JUDGMENT OF THE GENERAL COURT (Second Chamber)

17 May 2011 *

In Case T-299/08,

Elf Aquitaine SA, established in Courbevoie (France), represented by É. Morgan de Rivery and S. Thibault-Liger, lawyers,

applicant,

v

European Commission, represented by X. Lewis, É. Gippini Fournier and R. Sauer, acting as Agents,

defendant,

APPLICATION for, principally, annulment of Commission Decision C(2008) 2626 final of 11 June 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the Agreement on the European Economic Area (EEA) (Case COMP/38.695 — Sodium chlorate), in so far as it concerns the applicant, and, in the alternative, annulment or reduction of the fines imposed on the applicant in that decision,

* Language of the case: French.

THE GENERAL COURT (Second Chamber),

composed of I. Pelikánová, President, K. Jürimäe (Rapporteur) and S. Soldevila Fragoso, Judges,

Registrar: C. Kristensen, Administrator,

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

gives the following

Judgment

Background to the dispute

1 By Decision C(2008) 2626 final of 11 June 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the Agreement on the European Economic Area (EEA) (Case COMP/38.695 — Sodium chlorate) ('the contested decision), the Commission of the European Communities imposed sanctions on, among other undertakings, the applicant, Elf Aquitaine SA, which until 2006 was the parent company of Arkema France (formerly Atochem SA, then Elf Atochem SA, then Atofina SA and Arkema SA) on account of their participation in a complex of agreements and concerted practices affecting the sodium chlorate market in the EEA for the period 11 May 1995 to

9 February 2000 so far as the applicant and Arkema France were concerned (recitals 12 to 15 to and Article 1 of the contested decision).

2 Sodium chlorate is a strong oxidising agent manufactured by the electrolysis of a sodium chloride water solution in a diaphragm-less cell. Sodium chlorate can be produced as a crystal product or as a solution product. Its largest application is for the manufacturing of chlorine dioxide, which is used in the pulp and paper industry for the bleaching of chemical pulp. Other applications include, to a lesser extent, drinking water purification, textile bleaching, herbicides and uranium refining (recital 2 to the contested decision).

3 The main competitors on the sodium chlorate market in the EEA were, in 1999, the following undertakings. First of all, EKA Chemicals AB ('EKA'), whose share capital was wholly owned by the Akzo Nobel group, which held 49 % of the market. Finnish Chemicals Oy, whose share capital was indirectly and wholly owned by Erikem Luxembourg SA ('ELSA'), which held 30 % of the market. Next, Arkema France, 97.55 % of whose share capital was owned by the applicant between 1992 and 2000, had a 9 % market share. Last, Aragonesas Industrias y Energia SAU ('Aragonesas'), whose share capital was wholly owned between 1992 and 2000, directly or indirectly, by Uralita SA, had, as did Solvay SA/NV, a 5 % share of the market, while other producers jointly had 2 % of the market (recitals 13, 14, 25 to 30, 42 and 46 to the contested decision).

4 On 28 March 2003 EKA lodged an application with the Commission for immunity under the Commission notice of 19 February 2002 on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the 2002 Leniency Notice') concerning the existence of a cartel on the sodium chlorate market ('the cartel'). EKA

supported that application by documentary evidence and an oral statement (recitals 54 and 55 to the contested decision).

5 On 30 September 2003 the Commission adopted a decision granting EKA conditional immunity in accordance with point 15 of the 2002 Leniency Notice (recital 55 to the contested decision).

6 On 10 September 2004 the Commission sent requests for information to Finnish Chemicals, Arkema France and Aragonesas, pursuant to Article 18(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) (recital 56 to the contested decision).

7 On 18 October 2004 Arkema France, in its response to the Commission's request for information referred to at paragraph 6 above, submitted an application under the 2002 Leniency Notice (recital 57 to the contested decision).

8 On 29 October 2004 Finnish Chemicals lodged an application under the 2002 Leniency Notice with the Commission and provided the Commission orally with information relating to the cartel. Finnish Chemicals confirmed that application by letter of 2 November 2004 and at the same time provided documentary evidence relating to its participation in the infringement in question (recital 58 to the contested decision).

9 Beginning on 4 November 2004, the Commission sent requests for information pursuant to Article 18(2) of Regulation No 1/2003 to, among other undertakings, Arkema France, Aragonesas, EKA and Finnish Chemicals. The Commission also met the latter two undertakings. As regards the applicant, the Commission first sent it a request for information on 11 April 2008 (recitals 59 to 65 to the contested decision).

10 By letter of 11 July 2007 the Commission informed Arkema France that it intended to reject its application under the 2002 Leniency Notice (recital 563 to the contested decision).

11 By letter of the same date the Commission also informed Finnish Chemicals that it intended to grant it, under the 2002 Leniency Notice, a reduction of 30 to 50 % of the amount of any fine imposed on it (recital 583 to the contested decision).

12 On 27 July 2007 the Commission adopted a statement of objections, addressed to, in addition to the applicant, EKA, Akzo Nobel NV, Finnish Chemicals, ELSA, Arkema France, Aragonesas and Uralita. The addressees responded to the statement of objections within the prescribed period (recitals 66 and 67 to the contested decision).

13 On 20 November 2007 Arkema France and the applicant, among others, exercised their right to be heard orally at a hearing before the hearing officer (recital 68 to the contested decision).

14 On 11 June 2008 the Commission adopted the contested decision, which was notified to the applicant on 16 June 2008.

15 In the contested decision, the Commission observes, in substance, that Arkema France, EKA, Finnish Chemicals and Aragonesas pursued a strategy of stabilising the sodium chlorate market, the ultimate aim of which was to allocate sales volumes of that product among themselves, to coordinate the pricing policy towards their customers and thus to maximise their margins. The functioning of the cartel was based on frequent contacts between competitors in the form of bi- or multilateral meetings and telephone conversations, but without following a fixed pattern. According to the

Commission, those collusive practices took place from 21 September 1994 for EKA and Finnish Chemicals, from 17 May 1995 for Arkema France, from 16 December 1996 for Aragonesas and from 13 February 1997 for ELSA. The practices continued until 9 February 2000, at least so far as Arkema France, EKA, Finnish Chemicals and Aragonesas are concerned (recitals 69 to 71 to the contested decision).

16 As regards, in particular, the unlawful conduct of Arkema France, the Commission observes that the facts set out in the contested decision show that that undertaking participated directly in the anti-competitive practices in question. The Commission also observes that throughout the infringement period the applicant held more than 97 % of the shares in Arkema France. For that reason, the Commission maintains that there are reasonable grounds for considering that Arkema France was required to follow the policy defined by its parent company and was therefore unable to act autonomously. The Commission therefore concludes that it may be presumed that the applicant exercised decisive influence over Arkema France, which is borne out by the additional indicia which it sets out (recitals 384 and 386 to the contested decision).

17 As regards the calculation of the amounts of the fines imposed on, in particular, Arkema France and the applicant, the Commission relied on the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the Guidelines') (recital 498 to the contested decision).

18 First of all, the Commission states that, in order to determine the basic amount of the fine imposed on Arkema France, an amount corresponding to 19 % of the value of the sales of the products affected by the cartel in question should be taken into account. First, since Arkema France participated in the infringement for at least four years and eight months, the Commission considers that that amount should be multiplied by five in order to take account of the duration of the infringement. Second, in order to deter the undertakings concerned, and in particular Arkema France, from participating in horizontal price-fixing agreements, the Commission considers it necessary to

impose an additional amount corresponding to 19 % of the value of those sales. The Commission therefore concludes that a fine of EUR 22 700 000 should be imposed, for which Arkema France and the applicant are to be jointly and severally liable (recitals 510 and 521 to 523 to the contested decision).

19 Furthermore, as regards the adjustment of the basic amount of the fine, the Commission observes, with respect to aggravating circumstances, that on the date of adoption of the contested decision it had already imposed sanctions on Arkema France in three decisions in which that undertaking had been held liable for earlier cartel activities. On the one hand, the Commission considers, in substance, that Arkema France's conduct consisting in repeated infringement justifies an increase of 90 % of the basic amount of the fine. On the other hand, the Commission finds no attenuating circumstance in favour of Arkema France or the applicant that would justify a reduction of the fine. In particular, the Commission considers that, when all the facts of the case are taken into account, there are 'no exceptional circumstances' that could justify granting Arkema France a reduction of the fine outside the scope of the 2002 Leniency Notice (recitals 525, 526, 538 and 544 to the contested decision).

20 Next, the Commission states, in substance, that in order to ensure that fines have a sufficiently deterrent effect, and in the light of the fact that the applicant has a particularly large turnover beyond the sales of goods to which the infringement relates and, last, that that turnover is in absolute terms much larger than the turnover of the other undertakings involved, it is appropriate to apply an increase of 70 % of the basic amount of the fine (recitals 545, 548 and 559 to the contested decision).

21 In addition, the Commission finds that the fines to be imposed on Arkema France and the applicant, in particular, are below 10 % of their respective total turnovers in 2007 and that the fines that can be imposed on them before the application of the 2002

Leniency Notice come to EUR 43 130 000 for Arkema France and to EUR 38 590 000 for the applicant (recitals 551 and 552 to the contested decision).

22 Last, the Commission considers that Arkema France must not benefit from any reduction of the fine under the 2002 Leniency Notice, since the information which it supplied to the Commission did not constitute significant added value within the meaning of point 21 of that notice. Conversely, the Commission considers that Finnish Chemicals supplied it with evidence representing significant added value for the purposes of point 21 of that notice and therefore granted that undertaking a reduction of 50 % of the fine that would otherwise have been imposed on it (recitals 580, 588 and 591 to the contested decision).

23 Articles 1 and 2 of the operative part of the contested decision are worded as follows:

'*Article 1*

The following undertakings infringed Article 81 [EC] and Article 53 of the EEA Agreement by participating, for the periods indicated, in a complex of agreements and concerted practices with a view to allocating sales volumes, fixing prices, exchanging commercially sensitive information on prices and sales volumes and monitoring the execution of the anti-competitive arrangements for sodium chlorate in the EEA market:

(a) [EKA], from 21 September 1994 until 9 February 2000;

(b) Akzo Nobel …, from 21 September 1994 until 9 February 2000;

(c) Finnish Chemicals …, from 21 September 1994 until 9 February 2000;

(d) [ELSA], from 13 February 1997 until 9 February 2000;

(e) Arkema France …, from 17 May 1995 until 9 February 2000;

(f) [the applicant], from 17 May 1995 until 9 February 2000;

(g) Aragonesas …, from 16 December 1996 until 9 February 2000;

(h) Uralita …, from 16 December 1996 until 9 February 2000.

Article 2

For the infringement referred to in Article 1, the following fines are imposed:

(a) EKA … and Akzo Nobel …, jointly and severally, EUR 0;

(b) Finnish Chemicals …: EUR 10 150 000, of which jointly and severally with [ELSA] (in liquidation): EUR 50 900;

(c) Arkema France … and [the applicant], jointly and severally: EUR 22 700 000;

(d) Arkema France …: EUR 20 430 000;

(e) [the applicant]: EUR 15 890 000;

(f) Aragonesas … and Uralita …, jointly and severally: EUR 9 900 000.

…'

24 In Article 3 of the operative part of the contested decision, the Commission orders the undertakings referred to in Article 1 of that decision, first, to bring an immediate end to the infringement, in so far as they have not already done so, and, second, to refrain from repeating any act or conduct described in Article 1 and from any act or conduct having the same or similar object or effect.

25 Article 4 of the operative part of the contested decision lists the addressees of the contested decision, which are the undertakings referred to in Article 1 of that decision.

Procedure and forms of order sought

26 By application lodged at the Registry of the General Court on 1 August 2008, the applicant brought the present action.

27 Upon hearing the report of the Judge-Rapporteur, the Court (Second Chamber) decided to open the oral procedure. The Court put certain questions to the applicant and the Commission. It also requested the Commission to produce certain documents. With the exception of the transcript of EKA's oral application for immunity, which the Commission refused to produce, the parties responded to those requests within the prescribed period.

28 The parties presented oral argument and answered the questions put by the Court at the hearing on 2 June 2010.

29 By order of 11 June 2010 in Case T-299/08 *Elf Aquitaine* v *Commission*, not published in the ECR, the Court ordered the Commission to produce the transcript of EKA's oral application for immunity and gave leave for that document to be consulted by the applicant's lawyers at the Court Registry. The Commission produced that document within the prescribed period and the applicant's lawyers consulted it at the Court Registry. In answer to a written question put by the Court, the applicant stated that while it was unable to confirm that that document was identical to the document to which it had been given access in the context of the administrative procedure before the Commission, it had no reason to doubt that it was the same document.

30 The oral procedure was closed on 16 July 2010.

31 The applicant claims that the Court should:

— principally, annul, on the basis of Article 230 EC, the contested decision, in so far as it concerns the applicant;

— in the alternative, annul or reduce, on the basis of Article 229 EC, the amount of the fines imposed on the applicant in Article 2(c) and (e) of the contested decision;

— in any event, order the Commission to pay the costs.

32 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

1. *The principal claims, seeking annulment in part of the contested decision*

33 In support of its application for annulment of the contested decision in so far as it concerns the applicant, the applicant puts forward 10 pleas in law. The first plea alleges breach of the rules governing the imputation of liability for an infringement within groups of companies. The second plea alleges breach of six fundamental principles as a result of the imputation to the applicant of liability for the unlawful conduct in question. The third plea alleges distortion of the body of indicia submitted by the applicant. The fourth plea alleges the existence of contradictions in the grounds of the contested decision. The fifth plea alleges breach of the principle of

sound administration. The sixth plea alleges breach of the principle of legal certainty. The seventh plea alleges misuse of powers. The eighth plea alleges that the imposition of a personal fine on the applicant is unfounded. The ninth plea alleges breach of the principles and the rules that governed the calculation of the fine imposed jointly and severally on Arkema France and the applicant. The tenth plea alleges breach of the provisions of the 2002 Leniency Notice.

First plea, alleging breach of the rules governing the imputation of liability for an infringement within groups of companies

34 The applicant's first plea, alleging that the Commission, in the contested decision, breached the rules governing the imputation of liability for an infringement within groups of companies, is divided into five parts.

First part, alleging an error of law in the imputation to the applicant of the unlawful conduct in question

— Arguments of the parties

35 The applicant maintains, in substance, that the Commission erred in law in taking the view, at recital 369 to the contested decision, that it was not required to corroborate by specific evidence the presumption that, in substance, a parent company that wholly owns its subsidiary exercises decisive influence over that subsidiary ('the presumption of the exercise of decisive influence').

36 First, it follows both from a considerable body of case-law and from the Commission's previous practice when adopting decisions that the Commission is required to corroborate the presumption of the exercise of decisive influence by specific indicia showing that that influence exists. Those indicia should show either that the parent company was involved in the infringement, or that it was aware of the infringement, or that the internal organisation of the group enabled it actually to intervene in the commercial policy of its subsidiary. In particular, the applicant contends that for almost 40 years preceding the adoption of Decision C(2004) 4876 final of 19 January 2005 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/37.773 — MCAA) (OJ 2006 L 353, p. 12; 'the MCAA decision') the Commission applied specific indicia corroborating the presumption of the exercise of decisive influence. The applicant also submits that, at recital 574 to the decision of 1 October 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/C.39181 — Candle waxes) (OJ 2009 C 295, p. 17; 'the Candle Waxes decision'), the Commission acknowledged that before 2005 it did not impute liability for an infringement to a parent company without putting forward specific indicia to corroborate that presumption.

37 Second, the applicant observes that in the decision of 10 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.587 — Organic peroxides) (OJ 2005 L 110, p. 44; 'the Organic Peroxides decision'), the Commission did not impute liability to the applicant for the infringement found in that decision, as it took the view that Arkema France was wholly autonomous on the market.

38 Third, the applicant maintains, in substance, that the obligation for the Commission to put forward additional indicia corroborating the presumption of the exercise of decisive influence in the context of the application of Article 81 EC is supported by the case-law on the imputation to the State of a measure adopted by a public undertaking in State aid law. The applicant refers in that regard to Case C-482/99 *France* v *Commission* [2002] ECR I-4397 and Case T-442/03 *SIC* v *Commission* [2008] ECR II-1161. In the applicant's submission, in accordance with Article 295 EC, a private

shareholder in a group of companies cannot, under the principle of equal treatment, be treated less well than a public shareholder.

