OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 17 February 2011 [1]

1. The present appeal has been brought by Arkema SA ('Arkema' or 'the applicant') and seeks to have set aside of the judgment in *Arkema* v *Commission* [2] ('the judgment under appeal') in which the Court of First Instance of the European Communities (now 'the General Court') dismissed the applicant's application for the annulment of the Commission's decision of 19 January 2005 [3] ('the decision') finding that a number of companies, including that formed by the applicant, formerly Elf Atochem SA ('Elf Atochem') and subsequently Atofina SA ('Atofina'), and its parent company Elf Aquitaine SA ('Elf Aquitaine'), had infringed Article 81(1) EC and Article 53(1) of the Agreement on the European Economic Area ('EEA') by taking part in a continuing agreement concerning the market for monochloroacetic acid ('MCAA').

I — Background to the dispute, the judgment under appeal, procedure before the Court of Justice and forms of order sought by the parties

2. It appears from paragraph 3 et seq. of the judgment under appeal that the Commission began its investigation of the MCAA market towards the end of 1999 after having been informed of the existence of a continuing agreement concerning that market by one of the participating companies. On 14 and 15 March 2000 the Commission carried out on-the-spot inspections at the premises of, inter alia, Elf Atochem. On 7 and 8 April 2004 the Commission sent a statement of objections to twelve companies, including Elf Aquitaine and its subsidiary, Atofina (paragraphs 3, 4 and 7 of the judgment under appeal).

3. The Commission imputed liability for the infringement for the period from 1 January 1984 to 7 May 1999 to Elf Aquitaine and its subsidiary, Arkema. The Commission took the view that the fact that Elf Aquitaine held 98% of the shares in Atofina was sufficient in itself for liability for the actions of

1 — Original language: French.

2 — Judgment of 19 January 2009 in Case T-168/05 not published in the ECR.

3 — C(2004) 4876 final – MCAA.

its subsidiary to be imputed to Elf Aquitaine (paragraph 9 of the judgment under appeal).

4. The amount of the fines was determined by the Commission under its Guidelines for calculating fines under Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty [4] ('the Guidelines') and its Notice on the non-imposition or reduction of fines in cartel cases [5] (the 'Leniency Notice') (paragraph 13 of the judgment under appeal). The fine imposed jointly and severally on Elf Aquitaine and Arkema is EUR 45 million (Article 2(c) of the Decision and paragraph 30 of the judgment under appeal). In addition, the Commission found that Elf Atochem had been an addressee of Commission decision 94/599/EC of 27 July 1994 relating to a procedure under Article [81 EC] [6] at a time when Elf Aquitaine did not control Atofina, and thus imposed a separate fine on the latter to take into account its repeated infringement. The fine is EUR 13.5 million (Article 2(d) of the decision and paragraph 30 of the judgment under appeal).

5. On 25 April 2005, Arkema brought an action for annulment of the decision. Arkema claimed that the General Court should, principally, annul Articles 1(d), 2(c) and 4(9) of the decision so far as they relate to Elf Aquitaine and, consequently, amend Article 2(c) and (d) of the decision and, in the alternative, amend Article 2(c) and (d) of the decision so as to reduce the fine. The applicant put forward eight pleas in law in support of its action. Its first plea in support of its application for annulment alleged failure to observe the rules governing the imputability to a parent company of the practices of its subsidiary and discrimination against the Elf Aquitaine group. The second plea was that the principle of the subsidiary's legal and commercial independence was infringed as a result of the presumption of the parent company's decisive influence on the subsidiary. The third plea was that the principle of personal liability was infringed. The fourth plea was that there was discrimination between companies on the basis of their legal organisation and their size. The fifth plea concerned infringement of essential procedural requirements. In support of its application for the amendment of the decision, the applicant raised a sixth plea that the principle of proportionality was infringed by the decision setting the starting amount of the fine. By its seventh plea, the applicant claimed that the principle of proportionality was infringed by the decision setting the multiplier. The eighth plea was that the principle of proportionality was infringed by the decision setting the amount of the fine with reference to the duration of the infringement. Finally, the applicant raised, also in the alternative, a ninth plea claiming that the principle of proportionality was infringed by the decision setting the multiplier as a deterrent, in so

4 — OJ 1998 C 9, p. 3.
5 — OJ 1996 C 207, p. 4.
6 — OJ 1994 L 239, p. 14.

far as the Commission took Arkema's turnover into account twice (judgment under appeal, paragraphs 41 to 43).

