under appeal, would not be such as to entail that those judgments should be set aside, given that the rejection of the pleas in law concerned is in any event well founded for the reasons stated above. [32]

71. Last, as regards the appellants' arguments concerning the reasons stated in the judgments under appeal to the effect that all undertakings are obliged to ensure the proper maintenance of documentary records so that details of activity can be retrieved (paragraphs 86 to 89 of the *LGE* judgment and paragraph 97 of the *Philips* judgment), I will observe that, as is apparent from the use by the General Court of the expressions 'in any event' and 'moreover' in the paragraphs cited, those objections are directed against reasons that were stated for the sake of completeness in the judgments under appeal and, accordingly, are ineffective.

Conclusion In the light of the foregoing, I propose that the Court should dismiss as being unfounded the first ground of appeal put forward by LG Electronics against the judgment of 9 September 2015, *LG Electronics* v *Commission* (T-91/13, not published, EU:T:2015:609) and the second ground of appeal put forward by Koninklijke Philips Electronics NV against the judgment of 9 September 2015, *Philips* v *Commission* (T-92/13, not published, EU:T:2015:605).

32 See points 58 to 69 of this Opinion, and the judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France* (C-367/95 P, EU:C:1998:154, paragraph 47), and of 30 September 2003, *Biret International* v *Council* (C-93/02 P, EU:C:2003:517, paragraph 60).