39 Fourth, the applicant claims that the Commission's finding, at recital 369 to the contested decision, that it is not required to corroborate the presumption of the exercise of decisive influence by adducing additional elements to prove that a parent company controls its subsidiary is contrary to the solutions applied in most Member States of the European Union, such as Belgium, France, Italy and the United Kingdom, and also in the United States, whose influence on Community competition law cannot be denied. First, in all those States the national competition authorities make use of a body of indicia designed to establish that a subsidiary conducts itself autonomously in relation to its parent company. Second, while it is true that the Commission is not bound by the solutions applied by the national competition authorities of the Member States, it should none the less take them into account, given the mechanisms of reinforced cooperation that govern its relations with those authorities within the European competition network.

40 The Commission contests the applicant's arguments.

— Findings of the Court

41 First of all, it should be observed that, after setting out, at recitals 369 to 372 to the contested decision, the case-law on the imputability of the unlawful conduct of a

subsidiary to its parent company, the Commission states the following, at recitals 386 and 387 to that decision:

'(386) Throughout the period of the infringement, [the applicant] held more than 97 % of the shares in [Arkema France]. Given that, under these circumstances, there are reasonable grounds for considering that the subsidiary will have to follow the policy laid down by its parent company (and thus not act autonomously) and that the parent company will encounter no obstacles in setting such policy for its subsidiary, it can be presumed that [the applicant] exercised decisive influence over [Arkema France]. In addition, there are other elements which confirm the presumption that [the applicant] did in fact exercise decisive influence. To begin with, the members of the *Conseil d'Administration* (Board of Directors) of [Arkema France] were all appointed by [the applicant]. Furthermore, between 1994 and 1999 Mr [P.] was a member of the general management board of [Arkema France] and of [the applicant] and a member of the board of directors of [Arkema France]. The same applies for Mr [I.], who was a member of the board of directors of [Arkema France] between 1994 and 1998 and of [the applicant's] general management board between 1994 and 1997. Likewise, Mr [W.] sat on [Arkema France's] board of directors between 1994 and 1999 and was appointed to [the applicant's] general management board in 1999. Furthermore, a number of other individuals, such as Mr [D.] (1994-2000) and Mr [R.] (1994-1997), were at the same time members of the board of directors of [Arkema France] and of [the applicant]. Given these various overlaps of personnel both directing and overseeing [Arkema France's] business, and which (as regards the directors) had been appointed and — it must be assumed — could have been removed by [the applicant], the latter was clearly informed of all decisions to be taken by [Arkema France] and could influence them at any time. There was also no other significant shareholder which could have exerted an influence on the commercial policy to be followed by the subsidiary.

(387) Given the presumption following from [the applicant's] shareholding in [Arkema France] throughout the infringement (more than 97 %) and further taking into account the organisation links, the Commission considers that [the applicant] exercised decisive influence over [Arkema France].'

42 Furthermore, at recitals 396 to 415 to the contested decision, the Commission rejects the arguments which Arkema France and the applicant raised in their observations in response to the statement of objections and by which they sought to challenge the imputation to the applicant of liability for the infringement in question.

43 It therefore follows from the grounds of the contested decision set out at paragraphs 41 and 42 above that the Commission imputed liability for the infringement in question to the applicant on the basis of the presumption that a parent company which owns more than 97 % of the shares of its subsidiary exercises decisive influence over the subsidiary. The Commission also considered that that presumption was corroborated by additional indicia which it had set out in the contested decision and also that the arguments put forward by Arkema France and the applicant in the observations in response to the statement of objections did not suffice to rebut that presumption.

44 The Court must therefore consider whether, as the applicant maintains, the Commission erred in law in finding that the fact that the applicant held more than 97 % of Arkema France's shares was in itself sufficient for liability for the infringement in question to be imputed to it.

45 In Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraph 54, the Court of Justice observed that Community competition law referred to the activities of undertakings (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 59) and that the concept of undertaking covered any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (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 112; Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 107; and Case C-205/03 P *FENIN* v *Commission* [2006] ECR I-6295, paragraph 25).

46 The Court of Justice has also stated that the concept of an undertaking, in the same context, must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (see *Akzo Nobel and Others* v *Commission*, paragraph 45 above, paragraph 55 and the case-law cited).

47 When such an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement (see *Akzo Nobel and Others* v *Commission*, paragraph 45 above, paragraph 56 and the case-law cited).

48 The infringement of competition law must be imputed unequivocally to a legal person on whom fines may be imposed and the statement of objections must be addressed to that person. It is also necessary that the statement of objections indicate in which capacity a legal person is called on to answer the allegations (see *Akzo Nobel and Others* v *Commission*, paragraph 45 above, paragraph 57 and the case-law cited).

49 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, having regard in particular to the economic, organisational and legal links between those two legal entities (see *Akzo Nobel and Others* v *Commission*, paragraph 45 above, paragraph 58 and the case-law cited).

50 That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of the case-law mentioned at paragraphs 45 and 46 above. Thus, the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article 81 EC enables the Commission to address a decision imposing fines to the

parent company, without having to establish the personal involvement of the latter in the infringement (see *Akzo Nobel and Others* v *Commission*, paragraph 45 above, paragraph 59 and the case-law cited).

51 In the specific case where a parent company has a 100 % shareholding in a subsidiary which has infringed the competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary (see *Akzo Nobel and Others* v *Commission*, paragraph 45 above, paragraph 60 and the case-law cited).

52 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 exercises a decisive influence over the commercial policy of the subsidiary. The Commission will then 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 (see *Akzo Nobel and Others* v *Commission*, paragraph 45 above, paragraph 61 and the case-law cited).

53 While it is true that the Court of Justice referred in Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraphs 28 and 29, not only to the fact that the parent company owned 100 % of the capital of the subsidiary, but also to other circumstances, such as the fact that it was not disputed that the parent company exercised influence over the commercial policy of its subsidiary or that both companies were jointly represented during the administrative procedure, the fact none the less remains that those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the elements on which the General Court had based its reasoning and not to make the application of the presumption subject to the production of additional indicia relating to the actual exercise of influence by

the parent company (see *Akzo Nobel and Others* v *Commission*, paragraph 45 above, paragraph 62 and the case-law cited).

54 It is clear from all those considerations that where a parent company has a 100% shareholding in its subsidiary there is a rebuttable presumption that that parent company exercises a decisive influence over the conduct of its subsidiary (see *Akzo Nobel and Others* v *Commission*, paragraph 45 above, paragraph 63 and the case-law cited).

55 It is clear from the case-law of this Court, moreover, that where a parent company holds virtually all the shares in its subsidiary there are reasonable grounds for concluding that the subsidiary does not determine its conduct on the market autonomously and that it therefore forms, with the parent company, the same undertaking for the purposes of Article 81 EC (see, to that effect, Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 290 and the case-law cited).

56 In the present case, it must be stated, first, that, as the Commission observed at recital 386 to the contested decision, the applicant does not deny that it held more than 97% of Arkema France's shares at the material time and, more specifically, that it held 97.55% of those shares, as stated at recital 13 to the contested decision. Second, although the applicant maintains that the fact that it was the sole owner of shares in Arkema France cannot corroborate the presumption of the exercise of decisive influence, it puts forward no argument capable of calling in question the Commission's finding, at recital 396 to the contested decision, that the fact that a parent company owns virtually all the shares in its subsidiary can be assimilated to holding all that capital, since, in principle, 'the remaining shareholders will typically have no special minority rights but only a financial interest in the business of the subsidiary'.

57 Consequently, the Commission was correct to presume in the contested decision, in accordance with the case-law set out at paragraphs 45 to 55 above, that the applicant exercised decisive influence over Arkema France, on the basis of the finding that it held virtually all the shares in that subsidiary.

58 None of the arguments put forward by the applicant invalidates that conclusion.

59 First, as regards the arguments that, first, it follows both from the case-law and from the Commission's practice in previous decisions before the adoption of the MCAA decision that the Commission is required to corroborate the presumption of the exercise of decisive influence by specific indicia, they must be rejected as unfounded. As is clear from paragraphs 45 to 55 above, it was in accordance with established case-law that the Court of Justice observed, in *Akzo Nobel and Others* v *Commission*, paragraph 45 above, that the Commission was not required to corroborate that presumption by additional indicia. Furthermore, even though, as the Commission stated in the Candle Waxes decision, its practice in taking decisions before the adoption of the MCAA decision consisted in corroborating the presumption of the exercise of decisive influence by additional indicia, such an assertion cannot affect the conclusion, set out at paragraph 57 above, that the Commission was entitled, in the contested decision, to rely on the sole fact that the applicant held virtually all the shares in Arkema France to presume that it exercised decisive influence over that undertaking.

60 Second, the argument that the Commission erred in law in imputing liability for the unlawful conduct in question to the applicant, when it had not imputed liability in the Organic Peroxides decision, must be rejected as unfounded. In so far as, as is clear from paragraphs 45 to 55 above, it was on the basis of a correct interpretation of the concept of undertaking within the meaning of Article 81(1) EC that the Commission, in the contested decision, imputed liability for the infringement in question to the

applicant, the mere fact that the Commission did not impute liability in a previous decision penalising Arkema France cannot call in question the legality of the contested decision in that respect. Furthermore, since the Commission is able, but under no obligation, to impute liability for the infringement to a parent company (see, to that effect, Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraph 82, and Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraph 331), the mere fact that the Commission did not impute liability in the Organic Peroxides decision does not mean that it is required to make the same assessment in a subsequent decision (see, to that effect, 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 990).

61 Third, in so far as the applicant claims, in substance, that *France* v *Commission*, paragraph 38 above, paragraphs 50 to 52, 55 and 56, and *SIC* v *Commission*, paragraph 38 above, paragraphs 94, 95, 98, 99, 101 to 105 and 107, tend to confirm that the Commission is required to adduce additional indicia corroborating the presumption of the exercise of decisive influence on which it relies in the context of the application of Article 81 EC, that argument must be rejected as ineffective. The paragraphs in question, which dealt with the question whether a measure taken by a public undertaking can be imputed to the State and, accordingly, whether such a measure can be characterised as State aid within the meaning of Article 87 EC, have no bearing on the conditions of the imputation of liability for an infringement of Article 81 EC to a parent company, nor do they preclude the existence of the presumption of the exercise of decisive influence in relation to an infringement of Article 81 EC, the lawfulness of which has been expressly recognised by the European Union judicature, as is clear from the case-law set out at paragraphs 45 to 55 above.

62 Fourth, the argument that, in substance, the case-law in a number of Member States of the European Union and in the United States requires that the exercise of decisive influence by the parent company over the subsidiary must be corroborated by specific

indicia must be rejected as ineffective. Apart from the fact that the case-law of those States is not binding on the Commission and does not constitute the relevant legal framework by reference to which the lawfulness of the contested decision must be examined, the fact that the presumption of the exercise of decisive influence is not recognised by the case-law of those States, even if it were made out, would not in any event mean that it was unlawful in Community law.

63 In the light of the foregoing considerations, the first part must be rejected as unfounded in part and as ineffective in part.

Second part, alleging breach of the principles of the legal and economic autonomy of companies

— Arguments of the parties

64 The applicant maintains that when the presumption of the exercise of decisive influence is not, as was the case in the Commission's practice in taking decisions before the adoption of the MCAA decision, corroborated by additional indicia confirming that the parent company interfered with its subsidiary's activities on the market affected by the infringement, such a presumption is incompatible with the principle of autonomy of legal persons, since it means that the parent company is automatically liable for the infringements committed by its subsidiary.

65 First, the applicant claims that it is only by way of duly justified exception to the principle of the economic autonomy of legal persons that a parent company can be recognised as coming within the perimeter of the undertaking for the purposes

of Article 81 EC. In such an exceptional situation, a parent company could then be imputed with liability for the infringement committed by its subsidiary and be held jointly and severally liable to pay the fine imposed on the subsidiary, but it could not be ordered to pay a fine in its personal capacity.

66 The applicant observes that company law in the Member States of the European Union enshrines the principle that legal persons are legally autonomous, and that includes subsidiaries whose shares are wholly owned by their parent company. That principle flows from the attributes of legal personality and has the effect that each company has full legal personality and owns its own assets and that each company is fully responsible for its own acts, including for the consequences of its economic activities on the market. In that regard, the applicant states that the principle of the economic autonomy of a subsidiary, which follows from its legal autonomy, has been recognised by the case-law. That principle also constitutes a fundamental element of the proper functioning of modern economies. Consequently, the applicant and Arkema France, as distinct legal persons, both have their own legal and economic autonomy.

67 Second, the applicant maintains that the principle of the economic autonomy of the subsidiary represents the expression in concrete terms of the subsidiary's use of all the legal attributes of its legal personality. Analysis of the laws of most Member States of the European Union shows that the principle of autonomy of legal persons forms part of the fundamental legal bases on which their social organisation rests, and derogation from that principle is possible only in exceptional circumstances, as may be seen from the national case-law of the various States; and, furthermore, the Commission is required, when it applies competition law, not to ignore the case-law of the courts of the Member States of the European Union, as otherwise it will jeopardise the necessary convergence of the various systems of competition law within the European and international competition networks.

68 The Commission contests the applicant's arguments.

— Findings of the Court

69 The applicant maintains, in substance, that by imputing to it liability for the infringement in question, the Commission breached the principles according to which companies enjoy legal and economic autonomy.

70 However, without there being any need to rule on the extent of the principles according to which companies enjoy legal and economic autonomy, or even on the existence of the latter of those principles, it is sufficient to state that they cannot in any event mean that a company all or virtually all of whose shares are owned by another company necessarily acts autonomously on the market merely because it has its own legal personality or its own economic means. Such an assumption would completely disregard the numerous possibilities which exist in practice for a parent company holding all or virtually all the shares of its subsidiary to influence the conduct of its subsidiary, whether formally or informally.

71 Accordingly, the alleged principles of legal and economic autonomy on which the applicant relies in the present case have not been breached by the Commission.

72 The arguments which the applicant puts forward in that regard cannot succeed. First, as regards the arguments that the presumption of the exercise of decisive influence is contrary to the law applicable in some Member States of the European Union, they must be rejected as unfounded, for the same reasons as those set out at paragraph 62 above, namely that the laws of those States do not constitute the relevant legal framework by reference to which the lawfulness of the contested decision falls to

be assessed. Second, in so far as the applicant maintains that by imputing to it liability for the infringement in question the Commission breached the company law applicable in the Member States of the European Union and, accordingly, the principle of subsidiarity, it must be stated that it is in accordance with Article 81(1) EC that, when an economic entity infringes the competition rules, it must answer for that infringement, which the Commission is empowered to condemn pursuant to Article 23(2) of Regulation No 1/2003.

73 In the light of the foregoing considerations, the second part of the first plea must be rejected as unfounded.

Third part, alleging an error relating to the fact that the indicia which the Commission applied in the contested decision do not corroborate the presumption of the exercise of decisive influence

— Arguments of the parties

74 The applicant submits, in substance, that the Commission made an error of law and manifest errors of assessment in considering that the three additional elements set out at recital 386 to the contested decision (see paragraph 41 above) corroborated the presumption of the exercise of decisive influence. In that regard, the applicant maintains, in substance, that the fact that it appointed the members of its subsidiary's board of directors and the fact that five members of Arkema France's general

management board or board of directors sat on the applicant's general management committee or its board of directors do not corroborate that presumption.

75 The Commission contests the applicant's arguments.

— Findings of the Court

76 According to the case-law set out at paragraphs 52 to 55 above, the Commission is not required to corroborate, by means of additional elements, the presumption of the exercise of decisive influence which it is entitled to apply when a parent company owns all or virtually all the shares of its subsidiary, but, on the contrary, it is for the applicant, in order to rebut that presumption, to adduce sufficient evidence capable of showing that its subsidiary acted autonomously on the market.

77 Therefore, even on the view that, as the applicant asserts, the Commission was wrong to rely, at recital 386 to the contested decision, on indicia that were not capable of corroborating the presumption of the exercise of decisive influence, such an error would not in any event be of such a kind as to call in question the fact that the Commission was entitled to rely on the mere fact that the applicant owned virtually all the shares in its subsidiary to presume that it exercised decisive influence on the subsidiary.

