OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 23 April 2009 [1]

I — Introduction

1. These proceedings again give the Court an opportunity to clarify in one significant respect its case-law on the attribution of responsibility under antitrust law within groups of undertakings. However, unlike the recent *ETI* case, [2] this case does not concern an issue of succession to an undertaking, but the conditions under which a parent company is liable for the cartel offences of its subsidiaries.

2. The background to this case is a cartel proceeding in which the Commission found that four wholly-owned subsidiaries of Akzo Nobel NV had infringed Article 81(1) EC and Article 53(1) of the EEA Agreement [3] by participating in arrangements contrary to antitrust law in the choline chloride industry. Although the parent company, Akzo Nobel NV itself had not participated in the cartel, it was fined jointly and severally together with its subsidiaries. The relevant Commission decision of 9 December 2004 [4] ('the contested decision') was upheld in its entirety by the Court of First Instance by judgment of 12 December 2007 [5] ('the judgment under appeal').

3. The Court now has before it an appeal brought by Akzo Nobel NV and four other companies in the Akzo Nobel group. The parties essentially agree that a parent company can be called to account for the cartel offences of its subsidiaries if it exercises a decisive influence over them. However, there is fierce dispute as to whether such exertion of influence may be presumed where a parent company owns 100% of the shares in its subsidiaries or whether there must also be clear indications that the parent company exerts influence over the commercial behaviour of its subsidiaries; the case-law of the Court of First Instance is not uniform on this point. [6] A further issue to be clarified is precisely what must be the subject-matter of the parent company's decisive influence (subject-matter of the decisive influence).

1 — Original language: German.
2 — Case C-280/06 *ETI and Others* [2007] ECR I-10893.
3 — Agreement on the European Economic Area (OJ 1994 L 1, p. 3).
4 — Commission Decision 2005/566/EC of 9 December 2004 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-2/.37.533 — Choline Chloride), (notified under document number C(2004) 4717), summarised in OJ 2005 L 190, p. 22.
5 — Case T-112/05 *Akzo Nobel and Others* v *Commission* [2007] ECR II-5049.
6 — See in detail in this regard points 63 to 68 of this Opinion.

II — Relevant legislation

4. The relevant provisions in this case are Article 81(1) EC, Article 53(1) of the EEA Agreement and Article 23(2) of Regulation (EC) No 1/2003. [7]

5. Article 81(1) EC is worded, in part, as follows:

'The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

…'

6. Article 53(1) of the EEA Agreement includes a provision which is essentially identical in content to Article 81(1) EC but relates to trade between the Contracting Parties to the EEA Agreement and the territory covered by it.

7. Article 23(2) of Regulation No 1/2003 provides as follows:

'The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

7 — Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

(a) they infringe Article 81 or Article 82 of the Treaty; …

…

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

…'

III — Background to the dispute

A — *Facts and administrative procedure*

8. According to the Commission's findings, to which the Court of First Instance refers in the judgment under appeal, [8] the following facts form the basis of this case:

9. After it received a leniency application in April 1999 from a United States undertaking, the Commission initiated an investigation into the global choline chloride industry.

10. Choline chloride is a member of the B-complex group of water-soluble vitamins (vitamin B4) which is mainly used in the animal feed industry as a feed additive. In addition to producers, the choline chloride market is made up of converters, who buy the product from producers in liquid form and convert it into choline chloride on a carrier, either on behalf of the producer or on their own behalf, and distributors.

11. The appellants, five companies of the Akzo Nobel group, also operate in the choline chloride market. Akzo Nobel NV, established in the Netherlands, is the parent company of the Akzo Nobel group and holds (as a pure holding company) 100% of the capital of its subsidiaries Akzo Nobel Chemicals International BV and Akzo Nobel Nederland BV. The latter holds 100% of the capital of its subsidiary Akzo Nobel Chemicals BV which in turn holds all the shares of its subsidiary Akzo Nobel Functional Chemicals BV.

12. After concluding its investigations, the Commission found, in Article 1 of the contested decision, that the appellants had

8 — See, in particular, paragraphs 1 to 20 of the judgment under appeal.

participated, both at the global and at the European level, in agreements and concerted practices concerning price fixing, market sharing and the line of action to be followed against competitors in the choline chloride sector in the EEA and had therefore infringed Article 81(1) EC and Article 53(1) of the EEA Agreement. [9]

13. For the infringements found, the Commission imposed, in Article 2 of the contested decision, a fine of EUR 20.99 million, jointly and severally, on Akzo Nobel NV, Akzo Nobel Nederland BV, Akzo Nobel Chemicals International BV, Akzo Nobel Chemicals BV and Akzo Nobel Functional Chemicals BV.

14. In Article 3 of the contested decision, the Commission ordered the appellants to bring to an end immediately the infringements referred to in Article 1 and to refrain in future from the illegal conduct found, and from any measures having the same or similar object or effect.

15. In its statement of reasons, the Commission argued that the lack of commercial autonomy of the subsidiary companies meant that its decision had also to be directed at the parent company Akzo Nobel NV, although the latter, unlike those subsidiary companies, had not participated in the cartel itself. [10] For the same reason, throughout the decision, the Commission took as its basis, not least when calculating the amount of the fine, the market share and/or turnover of Akzo Nobel as a group. [11]

B — *The judicial proceedings*

16. Akzo Nobel NV, Akzo Nobel Nederland BV, Akzo Nobel Chemicals International BV, Akzo Nobel Chemicals BV and Akzo Nobel Functional Chemicals BV jointly brought an action against that Commission decision before the Court of First Instance and claimed that the Court should annul that decision and order the Commission to pay the costs of the proceedings. The Commission, on the other hand, contended that the Court should dismiss the action as inadmissible or as manifestly unfounded with respect to Akzo Nobel Nederland, Akzo Nobel Chemicals International and Akzo Nobel Chemicals, dismiss the remainder of the action and order the applicants to bear the costs.

17. On 12 December 2007, by the judgment under appeal, the Court of First Instance upheld the contested decision in its entirety. It dismissed the action and ordered the applicants to pay the costs.

9 — In addition to Article 81(EC), the decision is based on Article 53 of the EEA Agreement in respect of the period from 1 January 1994, the date of entry into force of the EEA Agreement.

10 — See recitals 168 to 175 to the contested decision.

11 — See recitals 12, 42, 44 and 201 to 203 to the contested decision.

18. By their joint appeal, lodged at the Registry of the Court of Justice on 3 March 2008, Akzo Nobel NV, Akzo Nobel Nederland BV, Akzo Nobel Chemicals International BV, Akzo Nobel Chemicals BV and Akzo Nobel Functional Chemicals BV now claim that the Court should:

— set aside the judgment under appeal, in so far as it rejected the plea that responsibility was wrongfully attributed — jointly and severally — to Akzo Nobel NV,

— annul the contested decision, in so far as it attributed responsibility to Akzo Nobel NV, and

— order the Commission to pay the costs of this appeal and of the proceedings before the Court of First Instance, in so far as they concern the plea raised in the appeal.