6. In the judgment under appeal the General Court dismissed all the pleas, both principal and alternative, and ordered the applicant to pay the costs.

7. By application lodged at the Registry of the Court of Justice on 15 December 2009, the applicant brought the present appeal. The applicant requests the Court to set aside the judgment under appeal and to order the Commission to pay the costs. The Commission contends that the Court should dismiss the appeal and order the applicant to pay the costs. The parties' representatives made submissions at the hearing on 25 November 2010.

II — The appeal

8. The applicant relies on four grounds in support of its appeal. The first ground is that the Commission infringed the rules governing the imputability to a parent company of the practices of its subsidiary. The second ground concerns infringement of the principle of non-discrimination arising from the irrebuttable nature of the presumption that a parent company exercises decisive influence over its subsidiaries. The third ground alleges infringement of the principle of equal treatment and of the right to a fair hearing. The fourth ground alleges infringement of the principle of proportionality in that Arkema's turnover was taken into account twice in determining the basis for setting the fine.

A — *First ground of appeal: the General Court failed to take account of the rules governing the imputability to a parent company of the practices of its subsidiary*

9. The applicant's first ground of appeal is, in essence, that in examining the evidence which it adduced to prove its independence on the market and to rebut the Commission's presumption as regards Elf Aquitaine, the General Court required a *probatio diabolica* of it, contrary to the rules governing the imputability to a parent company of the practices of its subsidiary and also to the applicant's right to a fair hearing, enshrined in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR').

10. It must be pointed out, as the General Court did at paragraphs 67 to 69 of the judgment under appeal, that it is clear from the case-law, that where a parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules, first, the parent company can exercise a decisive influence over the conduct of the

subsidiary [7] and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary. [8] In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent company exercises a decisive influence over the subsidiary's commercial policy. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market. [9]

11. The applicant's complaints relate in particular to paragraph 76 of the judgment under appeal, in which the General Court states as follows:

'With regard to the merits of the evidence adduced by the applicant to prove its independence, it must be observed that the claim that Elf Aquitaine is only a non-operational holding company that rarely intervenes in the management of its subsidiaries is not sufficient to rule out the possibility that it exercises decisive influence over the applicant's conduct by coordinating inter alia financial investments within the Elf Aquitaine group. In the context of a group of companies, a holding company that coordinates financial investments within the group is in a position to regroup shareholdings in various companies and has the function of ensuring that they are run as one, including by means of such budgetary control.'

12. According to the applicant, in stating that the holding company has 'the function' of ensuring that the subsidiaries are run as one, the General Court made the presumption concerning the parent company's decisive influence over the conduct of the subsidiary irrebuttable in law because any attempt to prove that the subsidiary acts independently on the market would run counter to the very function which the General Court finds holding companies to have, and would therefore be bound to fail.

13. First of all, as the Commission observes in its reply to the appeal, Arkema disputes neither the principle of the Commission's presumption as regards Elf Aquitaine nor the fact that the presumption applies in the circumstances of the present case (the parent company holds 98 % of the subsidiary's share capital). On the other hand, the applicant's

7 — See, to that effect, Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, paragraphs 136 and 137, and Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraph 60.

8 — See, to that effect, Case 107/82 *AEG-Telefunken* v *Commission* [1983] ECR 3151, paragraph 50; Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraph 29, and *Akzo Nobel and Others* v *Commission*, paragraph 60.