78 Accordingly, the third part must be rejected as ineffective, without there being any need to examine the arguments whereby the applicant seeks, in substance, to challenge the relevance of the indicia on which the Commission relied in the contested decision in order to corroborate the presumption of the exercise of decisive influence.

Fourth part, alleging that the Commission was wrong to consider that the applicant had not adduced a body of indicia rebutting the presumption of the exercise of decisive influence

— Arguments of the parties

79 The applicant maintains, in substance, that the Commission was wrong to consider that it had not submitted a body of consistent indicia rebutting the presumption of the exercise of decisive influence and establishing, first, that Arkema France acted autonomously on the market and, second, that the applicant did not interfere with its subsidiary's commercial policy. The applicant states that, contrary to the Commission's assertion, the body of indicia which it adduced was not confined to establishing that the applicant had not participated in the cartel or that it was not aware of the cartel.

80 In the first place, the applicant claims that it showed by a body of consistent indicia that Arkema France acted autonomously on the market.

81 First, the applicant observes, at the outset, that, as it observed in the context of the first part of the first plea (see paragraph 37 above), the Commission recognised that Arkema France enjoyed autonomy on the market in the Organic Peroxides decision. The applicant further maintains that, if in its decision of 3 May 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F/38.620 — Hydrogen peroxide and perborate) (OJ 2006 L 353, p. 54; 'the Hydrogen Peroxide decision'), the Commission at no time attempted to corroborate by any specific element the presumption of the exercise of decisive influence, that was because it had then considered that no indicium existed that would support that presumption. Last, in so far as sodium chlorate belongs to the same family of products as those referred to in the Organic Peroxides decision and the Hydrogen Peroxide

decision, and in so far as it was managed within the Elf Aquitaine group in exactly the same way as the products to which those two decisions related, the Commission cannot properly claim, in the context of the present case, that the applicant interfered with Arkema France's commercial strategy.

82 Second, the applicant maintains that Arkema France was part of a group characterised by the decentralised management of its subsidiaries and that, consequently, the applicant operated at the head of the group only in its capacity as a non-trading holding company and had no involvement in the operational management of its subsidiaries. For that reason, the Commission ought not to have imputed to the applicant liability for the infringement in question, just as, for the same reason, it had not imputed such liability to one of the parent companies penalised in its decision of 20 October 2004 relating to a proceeding under Article 81 [EC] (Case COMP/C.38.238 — Raw tobacco — Spain) (OJ 2007 L 102, p. 14; 'the Raw Tobacco Spain decision').

83 Third, the applicant maintains that Arkema France always defined its commercial strategy autonomously.

84 Contrary to the Commission's assertion at paragraph 324 of the statement of objections, and as the Commission recognised at the hearing before the hearing officer, the applicant never adopted or approved the activity plan or the activity budget of Arkema France specifically linked to sodium chlorate. On the contrary, Arkema France had at the material time all the means and the organisational, legal and financial resources necessary in order to define the commercial strategy of the activities linked with sodium chlorate and to manage those activities.

85 Furthermore, the applicant puts forward a series of arguments whereby it seeks to establish that Arkema France acted autonomously on the market. First of all, Arkema France had full power to enter into contracts without the prior authorisation of the parent company, which enabled it to manage its commercial policy in complete autonomy. Next, Arkema France was always free to define the range of products or services which it offered on the sodium chlorate market, since the applicant never gave any instructions or directions to its subsidiary concerning its production, the prices charged and the outlets of its production. In addition, Arkema France enjoyed complete freedom, without any interference on the part of its parent company, to define its sales objectives and its overall margins, since none of the applicant's staff was capable of being involved in that type of decision. The applicant, moreover, was never present on the markets, or upstream or downstream of the markets, on which its subsidiary operated. Last, Arkema France acted on the sodium chlorate market in its own name and on its own account and not as the applicant's representative or commercial agent.

86 Fourth, in the applicant's submission, Arkema France enjoyed complete financial autonomy. Such an assertion follows from the considerations set out at paragraphs 81 to 85 above and also from the very small scale of its sodium chlorate activity within the group at the material time. The applicant adds that the financial control which it exercised over Arkema France was very general and could not therefore apply to the activity related to sodium chlorate.

87 Fifth, the applicant maintains that Arkema France did not inform it about its activity on the market and that the mere fact that it submitted its accounts to the applicant remained strictly within the limits of the obligations of a holding company by reference to the applicable accounting rules and the rules on financial regulation. Accordingly, the submission of the accounts was very general and did not cover Arkema France's commercial policy.

88 Sixth, the applicant observes that, in the light of all the considerations set out at paragraphs 81 to 87 above, the Commission ought to have found that Arkema France's activity was not subject to instructions from the parent company. Furthermore, it follows both from the case-law and from the Commission's practice in taking decisions that all the indicia put forward by the applicant in order to rebut the presumption of the exercise of decisive influence are relevant for the purpose of demonstrating that its subsidiary was autonomous. The Commission's rejection of the indicia which the applicant supplied amounts to a de facto denial of that mode of evidence as a means of rebutting that presumption.

89 In the second place, the applicant claims that the Commission was wrong to reject, at recital 370 to the contested decision, the probative nature of the fact that it did not participate in the infringement committed by its subsidiary and also of the fact that the applicant was unaware of that infringement as a ground for precluding its liability, although the Commission expressly acknowledged in the contested decision that the applicant had never been directly or indirectly involved in the infringement in question. However, participation in or knowledge of an infringement is accepted as a relevant indicium, by the Commission and by the European Union judicature, in the context of the imputation to a parent company of liability for that infringement.

90 In the third place, the applicant submits that the Commission was wrong to consider, at recital 403 to the contested decision, that the fact that the applicant was not involved on the sodium chlorate market in the EEA or on the markets upstream or downstream of that product did not constitute evidence of its independence. Such a position is incompatible with the case-law established in the judgment of 12 September 2007 in Case T-30/05 *Prym and Prym Consumer* v *Commission*, not published in the ECR.

91 The Commission contests the applicant's arguments.

— Findings of the Court

92 The applicant maintains, in substance, that it submitted a body of indicia showing that Arkema France acted autonomously on the sodium chlorate market and that the applicant did not interfere with its subsidiary's commercial policy.

93 It must be borne in mind that, first, as follows from the case-law referred to in particular at paragraphs 52 to 55 above, when the Commission relies on the presumption of the exercise of decisive influence in order to impute liability for an infringement to a parent company, it is for the parent company to rebut that presumption by adducing sufficient evidence capable of demonstrating that its subsidiary acts autonomously on the market. Second, in order to establish that its subsidiary acts autonomously on the market and therefore to rebut that presumption, the parent company must submit any element relating to the organisational, economic and legal links between itself and its subsidiary that is of such a kind as to demonstrate that the two undertakings do not form a single economic entity.

94 In the present case, the Court must therefore examine whether the Commission was entitled to consider that the elements of the body of indicia which the applicant submitted did not serve to establish that Arkema France acted autonomously on the market and to rebut the presumption of the exercise of decisive influence.

95 First, as regards the applicant's argument that the position adopted by the Commission in the Organic Peroxides decision and in the Hydrogen Peroxide decision shows that Arkema France acted autonomously on the market, that argument must

be rejected as unfounded. First of all, it should be observed that the applicant misinterprets those decisions, since the Commission did not conclude that Arkema France acted autonomously, either, in particular, on the sodium chlorate market or, generally, on the other product markets on which it was active. It follows from Article 1 of the Organic Peroxides decision, in particular, that the Commission merely imposed a penalty on Arkema France (formerly Atofina), without ruling on whether liability for that infringement should be imputed to the applicant. Furthermore, it must be held that, in the Hydrogen Peroxide decision, the Commission concluded in substance, notably at recital 427 to that decision, that liability for the infringement at issue in that decision should be imputed to the applicant. Accordingly, neither of those decisions permits the conclusion that the Commission considered, in circumstances similar to those of the present case, that Arkema France acted autonomously on the market.

96 Furthermore, in so far as, as stated at paragraph 60 above, the Commission is able, but is under no obligation, to impute liability for an infringement to a parent company and in so far as it was on the basis of a correct interpretation of Article 81 EC that, in the present case, it imputed liability for the infringement in question to the applicant, any finding that the Commission, in previous cases, either considered that there was no need to impute such liability, or corroborated the presumption of the exercise of decisive influence by additional indicia, does not in any event permit the conclusion that in the present case it erred in law by imputing liability for the infringement in question to the applicant.

97 Second, as regards the applicant's arguments that Arkema France's autonomy is borne out by the decentralised management of the Elf Aquitaine group and by the fact that the applicant was merely a 'non-trading holding company' which did not interfere with the operational management of its subsidiaries and, accordingly, that the Commission ought not to have imputed to it liability for the infringement, as it also refrained from doing, with respect to a different parent company, in the Raw Tobacco Spain decision, they must also be rejected as unfounded.

98 First of all, it should be observed, on the one hand, that the assertion that the applicant is a 'non-trading holding company' is not supported by any specific element capable of establishing that the applicant did not exercise any decisive influence over its subsidiary. As may be seen from the case-law set out at paragraph 60 above, on the other hand, the fact that the Commission did not impute liability to a parent company for an infringement in the Raw Tobacco Spain decision does not, in any event, affect the finding that the conditions for imputation of such liability in the contested decision were satisfied.

99 Furthermore, and in any event, in the context of a group of companies a holding company's task is to consolidate the shareholdings in various companies and its function is to ensure unity of direction. It cannot therefore be precluded that the applicant exercised decisive influence over the conduct of its subsidiary by coordinating, in particular, financial investments within the Elf Aquitaine group. In addition, the internal allocation of the applicant's different activities, having characteristics of decentralised management, between different divisions or departments is a normal phenomenon within groups of companies such as that headed by the applicant. Accordingly, that argument does not in any way rebut the presumption that the applicant and Arkema France constituted a single undertaking for the purposes of Article 81 EC.

100 Third, in so far as the applicant maintains, first, that Arkema France always defined its commercial strategy on the sodium chlorate market autonomously, since the applicant never adopted or approved Arkema France's activity plan and activity budget specifically linked to that product and since Arkema France enjoyed, in substance, the capacity to act autonomously on the market and, second, that Arkema France had complete financial autonomy, since the applicant's control of its subsidiary was very general, those arguments must also be rejected as unfounded.

101 In effect, apart from the fact that the applicant's arguments are not supported by any specific element, it must be observed first of all that the fact that the applicant never adopted or approved Arkema France's activity plan and activity budget does not prove that it could not modify them, or reject them, or control their application.

102 Nor can it be precluded that the applicant exercised decisive influence over its subsidiary by coordinating, in particular, financial investments within the Elf Aquitaine group.

103 Last, although, as the applicant maintained, moreover, in its response to the statement of objections (see page 71 of that response) and as is apparent from recital 392 to the contested decision, the applicant controlled the most important commitments of its subsidiary, that circumstance merely reinforces the Commission's conclusion that the subsidiary was not autonomous by reference to the applicant.

104 Fourth, the applicant's argument that Arkema France did not inform it about its activity on the market and submitted its accounts to the applicant only in very general terms, in accordance with French law and its statutes, must be rejected as unfounded. In that regard, apart from the fact that it must be observed that that argument is not supported by any specific element, the applicant's recognition, as set out at paragraph 103 above, of the fact that it controlled its subsidiary's most important commitments tends to contradict that argument.

105 Fifth, in so far as the applicant claims that it never participated in the infringement, that it was never aware of the infringement and that it was not involved either upstream or downstream of the sodium chlorate market, just as it was not involved in that market, which was of minor importance to the applicant, it must be held that such elements are not capable of establishing Arkema France's autonomy. First of all,

it must be borne in mind that, in accordance with the case-law, it is not a relationship between the parent company and its subsidiary in which the parent company instigates the infringement or, a fortiori, the parent company's involvement in the infringement, but the fact that they constitute a single undertaking that enables the Commission to address the decision imposing fines to the parent company of a group of companies (*Michelin* v *Commission*, paragraph 55 above, paragraph 290). Nor can any inference be drawn from the fact that the applicant and Arkema France operated on separate markets or that the sodium chlorate market was of minor importance to the applicant. It must be held that, in a group such as that headed by the applicant, the allocation of tasks is a normal phenomenon which does not serve to rebut the presumption that the applicant and Arkema France constituted a single undertaking for the purposes of Article 81 EC. Accordingly, those arguments must be rejected as ineffective.

106 Sixth, as regards the applicant's argument that the Commission de facto denied it the right to rebut the presumption of the exercise of decisive influence by taking the view that the indicia which it had submitted did not serve to establish Arkema France's autonomy, it must be rejected as unfounded. In effect, in the contested decision, not only did the Commission not contest the applicant's right to submit indicia to rebut the presumption of the exercise of decisive influence but it was after examining the body of indicia which the applicant had submitted to the Commission that the latter correctly concluded, as may be seen from the findings set out at paragraphs 95 to 105 above, that the elements of that body of indicia did not serve to rebut the presumption of the exercise of decisive influence.

107 In the light of all the foregoing considerations, it must be concluded that the Commission was correct to consider that the applicant had not adduced evidence capable of rebutting the presumption of the exercise of decisive influence.

108 Accordingly, the fourth part of the first plea must be rejected as unfounded in part and as ineffective in part.

Fifth part, alleging transformation of the presumption of the exercise of decisive influence into an irrebuttable presumption

— Arguments of the parties

109 The applicant maintains that, in rejecting the body of indicia which the applicant had submitted to it, the Commission transformed the presumption of the exercise of decisive influence, which should be a rebuttable presumption, into an irrebuttable presumption.

110 In the first place, the applicant claims that the transformation of a rebuttable presumption into an irrebuttable presumption constitutes a breach of the principle of the presumption of innocence. First of all, that transformation constitutes a *probatio diabolica*, that is to say, a proof that is impossible to challenge and therefore a proof that is inadmissible in the light of the case-law. Next, at the hearing the applicant asserted that such a presumption was contrary to the principle of the presumption of innocence enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), as interpreted by the European Court of Human Rights in the *Salabiaku v. France* judgment of 7 October 1988, Series A no. 141-A, § 28, and in the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1), which, pursuant to the first subparagraph of Article 6(1) TEU, has the same legal value as the Treaties. Last, in answer to the questions put by the Court at the hearing,

the applicant stated that it considered that *Akzo Nobel and Others* v *Commission*, paragraph 45 above, was incompatible with the abovementioned provisions.

111 In the second place, the applicant maintains that the Commission made the presumption of the exercise of decisive influence which it established in the contested decision impossible to rebut.

112 First, it follows from recitals 396 and 412 to the contested decision that the Commission itself considers that the rebuttal of the presumption of the exercise of decisive influence is in practice virtually impossible to effect, since the Commission states at those recitals that 'what is presumed is true in almost all cases'.

113 Second, the Commission refused to take into consideration the indicia which the applicant had put forward in order to rebut the presumption of the exercise of decisive influence, although where such indicia are invoked by the Commission they enable it to corroborate that presumption.

114 Third, it follows from recital 401, *in fine*, to the contested decision that the Commission wrongly considers that a parent company must be held liable for an infringement whether or not it has interfered with its subsidiary's activity, whether or not it has allowed the subsidiary to act freely, and whether or not it was aware of the infringements committed by that subsidiary.

115 Fourth, the Commission failed to draw the appropriate inferences from its error of interpretation, which it acknowledged at the hearing before the hearing officer, of the observations formulated by Arkema France on 18 October 2004, in answer to the request for information which the Commission had sent to it on 10 September 2004 and in which it had confused Elf Atochem and the applicant.

116 Fifth, the Commission relied in the contested decision not on specific elements showing that the applicant did in fact exercise decisive influence over Arkema France's commercial management, but on mere unsubstantiated assertions, which constitute other presumptions and assumptions which the Commission never verified.

117 Sixth, it should be inferred from the rejection of all the elements in the body of indicia submitted by the applicant that the Commission requires negative documentary evidence that a parent company did not interfere with its subsidiary's commercial policy.