19. The Commission for its part contends that the Court should:

— dismiss the appeal and

— order the appellants to bear the costs.

20. The procedure on the appeal before the Court was conducted in writing. None of the parties applied for a hearing to be held.

IV — Assessment

A — *Admissibility of the appeal*

21. The Commission first raises two objections to the admissibility of the appeal.

22. By its first objection, it disputes the right of appeal and/or legal interest of most of the appellants. It argues that the appeal contests only the joint and several liability of Akzo Nobel NV, and therefore that Akzo Nobel Nederland BV, Akzo Nobel Chemicals International BV, Akzo Nobel Chemicals BV and Akzo Nobel Functional Chemicals BV lack *locus standi*.

23. This objection by the Commission is mistaken. The *right of appeal* of all appellants arises, pursuant to the first sentence of the second paragraph of Article 56 of the Statute of the Court of Justice, simply from the fact that they have been unsuccessful in their submissions before the Court of First Instance. [12]

24. Next, so far as their *legal interest* is concerned, according to settled case-law the appeal must be likely, if successful, to procure an advantage to the party bringing it. [13] This too must be affirmed as regards Akzo Nobel Nederland BV, Akzo Nobel Chemicals International BV, Akzo Nobel Chemicals BV and Akzo Nobel Functional Chemicals BV. Even though the appeal in this case is directed only against the joint and several liability of Akzo Nobel NV, it may nevertheless also procure a tangible advantage for all the other appellants.

25. The judgment of the Court of First Instance upheld the fine of EUR 20.99 million imposed jointly and severally on the appellants by the Commission. If that were to remain the position, the Commission would be at liberty, according to the principles underlying the joint and several liability, to demand payment of the whole amount of the fine from each appellant. However, if the judgment of the Court of First Instance in respect of the liability of Akzo Nobel NV were to be set aside on appeal, the market share and/or turnover of the entire Akzo Nobel group of undertakings should no longer be taken into account when setting the fine, which would mean that the fine imposed jointly and severally on the subsidiaries ought to be far smaller. This would have the considerable advantage for the other appellants that the total amount which the Commission can claim from each of them individually, according to the principles underlying joint and several liability, would have to be appreciably reduced. This would, in addition, diminish any risk that a settlement of the joint and several debt by intra-group contributions could go wrong.

26. By its second objection to the admissibility of the appeal, the Commission contends that parts of the ground of appeal constitute *inadmissible new pleas in law*. Thus, it argues that the appellants did not dispute before the Court of First Instance the validity as such of the presumption that a parent company exercises a decisive influence over a wholly-owned subsidiary. In addition, the appellants did not plead at first instance that, as they now maintain, a broad construction of the subject-matter of the decisive influence infringes the principle of personal responsibility.

27. This objection by the Commission must likewise be rejected.

12 — See also Case C-383/99 P *Procter & Gamble* v *OHIM* [2001] ECR I-6251, '*Baby-dry*', paragraph 18; Case C-362/05 P *Wunenburger* v *Commission* [2007] ECR I-4333, paragraph 36; and Case C-71/07 P *Campoli* v *Commission* [2008] ECR I-5887, paragraph 39.

13 — Case C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-3319, paragraph 13; Case C-174/99 P *Parliament* v *Richard* [2000] ECR I-6189, paragraph 33; and Case C-277/01 P *Parliament* v *Samper* [2003] ECR I-3019, paragraph 30; see also my Opinion in Case C-413/06 P *Bertelsmann and Sony* v *Impala* [2008] ECR I-4951, point 75.

28. It is true that, under Article 42(2) in conjunction with Article 118 of the Rules of Procedure of the Court of Justice, it is inadmissible to put forward new pleas in law in appeal proceedings. However, the appellant is allowed to introduce new arguments in relation to his pleas in law already put forward at first instance, in particular in response to the legal view expressed by the Court of First Instance in the judgment under appeal. [14] Contrary to the Commission's view, the overriding consideration is not whether the appellants are putting forward a new argument at all, but whether the newly-introduced argument may be regarded as an independent plea in law or merely as the admissible amplification of a plea introduced previously in the proceedings. [15]

29. Even if it were to be accepted that the appellants have in fact only now, in the appeal proceedings, contested the validity of the presumption rule as such, they would thereby merely have been amplifying a plea in law previously put forward at first instance. That is because, at first instance, the appellants already claimed inter alia that Akzo Nobel NV was wrongfully held jointly and severally liable, since, in the absence of the exercise of a 'decisive influence' over the market conduct of its subsidiaries, it does not form an economic unit with them and is therefore not an undertaking within the meaning of Article 81 EC. If they now, on appeal, also expressly contest the applicability of the presumption rule as such, that is merely a further argument in support of the absence, as maintained by them, of any 'decisive influence' on the part of Akzo Nobel NV. In reality, the sole purpose served by that presumption rule is the practical application and formulation of the criterion of 'decisive influence', with which it is therefore closely linked.

30. All that is so, particularly in view of the fact that an appeal pursuant to Article 225 EC, the first paragraph of Article 58 of the Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court of Justice may not merely repeat the pleas in law and arguments previously submitted to the Court of First Instance, but must include arguments specifically relating to the alleged error of law made by the Court of First Instance. [16] Since the Court of First Instance dealt intensively with the presumption rule in its judgment under appeal, [17] the appellants were likewise bound to concern themselves with that presumption rule in their appeal. By contrast, that was not absolutely necessary at first instance, since the Commission — unlike the Court of First Instance subsequently in the judgment under appeal — had not dealt in detail with the presumption rule in the contested decision.

31. Nor do the spirit and purpose of Article 118 of the Court's Rules of Procedure

14 — Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 178; Case C-229/05 P *PKK and KNK* v *Council* [2007] ECR I-439, paragraphs 64 to 66; Case C-295/07 P *Commission* v *Département du Loiret* [2008] ECR I-9363, paragraph 99; see also my Opinion in Case C-412/05 P *Alcon* v *OHIM* [2007] ECR I-3569, points 17 and 18.

15 — See, in this regard, the case-law cited in footnote 14; to the same effect, the judgments given with regard to Article 42(2) of the Rules of Procedure of the Court of Justice in Case 306/81 *Verros* v *Parliament* [1983] ECR 1755, paragraph 9; Case C-301/97 *Netherlands* v *Council* [2001] ECR I-8853, paragraphs 166 and 169; and Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraphs 85 and 86.