9 — *Akzo Nobel and Others* v *Commission*, paragraph 60.

objections are directed only at the reasoning on the basis of which the General Court ruled out the possibility that the fact that Elf Aquitaine is a non-operational holding company may be sufficient to rebut the presumption.

14. In paragraph 76 of the judgment under appeal, the General Court stated, first, that the fact that a holding company does not act directly on the market does not in itself rule out the possibility that it may exercise decisive influence over the commercial policy of its subsidiaries by means of the coordination of financial investments within the group. In saying that, the General Court aimed to counter the applicant's argument that the purely financial nature of the parent company meant that it would not interfere in the market practices of the operational companies in the group. However, the applicant's objections do not aim to challenge in substance the conclusion that follows from that assertion, namely that the presumption that decisive influence is actually exercised on the commercial policy of subsidiaries may be applied to a non-operational holding company also.

15. The General Court then justifies that conclusion by stating that 'a holding company that coordinates financial investments within the group is in a position to regroup shareholdings in various companies and has the function of ensuring that they are run as one, including by means of such budgetary control'. According to Arkema, it is the second part of that sentence that makes the presumption applied as regards Elf Aquitaine *de facto* irrebuttable because, as the applicant explains in its statement in reply, 'the criterion that subsidiaries are run as one is precisely the criterion which, according to the Commission, makes it possible to impute a subsidiary's practices to its parent company'.

16. I note straightaway that, if Arkema's reasoning were to be followed, the Court's assertion would in fact have a much wider implication than that which the applicant itself attributes to it and would, in essence, amount to saying that any holding company, whether operational or non-operational, and irrespective of any consideration regarding the size of its shares in the capital of its subsidiaries, must be held liable for its actions simply because of its function of running those companies as one. It is clear that the Court's assertion has no such implication.

17. On the other hand, in view of the context of that statement, I think it must be regarded as confined to non-operational holding companies and to situations where the conditions for applying the presumption relied on as regards Elf Aquitaine are fulfilled.

18. Furthermore, it is clear from settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, [10] having regard in particular to the economic, organisational and legal links between those two legal entities. [11] However, contrary to what the applicant seems to imply, the function which the General Court recognises that a non-operational holding company has of running the group companies as one does not necessarily entail interference in the commercial policy of its subsidiaries, particularly in the terms required by the case-law cited above. Such interference must be proved and, in accordance with the relevant principles, which are not disputed by the applicant, it may be presumed where the parent company holds the entire share capital of the subsidiaries. According to the same principles, it will always be open to the parent company or its subsidiaries to prove the contrary.

19. Likewise, to acknowledge, as the General Court does, that the function of a non-operational holding company is to run its subsidiaries as one does not deprive them or their parent company of the option of attempting to rebut that presumption by proving that the abovementioned function (assuming that it takes the form of interference in the commercial policy of the operational companies in the group) was not actually exercised. It is clear from the case-law cited above that the presumption refers to the *actual exercise* of decisive influence on the conduct of its subsidiary by a parent company which holds the entire share capital of that subsidiary.

20. It follows that, contrary to what the applicant claims, the statement at paragraph 76 of the judgment under appeal cannot be understood as confirming that any holding company, whether operational or non-operational, inevitably actually exercises decisive influence simply because it has the function, within a group of companies, of running those companies as one.

21. In the passage at issue, the General Court merely asserts that the possibility cannot be ruled out that a non-operational holding company, in spite of the fact that it does not act directly in the market, may exercise a decisive influence on the commercial policy of its subsidiaries in view of its function of financial management and coordination and that therefore such influence may be presumed to be actually exercised where the subsidiaries are wholly owned or almost wholly owned. That is why, to follow the Court's reasoning,

10 — See, to that effect, *Imperial Chemical Industries* v *Commission*, paragraphs 132 and 133, Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraph 44; Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 15; *Stora Kopparbergs Bergslags* v *Commission*, paragraph 26, and *Akzo Nobel and Others* v *Commission*, paragraph 58.