118 The Commission contests the applicant's arguments.

— Findings of the Court

119 The applicant claims, in substance, that in rejecting the indicia which it had supplied to it, the Commission transformed the presumption of the exercise of decisive influence into an irrebuttable presumption. In the applicant's submission, such a presumption is unlawful under the ECHR and the Charter of Fundamental Rights of the European Union and also under the case-law of the European Union judicature and the European Court of Human Rights.

120 In that regard, it should be observed that, in accordance with the case-law cited at paragraph 52 above, the applicant is not required to adduce evidence that it did not interfere in the management of its subsidiary, but solely to adduce sufficient evidence to show that its subsidiary acted independently on the market in question.

121 The fact that the applicant did not, in the present case, adduce evidence capable of rebutting the presumption of the exercise of decisive evidence, as is clear from the examination of the fourth part of the first plea (see paragraphs 95 to 106 above), does not mean that that presumption cannot be rebutted in any circumstances.

122 For that reason, first, the applicant's argument set out at paragraph 110 above, that, in substance, the presumption of the exercise of decisive influence which the Commission established in the contested decision and the lawfulness of which was recognised by the Court of Justice in *Akzo Nobel and Others* v *Commission*, paragraph 45 above, is contrary to the principle of the presumption of innocence as recognised in the Charter of Fundamental Rights of the European Union and the ECHR, and as interpreted by the European Court of Human Rights and the European Union judicature, must be rejected as ineffective. Second, the arguments set out at paragraphs 111 to 117 above, that, in substance, the Commission was wrong to consider that the indicia which the applicant had supplied had not established that the applicant did not exercise decisive influence over Arkema France, must be rejected as unfounded, since, as stated in the context of the examination of the fourth part of the first plea (see paragraphs 95 to 106 above), it was because none of the indicia submitted by the applicant permitted the conclusion, in the present case, that Arkema France acted autonomously on the market that the Commission, in the contested decision, imputed liability for the infringement to the applicant.

123 Accordingly, the fifth part of the first plea must be rejected as unfounded in part and as ineffective in part and, consequently, the first plea must be rejected in its entirety.

Second plea, alleging breach of six fundamental principles, resulting from the imputation to the applicant of the unlawful conduct in question

124 The applicant maintains, in substance, that the Commission breached six fundamental principles by imputing to it the unlawful conduct of Arkema France. The present plea is therefore divided into six parts.

First part, alleging breach of the applicant's rights of defence

— Arguments of the parties

125 The applicant maintains, in substance, that its rights of defence were breached before and after the statement of objections was notified to it.

126 In the first place, the applicant claims that the Commission's assessment at recital 406 to the contested decision that it was not required to apply any particular diligence towards the applicant before issuing the statement of objections is invalidated by the case-law as established in Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10921 and Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725. The applicant maintains that the Commission ought to have made use of its investigative powers, before

issuing the statement of objections, in order to gather indicia corroborating the presumption of the exercise of decisive influence, instead of relying solely on the indicia supplied by Arkema France. At the hearing the applicant stated that such an obligation also follows from Case T-99/04 *AC-Treuhand* v *Commission* [2008] ECR II-1501 and from the Commission's Best Practices on the conduct of proceedings concerning Articles 101 TFEU and 102 TFEU ('the "Best Practices" code'), which at the date of the hearing was available on the Commission's internet site.

127 Next, in the absence of measures of investigation undertaken against it, the applicant was deprived of its right to explain, before the adoption of the statement of objections, the way in which the Elf Aquitaine group functioned, its relationship with Arkema France and its purely passive role in the management of its sodium chlorate activity. The applicant was also unable to check the veracity of the information provided by Arkema France and for which that undertaking had requested confidential treatment, such as, for example, the applicant's turnover which Arkema France had supplied to the Commission in answer to a request for information.

128 Furthermore, since the investigation related to the period following Arkema France's departure from the Elf Aquitaine group, on 18 May 2006, the Commission could not obtain complete answers to the questions which it had put to Arkema France. The applicant therefore lost the opportunity, first, to secure a modification of the objections raised against it by demonstrating, at the investigation stage, that the infringement by Arkema France could not be imputed to it and, second, to avoid the imposition of two separate fines. The applicant added at the hearing that in so far as the statement of objections was received by it at a time when Arkema France was no longer part of the Elf Aquitaine group and when four years had elapsed since the beginning of the investigation, it no longer had evidence enabling it to defend itself effectively at the date of notification of the statement of objections.

129 Last, the alteration of the applicant's ability to defend itself was aggravated by the incoherent and contradictory nature of the position adopted by the Commission in the MCAA decision, in Decision C(2006) 2098 final of 31 May 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F/38.645 — Methacrylates) (OJ 2006 L 322, p. 20; 'the Methacrylates decision), in the Hydrogen Peroxide decision and in the contested decision.

130 Furthermore, at the hearing the applicant observed, first, that the Court of Justice had recognised the penal nature of fines in competition matters in Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287; the judgment of 22 May 2008 in Case C-266/06 P *Evonik Degussa* v *Commission and Council*, not published in the ECR; and Case C-45/08 *Spector Photo Group and Van Raemdonck* [2009] ECR I-12073, and, second, that the Charter of Fundamental Rights of the European Union, which entered into force on 1 December 2009, was of immediate application in disputes pending before this Court. In that connection, the applicant maintains that its fundamental rights have been breached, since the Commission wrongly considered that 'it is the undertaking, and not each of the legal persons taken separately, that must benefit from fundamental rights'.

131 In the second place, the applicant maintains that it follows from recitals 402 to 406 to the contested decision that the Commission, in breach of the requirements laid down in the case-law, failed to examine carefully all the elements of the body of indicia which it had submitted in order to rebut the presumption of the exercise of decisive influence, since it merely rejected those elements by unsubstantiated assertions, assumptions and purely theoretical presumptions, which do not correspond to the reality of the operation of the Elf Aquitaine group at the material time.

132 The Commission contests the applicant's arguments.

— Findings of the Court

133 The applicant claims that the Commission breached its rights of defence, first, by failing to carry out any measure of investigation against the applicant before notifying it of the statement of objections and, second, by failing to examine carefully, after notification of the statement of objections, all the elements of the body of indicia which the applicant had submitted in order to rebut the presumption of the exercise of decisive influence.

134 According to consistent case-law, respect for the rights of the defence requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 10, and Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraph 21).

135 Like Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87), which was repealed and replaced by Regulation No 1/2003, the latter regulation provides, in Article 27(1), that the parties are to be sent a statement of objections which must set forth clearly all the essential facts upon which the Commission is relying at that stage of the procedure (*Aalborg Portland and Others* v *Commission*, paragraph 45 above, paragraph 67), to enable those concerned to be aware of the conduct in which the Commission alleges they have been engaged and to put forward their defence before the Commission adopts a final decision. That statement of objections constitutes the procedural safeguard applying the fundamental principle of Community law which requires observance of the rights of the defence in all proceedings (Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler and Others* v *Commission* [2009] ECR I-7191, paragraph 35).

136 That principle requires, in particular, that the statement of objections which the Commission sends to an undertaking on which it envisages imposing a penalty for an infringement of the competition rules contain the essential elements used against it, such as the facts, the characterisation of those facts and the evidence on which the Commission relies, so that the undertaking may submit its arguments effectively in the administrative procedure brought against it (see *Papierfabrik August Koehler and Others* v *Commission*, paragraph 135 above, paragraph 36 and the case-law cited).

137 In particular, the statement of objections must specify unequivocally the legal person on whom fines may be imposed, it must be addressed to that person and it must indicate in what capacity that person is called upon to answer the allegations (see, to that effect, *Papierfabrik August Koehler and Others* v *Commission*, paragraph 135 above, paragraphs 37 and 38).

138 It is by the statement of objections that the undertaking concerned is informed of all the essential elements on which the Commission is relying at that stage of the procedure. Consequently, it is only after notification of the statement of objections that the undertaking is able to rely in full on its rights of defence (see Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 59 and the case-law cited, and *AC-Treuhand* v *Commission*, paragraph 126 above, paragraph 48).

139 As regards the applicant's first complaint, namely that the Commission breached its rights of defence by failing to carry out any measure of investigation against it before the statement of objections was notified to it, it must be observed that, while the parties have not provided the Court with that statement of objections, it none the less follows unambiguously from the applicant's observations of 27 September 2007 in response to that statement of objections that the Commission informed the applicant that it intended to impute Arkema France's unlawful conduct to the applicant on the basis of the presumption of the exercise of decisive influence. The applicant was therefore aware of the objections raised against it in the statement of objections and

was in a position to respond, and did in fact respond in writing, to the statement of objections. Nor does the applicant deny that it was in a position to present, and did in fact present, its observations on the statement of objections at the hearing before the hearing officer.

140 The fact that the Commission did not carry out any measure of investigation against the applicant before notifying it of the statement of objections, or again, as the applicant observes, moreover, that in previous decisions the Commission did or did not impute to the applicant liability for other infringements committed by its subsidiary, cannot affect the conclusion that the Commission was entitled to inform the applicant for the first time of the objections against it in the statement of objections. The applicant was given the opportunity during the administrative procedure to put forward its views on the reality and relevance of the facts and circumstances alleged by the Commission in its statement of objections, both in its observations in response to the statement of objections and at the hearing before the hearing officer.

141 The Commission therefore did not breach the applicant's rights of defence by not undertaking any measure of investigation against it before notifying it of the statement of objections.

142 The other arguments put forward by the applicant do not invalidate that conclusion.

143 First, the argument raised by the applicant at the hearing, that the Commission breached its fundamental rights as recognised by the Community case-law and the Charter of Fundamental Rights of the European Union, by wrongly considering that it was the undertaking, and not each of the legal persons taken individually, that should benefit from those fundamental rights, must be rejected as unfounded. Apart from the fact that it does not follow from either the contested decision or its written pleadings that the Commission took such a view, it must be stated that, as is clear from recital 66 to the contested decision and Article 4 of the operative part of that decision,

it was to the applicant and to Arkema France, each taken separately, that the Commission addressed the statement of objections and the contested decision, so that, both during and after the administrative procedure, it respected the rights of defence of each of those two companies.

144 Second, the argument that it follows from the case-law cited at paragraph 126 above that the Commission was wrong to consider in the present case that it was not required to act with particular diligence with respect to the applicant must also be rejected as unfounded.

145 First of all, in *Thyssen Stahl* v *Commission*, paragraph 126 above, paragraph 31, the Court of Justice held that the Commission must be found to have breached an undertaking's rights of defence where it is possible that the outcome of the administrative procedure might have been different as a result of an error committed by the Commission. The Court of Justice also held in the same paragraph that an undertaking establishes that there had been such a breach where it adequately demonstrates, not that the Commission's decision would have been different in content, but rather that it would have been better able to ensure its defence had there been no error, for example because it would have been able to use for its defence documents to which it had been denied access during the administrative procedure. In the present case, however, it must be held that the applicant has not established that the fact that the Commission did not address any measure of investigation to it before notifying it of the statement of objections might have led the Commission to arrive at a different result in the contested decision. Contrary to the applicant's contention, it had the opportunity to make known, on the basis of the statement of objections, its observations on the mode of functioning of the Elf Aquitaine group, its relationship with Arkema France and what it claims to have been its purely passive role in the management of its activity relating to sodium chlorate.

146 Next, in *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, paragraph 126 above, paragraphs 48 to 50 and 56, the Court of Justice held, in particular, that it was essential to prevent the rights of the defence from being irremediably compromised on account of the excessive duration of the investigation phase and to ensure that that phase did not impede the establishment of evidence designed to refute the existence of conduct susceptible of rendering the undertakings concerned liable. In the present case, it must be observed that the applicant has put forward no specific element establishing that the investigation phase preceding the adoption of the contested decision was excessively long and thus impeded the applicant from supplying indicia capable of rebutting the presumption of the exercise of decisive influence.

147 Last, in *AC-Treuhand* v *Commission*, paragraph 126 above, paragraph 56, this Court considered that when the first measure is taken in respect of an undertaking, including in requests for information under Article 11 of Regulation No 17, the Commission is required to inform the undertaking concerned, inter alia, of the subject-matter and purpose of the investigation. At paragraph 58 of that judgment, the Court also observed that it followed from the case-law that it is only where the irregularity committed by the Commission was capable of actually compromising the rights of defence of the undertaking involved in the administrative procedure that such an irregularity could lead to the annulment of the Commission's final decision. In the present case, apart from the fact that it cannot be inferred from that judgment that the Commission is required, as the applicant asserts, to take measures of investigation with respect to an undertaking before issuing a statement of objections where it considers that it otherwise has information that justifies issuing the statement of objections, it must be held that the applicant has put forward no specific element establishing that it was thereby deprived of the opportunity to adduce evidence that it did not exercise decisive influence over Arkema France.

148 Third, as regards the argument that the Commission breached its 'Best Practices' code by not addressing any investigative measure to the applicant, it must be held that that code, which, in accordance with paragraph 5 thereof, is to apply only to ongoing and future cases at the time of its publication in the *Official Journal of the European Union*, was adopted after the contested decision and is therefore not applicable to

the facts of the present case. Furthermore, and in any event, it must be observed that paragraph 14 of that code provides, with reference to *AC-Treuhand* v *Commission*, paragraph 126 above, paragraph 56, that, '[a]t the moment of the first investigative measure addressed to them (normally a request for information or an inspection), undertakings are informed of the fact that they are subject to a preliminary investigation as well as about the subject-matter and purpose of such investigation'. Therefore, without there being any need to adjudicate on the legal scope of that code, it must be held, in any event, that it imposes no obligation on the Commission to address investigative measures to undertakings before adopting the statement of objections.

149 Accordingly, the applicant's first complaint must be rejected as unfounded.

150 As regards the applicant's second complaint, that the Commission breached its rights of defence in so far as it did not carefully examine all the elements of the body of indicia which the applicant had submitted in order to rebut the presumption of the exercise of decisive influence, it must be held, first, that, as the Commission observes, the applicant does not identify any element of fact or of law referred to in the contested decision with respect to which it was unable to provide an explanation in its response to the statement of objections. Second, it is appropriate to refer to recitals 397 to 415 to the contested decision to find that the Commission answered in a substantiated and exhaustive manner the arguments raised by Arkema France and the applicant in their observations in response to the statement of objections. Consequently, the Commission cannot be criticised for having breached the applicant's rights of defence in that regard.

151 Accordingly, the applicant's second complaint, and also the first part of the plea in its entirety, must be rejected as unfounded.

Second part, alleging breach of the principle of equality of arms

— Arguments of the parties

152 The applicant claims that the Commission breached the principle of equality of arms. That breach is, in the present case, the consequence of the fact that, instead of adducing specific elements that would permit different light to be shed on the facts of the case as revealed by the body of indicia which the applicant supplied, the Commission merely put forward new assumptions and presumptions, although, in accordance with the case-law, the applicant had provided a different plausible explanation for the facts from that used by the Commission.

153 At the hearing the applicant further submitted that the fact that the Commission failed to carry out an investigation with respect to the applicant entailed a breach of the principle of equality of arms, in so far as it would have been able to 'keep the evidence' and 'protect itself against an accusation that it interfered with its subsidiary'.

154 The Commission contests the applicant's arguments.

— Findings of the Court

155 The applicant claims, in substance, that the Commission breached the principle of equality of arms, in so far as, when it had provided a body of indicia constituting a plausible explanation for the fact that Arkema France exercised its activity autonomously, it was then for the Commission to adduce specific evidence corroborating the presumption of the exercise of decisive influence.

156 It should be borne in mind that the principle of equality of arms, just like, among others, the adversarial principle, is no more than a corollary of the very concept of a fair hearing (see, by analogy, Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 31; Case C-89/08 P *Commission* v *Ireland and Others* [2009] ECR I-11245, paragraph 50; and Case C-197/09 RX-II *M* v *EMEA* [2009] ECR I-12033, paragraphs 39 and 40). It implies, in particular, that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (see Eur. Court HR, *Dombo Beheer BV v. the Netherlands*, judgment of 27 October 1993, Series A no. 274, § 33; *Ernst and Others v. Belgium*, no. 33400/96, § 60; and *Vezon v. France*, no. 66018/01, § 31).

157 In the present case, contrary to the applicant's contention, the applicant was not placed at a substantial disadvantage vis-à-vis the Commission as a result of the Commission's application of the presumption of the exercise of decisive influence on the basis of the capital links with Arkema France.