16 — Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 34 and 35; Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10505, paragraph 121; and Case C-431/07 P *Bouygues and Others* v *Commission* [2009] ECR I-2665, paragraph 86; see also Case C-202/07 P *France Télécom* v *Commission* [2009] ECR I-2369, paragraph 69.

17 — See paragraphs 60 to 62 of the judgment under appeal.

dictate any other legal assessment in this case. According to settled case-law, that provision is intended to prevent a case being brought before the Court that is of wider ambit than that which came before the Court of First Instance; in an appeal, the Court's jurisdiction is thus confined to an assessment of the findings of law with regard to the submissions discussed at first instance. [18] However, in this case, the Court of First Instance has already dealt extensively with the requirements and applicability of the presumption rule in relation to Akzo Nobel NV. [19]

32. Nor, equally, does the appellants' submission that a broad construction of the subject-matter of decisive influence infringes the principle of personal responsibility constitute an inadmissible new plea in law. The appellants have already argued before the Court of First Instance that the parent company's decisive influence should be taken into account only where it relates to specific aspects of the subsidiary's commercial policy. [20] The Court of First Instance, which in this respect starts from a broader understanding of the subject-matter of decisive influence, rejected that submission in the judgment under appeal. If the appellants now criticise the consequences of that — in their view, too broad — interpretation, they are merely responding to the observations of the Court of First Instance on this point.

18 — Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraphs 57 to 59; 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 165; Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraph 114; *PKK and KNK* v *Council*, cited in footnote 14, paragraphs 61 and 66; and *France Télécom* v *Commission*, cited in footnote 16, paragraph 60.

19 — See again paragraphs 60 to 62 of the judgment under appeal.

20 — See paragraph 63 of the judgment under appeal, where that submission is even referred to as the applicants' central argument.

33. Their submission therefore constitutes an admissible new argument in relation to a plea in law which was previously covered by the proceedings at first instance. In this respect also, there is no likelihood that the Court could exceed its jurisdiction in appeal proceedings, since the Court of First Instance has already dealt extensively with the question of the subject-matter of the parent company's decisive influence. [21]

34. The appeal is therefore admissible in its entirety.

B — *Substance of the appeal*

35. The appellants take the view that it was wrong to address the contested decision also to Akzo Nobel NV, as a result of which the latter, as the parent company of the Akzo Nobel group, was wrongly held liable for the cartel offences of its subsidiaries. On that basis, they contest the judgment at first instance with a single ground of appeal. They submit that the Court of First Instance misinterpreted and misapplied the concept of 'undertaking' in Article 81 EC and Article 23(2) of Regulation No 1/2003 by regarding Akzo Nobel NV and its subsidiaries as *one undertaking*.

21 — See paragraphs 63 to 65 of the judgment under appeal.

1. Preliminary remark

36. The fundamental problem of attributing cartel offences is based on the fact that the addressees of the competition rules and the addressees of decisions by the competition authorities are not necessarily the same. [22]

37. Specifically, whereas the competition rules are directed at undertakings and apply to them directly regardless of how they are organised and their legal nature, [23] decisions by competition authorities penalising breaches of competition rules can be directed only at persons, not least because such decisions must be enforced. [24] For that reason, in every case in which a competition authority penalises a cartel offence, the question arises as to the attribution of that conduct to a specific person. [25]

38. In selecting criteria for attributing offences, both the sanctionative nature of the measures imposed and their purpose must be taken into account.

39. The consequence of the *sanctionative nature* of measures imposed by competition authorities for punishing cartel offences — in particular fines — is that the area is at least akin to criminal law. Therefore, what is decisive for the attribution of cartel offences is the *principle of personal responsibility*, [26] which is founded in the rule of law and the principle of fault. [27] Personal responsibility means that in principle a cartel offence is to be

22 — See also, in regard to this and the following points, my Opinion in *ETI and Others*, cited in footnote 2, points 68 to 72.

23 — *ETI and Others*, cited in footnote 2, paragraphs 38 and 43.

24 — Article 256(1) EC provides that decisions of the Commission which impose a pecuniary obligation are to be enforceable. Whereas the German language version of the Treaty lacks any further clarification, it can be inferred from a number of other language versions that 'enforceable' must refer to the enforceability of decisions which are adopted in relation to natural or legal persons; see, for example, the French ('personnes'), Italian ('persone'), English ('persons'), Portuguese ('pessoas'), Spanish ('personas') and — especially clearly — Dutch ('natuurlijke of rechtspersonen') versions.

25 — The judgments in Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraph 236, and Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, '*PVC II*', paragraph 978, are particularly clear on this point; to the same effect, see 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 60.

26 — Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraphs 78 and 145, and *ETI and Others*, cited in footnote 2, paragraph 39. The principle of personal responsibility is normally also the starting point taken by the national legal orders of the Member States for attributing cartel offences.

27 — On this point, see the Opinion of Advocate General Ruiz-Jarabo Colomer in *Aalborg Portland* v *Commission*, cited in footnote 25, in particular points 63 to 65. The principle of fault is expressed in, for example, Article 23(2) of Regulation No 1/2003, which provides that conduct which is either *intentional* or *negligent* may be punished by a fine.

attributed to the natural or legal person who operates the undertaking which participates in the cartel; [28] in other words, the principal of the undertaking is liable.

40. So far as the *purpose* of the measures imposed is concerned, it must be borne in mind that they serve the effective enforcement of competition rules in order to prevent distortions of competition (Article 3(1)(g) EC); accordingly, they are intended to deter economic operators from committing cartel offences. [29]

41. Taking personal responsibility as a reference point normally supports the effective enforcement of the competition provisions, given that the person conducting the undertaking also has decisive influence over its market behaviour; the pressure of the penalties imposed should lead him to alter this conduct, such that in future the undertaking conducts itself in compliance with competition law. At the same time the penalty has general deterrent effect in that it also deters other economic participants from committing cartel offences.

42. Admittedly, the ever-increasing complexity of the organisational structure of economic operators can lead to the situation in which an undertaking is made up of more than one company and the natural or legal person actually responsible for a cartel offence is not — or not solely — the person who appears to outsiders to be the cartel participant. For the purposes of applying the rules on competition, the formal separation between companies resulting from their separate legal personality is not, however, conclusive, the decisive test being the unity of their conduct on the market. [30]

43. Where, for example, within a group structure, a parent company exercises decisive influence over its subsidiaries, some of which have — together with third parties — participated in a cartel, it accords with the principle of personal responsibility and with the objective of effective enforcement of the competition rules to hold all the companies of the group which have participated in the cartel, together with the parent company, jointly and severally liable for the purpose of punishing the cartel offence. Only in that way can it also be ensured that, when assessing the amount of a fine to be imposed, the true

28 — To this effect, see Case C-248/98 P *KNP BT* v *Commission* [2000] ECR I-9641, paragraph 71; Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 78; Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, '*Stora*', paragraph 37; and Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraph 27; see also Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 63.