11 — *Akzo Nobel and Others* v *Commission*, paragraph 58.

it is not sufficient to claim that the parent company is non-operational in order to rebut the presumption, which remains a rebuttable presumption, as the Court points out, citing the settled case-law of the Union courts in other passages of the judgment under appeal, particularly at paragraphs 67 and 82.

24. I therefore suggest that the first ground of appeal be dismissed in its entirety as unfounded.

B — *Second ground of appeal: infringement of the principle of non-discrimination*

22. Consequently, because it arises from a misreading of the judgment under appeal, there is no foundation for the complaint that the rules governing the imputability of a subsidiary company's practices to its parent company were disregarded because the General Court affirmed that the presumption based on the fact that the subsidiary is wholly owned by the parent company is irrebuttable.

25. The applicant's second ground of appeal is that the assertion by the General Court that the presumption based on the fact that the subsidiary company is wholly owned by the parent is irrebuttable amounts to an infringement of the principle of non-discrimination as between the members of a cartel, depending on whether they belong to a group of companies or not. I consider that this second ground of appeal must also be dismissed as unfounded because it arises from the same – in my view mistaken – reading of the judgment under appeal

C — *Third ground of appeal: infringement of the principle of equal treatment and the right to a fair hearing*

23. There is likewise no foundation for the complaint that Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms was infringed because, notwithstanding the lack of argument on the part of the applicant, it cannot be read as starting from the same erroneous premiss that, in the judgment under appeal, the General Court made it legally impossible to rebut the abovementioned presumption.

26. In the context of its third ground of appeal, the applicant claims in essence that the General Court, in response to the applicant's fifth plea, examined only Elf Aquitaine's

submissions and not those of the applicant, thus infringing its right to a fair hearing and the principle of equal treatment. This ground of appeal is directed at paragraphs 122 to 129 of the judgment under appeal.

27. Like the Commission, I have some difficulty in understanding fully the subject-matter of this ground of appeal.

28. Paragraphs 122 to 129 of the judgment under appeal respond to the applicant's complaints raised at first instance in its plea alleging that there was no statement of reasons in the decision. However, in criticising those paragraphs in the present ground of appeal, the applicant does not appear to be complaining that the General Court omitted to impose a penalty for the lack of a statement of reasons or that it misconstrued the extent of the Commission's obligation to state reasons, but rather that it omitted to examine the substance of Atofina's submissions to prove that it acted independently on the market.

29. In those circumstances, I question whether the formulation of that ground of appeal satisfies the conditions of clarity which are required for it to be admissible. [12]

30. As to the merits, assuming that the present ground of appeal must be construed as claiming that the General Court omitted to condemn the Commission's alleged failure to take into account the evidence submitted by Atofina or the Commission's failure to state reasons for finding that that evidence was irrelevant or insufficient, I observe that, at paragraph 127 of the judgment under appeal, the General Court states that 'since the Commission's response to the main points of Elf Aquitaine's arguments […] would not differ according to whether the parent company or its subsidiary was concerned, the Commission was not required to reply separately to the arguments put forward by the applicant'. That point refers to paragraph 75 of the judgment under appeal, in which the General Court, after finding in the previous paragraph that 'the applicant's arguments seeking to prove its independence were also put forward by its parent company […] to prove that it did not exercise a decisive influence on its subsidiary's commercial policy', concluded that 'in dismissing the arguments put forward by the parent company, the Commission gave an overall response to both companies'.

31. The General Court therefore clearly started from the premiss that the arguments put forward by Atofina and by Elf Aquitaine during the administrative procedure were the same and that examination of the former entailed examination of the latter. However, it must be observed that the applicant does not even attempt to dispute the reasonableness of that assumption. In particular, the applicant does not state which evidence specifically adduced by Atofina, other than that adduced by

12 — Case C-178/00 *Italy* v *Commission* [2003] ECR I-303. paragraph 6, and Case C-199/03 *Ireland* v *Commission* [2005] ECR I-8027, paragraph 50).