158 Since, as established at paragraph 57 above, the Commission was correct to presume that the applicant exercised decisive influence over Arkema France, on the basis of the fact that it held virtually all the shares in that undertaking, and, as is clear from the findings set out at paragraphs 139 and 140 above, it was open to the applicant, in its observations in response to the statement of objections and at the hearing before the hearing officer, to submit all the elements of law and of fact in order to rebut that presumption, the Commission did not breach the principle of equality of arms in the present case.

159 The argument which the applicant raised at the hearing that the Commission breached the principle of equality of arms in that the applicant would, if an investigation had been undertaken against it, have been able to 'keep the evidence' that Arkema France acted autonomously and thus to 'protect itself against an accusation that it interfered with its subsidiary' must be rejected as unfounded. It must be borne in mind, first of

all, that the applicant, which was the parent company of Arkema France when the Commission sent that undertaking a request for information, on 10 September 2004, was able from that date to gather any evidence of its subsidiary's autonomy. Furthermore, the applicant's argument in that regard is not supported by any specific element establishing that evidence that might have been of use to its defence disappeared or that the contested decision might have been different if a measure of investigation had been addressed to it before the statement of objections. Last, and in any event, that argument does not invalidate the conclusion, set out at paragraph 158 above, that it was open to the applicant, in the context of its observations in response to the statement of objections and at the hearing before the hearing officer, to submit all the elements of law and of fact that would have served to rebut the presumption of the exercise of decisive influence.

160 The second part of the second plea must therefore be rejected as unfounded.

Third part, alleging breach of the presumption of innocence

— Arguments of the parties

161 The applicant maintains that the Commission breached the presumption of innocence, a fundamental right guaranteed by the EC Treaty and by Article 6(2) of the ECHR.

162 In the first place, the applicant observes that, at recitals 409 to 411 to the contested decision, the Commission imposed a sanction on the applicant for an infringement of Article 81 EC, on the basis of a presumption which was not supported by any specific element and which led the Commission to disregard the evidence to the contrary which the applicant had adduced. Such a formal finding of liability is based on mere allusions, which this Court condemned in Joined Cases T-22/02 and T-23/02 *Sumitomo Chemical and Sumika Fine Chemicals* v *Commission* [2005] ECR II-4065, paragraph 106.

163 First of all, the Commission was required to establish the guilt of, on the one hand, Arkema France and, on the other, the applicant, specifically and separately. Next, and in any event, the applicant's guilt was not established, since its liability was established in breach of the rules governing the imputation of liability for an infringement to a parent company and also in breach of the applicant's rights of defence.

164 Last, at the hearing the applicant observed that the failure to undertake an investigation against it shows that the Commission acted on the basis of a prejudice. The applicant maintains that the contested decision is based on that prejudice, which 'endured on account of the procedure before the Commission, which [is] wholly unacceptable today in the light of the requirements of the Charter of Fundamental Rights of the European Union', in so far as the final decision is adopted by an institution which is at the same time 'responsible for the investigation, the prosecution and the decision'.

165 In the second place, the applicant contends that, in automatically applying to it the presumption of the exercise of decisive influence, the Commission imposed on it an irrebuttable presumption of guilt, which constitutes a *probatio diabolica* and is unacceptable. The applicant observes that, according to the case-law of the European Court of Human Rights, every presumption must be confined within reasonable limits which maintain the rights of the defence (see Eur. Court HR, *Salabiaku v. France*, paragraph 110 above, § 28, and *Janosevic v. Sweden*, no. 34619/97, § 101). Next, under

the Community case-law, any systematic use of presumptions of guilt must be precluded and any presumption of guilt must be capable of being rebutted effectively by the person to whom it is applied.

166 The Commission contests the applicant's arguments.

— Findings of the Court

167 The applicant claims, in substance, that there has been a breach of the presumption of innocence, in so far as the Commission imposed a penalty on it for an infringement committed by Arkema France without corroborating the presumption of the exercise of decisive influence and without having regard to the body of indicia which it had adduced that was, in the applicant's submission, capable of rebutting that presumption, and also by breaching its rights of defence.

168 According to the case-law, the presumption of innocence implies that every person accused is presumed to be innocent until his guilt has been established according to law. It thus precludes any formal finding and even any allusion to the liability of an accused person for a particular infringement in a final decision unless that person has enjoyed all the usual guarantees accorded for the exercise of the rights of the defence in the normal course of proceedings resulting in a decision on the merits of the case (Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse* v *Commission* [2007] ECR II-4225, paragraph 76).

169 In the present case, it is common ground that the infringement in question was acknowledged by the applicant's subsidiary. Next, as observed at paragraph 57 above, the Commission was correct to presume in the contested decision that the applicant

was liable for the conduct of its subsidiary on account of the fact that it held more than 97 % of the subsidiary's shares. In so far as, as stated at paragraph 107 above, the applicant has not rebutted the presumption of the exercise of decisive influence, the Commission was therefore correct to impute to the applicant liability for the infringement in question.

170 Furthermore, as observed in the context of the examination of the first part of the second plea, alleging breach of the applicant's rights of defence (see paragraphs 139 and 140 above), the applicant was put in a position to make known its point of view, during the administrative procedure, on the reality and relevance of the facts and circumstances alleged by the Commission in the statement of objections, both in its observations in response to the statement of objections and at the hearing before the hearing officer, so that it enjoyed all the usual guarantees accorded for the exercise of the rights of the defence in the normal course of proceedings resulting in a decision on the merits of the case.

171 Last, as stated in the context of the examination of the fifth part of the first plea (see paragraph 121 above), the fact that the applicant did not, in the present case, adduce evidence capable of rebutting the presumption of the exercise of decisive influence does not mean that that presumption cannot be rebutted in any circumstances and that, as the applicant also observes, the Commission imposed on it an irrebuttable presumption of guilt, which constitutes a *probatio diabolica*, or that it imposed a penalty on the applicant solely on the basis of a 'prejudice' which the applicant did not have the opportunity to rebut.

172 It follows that the Commission did not breach the presumption of innocence by presuming that the applicant exercised decisive influence over its subsidiary.

173 Furthermore, in so far as the applicant maintained at the hearing, in substance, that the presumption of innocence, as recognised in the Charter of Fundamental Rights of the European Union, was breached in the present case, since the Commission is an institution responsible for 'the investigation, the prosecution and the decision', it must be stated that, as the Commission asserted orally, that complaint was submitted out of time, since it was formulated for the first time at the hearing stage and since it cannot be regarded as amplifying the present plea as submitted in the application, according to which the presumption of the exercise of decisive influence on which the Commission relied in the contested decision is contrary to the presumption of innocence. This complaint must therefore be rejected as inadmissible, in accordance with Article 48(2) of the Rules of Procedure of the General Court.

174 Accordingly, the third part of the second plea must be rejected as unfounded in part and as inadmissible in part.

Fourth part, alleging breach of the principle of liability for personal acts and the principle that penalties should be applied only to the offender

— Arguments of the parties

175 The applicant claims that the Commission breached the principle of personal liability and its corollary, the principle that penalties should be applied only to the offender, first, by accepting the existence and the liability of the alleged undertaking formed by the applicant and Arkema France and, second, by ordering the applicant to pay, first, a fine imposed on it jointly and severally with Arkema France and, second, a fine in the applicant's personal capacity, when the Commission ought to have acknowledged the existence of two separate economic entities in the absence of specific elements capable of corroborating the presumption of the exercise of decisive influence. The breach of those principles is confirmed by recitals 313 and 315 to the contested decision,

which refer to the concepts of perpetrator and co-perpetrator of the infringement. The Commission thus wrongly characterised the applicant as a co-perpetrator of the infringement in question.

176 The Commission contests the applicant's arguments.

— Findings of the Court

177 The applicant claims, in substance, that in imputing to it liability for the infringement in question, the Commission breached the principle of liability for personal acts and the principle that penalties should be applied only to the offender.

178 Under the principle that penalties should be applied only to the offender, a natural or legal person may be penalised only for acts imputed to it individually (Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 63), and that principle applies in any administrative procedure that may lead to the imposition of sanctions under competition law (Case T-304/02 *Hoek Loos* v *Commission* [2006] ECR II-1887, paragraph 118).

179 However, as is clear from the case-law set out at paragraphs 45 to 50 above, that principle must be reconciled with the concept of undertaking within the meaning of Article 81 EC. Thus, where the economic entity infringes the competition rules, it must, according to the principle of personal liability, answer for that infringement.

180 As already stated at paragraph 105 above, however, it is not a relationship between the parent company and its subsidiary in which the parent company instigates the infringement or, a fortiori, the parent company's involvement in the infringement, but the fact that they constitute a single undertaking for the purposes of Article 81 EC that enables the Commission to address the decision imposing fines to the parent company of a group of companies (see, to that effect, *Michelin* v *Commission*, paragraph 55 above, paragraph 290). Accordingly, the applicant was personally condemned for an infringement which it is deemed to have committed itself because of its economic and legal links with Arkema France, which enabled it to determine the latter's conduct on the market.

181 It follows that the imputation to the applicant of liability for the infringement in question does not breach the principle that penalties should be applied only to the offender.

182 In that regard, the applicant's argument that it follows from recitals 313 and 315 to the contested decision that the Commission was wrong to regard the applicant as the perpetrator or co-perpetrator of the infringement must be rejected as unfounded. Apart from the fact that, in those recitals, the Commission does not characterise the applicant in such terms, it follows clearly from a reading of, in particular, recitals 367 to 375, 386, 387, 396 and 415 to the contested decision, taken together, that the Commission considered that, in so far as the applicant exercised decisive influence over Arkema France and the two companies therefore constituted an undertaking within the meaning of Article 81 EC, those companies constituting the undertaking, within the meaning of Article 81 EC, that had committed the infringement should be held liable for the infringement.

183 Accordingly, the fourth part of the second plea must be rejected as unfounded.

Fifth part, alleging breach of the principle that penalties must be strictly defined by law

— Arguments of the parties

184 The applicant claims that, in breaching the principle of personal liability and the principle that penalties should be applied only to the offender, the Commission breached the principle that penalties must be strictly defined by law. The applicant maintains that it was condemned in spite of the absence of any legal provision imposing a penalty for an infringement that has not been established against an undertaking. First, Article 23(2) of Regulation No 1/2003 authorises the Commission solely to impose penalties on undertakings 'which participate in [an] infringement'; and, second, the Guidelines provide that the Commission's power to impose sanctions should be exercised only 'within the limits laid down [in Regulation No 1/2003]'.

185 The Commission contests the applicant's arguments.

— Findings of the Court

186 The applicant claims, in substance, that the Commission breached the principle that penalties must be strictly defined by law by imposing a penalty on it, when Article 23(2) of Regulation No 1/2003 and the Guidelines make no provision for such a penalty.

187 According to the case-law, the principle that penalties must be strictly defined by law requires that legislation must clearly define offences and the penalties which they attract. That condition is satisfied where the individual concerned is in a position, on the basis of the relevant provision and if need be with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable (*Evonik Degussa* v *Commission and Council*, paragraph 130 above, paragraph 39).

188 It should be observed that, under Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003, the Commission may by decision impose fines on undertakings which infringe, in particular, Article 81 EC.

189 In the present case, regard being had to the provisions cited at paragraph 188 above, and in so far as the applicant and its subsidiary Arkema France were considered to form an undertaking within the meaning of Article 81 EC, the Commission was able, without committing a breach of the principle that penalties must be strictly defined by law, to impose, in accordance with the case-law set out at paragraph 50 above, a fine on the legal persons forming part of that undertaking.

190 Accordingly, the fifth part of the second plea must be rejected as unfounded.

Sixth part, alleging breach of the principle of equal treatment

— Arguments of the parties

191 The applicant maintains that the principle of equal treatment, according to which, in accordance with the case-law, comparable situations must not be treated differently, has been breached in the present case in two ways.

192 In the first place, the applicant claims that the Commission breached the principle of equal treatment in so far as, in the Organic Peroxides decision, liability for the

infringement in which Arkema France had participated had not been imputed to the applicant, although at the time of the facts at issue in that decision the Elf Aquitaine group was run in the same way as at the time of the facts at issue in the contested decision. The applicant adds, in that regard, that the Commission has also breached the principle of legal certainty.

193 In particular, the applicant observes that the Commission's arguments that the fact that it did not previously impute liability for the infringement in question to the applicant does not prevent it from imputing such liability in the contested decision, that it enjoys a wide discretion in relation to fines and that it is not bound by its own practice in taking decisions must be rejected. It is incoherent that, in identical situations, the Commission may or may not impute liability for an infringement to the applicant; and such a power does not fall within the discretion conferred on the Commission to ensure the effective application of the competition rules, but is simply arbitrary and not amenable to review by the European Union judicature.

194 In the second place, the applicant maintains that the principle of equal treatment of, on the one hand, itself and, on the other, Akzo Nobel and ELSA has been breached. In that regard, the applicant observes that at recitals 378 to 382 and 481 to 483 to the contested decision, although the Commission applies a body of specific indicia in order to corroborate the presumption of the exercise of decisive influence vis-à-vis EKA and ELSA, it dispenses with producing specific indicia vis-à-vis the applicant for the purpose of imputing to it the infringement committed by Arkema France. There is no justification for such different treatment.

195 The Commission contests the applicant's arguments.

— Findings of the Court

196 According to settled case-law, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 56 and the case-law cited).

197 As regards the applicant's first complaint, that the Commission breached both the principle of equal treatment and the principle of legal certainty, in so far as it did not impute liability to the applicant for the infringement at issue in the Organic Peroxides decision, it must be rejected as unfounded. Since, between adopting the Organic Peroxides decision and adopting the contested decision, the Commission had already imputed to the applicant liability for the infringements found in three decisions, namely the MCAA decision, the Hydrogen Peroxide decision and the Methacrylates decision, the applicant could not be unaware of the conditions on which such liability was imputed. Furthermore, it should be borne in mind that, as stated at paragraph 60 above, since the Commission is able, but under no obligation, to impute liability for the infringement to a parent company and since the conditions on which such liability may be imputed were met in the present case, the mere fact that the Commission did not impute such liability in the Organic Peroxides decision did not mean that it was under an obligation to make the same assessment in the contested decision.

198 In addition, the applicant's argument that the fact that the Commission has a discretion which allows it to impute an infringement committed by a subsidiary to its parent company is arbitrary must be rejected as unfounded. Although, in accordance with the case-law cited at paragraph 60 above, the Commission has a discretion to decide whether it is appropriate to impute liability for an infringement to a parent company, the fact none the less remains that its decision to impute such liability does

not, as in the present case, escape review by the European Union judicature, to which it falls to determine that the conditions of such imputation are met.

199 The applicant's first complaint must therefore be rejected as unfounded.

200 As regards the applicant's second complaint, that it was given discriminatory treatment in the contested decision by comparison with Akzo Nobel and ELSA, in so far as, unlike in their case, the Commission dispensed with adducing specific elements vis-à-vis the applicant for the purpose of imputing to it liability for the infringement in issue, it must be rejected as unfounded.

201 First, that complaint is based on a misreading of the contested decision. Just as the Commission put forward additional indicia to corroborate the presumption that Akzo Nobel exercised decisive influence over its subsidiary EKA (recital 378 to the contested decision) and that ELSA did likewise over its subsidiary Finnish Chemicals (recital 481 to the contested decision), the Commission also put forward indicia designed to corroborate the presumption that the applicant exercised decisive influence over Arkema France (recital 386 to the contested decision).

202 Second, even if, in the contested decision, the Commission had corroborated the presumption of the exercise of decisive influence only with respect to Akzo Nobel and its subsidiary EKA, and also with respect to ELSA and its subsidiary Finnish Chemicals, but not with respect to the applicant and its subsidiary, that would not affect the legality of that decision. As follows from the assessment set out at paragraph 77 above, the Commission was not required to corroborate that presumption, regard being had to the fact that the applicant held virtually all the shares in its subsidiary. Accordingly, even on the assumption that those undertakings were in a comparable situation, the fact that the Commission decided to corroborate the presumption of the exercise of

decisive influence with respect to only some of them is not liable to entail the annulment of the contested decision.

203 Accordingly, the applicant's second complaint, and the sixth part of the plea in its entirety, must be rejected as unfounded.