29 — In this regard, see the early Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 173, according to which the purpose of penalties for cartel offences 'is to suppress illegal activities and to prevent any repetition'; see also Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 22. As regards the purpose of future infringements, see also Case C-289/04 P *Showa Denko* v *Commission* [2006] ECR I-5859, paragraph 61, and Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 37.

30 — To this effect, see Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 41.

economic strength of the whole undertaking is correctly taken into account and that the successful enforcement of the fine is not jeopardised by any transfers of assets between the parent company and its subsidiaries.

44. To that effect, the Court has consistently held that a subsidiary's conduct can be imputed to its parent company, in particular where the subsidiary, although having separate legal personality, 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. [31]

45. That is precisely the central issue in this case. It is necessary to clarify whether Akzo Nobel NV, as the parent company, was correctly held liable for the cartel offences of its subsidiaries. [32] On the one hand, the appellants claim that the Court of First Instance proceeded from an incorrect standard of proof in regard to the decisive influence of Akzo Nobel NV over its subsidiaries (first part of the ground of appeal). On the other hand, they allege that the Court of First Instance erred as to the subject-matter of that influence, in so far as it assumed that all organisational, economic and legal ties between the undertakings were to be taken into account for that purpose, whereas regard should properly be had only to commercial policy in the narrower sense (second part of the ground of appeal).

2. The requirements as to proof of the exertion of decisive influence by the parent company over its subsidiaries (first part of the ground of appeal)

46. The first part of the ground of appeal is devoted to the requirements as to proof of the exertion of decisive influence by the parent company over its subsidiaries. The appellants complain that, in paragraphs 60 to 62 of the judgment under appeal, the Court of First Instance failed to apply the requirements as to proof which follow from the existing case-law.

47. To begin with, the parties to these proceedings agree that attribution of a subsidiary company's cartel offence to its parent

31 — See the leading cases in this regard: Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, '*ICI*', paragraphs 132 to 135; Case 52/69 *Geigy* v *Commission* [1972] ECR 787, '*Geigy*', paragraph 44; and Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, '*Continental Can*', paragraph 15; similarly, Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, paragraph 27; Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11005, paragraph 96; *Dansk Rørindustri and Others* v *Commission*, cited in footnote 18, paragraph 117; and *ETI and Others*, cited in footnote 2, paragraph 39 in conjunction with 49.

32 — The related issue of the attribution of a cartel offence to the economic successor to the cartel participant (see, for example, in this regard, *ETI and Others*, cited in footnote 2) is not the subject of the present case and will accordingly not be considered below. Nor does this case concern the question as to whether and in what circumstances the economic successor is liable for debts resulting from fines imposed on its predecessor.

company must satisfy two cumulative conditions: firstly, the parent company must be in a position to exert decisive influence over its subsidiary and, secondly, it must also actually exert that influence. [33]

48. In order for a parent company to *be in a position* to exert decisive influence over its subsidiary, there must be more than merely a bond of economic dependence between the subsidiary and the parent company. [34] In the present case, however, there is no need for any detailed discussion as to what type of link between the two companies is required for that purpose. [35] That is because a parent company is in any event undoubtedly in a position to exert decisive influence over its subsidiary if — like Akzo Nobel NV in this case — it controls it wholly, [36] whether by means of a direct shareholding or indirectly through its shareholdings in other companies.

49. It is, on the other hand, a matter of fierce dispute as to what requirements should be applied as to proof of the *actual exercise of decisive influence* by the parent company over its subsidiary. In contrast to the Commission, the appellants are of the opinion that an attribution of responsibility under antitrust law is possible — at least in the case at issue — only if, in addition to the 100% shareholding, there are specific indicia that the subsidiary was actually influenced by its parent company. In simplified terms, it could be said that, from the appellants' point of view, proof of the exertion of decisive influence requires proof of '100% plus X'.

50. I am not persuaded by that approach of the appellants. As I shall explain below, it finds no support in the Court's existing case-law. On the contrary, according to that case-law there is a *rebuttable presumption* that a parent company which wholly controls its subsidiary actually exercises decisive influence over it (see (a) below). In my view, moreover, there is also no reason to depart from that presumption rule and to require proof of '100% plus X' along the lines advocated by the appellants (see (b) below).

33 — See, to that effect, *ICI*, cited in footnote 31, paragraph 137, and Case 107/82 *AEG-Telefunken* v *Commission* [1983] ECR 3151, '*AEG*', paragraph 50, first sentence.

34 — To that effect, see Joined Cases 32/78 and 36/78 to 82/78 *BMW Belgium and Others* v *Commission* [1979] ECR 2435, paragraph 24, second sentence.

35 — It is clear from the case-law that decisive influence or control for the purposes of competition law can be assumed to exist even with a shareholding below 100% (see, for example, *ICI*, cited in footnote 31, paragraphs 136 and 137).

36 — Only in public procurement law have even higher requirements so far been applied (Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 64 et seq.), namely when it is necessary to determine whether an 'in-house operation' is involved. As I explained in my Opinion in *Parking Brixen* (see, in particular, points 75 and 76), I consider that approach mistaken. Nevertheless, the in-house case-law, as it finds expression in the *Parking Brixen* judgment, cannot be applied to a case such as this anyway. It is actually devoted to a particular variety of control which must specifically go beyond 'normal' control in the company-law and competition-law sense. The contracting authority must exercise over the entity to which the contract is awarded a control 'similar to that which it exercises over its own departments'.

(a) The rebuttable presumption of exertion of decisive influence where the parent company has a 100% shareholding in the subsidiary

51. According to the Court's case-law, there is a *presumption* that a parent company actually exerts decisive influence over a wholly-owned subsidiary.

52. Thus, it already follows from the judgment in *AEG* that, when attributing anti-competitive conduct within a group, it is not necessary to consider whether a parent company made use of the power available to it to exert a decisive influence on the distribution and pricing policy of its wholly-owned subsidiaries; that is because, according to the Court, a wholly-owned subsidiary 'necessarily follows a policy laid down by the same bodies as, under its statutes, determine' the parent company's policy. [37]

53. That case-law is confirmed in *Stora*. According to that judgment, where a parent company has a 100% shareholding in its subsidiary, it can legitimately be assumed that the parent company in fact exerts decisive influence over that subsidiary's conduct. [38]

54. The fact that that assumption is a *rebuttable presumption* can likewise be inferred from *Stora*: in that case, the Court took the view that it was for the parent company (as the appellant) to rebut the presumption of an exertion of decisive influence by adducing sufficient evidence. [39]

55. The appellants nevertheless attempt to demonstrate, by reference to paragraphs 28 and 29 of the judgment in *Stora*, that, in that judgment, the Court restricted the application of the presumption rule and tightened the conditions for attributing conduct as between a subsidiary and a parent company. The relevant passage of that judgment is worded as follows:

> '28 Thus, contrary to the appellant's contention, the Court of First Instance did not hold that a 100 per cent shareholding in itself sufficed for a finding that the parent company was responsible. It also relied on the fact that the appellant had not disputed that it was in a position to exert a decisive influence on its subsidiary's commercial policy, or produced evidence to support its claim that the subsidiary was autonomous.