Elf Aquitaine, was not examined by the Commission or was rejected without a sufficient reason begin given, and without the General Court condemning the failure to examine it or to state a reason.

32. In those circumstances, and in so far as it is to be construed as stated in paragraph 30 above, the present ground of appeal must be dismissed as unfounded.

33. I think the conclusion must be the same if the purpose of the ground of appeal is to complain that the General Court did not itself examine the merits of the evidence adduced by Atofina during the administrative procedure to prove that it acted independently on the market. It is clear from paragraphs 76 to 80 of the judgment under appeal that the General Court did examine that evidence by taking into account, in particular, the submission concerning Elf Aquitaine's status as a non-operational holding company (paragraph 76), the assertion that Atofina never implemented, a specific policy of reporting to Elf Aquitaine on the MCAA market (paragraph 78), the submission that MCAA activity within the Elf Aquitaine group was minor (paragraph 79) and the fact that the two companies operated in separate markets and did not supply customers (paragraph 80).

34. Therefore the third ground of appeal, claiming infringement of the principle of equal treatment and the right to a fair hearing, cannot succeed in any case.

D — *Fourth ground of appeal: infringement of the principle of proportionality*

35. According to the applicant, the General Court infringed the principle of proportionality in upholding the calculation method used by the Commission to determine the component of the fine relating to Arkema's repeated infringement. That method means that Arkema's turnover is taken into account twice in calculating the respective bases to which the multipliers used for Elf Aquitaine and Arkema as a deterrent are applied. The General Court did not dispute that the turnover was taken into account twice, but justified it on the basis of the Commission's requirement to adhere to the calculation method laid down by the Guidelines, thus

imparting to them 'an absolute binding force' which they do not have.

36. At paragraph 198 of the judgment under appeal, the General Court states that it is clear from the decision that, at the time of the infringement, Elf Atochem had already been the subject of an earlier Commission decision in a cartel case, at a time when Atofina was not controlled by Elf Aquitaine (see paragraph 4 above). For that reason the Commission found that in the case of Elf Atochem there was repeated infringement which was an aggravating circumstance and increased the basic fine to be imposed by 50%.[13] In order to 'isolate' that component of the penalty, the Commission adopted the following method of calculation, set out in the footnote on page 222 of the decision and at paragraph 199 of the judgment under appeal:

'The increase for recidivism applies only to Atofina (Atochem) and not to its parent company, Elf Aquitaine, as the latter was not in control of Atofina at the time of the infringement. The multiplying factor applied to Elf, namely 2.5 is not included in the calculation. Instead a multiplying factor of 1.5, which would have been applied had Atofina been the sole addressee of the Decision (given its worldwide turnover of EUR 17.8 thousand million), will be used for the purposes of calculating recidivism. A separate fine will accordingly be addressed to Atofina alone for this amount.'

37. At paragraph 203 of the judgment under appeal, the General Court sets out as follows the Commission's calculation of the hypothetical basic amount to which the 50% increase was applied on account of Atofina's repeated infringement:

'12 million (starting amount) x 1.5 (deterrent multiplier, fixed by reference to Arkema's turnover) = 18 million + (18 million x 150%) (increase for duration of infringement) = EUR 45 million.'

38. After that amount is adjusted by the increase for recidivism and the 40% reduction on the basis of the Leniency Notice, the fine which was finally imposed on Arkema pursuant to Article 2(d) of the decision was EUR 13.5 million.