204 In so far as the six parts of the second plea must be rejected as unfounded in part, as inadmissible in part and as ineffective in part, that plea must be rejected in its entirety.

Third plea, alleging distortion of the body of indicia submitted by the applicant

Arguments of the parties

205 The applicant claims that the grounds set out by the Commission at recitals 400 to 404 to the contested decision for rejecting the elements of the body of indicia which it submitted show that the Commission distorted some of those indicia by using unsubstantiated extrapolations, assumptions and presumptions. Furthermore, the Commission's assertion at recital 404 to the contested decision that the facts of the case are in line with such presumptions supports the assertion that it distorted those indicia.

206 The Commission contests that argument.

Findings of the Court

207 First of all, it must be noted that, in support of this plea, the applicant puts forward no specific element to substantiate its assertion that the Commission distorted the body of indicia which it had submitted in order to rebut the presumption of the exercise of decisive influence. Next, in so far as the applicant maintains, in substance, that the Commission was wrong to consider that the body of indicia which the applicant had supplied did not rebut the presumption of the exercise of decisive influence, it must be held that that plea constitutes a reformulation of the fourth part of the first plea and it must therefore be rejected for the same reasons as those set out at paragraphs 95 to 107 above, where it was held that the body of indicia submitted by the applicant did not serve to rebut that presumption.

208 Accordingly, the third plea must be rejected as unfounded.

Fourth plea, alleging the existence of contradictions in the grounds of the contested decision

209 The applicant claims that the contested decision contains three contradictions which render it null and void. In answer to the questions put by the Court at the hearing, the applicant confirmed that it was relying in that regard on a failure to state reasons. This plea is divided into three parts.

First part, alleging a contradiction in the grounds of the contested decision with respect to the application of the concept of undertaking within the meaning of Article 81(1) EC

— Arguments of the parties

210 The applicant maintains that there is a contradiction in the grounds of the contested decision with respect to the application of the concept of undertaking within the meaning of Article 81(1) EC.

211 In the first place, the applicant observes that while it is apparent from recitals 1 and 320 to the contested decision that the Commission considered that the addressees of the decision were penalised because of their participation in the infringement in question, it inconsistently observes, at the same time, at recitals 69, 384 and 385 to the decision that the applicant never participated in the infringement in question.

212 In the second place, the applicant claims that the contested decision contains a contradiction in the grounds relating to the 'perimeter' of the undertaking, within the meaning of Article 81(1) EC, which the Commission applied.

213 First, the Commission defined, at recitals 16 and 385 to the contested decision, Arkema France as the sole undertaking liable for the infringement, whereas, at recitals 375 and 415 to the decision, it considered that it should impute the infringement committed by Arkema France to the applicant.

214 Second, there exist, in the contested decision, contradictions in the grounds devoted to the calculation of the two fines imposed on the applicant. In that regard, the applicant claims that the Commission imposes a personal fine on it in the contested decision, although it did not participate in the infringement and was not aware of it, and that the two fines imposed on it were calculated on the basis of parameters that were specific to Arkema France and over which the applicant was unable to exercise any influence.

215 The Commission contests the applicant's arguments.

— Findings of the Court

216 According to settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63 and the case-law cited, and *Hoek Loos* v *Commission*, paragraph 178 above, paragraph 58).

217 It is also settled case-law that, where a decision taken in application of Article 81 EC relates to several addressees and raises a problem with regard to liability for the infringement, it must include an adequate statement of reasons with respect to each of the addressees, in particular those of them who, according to the decision, must bear the liability for the infringement (Case T-38/92 *AWS Benelux* v *Commission* [1994]

ECR II-211, paragraph 26). Thus, in order to contain an adequate statement of reasons in regard to the parent companies of the subsidiaries which have committed the infringement, the Commission's decision must contain a detailed statement of reasons for imputing the infringement to those companies (see, to that effect, Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 80).

218 In the present case, without there being any need to examine each of the recitals to the contested decision on which the applicant relies, it must be held that it follows unambiguously from recitals 386 and 387 to the contested decision, set out at paragraph 41 above, that it was on the basis of the finding that the applicant and Arkema France constituted a single undertaking for the purposes of Article 81 EC that the Commission decided to impute the infringement committed by Arkema France to the applicant and to impose fines on it.

219 In fact, even if the contradictions in the grounds of the contested decision on which the applicant relies were established, the fact would none the less remain that the statement of reasons in that decision, first, enabled the applicant to ascertain the reasons why a finding of infringement was made against it and why the fines were imposed on it, which is established by the fact that the applicant challenges in its first two pleas the legality of the contested decision in so far as the Commission imputed to it liability for the infringement in question and in its eighth and ninth pleas the fact that a fine was imposed on the applicant jointly and severally with Arkema France and in its personal capacity and, second, enabled the Court to exercise its power of review.

220 Furthermore, in so far as the applicant claims that there is a contradiction in the grounds arising from the fact that the fines imposed on it in Article 2(c) and (e) of the contested decision were calculated on the basis of 'parameters that were specific' to Arkema France, that argument must be rejected as unfounded. It should be observed in that regard that, apart from the fact that the applicant has not stated in what way such a calculation of the fines is contradictory, the imposition of a personal fine and the fact that that fine is calculated on the basis of parameters specific to Arkema France follows directly from the application of the Guidelines and therefore calls for

no particular reasons to be stated in the contested decision. In those circumstances, the first part of the fourth plea must be rejected as unfounded.

Second part, alleging a contradiction in the grounds of the contested decision with respect to the applicant's knowledge of the infringement in question

— Arguments of the parties

221 The applicant claims that there is a contradiction in the grounds of the contested decision with respect to the knowledge which it could have had of the infringement committed by Arkema France. The Commission first asserts in the contested decision that the applicant was necessarily aware of the activity of Arkema France owing to the presence of the same individuals within the applicant's and Arkema France's staff and then contradicts itself by stating, at recital 401 to the contested decision, that the applicant may not have been aware of the anti-competitive activities of its subsidiary.

222 The Commission contests the applicant's arguments.

— Findings of the Court

223 In so far as the applicant maintains that certain grounds of the contested decision are contradictory as to the applicant's knowledge of the infringement in question, it

must be stated that, even if such contradictions were established, that would have no impact on the fact that, since Arkema France and the applicant constituted a single undertaking for the purposes of Article 81(1) EC, the Commission could, in accordance with the case-law set out at paragraphs 45 to 55 above, impute liability for the infringement in question to the applicant, irrespective of the fact that it was aware of or participated directly in that infringement, which the Commission was not required to establish. Accordingly, any contradiction in the grounds of the contested decision in that regard has no impact in any event on the lawfulness of the contested decision.

224 Accordingly, the second part of the fourth plea must be rejected as ineffective.

Third part, alleging a contradiction in the grounds of the contested decision with respect to the nature of the control which a parent company exercises over its subsidiary in order to be imputed with the infringement committed by the subsidiary

— Arguments of the parties

225 The applicant claims that there is a twofold contradiction in the grounds of the contested decision.

226 In the first place, the applicant observes that the Commission correctly asserts, at recital 407 to the contested decision, that the imputation to a parent company of liability for an infringement is subject to proof of the exercise of effective control by the parent company over the commercial policy of its subsidiary. Yet the Commission's examination of the body of indicia submitted by the applicant, as is apparent from

recitals 403 and 404 to the contested decision, shows that the Commission extended the scope of that effective control by the applicant beyond its subsidiary's commercial policy.

227 In the second place, the applicant maintains that recitals 403 and 404 to the contested decision contradict recital 413 to that decision, where the Commission maintains that it relied in the Hydrogen Peroxide decision solely on a presumption that the applicant exercised decisive influence over its subsidiary's commercial policy.

228 The Commission contests the applicant's arguments.

— Findings of the Court

229 By its two complaints, the applicant claims, in substance, that there are contradictions in the grounds of the contested decision with respect to the nature of the control that a parent company must exercise over its subsidiary in order for the Commission to be able to impute liability for an infringement to the parent company.

230 In the present case, it must be held that, even if the contradictions in the grounds of the contested decision were established, they would have no impact on the finding that the Commission did not breach its obligation to state reasons in that regard, since, first, as is clear upon examining the fourth part of the first plea (see paragraphs 95 to 107 above), the applicant was put in a position to ascertain the grounds that led the Commission to conclude that the indicia which the applicant had submitted did not serve to rebut the presumption of the exercise of decisive influence and, accordingly,

to challenge the lawfulness of the contested decision and, second, the Court was able to exercise its power of review.

231 Accordingly, the third part of the fourth plea must be rejected as unfounded and the fourth plea must be rejected in its entirety as unfounded in part and ineffective in part.

Fifth plea, alleging breach of the principle of sound administration

Arguments of the parties

232 The applicant claims, in substance, that the Commission breached the principle of sound administration.

233 In the first place, the Commission did not examine carefully and impartially all the relevant elements of fact and, in particular, the information which the applicant had supplied to it in its observations in response to the statement of objections, which established clearly and precisely Arkema France's economic autonomy on the market. Nor did the Commission carry out an individual and specific examination of the applicant's situation.

234 In the second place, the principle of sound administration requires that the Commission apply to undertakings the rules which it applies to itself. However, at recital 358 to the contested decision the Commission observed that it was entitled to rely on a number of indicia to establish an infringement although it de facto denies that mode

of proof to the applicant in the present case. The applicant refers to the fourth and fifth parts of the first plea in that regard.

235 In the third place, the applicant claims that, contrary to the Commission's assertion at recital 314 to the contested decision, the principle of sound administration requires, as the applicant stated in its observations in response to the statement of objections, that the Commission suspend adoption of the contested decision pending the decision of this Court in the actions which it had brought against the MCAA decision, the Hydrogen Peroxide decision and the Methacrylates decision. The applicant observes, in that regard, that the fact that the applicant is obliged to bring a new action for annulment against a Commission decision may be contrary to the requirement of procedural economy, as this Court held in Case T-36/99 *Lenzing* v *Commission* [2004] ECR II-3597.

236 The Commission contests the applicant's arguments.

Findings of the Court

237 According to settled case-law, where the European Union institutions have a power of appraisal in order to be able to fulfil their tasks, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14; Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 86; and Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881, paragraph 99).

238 In the present case, the Court must examine each of the three complaints whereby the applicant seeks to establish that the Commission breached the principle of sound administration.

239 In the first place, as regards the applicant's complaint that the Commission did not examine carefully and impartially the indicia which it had submitted in order to rebut the presumption of the exercise of decisive influence and did not examine the applicant's specific situation, it must be rejected as unfounded. Apart from the fact that the applicant puts forward no specific argument or evidence to substantiate that complaint, it follows from recitals 396 to 415 to the contested decision that the Commission examined and expressly rejected the arguments which the applicant put forward in order to rebut that presumption.

240 In the second place, as regards the applicant's complaint that, in substance, the Commission breached the principle of sound administration in so far as, in the present case, it rejected de facto the mode of proof by a body of indicia to rebut the presumption of the exercise of decisive influence, even though the Commission employed such a mode of proof, it must be rejected as unfounded. It must be stated, in that regard, that, as set out in the context of the fourth part of the first plea (see paragraphs 95 to 107 above), it was after examining the elements of the body of indicia submitted by the applicant that the Commission considered that they were not capable of rebutting the presumption of the exercise of decisive influence. The Commission therefore did not breach the principle of sound administration in that regard.

241 In the third place, as regards the applicant's complaint that the Commission ought, in accordance with the principles of sound administration and procedural economy, to have suspended the procedure brought against the applicant in the present case pending the decision of this Court in the actions which it had brought against the MCAA decision, the Hydrogen Peroxide decision and the Methacrylates decision, it must be rejected as unfounded. It must be held, first of all, that, apart from the fact that the Commission's decisions are presumed to be lawful, until such time as they are

annulled or withdrawn (Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 48), there is no legal provision that requires that the Commission suspend the adoption of decisions in cases relating to different facts. Furthermore, contrary to the applicant's assertion, it does not follow from *Lenzing* v *Commission*, paragraph 235 above, paragraph 56, that the Commission was required, in the present case, for reasons of procedural economy, to suspend the adoption of the contested decision pending the decision of this Court in the actions which the applicant had brought against other decisions imposing fines on it. In fact, at paragraph 56 of that judgment, this Court considered, in substance, that when a decision forming the subject-matter of an action has been amended, the parties may be authorised to adjust the form of order sought to take account of this new fact which has come to light, since '[i]t would be contrary to the proper administration of justice and to a requirement for procedural economy to make the applicant lodge a new application before the Court for annulment' in such circumstances.

242 Accordingly, the applicant's third complaint, and the fifth plea in its entirety, must be rejected as unfounded.

Sixth plea, alleging breach of the principle of legal certainty

Arguments of the parties

243 The applicant claims, in substance, that the contested decision seriously jeopardises the legal certainty which it was entitled to expect, in the light of the consistent case-law which it invoked in the context of the first plea.

244 In the first place, the imputation to the applicant in the contested decision of liability for the infringement in question is based on a criterion that is as novel as it is incomprehensible, which depends on the Commission's goodwill in the absence of any specific evidence of any involvement by the parent company in its subsidiary's commercial policy.

245 In the second place, the Commission, in the contested decision, for the first time, and without any legal basis, ordered the applicant to pay two separate but cumulative fines, one of which is personal to the applicant, for the same facts.

246 In the third place, the applicant contends, as it has already done in the context of the first part of the fourth plea, that, in so far as the links between it and Arkema France are the same in the present case and in the case in which the Commission adopted the Organic Peroxides decision, it is incomprehensible that the Commission adopted wholly different solutions in those two cases.

247 The Commission contests those arguments.

Findings of the Court

248 As regards, in the first place, the applicant's complaint that the Commission has breached the principle of legal certainty, since it decided to impute to the applicant liability for the infringement in question on the basis of a 'novel' and 'incomprehensible' criterion, it must be rejected as unfounded. First, as stated at paragraph 197 above, the Commission, before adopting the contested decision, imputed to the applicant liability for the infringements penalised in three decisions, namely the MCAA

decision, the Hydrogen Peroxide decision and the Methacrylates decision. Accordingly, the applicant cannot properly claim that it was not aware of the conditions in which liability for an infringement would be imputed to a parent company. Second, and in any event, as is apparent from the case-law set out at paragraphs 45 to 55 above, the presumption of the exercise of decisive influence on which the Commission relied in the contested decision in order to penalise the applicant is neither 'novel' nor 'incomprehensible'.

249 As regards, in the second place, the applicant's complaint that the Commission breached the principle of legal certainty by ordering it, for the first time, and without any legal basis, to pay two separate but cumulative fines, one of which is imposed on the applicant personally, for the same facts, it must be stated, first of all, that, in accordance with the penalties provided for in Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003, the Commission may, by decision, impose fines on undertakings which infringe Article 81 EC. It is established that the object of the penalties provided for in Article 15 of Regulation No 17 and Article 23 of Regulation No 1/2003 is to suppress illegal activities and to prevent any recurrence (see Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraph 218 and the case-law cited).

250 According to the case-law, it falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking (Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 78).

251 For the purposes of their application and their implementation, decisions adopted under Article 81 EC must, however, be addressed to entities having legal personality (see, to that effect, *Akzo Nobel and Others* v *Commission*, paragraph 45 above, paragraph 59, and *PVC II*, paragraph 60 above, paragraph 978). Thus, when the Commission adopts a decision pursuant to Article 81(1) EC, it must identify the natural

or legal person or persons, who may be held liable for the conduct of the undertaking in question and who may be penalised on that basis, to whom the decision will be addressed (see, to that effect, Case 170/83 *Hydrotherm Gerätebau* [1984] ECR 2999, paragraph 11).

252 Furthermore, it must be borne in mind that the Guidelines on setting fines which the Commission adopts ensure legal certainty on the part of undertakings, since they determine the method which the Commission has bound itself to use for the purposes of setting fines (see, to that effect, Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, 'the judgment of the Court of Justice in *Groupe Danone* v *Commission*', paragraph 23). The administration may not depart from those Guidelines in an individual case without giving reasons that are compatible with the principle of equal treatment (Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 91).