37 — *AEG*, cited in footnote 33, paragraph 50.
38 — *Stora*, cited in footnote 28, paragraph 29, second sentence.
39 — *Stora*, cited in footnote 28, paragraphs 28 and 29, last sentence in each case.

29 It is also incorrect to claim that the Court of First Instance thus placed on the appellant the burden of proving that its subsidiary had acted independently. As that subsidiary was wholly owned, the Court of First Instance could legitimately assume, as the Commission has pointed out, that the parent company in fact exercised decisive influence over its subsidiary's conduct, particularly since it had found, in paragraph 85 of the contested judgment, that during the administrative procedure the appellant had presented itself as being, as regards companies in the Stora Group, the Commission's sole interlocutor concerning the infringement in question. In those circumstances, it was for the appellant to reverse that presumption by adducing sufficient evidence.'

56. Contrary to the appellants' view, it cannot in any way be inferred from that passage of the *Stora* judgment that the Court departed from its previous case-law and tightened the requirements for attributing responsibility under antitrust law as between parent and subsidiary companies.

57. Admittedly, in that case, the Court did indeed observe, when reviewing the findings of the Court of First Instance, that the Court of First Instance 'did not hold that a 100 per cent shareholding in itself sufficed for a finding that the parent company was responsible'. [40] However, it cannot be concluded from that statement that it is for *the competition authority*, of its own accord, to adduce evidence of the actual exertion of influence by the parent company on its wholly-owned subsidiary in order to be able to attribute to the parent company a cartel offence committed by the subsidiary. On the contrary, that wording in the *Stora* judgment merely makes it clear that it is open *to the parent company* in the case at issue to dispute the exertion of decisive influence by producing evidence in rebuttal and thus rebutting the presumption of exertion of influence which exists where there is a 100% shareholding.

58. This becomes particularly clear on a reading of the Court's subsequent observations in *Stora*. These make it clear that, '[a]s that subsidiary was wholly owned', the Court of First Instance 'could legitimately assume … that the parent company in fact exercised decisive influence over its subsidiary's conduct' and that it was for the appellant — that is, the parent company — 'to reverse that presumption by adducing sufficient evidence'. [41]

59. The fact that, in *Stora*, the parent company of the Stora Group had presented itself as being the Commission's sole interlocutor, must not be misconstrued as a restriction of the presumption rule. It is true that the Court, like the Court of First Instance

40 — *Stora*, cited in footnote 28, paragraph 28.

41 — *Stora*, cited in footnote 28, paragraph 29.

before it, emphasises that fact in its judgment. [42] However, by the use of the introductory word 'particularly', it is made clear that the sole representation of the Stora group by its parent company during the administrative procedure was regarded merely as an additional factor which does not in any way restrict the presumption of the exercise of decisive influence, which prevails in any case, but may possibly even reinforce it. [43]

60. In the *Stora* judgment, therefore, the Court does not by any means establish still further conditions alongside the 100% shareholding for the applicability of the presumption rule. This is also evident from a comparison with the Opinion of Advocate General Mischo in that case, in which he had considered the 100% shareholding not to be sufficient as a ground for attributing the conduct to the parent company, but had required 'something more' as well. [44] His line of argument was precisely not taken up by the Court in the *Stora* judgment.

61. The Court of First Instance thus kept within the limits of the Court's existing case-law when it took as the basis for the judgment under appeal a rebuttable presumption that a parent company which holds 100% of the capital of its subsidiary exerts decisive influence over its conduct. [45] The appellants' submissions to the contrary are therefore unfounded.

(b) No reason to tighten the requirements for the attribution of responsibility under anti-trust law as between a parent company and its subsidiary

62. It remains to be considered whether the Court should take this case as an opportunity to raise the standard of proof to '100% plus X' as advocated by the appellants. This discussion also appears necessary, and specifically so, in the light of the more recent case-law of the Court of First Instance; mention should be made, in particular, of the judgments in *DaimlerChrysler* [46] and *Bolloré*, [47] on which the appellants have relied in support of their argument.

63. I will state at the outset that — contrary to what is submitted by the appellants — the *DaimlerChrysler* and *Bolloré* judgments of the

42 — *Stora*, cited in footnote 28, paragraph 29.

43 — To that effect, see also Case T-354/94 *Stora Kopparbergs Bergslags* v *Commission* [2002] ECR II-843, paragraph 68, last sentence.

44 — Opinion of Advocate General Mischo in *Stora*, cited in footnote 28, points 40, last sentence, and 48.

45 — Paragraphs 60 to 62 of the judgment under appeal.

46 — Case T-325/01 *DaimlerChrysler* v *Commission* [2005] ECR II-3319, '*DaimlerChrysler*', paragraph 219; this judgment is final and binding.

47 — Joined Cases T-109/02, T-118/02, T-122/02, T-125/02 and T-126/02, T-128/02 and T-129/02, T-132/02 and T-136/02 *Bolloré* v *Commission* [2007] ECR II-947,'*Bolloré*', paragraph 132. Three appeals against that judgment are currently pending before the Court of Justice, although they do not concern the criteria for the attribution of cartel offences as between a subsidiary and a parent company; in his Opinion of 2 April 2009 in Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler and Others* v *Commission*, pending before the court, Advocate General Bot proposes that the Court should set aside the judgment in *Bolloré* in part.

Court of First Instance do not by any means point in the same direction.

64. First, as regards *DaimlerChrysler*, the Court of First Instance does admittedly appear — at least on a superficial examination — not to regard the parent company's 100% shareholding in its subsidiary as sufficient and to require still further evidence as proof of the exertion of decisive influence. It in fact states that 'a 100 per cent shareholding does not in itself suffice for a finding of responsibility against the parent company …'. [48] However, immediately after that statement, the Court of First Instance makes it clear: 'Given the fact that the whole of the share capital of the subsidiary was held, the Commission is entitled to assume that the parent company exerted a decisive influence on the conduct of its subsidiary …'. [49] Moreover, the Court of First Instance emphasises that, in the case at issue, it was for the parent company to rebut the presumption by sufficient evidence. [50]

65. The fact that the parent company had put itself forward in the administrative procedure as being the sole representative of the companies in the group is — as the introductory word 'particularly' clearly indicates — regarded merely as an additional factor which does not restrict the already existing presumption of the exertion of decisive influence, but possibly even reinforces it. [51]

66. Thus, contrary to first appearances, in *DaimlerChrysler* the Court of First Instance does not go against the case-law established by the Court in *AEG* and *Stora*. On the contrary, in *DaimlerChrysler* — as, moreover, in some of its other judgments as well [52] — the Court of First Instance follows the *AEG* and *Stora* judgments closely and applies only the rebuttable presumption of the exertion of decisive influence recognised by the Court of Justice. It does not at all raise the standard of proof along the lines of a '100% plus X' formula.