39. It must be observed, first, that contrary to what the applicant appears to believe, Arkema's turnover was not taken into

13 — Paragraph 314 of the decision.

account in calculating the 'bases' to which the Commission applied the multipliers used as deterrents for, respectively, Elf Aquitaine/Arkema [14] and for Arkema alone, but in determining the multipliers themselves. As appears from paragraph 279 et seq. of the decision, the starting amount of the fine imposed on Elf Aquitaine/Arkema and of the increase for repeated infringement on the part of Atofina (EUR 12 million) was calculated by taking account of the gravity of the infringement and the respective weight of the companies which took part in it, estimated on the basis of their market shares. Multipliers were applied to the starting amount to ensure that the fine had a sufficient deterrent effect. For Arkema/Elf Aquitaine, the factor was set at 2.5 to take account of its worldwide turnover of EUR 84.5 thousand million (paragraphs 299 and 300 of the decision), whereas a lower factor of 1.5 was set for the deterrent increase applied to Arkema alone, in view of its worldwide turnover of EUR 17.8 thousand million (footnote 222 of the decision).

40. Next, as the General Court notes at paragraph 201 of the judgment under appeal, 'according to paragraphs 2 and 3 of the Guidelines, the Commission, having determined the basic amount of the fine taking into account the gravity and duration of the infringement, subsequently increases or decreases that amount, as appropriate, according to aggravating or extenuating circumstances'. The resulting adjustments to the basic amount are normally a percentage of that amount (an increase of 50 % of the basic amount for repeated infringement and a reduction of 40 % for leniency in the applicant's case). Consequently the overall outcome of increases and reductions may vary in real terms, depending on all the factors which are taken into consideration in determining the basic amount and, therefore, not only on the company's financial capacity (turnover), but also on the part it plays in the market in question (market shares) and, generally, the gravity and duration of the infringement.

14 — It will be recalled that the amount for which Arkema and Elf Aquitaine are jointly and severally liable was calculated as follows: starting amount 12 million (paragraph 296 of the decision); multiplied by the factor of 2.5 (paragraph 300 of the decision) = 30 million (intermediate amount not shown in the decision); increase for duration (plus 150 %) gives the basic amount of 75 million (page 303 of the decision); no aggravating circumstances (footnote 222 of the decision); leniency application with 40 % reduction of the basic amount (paragraphs 340 and 341 of the decision): 45 million (paragraph 348, third indent, of the decision).

41. Consequently, to agree with the applicant's reasoning would mean asserting that any increase on the ground of aggravating circumstances takes the form of counting

twice the different components of the basic amount, which could not be accepted.

42. Furthermore, the method used in the present case by the Commission, which recalculated the basic amount for Arkema alone, aimed to avoid account being taken, for calculating an increase in the fine for which Atofina alone was liable, of a component (the multiplier applied to Arkema/Elf Aquitaine) which did not reflect the true situation of that company. Such a method, which has the effect of neutralising, in relation to Arkema, the increase in the basic amount due to the greater financial capacity of Arkema/Elf Aquitaine, does not seem to me objectionable in itself.

43. With regard to the choice of multipliers used as a deterrent respectively for Arkema/Elf Aquitaine and for Arkema alone, I observe that the applicant does not dispute the manner in which they were arrived at or their level and, in essence, the applicant merely asserts that, as a result of using them, its turnover was taken into account twice. [15]

44. I therefore consider that there is no factual basis for the complaint of an infringement of the principle of proportionality or the complaint that the General Court erred in law in interpreting the Commission Guidelines as having absolute binding force.

45. Consequently, in my view the fourth ground of appeal must be dismissed in its entirety as unfounded.

15 — On this point I must observe that, so far as it is relevant, according to the case-law, although it is permissible, for the purpose of fixing the fine, to have regard to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, it is important not to confer on that figure an importance disproportionate in relation to the other factors as the fixing of an appropriate fine cannot be the result of a simple calculation based on the total turnover, see Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 100. In addition, the Commission cannot, by a mechanical recourse to arithmetical formulae alone, divest itself of its own power of assessment in determining the amount of the fine, see Case C-283/98 P *Mo och Domsjö* [2000] ECR I-9855, paragraph 47.

III — Conclusion

46. In the light of all the above considerations, I therefore propose that the Court dismiss the appeal and that the applicant be ordered to pay the costs, in accordance with Article 69(2) of the Rules of Procedure of the Court of Justice.