253 According to points 9 to 11 of the Guidelines, the setting of fines is done in two steps. First, in accordance with points 12 to 26 of the Guidelines, the Commission must determine a basic amount of the fine, which is set on the basis of a percentage of the value of sales by the undertakings concerned multiplied by the number of years of their participation in the cartel, to which is added a sum corresponding to a percentage of the value of those sales in order to deter them from participating in cartels. Second, in accordance with points 27 to 29 of the Guidelines, the Commission may take into account circumstances that result in a reduction or an increase in the amount of the fine. Point 28 of the Guidelines states, in particular, that, in substance, repeated infringement may result in an increase of 100 % of the basic amount of the fine for each infringement of the same or similar type previously found. Furthermore, points 30 and 31 of the Guidelines provide, in certain circumstances, for an additional increase in the amount of the fine. In particular, according to point 30 of the Guidelines, '[t]he Commission will pay particular attention to the need to ensure that fines have a

sufficiently deterrent effect' and 'to that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates'. In that regard, it should be borne in mind that this Court has held that, in so far as an undertaking whose worldwide turnover is much higher than that of the other members of the cartel is more readily able to raise the necessary funds to pay its fine, the Commission is entitled to increase the fine on that basis in order to ensure that it has a sufficiently deterrent effect on that undertaking (see, to that effect, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraph 241).

254 In the present case, first, it should be observed that, as is clear from paragraphs 18 to 23 above, the Commission, in the contested decision, in accordance with the provisions of the Guidelines, the terms of which are summarised at paragraph 253 above, imposed a fine, first, in the amount of EUR 22 700 000 on Arkema France and the applicant jointly and severally, which corresponds to the basic amount of the fine (see Article 2(c) of the contested decision), second, in the amount of EUR 20 430 000 on Arkema France alone, which corresponds to an increase of 90 % of the basic amount of the fine for repeated infringement (Article 2(d) of the contested decision) and, third, in the amount of EUR 15 890 000 on the applicant alone (see Article 2(e) of the contested decision), which corresponds to an increase of 70 % of the basic amount of the fine to reflect the size of its turnover beyond the sales of the products to which the infringement relates.

255 Second, it must be emphasised that, while the applicant and Arkema France formed an undertaking within the meaning of Article 81 EC at the time of the infringement in question, that undertaking no longer existed at the time of the adoption of the contested decision, since, as explained at paragraph 1 above, Arkema France was no longer controlled by the applicant as from 2006.

256 In those circumstances, it was in accordance with Article 23(2) of Regulation No 1/2003 that the Commission was able, first, to impose a fine on the applicant and Arkema France jointly and severally, since they were, at the time of the facts at issue, the two companies that formed the undertaking, within the meaning of Article 81 EC, and had to answer for the infringement in question, and, second, in order to take account of the circumstance set out at paragraph 255 above, to impose an increase of the basic amount of the fine under point 30 of the Guidelines on the applicant alone, whose turnover, as the Commission correctly stated at recitals 548 and 549 to the contested decision, was on the date of adoption of the contested decision particularly large by comparison with the other entities penalised and could thus more readily raise the necessary funds to pay a fine.

257 Accordingly, in imposing a fine jointly and severally on Arkema France and the applicant, which it then increased by 70 % for the applicant alone, the Commission acted in accordance with the power to set fines conferred on it by Article 23(2) of Regulation No 1/2003 and which it bound itself to apply in accordance with the provisions of the Guidelines. The applicant's complaint that the Commission breached the principle of legal certainty by ordering it, without any legal basis for doing so, to pay two separate but cumulative fines must therefore be rejected as unfounded.

258 As regards, in the third place, the applicant's complaint that the Commission breached the principle of legal certainty owing to the 'variable geometry reasoning' which it employed in the contested decision and in the Hydrogen Peroxide decision, it must be rejected as unfounded. Apart from the fact that, in those two decisions, the Commission imputed liability for the infringements in question to the applicant in the same way, on the basis of the presumption of the exercise of decisive influence, it must be borne in mind in any event that, as is clear from the case-law set out at paragraph 60 above, even if the Commission had not imputed such liability in a previous decision, that did not in any way prevent it from doing so in a subsequent decision.

259 Accordingly, the sixth plea must be rejected as unfounded.

Seventh plea, alleging misuse of powers

Arguments of the parties

260 The applicant claims that, in imputing to it liability for the infringement in question and ordering it to pay two cumulative fines, the Commission misused its powers under Regulation No 1/2003. The penalties imposed on the applicant were diverted from their legitimate objective under that regulation, since the Commission sought to maximise the penalty imposed on an undertaking other than the applicant, in fact its subsidiary, which acknowledged its liability for the infringement in question.

261 The Commission contests that argument.

Findings of the Court

262 It has consistently been held that a decision is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken for the purpose of achieving ends other than those stated (see Joined Cases T-133/95 and T-204/95 *IECC* v *Commission* [1998] ECR II-3645, paragraph 188 and the case-law cited).

263 First, in so far as the applicant claims, in substance, that the Commission misused its powers by imputing to it liability for the infringement in question, it must be borne in mind that, as examined in the context of the five parts of the first plea, the Commission was entitled to impute such liability, since Arkema France and the applicant formed a single undertaking for the purposes of Article 81 EC.

264 Second, in so far as the applicant claims, in substance, that the Commission misused its powers by imposing a personal fine on the applicant in Article 2(e) of the contested decision, it must be borne in mind that, as found in the context of the examination of the second complaint in the sixth plea (see paragraphs 249 to 257 above), it was pursuant to Article 23(2) of Regulation No 1/2003 and in accordance with point 30 of the Guidelines that the Commission increased the basic amount of the applicant's fine alone.

265 Accordingly, the seventh plea must be rejected as unfounded.

Eighth plea, alleging that the imposition of a personal fine on the applicant is unfounded

Arguments of the parties

266 The applicant claims, in substance, that the fine imposed on it in Article 2(e) of the contested decision is unfounded in law.

267 In the first place, the applicant contends that the fine of EUR 15 890 000 imposed on it has no basis in law and infringes a number of provisions and principles of Community law.

268 First, the imposition of a personal fine on the applicant is contrary to Article 81(1) EC and Article 23(2) of Regulation No 1/2003. In the absence of economic unity with Arkema France, the personal fine imposed on the applicant cannot be justified, since the applicant did not participate in the infringement in question. Furthermore, it is contradictory to maintain that the applicant and Arkema France form one and the same undertaking and to impose a personal sanction on the applicant, which amounts to acknowledging the existence of two undertakings within the same group. In addition, only direct participation in an infringement entails liability calling for a personal sanction. At the hearing the applicant also observed that such a fine resulted in its being penalised twice for the same infringement, which is contrary to the Charter of Fundamental Rights of the European Union.

269 Second, the imposition of a personal fine on the applicant breaches point 30 of the Guidelines, since that point refers only to the possibility of increasing 'the fine to be imposed on undertakings' and since, in the present case, the only 'relevant' undertaking is, within the Elf Aquitaine group, Arkema France.

270 Third, the applicant contends, first of all, that the personal fine imposed on it constitutes, in the absence of any legal basis, a breach of the principle of the presumption of innocence, the principle of the autonomy of legal persons, the principle of legality, the principle of liability for personal acts and the principle that penalties should be applied only to the offender. Furthermore, the Commission committed, in that regard, a second breach of the principle of legality, since point 30 of the Guidelines does not specify the parameters of the calculation of the 'specific increase of the fine for deterrence'. The 70 % increase of the amount of the fine imposed on the applicant therefore has no legal basis, in breach of the principle of legality, which requires that a measure

imposing sanctions must have a sufficient degree of precision. At the hearing the applicant also observed that the Guidelines did not in any event have the legal force of a legislative provision.

271 In the second place, the applicant claims that, in basing, at recitals 545 to 549 to the contested decision, the personal fine imposed on Arkema France on the alleged need to assure deterrence 'in consideration of the size of the undertaking's turnover beyond the sales of the goods or services to which the infringement relates', the Commission infringed Community law in two respects.

272 First, it is unfair to impose a personal fine on the applicant for deterrence, when that fine is calculated on the basis of the basic amount of the fine imposed on Arkema France, which already includes a specific increase for deterrence. Furthermore, the imposition of a personal fine on the applicant is irrelevant, since the undertaking formed, according to the Commission, by Arkema France and the applicant has no longer existed since 2006. In addition, although deterrence is a factor that the Commission may take into consideration when setting the amount of the fine, it does not constitute the legal basis of the fine itself.

273 Second, the applicant maintains that the Commission could not rely on the applicant's global turnover alone in order to impose a personal fine on the applicant and ought to have taken into consideration only the small proportion of the turnover of the product in question in the undertaking's global turnover in order to determine the amount of the fine. The applicant observes, in that regard, that according to the case-law the size of the global turnover of the undertaking is only an approximate and imperfect criterion for setting the amount of the fine. Since the applicant is not

present on the sodium chlorate market in the EEA its economic capacity to harm competition is zero.

274 In the third place, the applicant contends that the Commission was not entitled to refer to the Methacrylates decision to justify the need for a fine which had been imposed on it in its personal capacity, since that decision is at present the subject-matter of an action for annulment before this Court.

275 In the fourth place, the applicant claims that it is unfair to calculate the fine imposed on it in its personal capacity on the basis of the factors of gravity, duration and deterrence set out at recitals 511 to 523 to the contested decision, the parameters of which escape the applicant, since it was not aware of the infringement in question and could not influence those parameters.

276 In the fifth place, the contested decision did not take sufficient account of four factors when calculating the fine imposed on the applicant in its personal capacity. First of all, it ought to have taken into consideration the fact that the duration of Arkema France's involvement in the infringement in question was less than that of EKA and Finnish Chemicals. Next, the Commission ought to have taken into consideration the attenuating circumstance referred to at recital 401 to the contested decision, relating to the negligence which it is alleged to have displayed with respect to its subsidiary. In addition, account should be taken of the procedural irregularities constituting a breach of fundamental rights that are set out in the applicant's second plea. Last, the Commission ought to have taken account of Arkema France's cooperation during the administrative procedure.

277 In the sixth place, the imposition of a personal fine on the applicant breaches the principle of equal treatment, in two respects.

278 First, the applicant is the only parent company, among the other parent companies implicated in the contested decision, namely Akzo Nobel, ELSA and Uralita, to be given a personal fine for deterrence, although that fine is unfairly based on deterrence being taken into account twice.

279 Second, the applicant observes that it follows from recital 524 to the contested decision that the Commission rounded the basic amount of the fine imposed on Arkema France and the applicant downwards by only EUR 54 000, whereas the basic amounts of the fines imposed on Finnish Chemicals and EKA were rounded downwards by EUR 660 000 and EUR 213 500 respectively. It was on the basis of that first basic amount that the fine imposed on the applicant in its personal capacity was calculated.

280 The Commission contests the applicant's arguments.

Findings of the Court

281 The applicant disputes, in substance, the fine of EUR 15 890 000 which the Commission imposed on it in Article 2(e) of the contested decision. In that context, the applicant raises six complaints.

282 By its first complaint, the applicant puts forward three arguments relating to the lack of a legal basis on which the Commission could impose a personal fine on it.

283 First, in so far as the applicant maintains that the fine of EUR 15 890 000 imposed on it in Article 2(e) of the contested decision has no legal basis and infringes Article 81(1) EC and Article 23(2) of Regulation No 1/2003 in the absence of economic unity with Arkema France and that the imposition of that fine breaches point 30 of the Guidelines, since that point refers only to the possibility of increasing 'the fine to be imposed on undertakings' and since, in the present case, the only 'relevant' undertaking is, within the Elf Aquitaine group, Arkema France, it must be held that that argument constitutes a reformulation of the second complaint in the sixth and seventh pleas which should be rejected for the same reasons as those set out at paragraphs 249 to 257 and 264 above. It is in accordance with its power to set the amount of fines under Article 23(2) of Regulation No 1/2003 that the Commission bound itself to apply in accordance with the provisions of the Guidelines that the Commission imposed on the applicant an increase of 70 % of the basic amount of the fine, taking into account that at the date of adoption of the contested decision the applicant's particularly large turnover meant that it was more readily able to raise the funds necessary to pay the fine.

284 Second, as regards the applicant's argument that the imposition on it of the fine of EUR 15 890 000 breaches the principle of the presumption of innocence, the principle of autonomy of legal persons, the principle of liability for personal acts and the principle that penalties should be applied solely to the offender, it must be observed that, apart from the fact that the breaches to which it refers are not substantiated by any specific argument, that argument must be rejected for the same reasons as those set out in the context of the second part of the first plea (see paragraphs 69 to 73 above) and also in the context of the third (see paragraphs 167 to 174 above), fourth (see paragraphs 177 to 183 above) and fifth (see paragraphs 186 to 190 above) parts of the second plea. Since Arkema France and the applicant constituted a single undertaking for the purposes of Article 81 EC, the Commission did not breach the principle of autonomy of legal persons, the principle of the presumption of innocence, the principle of liability for personal acts and the principle that penalties should be imposed only on the offender by imposing on the applicant alone an increase of the basic amount of the fine on account of its particularly large turnover at the time of the adoption of the contested decision.

285 Third, as regards the applicant's argument that the breach of the principle of legality is all the more blatant in the present case because point 30 of the Guidelines does not state with a sufficient degree of precision that an increase of 70 % of the basic amount of the fine can be imposed in such circumstances, it must be borne in mind, first, that the Guidelines are not the legal basis for the setting of the fine, but merely provide more specific information about the application of Article 23(2) of Regulation No 1/2003 (see, by analogy, the judgment of the Court of Justice in *Groupe Danone* v *Commission*, paragraph 252 above, paragraph 28), and, second, that while the basic amount of the fine is set by reference to the infringement, the gravity of the infringement is determined by reference to many other factors, for which the Commission has a wide discretion (judgment of the Court of Justice in *Groupe Danone* v *Commission*, paragraph 252 above, paragraph 25). It is therefore pursuant to Article 23(2) of Regulation No 1/2003 and in accordance with point 30 of the Guidelines, which the Commission has bound itself to apply in the exercise of its discretion, that the Commission was able to impose on the applicant an increase of 70 % of the basic amount of the fine on account of the fact that, owing to its particularly large turnover, it was able to raise the funds to pay the fine more readily than the other undertakings penalised in the present case.

286 Accordingly, the Commission did not breach the principle of legality when it acted in the present case. The applicant's first complaint must therefore be rejected as unfounded.

287 By its second complaint, the applicant disputes, in substance, the amount of the personal fine imposed on it in Article 2(e) of the contested decision.

288 First, as regards the applicant's argument that, in substance, it is 'unfair' that a personal fine should be imposed on it for deterrence, when that fine is calculated by reference to the basic amount of the fine imposed jointly and severally on Arkema France

and the applicant, which already includes a specific increase for deterrence, it should be borne in mind that, as stated at recital 523 to the contested decision, the fine of EUR 22 700 000 imposed jointly and severally on the applicant and Arkema France corresponds to the basic amount of the fine, which includes an additional amount of 19 % of the value of Arkema France's sales (see paragraph 18 above), in accordance with point 25 of the Guidelines, 'in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements'. Conversely, the fine of EUR 15 890 000 imposed on the applicant alone corresponds to 70 % of the basic amount of the fine and is intended, in accordance with point 30 of the Guidelines, to 'ensure that fines have a sufficiently deterrent effect' for undertakings whose turnover, beyond the sales of goods or services to which the infringement relates, is particularly large.

289 Accordingly, it must be stated that, first, the additional amount of 19 % of the value of Arkema France's sales taken into consideration in the calculation of the basic amount of the fine, in accordance with point 25 of the Guidelines, and, second, the specific increase imposed on the applicant pursuant to point 30 of the Guidelines, correspond to two distinct objectives of deterrence, which the Commission was entitled to take into account when determining the fine to be imposed on the applicant. The applicant's argument in that regard must therefore be rejected as unfounded.

290 Second, in so far as the applicant maintains that the Commission ought to have taken into consideration only the small proportion which the turnover for the product at issue represented in the undertaking's global turnover in order to determine the amount of the personal fine imposed on it, it must be rejected as unfounded. As stated at point 30 of the Guidelines, it is precisely where the total amount of the turnover of the undertaking is 'particularly large' by reference to the value of the sales of the

goods to which the infringement relates that the Commission is entitled to impose an additional amount for deterrence.