67. In *Bolloré*, on the other hand, the situation is different. In that case, the Court of First Instance states: '… [A]lthough the evidence relating to the 100% shareholding in its subsidiary provides a strong indication that the parent is able to exercise a decisive influence over the subsidiary's conduct on the market, this is not in itself sufficient to

48 — *DaimlerChrysler*, cited in footnote 46, paragraph 219.
49 — *DaimlerChrysler*, cited in footnote 46, paragraph 219.
50 — *DaimlerChrysler*, cited in footnote 46, paragraph 220.
51 — *DaimlerChrysler*, cited in footnote 46, paragraph 219, last half-sentence.
52 — Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 149; Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraphs 961, 984 and 985; Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 290; Case T-330/01 *Akzo Nobel* v *Commission* [2006] ECR II-3389, paragraphs 81 to 83; Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 136; and Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraph 125.

attribute liability to the parent for the conduct of its subsidiary... Something more than the extent of the shareholding must be shown, but this may be in the form of indicia.' [53]

68. With those statements in *Bolloré*, the Court of First Instance abandons the framework established by the Court in *AEG* and *Stora*. [54] Instead, unlike the Court of Justice in this respect, the Court of First Instance follows the Opinion of Advocate General Mischo in *Stora*, which it also expressly cites. The call for 'something more than the extent of the shareholding', which may be in the form of indicia, ultimately derives from that Opinion. [55] In its subsequent observations in *Bolloré*, the Court of First Instance examines various facts and circumstances in order to establish whether they contain indicia for or against a decisive influence on the part of Bolloré over its subsidiary, taking as its starting point both the Commission's findings in the administrative procedure and the parties' submissions in the judicial proceedings. [56] In *Bolloré*, therefore, the Court of First Instance increased the requirements as to proof of the exertion of decisive influence by the parent company over its subsidiary along the lines of a '100% plus X' rule.

69. I do not believe that the Court should adopt the legal view of the Court of First Instance as expressed in *Bolloré*. If, in that judgment, the Court of First Instance intended merely to continue the existing case-law, it failed to adhere to the framework established by the Court in *AEG* and *Stora* [57] and blurred the distinction between the existence of control and its actual exercise. [58] If, on the other hand, the Court of First Instance intended deliberately to go beyond the limits of the previous case-law, it failed to give any reasons for so doing.

70. Moreover, I can see no convincing reason to increase the requirements to '100% plus X'.

71. The effective enforcement of competition law requires clear rules. A presumption rule such as that recognised by the Court in *AEG* and *Stora*, which allows the Commission as the competition authority to attribute to a parent company the responsibility for the cartel offences of its wholly-owned subsidiaries, creates legal certainty and is straightforward to implement in practice.

72. Generally speaking, presumption rules are by no means unknown in competition law. [59] On the contrary, the characteristics of

53 — *Bolloré*, cited in footnote 47, paragraph 132.
54 — In this regard, see above, points 51 to 60 of this Opinion.
55 — Opinion of Advocate General Mischo in *Stora*, cited in footnote 28, point 48.
56 — *Bolloré*, cited in footnote 47, paragraphs 133 to 150.
57 — In this regard, see above, points 51 to 60 of this Opinion.
58 — In this regard, see above, point 47 of this Opinion.
59 — See, for example, *Commission* v *Anic Partecipazioni*, cited in footnote 26, paragraphs 121 and 126; Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraphs 162 and 167; and *Aalborg Portland and Others* v *Commission*, cited in footnote 25, paragraph 81.

evidence tendered as proof of infringements of competition rules imply that it must be open to the authority or private party on whom the burden of proof lies to draw certain conclusions from typical sequences of events on the basis of common experience. [60]

73. Where, in a group of undertakings, the parent company holds 100% of the shares in its subsidiary, the parent company is — as already mentioned [61] — in a position to exercise decisive influence over its subsidiary. In fact, it then has the sole right to appoint the members of the subsidiary's management bodies, and it is not unusual for there to be personal interconnections between the two companies. Moreover, it follows from the 100% shareholding that the interests of other shareholders cannot play any part either in strategic decisions or in the day-to-day business of the subsidiary. There is thus complete coincidence of interests between the parent company and its wholly-owned subsidiary. In those circumstances, the obvious conclusion is that the subsidiary does not determine its own market conduct independently, but in accordance with the wishes of its parent company. [62]

74. Recourse to a presumption rule such as that under discussion here does not lead to a reversal of the burden of proof that would be incompatible with the presumption of innocence. [63] On the contrary, only the *standard of proof* [64] which must be satisfied when attributing responsibility under antitrust law as between a parent company and its subsidiary is being laid down. Since the parent company's 100% shareholding in its subsidiary supports *prima facie* the conclusion that decisive influence is actually being exercised, it is for the parent company to rebut precisely that conclusion, adducing cogent evidence to the contrary; failing this, that conclusion is adequate to discharge the burden of proof. [65] In other words, there is an interplay between the respective burdens of adducing evidence prior to consideration of the objective burden of proof. [66]

60 — See, in this regard, my Opinion in Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, point 89.

61 — See above, point 48 of this Opinion.

62 — See, to that effect, the Opinion of Advocate General Warner in Joined Cases 6/73 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223, 266.

63 — With regard to the presumption of innocence, see Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and Article 48(1) of the Charter of fundamental rights of the European Union, proclaimed for the first time in Nice on 7 December 2000 (OJ 2000 C 364, p. 1); proclaimed again in Strasbourg on 12 December 2007 (OJ 2007 C 303, p. 1), which, even though they do not currently produce for the Community any binding effects comparable to primary law, may be referred to as a source of legal guidance.

64 — The *standard of proof* determines the requirements which must be satisfied for facts to be regarded as proven. It must be distinguished from the *burden of proof*. The *burden of proof* determines, first, which party must put forward the facts and, where necessary, adduce the related evidence (*subjektive* or *formelle Beweislast*, also known as the evidential burden); second, the allocation of that burden determines which party bears the risk of facts remaining unresolved or allegations unproven (*objektive* or *materielle Beweislast*). In addition, see my analysis in Kokott, J., *Beweislastverteilung und Prognoseentscheidungen bei der Inanspruchnahme von Grund- und Menschenrechten*, Berlin and Heidelberg 1993, p. 12 et seq.

65 — To the same effect — albeit in a somewhat different context — see *Aalborg Portland and Others* v *Commission*, cited in footnote 25, paragraph 79, and Joined Cases 110/88, 241/88 and 242/88 *Lucazeau and Others* [1989] ECR 2811, paragraph 25.

66 — See also, in this regard, my Opinion in Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, point 73, and my Opinion in *T-Mobile Netherlands*, cited in footnote 60, point 89.

75. The interests of the parent company are not impaired by a presumption rule such as that under discussion here. It is open to the parent company to rebut, in a specific case, the presumption of exertion of decisive influence, based on conclusions derived from common experience, by demonstrating that it exercised restraint and did not influence the market conduct of its subsidiary. [67] The facts and information which are necessary for that purpose originate in any case in the domain of the parent and subsidiary company. It is therefore perfectly justifiable to require the latter to discharge the burden of adducing evidence in this respect.

76. Against that background, the Court should adhere to the rule that, where the parent company has a 100% shareholding in its subsidiary, the rebuttable presumption may be made that the parent company exerts decisive influence over its subsidiary.

(c) Miscellaneous matters

77. Finally, I turn to two complaints raised by the appellants concerning proof of the existence or absence of autonomy of a wholly-owned subsidiary in relation to its parent company.

78. Firstly, the appellants submit that the Court of First Instance failed to have regard to the requirements arising from the rights of the defence in respect of the administrative procedure before the Commission. They maintain that, under those requirements, it is for the Commission to produce evidence, in its statement of objections, of the subsidiary's lack of autonomy. In this case, however, the Commission only dealt with this question in the contested decision.

79. If one starts, as I have suggested, from the presumption that a parent company exercises decisive influence over its wholly-owned subsidiary, this complaint is unfounded. The presumption actually releases the Commission from the obligation to put forward evidence of a lack of autonomy of the wholly-owned subsidiary or to hear the views of the parties to the proceedings on the matter.

80. The Commission is merely required to indicate unequivocally in its statement of objections the legal person on whom fines may be imposed, and the statement of objections must also be addressed to that person. [68] In order to establish the responsibility of a parent company for the cartel

67 — The Commission correctly mentions the following examples in this regard: (a) the parent company is an investment company and behaves like a pure financial investor, (b) the parent company holds 100% of the shares in the subsidiary only temporarily and for a short period, (c) the parent company is prevented for legal reasons from fully exercising its 100% control over the subsidiary; see also the examples cited by Advocate General Warner in his Opinion in *Commercial Solvents*, cited in footnote 62.

68 — Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365, paragraphs 143 and 146; Case C-176/99 P *ARBED* v *Commission* [2003] ECR I-10687, paragraph 21; and *Aalborg Portland and Others* v *Commission*, cited in footnote 25, paragraph 60.

offences of its wholly-owned subsidiary, it is therefore sufficient in principle for the Commission to set out the shareholding structure in the statement of objections.

81. It is then for the parent company to rebut the presumption of exertion of decisive influence by adducing cogent evidence to the contrary. In so far as it has not already adduced such evidence during the investigation, it has the opportunity to do so in its written reply to the statement of objections and during any oral hearing. It is then for the Commission to assess that evidence and, against that background, to review the provisional conclusions which it drew in the statement of objections. [69]

82. It is beyond dispute that those requirements were satisfied in this case.

83. Secondly, the appellants criticise the statement by the Court of First Instance that the parent company can be held jointly and severally liable unless it proves that its subsidiary 'does not, in essence, comply with the instructions which it issues and, as a consequence, acts autonomously on the market'. [70] They claim that the Court of First Instance thereby unlawfully restricts the possibility of adducing evidence in rebuttal solely to cases in which the parent company has issued instructions to the subsidiary and these have not been carried out.

84. That argument is also unconvincing. It is based on a patent misreading of the judgment under appeal, which takes a single — admittedly unclear — phrase in the grounds of the judgment out of its context. If the rest of the grounds of the judgment under appeal are taken into account, it is sufficiently clear that the Court of First Instance would allow all evidence in rebuttal adduced by the parent company 'to establish that its subsidiary was independent'. [71] That also includes cases in which the parent company had not issued any instructions at all to its subsidiary.

(d) Interim conclusion

85. In the light of the foregoing observations, the first part of the ground of appeal is unfounded.

69 — Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 14; *Aalborg Portland and Others* v *Commission*, cited in footnote 25, paragraph 67; Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 62; and Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 63.

70 — Paragraph 62 of the judgment under appeal.

71 — Paragraph 60, last sentence, of the judgment under appeal.

3. The subject matter of the parent company's decisive influence (second part of the ground of appeal)

86. By the second part of their ground of appeal, the appellants object to paragraphs 64 and 65 of the judgment under appeal. They argue that in those paragraphs the Court of First Instance failed to appreciate what must be the subject-matter of the parent company's decisive influence over its subsidiary in order for there to be a justification for attributing responsibility for the cartel offences of the subsidiary. In the appellants' view, the Court of First Instance wrongly refers in this connection to 'all economic and legal organisational links' between parent and subsidiary. The correct position is that the only relevant criterion is the exertion of influence on *commercial policy in the narrower sense*, that is, on the determination of the subsidiary's market conduct.

87. It should be noted in this regard that the absence of autonomy of the subsidiary in terms of its market conduct is only one possible connecting factor on which to base an attribution of responsibility to the parent company. It is not the only connecting factor, for, according to the Court's case-law, attribution of conduct to the parent company is possible 'in particular' where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct. [72] That circumstance alone militates against the appellants' view that the only relevant factor in attributing conduct under antitrust law is what influence the parent company has over the subsidiary in relation to its commercial policy in the narrower sense.

88. In quite general terms, attribution of conduct as between parent and subsidiary is always possible where both form one *economic entity*, that is, where they are to be regarded as *a single undertaking*; in other words, responsibility under antitrust law is attributed to the parent company 'in view of the unity of the group thus formed'. [73]

89. However, even if the autonomy of the subsidiary as regards its commercial policy in the narrower sense is examined, the decisive influence of the parent company does not necessarily have to result from specific instructions, guidelines or rights of co-determination in terms of pricing, production and sales activities or similar aspects essential to market conduct. Such instructions are merely a particularly clear indication of the existence of the parent company's decisive influence over its subsidiary's commercial policy. [74] However, autonomy of the subsidiary cannot necessarily be inferred from their absence.

72 — *ICI*, paragraph 133; *Geigy*, paragraph 44; and *Continental Can*, paragraph 15, cited in footnote 31.

73 — See *ICI*, cited in footnote 31, paragraphs 132 and 133, and *Geigy*, cited in footnote 31, paragraph 44.

74 — See, for example, in this regard, *ICI*, paragraphs 137 and 138, and *Geigy*, paragraph 45, cited in footnote 31.

90. Nor, a fortiori, can it depend on whether the parent company has interfered in the day-to-day business of its subsidiary, or, equally, whether anti-competitive activities engaged in by the subsidiary were attributable to an instruction from the parent company or known to the latter. [75]

91. A parent company may exercise decisive influence over its subsidiaries even when it does not make use of any actual rights of co-determination and refrains from giving any specific instructions or guidelines on individual elements of commercial policy. Thus, a single commercial policy within a group may also be inferred *indirectly* from the totality of the economic and legal links between the parent company and its subsidiaries. [76] Conversely, the absence of such a single commercial policy as between a parent company and its subsidiary can be established only on the basis of an assessment of the totality of all the economic and legal links existing between them. [77]

92. For example, the parent company's influence over its subsidiaries as regards corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters may have indirect effects on the market conduct of the subsidiaries and of the whole group. Moreover, as the Commission correctly points out, even a company's mere membership of a group may influence its market conduct, in relation, for example, to the question of with whom that company should actively compete.

93. In the end, the decisive factor is whether the parent company, by reason of the intensity of its influence, can direct the conduct of its subsidiary to such an extent that the two must be regarded as one economic unit.

94. Since what matters, therefore, is the general relationship of parent and subsidiary, in paragraph 65 of the judgment under appeal the Court of First Instance rightly emphasised the importance of the 'economic and legal organisational links' between them, rather than confining itself solely to commercial policy in the narrower sense.

95. The appellants object that this approach amounts to introducing a regime of strict liability of the parent company of a group for

75 — In this respect, the English translation of the judgment in *ICI*, cited in footnote 31, paragraph 133, may give rise to misunderstandings. The phrase 'in all material respects' used in that paragraph could in fact be construed to the effect that the subsidiary must carry out the instructions of its parent company *in every detail.* The fact that this is not what is meant is clear both from a glance at the Dutch language version of the judgment, which alone is authentic ('in hoofdzaak') and from a comparison with the French version, the language in which the judgment was deliberated ('pour l'essentiel').

76 — The Court particularly emphasises these economic and legal links in its more recent case-law; see *Metsä-Serla and Others* v *Commission*, cited in footnote 31, paragraph 27; *Aristrain* v *Commission*, cited in footnote 31, paragraph 96; and *Dansk Rørindustri and Others* v *Commission*, cited in footnote 18, paragraph 117; see also *ETI and Others*, cited in footnote 2, paragraph 49.

77 — It is self-evident that, in this context, the subsidiary's separate legal personality is no more a deciding factor than the mere fact that it is provided with its own organs (see, in this regard, *ICI*, paragraph 132; *Geigy*, paragraph 44; and *Continental Can*, paragraph 15, cited in footnote 31).

the cartel offences of its subsidiaries that conflicts with the principle of personal responsibility.

96. I am not convinced by that argument.

97. The fact that the parent company which exercises decisive influence over its subsidiaries can be held jointly and severally liable for their cartel offences does not in any way constitute an exception to the principle of personal responsibility, [78] but is the expression of that very principle. That is because the parent company and the subsidiaries under its decisive influence are collectively a single undertaking for the purposes of competition law and responsible for that undertaking. [79] If that undertaking deliberately or negligently infringes the competition rules, in particular Article 81 EC and Article 53 of the EEA Agreement, that gives rise to the collective personal responsibility of all the principals in the group structure, regardless of whether they are the parent company or a subsidiary. [80]

98. This form of parent-company responsibility under antitrust law also has nothing to with strict liability. On the contrary, as mentioned, the parent company is one of the principals of the undertaking which negligently or intentionally committed the competition offence. In simplified terms, it could be said that it is (together with all the subsidiaries under its decisive influence) the legal embodiment of the undertaking which negligently or intentionally infringed the competition rules.

99. Admittedly, the parent company's involvement in the commission of the offence may not have been directly apparent outwardly, for example, through the participation of its own staff in meetings of the cartel members. However, that does not detract from its personal (co-)responsibility for the offence. As the parent company exercising decisive influence over its subsidiaries, it pulls the strings within the group of companies. It cannot simply shift responsibility for cartel offences committed within that group just to individual subsidiaries.

100. Finally, it should be mentioned that the appellants also accuse the Court of First Instance of failing to state reasons. They find it 'vague' and 'incomprehensible' as to what evidence a parent company has to put forward to the Court of First Instance to demonstrate that it and its subsidiaries do not between them constitute a single economic entity. [81]

78 — With regard to the principle of personal responsibility, see above, point 39 of this Opinion and the case-law cited in footnote 26.

79 — See above, points 42 and 43 of this Opinion.

80 — To that effect, see also *ICI*, cited in footnote 31, paragraph 141.

81 — The appellants refer in this connection to paragraph 65 of the judgment under appeal.

101. This complaint also is unfounded. The concept of a single economic entity is a familiar legal concept which is regularly used in connection with Article 81 EC and Article 53 of the EEA Agreement. As regards the evidence to be adduced, the Court of First Instance was unable to make an exhaustive list because, as it states, it depends on the circumstances of each individual case. [82] However, it is unequivocally clear from the subsequent observations in the judgment under appeal what kind of evidence the Court was expecting in this case. [83]

102. In reality, therefore, this last complaint by the appellants is not so much directed at a failure to state reasons, but rather aims to question the validity of the findings made by the Court of First Instance. I have already stated that they have no prospect of succeeding with it.

103. Consequently, the second part of the ground of appeal is also unfounded.

82 — Judgment under appeal, paragraph 65 at the end.

83 — Paragraph 66 in conjunction with paragraphs 67 to 85 of the judgment under appeal.

C — *Summary*

104. Overall, therefore, the appellants' submissions are admissible, but unfounded. Consequently, their appeal should be dismissed.

V — Costs

105. Under Article 122(1) of the Rules of Procedure, the Court of Justice is to decide on the costs when an appeal is dismissed. It follows from the first sentence of Article 69(2) in conjunction with Article 118 of the Rules of Procedure that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Pursuant to the second sentence of Article 69(2) of the Rules of Procedure, where there are several unsuccessful parties the Court is to decide how the costs are to be shared.

106. Since the Commission has applied for costs and the appellants have been unsuccessful, the appellants should be ordered to pay the costs. Since they brought the appeal jointly, they must bear the costs jointly and severally.

VI — Conclusion

107. In the light of the foregoing considerations, I propose that the Court should:

(1) dismiss the appeal;

(2) order Akzo Nobel NV, Akzo Nobel Nederland BV, Akzo Nobel Chemicals International BV, Akzo Nobel Chemicals BV and Akzo Nobel Functional Chemicals BV to pay the costs of the proceedings jointly and severally.