291 Accordingly, the applicant's second complaint must be rejected as unfounded.

292 By its third complaint, the applicant maintains that the Commission was not entitled to refer to the Methacrylates decision in order to justify the need to impose a personal fine on it, since that decision currently forms the subject-matter of an action for annulment before this Court. In that regard, first, it should be observed that, as is clear from the case-law set out at paragraph 241 above, Commission decisions are presumed to be lawful so long as they have not been annulled or withdrawn. Accordingly, there is no legal provision that prevents the Commission from making reference to the Methacrylates decision in the contested decision in order to substantiate its reasoning. Second, and in any event, even if the Methacrylates decision were annulled by the European Union judicature, that would not affect the legality of the contested decision, since, as stated at paragraphs 256 and 257 above, it is pursuant to Article 23(2) of Regulation No 1/2003 and in accordance with point 30 of the Guidelines that the Commission imposed a personal fine on the applicant in the present case.

293 Accordingly, the applicant's third complaint must be rejected as unfounded.

294 By its fourth complaint, the applicant maintains that it is unfair that the personal fine imposed on it should be calculated on the basis of the factors of gravity, duration and deterrence specific to Arkema France, the parameters of which escape the applicant, and that it be calculated on that basis even though the applicant was not aware of the infringement in question and could not influence those parameters.

295 In that regard, it must be stated that the applicant puts forward no argument or evidence to call in question the fact that, as stated at paragraphs 256 and 257 above, it was pursuant to Article 23(2) of Regulation No 1/2003 and in accordance with point 30 of the Guidelines that the Commission imposed a personal fine on the applicant. The fact that the applicant was or was not aware of the infringement in question and that the personal fine imposed on it is based on data specific to Arkema France cannot undermine that conclusion.

296 Accordingly, the fourth complaint must be rejected as unfounded.

297 By its fifth complaint, the applicant claims that the Commission failed to take four factors into consideration when calculating the personal fine imposed on the applicant. It maintains that the Commission ought to have taken into consideration, first, the fact that Arkema France's involvement in the infringement in question was for a lesser duration than that of EKA and Finnish Chemicals; second, the attenuating circumstance recognised by the Commission, at recital 401 to the contested decision, based on the negligence that the applicant displayed with respect to its subsidiary; third, the procedural irregularities constituting a breach of the applicant's fundamental rights set out in the second plea; and, fourth, the cooperation provided by Arkema France during the administrative procedure.

298 In that regard, it must be borne in mind that, as stated at paragraph 254 above, the fine of EUR 15 890 000 imposed on the applicant corresponds exclusively to the increase of 70 % of the basic amount of the fine provided for at point 30 of the Guidelines. In accordance with that point, even if the circumstances set out at paragraph 297 above were established, the Commission was in no way required to take them into consideration when deciding on such a rate of increase.

299 Accordingly, the fifth complaint must be rejected as unfounded.

300 By its sixth complaint, the applicant claims that the fact that a personal fine was imposed on it breaches the principle of equal treatment, in two respects.

301 First, the applicant maintains that the principle of equal treatment was breached in so far as it is the only parent company, among the other parent companies implicated in the contested decision, namely Akzo Nobel, ELSA and Uralita, to have been given a personal fine under point 30 of the Guidelines, although that fine is unfairly based on deterrence having been taken into account twice.

302 In that regard, it must be borne in mind that, according to the case-law, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see *Advocaten voor de Wereld*, paragraph 196 above, paragraph 56 and the case-law cited).

303 It must be held in the present case that, as the Commission observed at recitals 548 and 549 to the contested decision without being disputed by the applicant, the applicant has a much larger turnover than the other undertakings that were fined in the contested decision, since it has a turnover of EUR 139 389 million, while the turnovers of EKA, ELSA and Uralita come to EUR 550 million, EUR 509 000 and EUR 1 095 million respectively. Therefore, owing to its much larger turnover by comparison with the turnovers of the other undertakings on which sanctions were imposed, the applicant was not in a comparable situation with those undertakings and the Commission was therefore justified in treating it differently from those undertakings.

304 Consequently, the Commission did not breach the principle of equal treatment by increasing the fine imposed on the applicant in accordance with point 30 of the Guidelines. Accordingly, the applicant's first argument must be rejected as unfounded.

305 Second, as regards the applicant's argument that it follows from recital 524 to the contested decision that the Commission rounded the amount of the fine imposed jointly and severally on the applicant and Arkema France downwards by only EUR 54 000, whereas the amounts of the fines imposed on Finnish Chemicals and EKA were rounded downwards by EUR 666 000 and EUR 213 500 respectively, it should be borne in mind, first of all, that under point 26 of the Guidelines, 'in determining the basic amount of the fine, the Commission will use rounded figures'.

306 Next, it is clear on reading the Commission's answer to the written questions put by the Court and the internal document which it produced in that regard, explaining the method which it employed when rounding downwards the amounts of the fines imposed on the entities in question in the contested decision, it must be held, first, that the Commission reduced the amount of EKA's and Akzo Nobel's fine from EUR 116 243 541 to EUR 116 000 000, the amount of Finnish Chemicals' fine from EUR 68 773 445 to EUR 68 000 000, the amount of ELSA's fine from EUR 42 322 120 to EUR 42 000 000, the amount of Arkema France's and the applicant's fine from EUR 22 754 400 to EUR 22 700 000 and, last, the amount of Aragonesas' and Uralita's fine from EUR 9 969 300 to EUR 9 900 000. Second, it follows from the rounding downwards of those fines that, as the Commission explains in substance in that document, it rounded the amounts of each fine in question downwards to the nearest EUR 1 million below when that did not result in a reduction of more than 2 % of the amount of the fine and to the nearest EUR 100 000 below where rounding the fine downwards to the nearest EUR 1 million below would have resulted in a reduction of more than 2 % of the fine.

307 Therefore, while the fines imposed on EKA and Akzo Nobel, Finnish Chemicals and ELSA were reduced by EUR 243 541, EUR 773 445 and EUR 322 120 respectively, which represent reductions that are higher in absolute terms than those received by Arkema France and the applicant and by Aragonesas and Uralita, namely EUR 54 400 and EUR 69 300 respectively, following the application of point 26 of the Guidelines, the fact none the less remains that the method employed by the Commission was applied consistently for each of the undertakings concerned and that that method is objectively justified in so far as the Commission was entitled, in accordance with its discretion when setting fines, to take the view that rounding those amounts of the fines downwards should not in any event result in a reduction of more than 2 % of the fine.

308 Accordingly, it must be held that the Commission did not breach the principle of equal treatment when it rounded downwards the amount of the fine imposed jointly and severally on the applicant and Arkema France. In the light of all the foregoing considerations, the eighth plea must be rejected in its entirety as unfounded.

Ninth plea, alleging breach of the principles and the rules that governed the calculation of the fine imposed jointly and severally on Arkema France and the applicant

309 The applicant disputes, in substance, the amount of the fine imposed on it jointly and severally with Arkema France in Article 2(c) of the contested decision. This plea is divided into two parts.

First part, alleging errors in the calculation of the amount of the fine imposed jointly and severally on Arkema France and the applicant

— Arguments of the parties

310 The applicant claims, in substance, that the Commission failed to take account of certain elements when calculating the amount of the fine imposed jointly and severally on it and Arkema France in Article 2(c) of the contested decision.

311 In the first place, the applicant disputes the amount of the fine imposed jointly and severally on it and Arkema France in Article 2(c) of the contested decision, referring to four arguments which it put forward in the fifth complaint in the eighth plea, in which it objects to the fine imposed on it in Article 2(e) of the contested decision (see paragraph 297 above). Accordingly, it claims, first, that the Commission ought to have taken into consideration the fact that Arkema France was involved in the infringement in question for a shorter period than EKA and Finnish Chemicals. Second, the Commission ought to have taken account of the attenuating circumstance to which it refers at recital 401 to the contested decision, relating to the applicant's possible negligence vis-à-vis its subsidiary. Third, the Commission ought to have taken into consideration the procedural irregularities constituting a breach of fundamental rights listed in its second plea. Fourth, the applicant maintains that the Commission ought to have taken account of Arkema France's cooperation during the administrative procedure.

312 In the second place, the applicant refers to the first argument which it put forward in the sixth complaint in the eighth plea (see paragraph 278 above), whereby it claims that the Commission breached the principle of equal treatment by imposing a personal fine on the applicant alone, when the other parent companies in the contested decision were fined only jointly and severally with their subsidiaries.

313 The Commission contests that argument.

— Findings of the Court

314 In the first place, as regards the four arguments whereby the applicant seeks to dispute the calculation of the amount of the fine imposed in Article 2(c) of the contested decision, first, the argument that the fine should be reduced on account of the fact that the applicant was involved in the infringement in question for a shorter period than EKA and Finnish Chemicals must be rejected as unfounded. It should be observed in that regard that, as expressly stated at recital 522 to the contested decision, the Commission took into consideration, in accordance with point 24 of the Guidelines, a multiplier of 5 for Arkema France and the applicant, corresponding to a period of participation in the cartel of four years and eight months, while it applied a multiplier of 5.5 for EKA and its parent company and also for Finnish Chemicals and its parent company because they had participated in the infringement in question for a period of five years and four months. Accordingly, the applicant's argument in that regard must be rejected as unfounded.

315 Second, in so far as the applicant relies on the attenuating circumstance which the Commission recognised, at recital 401 to the contested decision, resulting from the 'possible negligence' which the applicant had displayed with respect to its subsidiary, it must be held that that argument is based on an incorrect reading of that recital. In

fact, at that recital, the Commission does not, contrary to the applicant's contention, state that the negligence which the applicant displayed in controlling the actions of its subsidiary constitutes an attenuating circumstance, but, on the contrary, that '[t]he lack of diligence of the higher management of [Arkema France] and [the applicant] in exercising their duties, resulting in the alleged lack of awareness of the statutory and management bodies of [Arkema France] and [the applicant] of the actions taken by employees, cannot serve as an argument for the two companies to escape liability for such actions'. Furthermore, and in any event, the applicant puts forward no argument to support its claim that the Commission was wrong to consider that the applicant's 'possible negligence' in supervising its subsidiary could justify granting a reduction of the fine. Accordingly, that argument must be rejected as unfounded.

316 Third, as regards the applicant's argument that the Commission ought to have taken into consideration the breaches of its fundamental rights which it set out in its second plea in order to grant it a reduction of the fine which it imposed on the applicant jointly and severally with Arkema France, it must be borne in mind that, as stated in the context of the examination of that plea (see paragraph 204 above), the Commission did not commit any of the breaches which the applicant invokes. Accordingly, that argument must also be rejected as unfounded.

317 Fourth, as regards the argument that the Commission ought to have taken account of Arkema France's cooperation during the administrative procedure, it must be held that the applicant does not put forward in the present plea any specific argument to contest the Commission's findings, at recitals 543 and 544 and 561 to 580 to the contested decision, that, in substance, Arkema France's cooperation did not justify granting a reduction of the fine within or outside the scope of the 2002 Leniency Notice. Accordingly, that argument must be rejected as unfounded.

318 In the second place, as regards the applicant's argument that the Commission breached the principle of equal treatment in so far as the applicant is the only one among the other parent companies on which fines were imposed to be given a personal fine, it must be rejected as unfounded. It should be borne in mind that, as stated in the context of the sixth plea (see paragraph 254 above), the fine imposed on the applicant in Article 2(e) of the contested decision corresponds to the 70% increase in the basic amount of the fine imposed jointly and severally on it and Arkema France in Article 2(c) of that decision, owing to the fact that its much larger turnover at the time of adoption of the contested decision by comparison with that of the other entities concerned enabled it to raise more readily the funds necessary to pay the fine. In so far as it is common ground that the other parent companies on which sanctions were imposed in the contested decision did not have turnovers that justified such an increase, it must be held that the applicant was not in a comparable situation to those companies that should have led the Commission to treat them in the same way.

319 Accordingly, the first part of the ninth plea must be rejected as unfounded.

Second part, alleging breach of the principle of equal treatment in connection with the fine imposed jointly and severally on Arkema France and the applicant

— Arguments of the parties

320 The applicant claims that the Commission breached the principle of equal treatment, since the fine imposed jointly and severally on it and Arkema France is the highest among those imposed on the undertakings penalised in the contested decision.

321 In the first place, as the applicant claimed, moreover, in the context of the sixth complaint in its eighth plea (see paragraph 279 above), the rounding downwards of the basic amount of the fine imposed jointly and severally on it and Arkema France was much lower than that of the basic amounts of the fines imposed on Finnish Chemicals and EKA.

322 In the second place, the fine imposed jointly and severally on Arkema France and the applicant did not take sufficient account, in accordance with the Guidelines, of two factors. First, the Commission took insufficient account of Arkema France's small turnover on the sodium chlorate market in the EEA by comparison with that of EKA, which received immunity from a fine, and of Finnish Chemicals, which was ordered to pay a fine four times smaller than that imposed on Arkema France. Second, the Commission took insufficient account of Arkema France's small market share, which is 9% of the sodium chlorate market, by comparison, on the one hand, with that of EKA, which is five times greater, and, on the other hand, the market share of Finnish Chemicals, which is three times greater. In that regard, the applicant also observes that there is a difference of only four percentage points between Arkema France's market share and the market shares of Aragonesas and Solvay.

323 In the third place, the applicant maintains that the fine imposed jointly and severally on it and Arkema France takes insufficient account of Arkema France's lesser involvement in the infringement in question by comparison with the involvement of EKA and Finnish Chemicals.

324 The Commission contests those arguments.

— Findings of the Court

325 As regards, in the first place, the applicant's complaint that the rounding downwards of the basic amount of the fine imposed jointly and severally on it and Arkema France was much smaller than the rounding downwards of the basic amounts of the fines imposed on Finnish Chemicals and EKA, it must be stated that that complaint is strictly identical to the sixth complaint in the eighth plea (see paragraph 279 above). It must therefore be rejected as unfounded for the same reasons as those set out at paragraphs 305 to 308 above, according to which it was found, in substance, that the method of rounding downwards the amount of that fine had been applied consistently for each of the undertakings penalised in the contested decision and that that method was objectively justified.

326 As regards, in the second place, the applicant's complaint that the Commission breached the principle of equal treatment in so far as it took insufficient account, on the one hand, of Arkema France's low turnover on the sodium chlorate market in the EEA by comparison with EKA and Finnish Chemicals and, on the other hand, of Arkema France's small market share on that market, it must be rejected as unfounded.

327 First, it must be held that the applicant puts forward neither argument nor evidence to establish that, in the light of the elements which it took into consideration in setting the fine imposed jointly and severally on the applicant and Arkema France, the Commission applied the provisions of the Guidelines in a discriminatory manner in the contested decision. Second, while there is a significant difference between the amount of the fine imposed on Arkema France and the applicant and the amounts of the fines imposed jointly and severally on EKA and Akzo Nobel and on ELSA and Finnish Chemicals, in spite of the fact that Arkema France's share of the sodium chlorate market in the EEA was smaller than EKA's and Finnish Chemicals' market shares, that is justified by the fact that EKA and Akzo Nobel obtained a complete

exemption from a fine and that the maximum amount of 10 % of the turnover of Finnish Chemicals, which received a reduction of 50 % of the fine in application of the 2002 Leniency Notice, was almost half of the applicant's (see the tables at recitals 524 and 552 to the contested decision).

328 As regards, in the third place, the applicant's complaint that the fine which the Commission imposed on it jointly and severally with Arkema France does not take sufficient account of Arkema France's lesser involvement in the infringement by comparison with that of EKA and Finnish Chemicals, it should be observed that, apart from the fact that the applicant puts forward no argument or evidence in its written pleadings in order to substantiate that complaint, it does not dispute the grounds which the Commission set out at recital 536 to the contested decision for rejecting the applicant's arguments in that regard, namely that '[the applicant] maintained frequent contacts with its competitors throughout the period of its involvement in the cartel', '[those] initial contacts with competitors already show its active participation in the anti-competitive arrangements [in question]', or again that the applicant's assertion that 'it could not have played a mediating role [between EKA and Finnish Chemicals] due to its limited market share is clearly rebutted by the documentary evidence referred to in [the contested decision]'.

329 Therefore, the third complaint and, accordingly, the ninth plea in its entirety must be rejected as unfounded.

Tenth plea, alleging breach of the provisions of the 2002 Leniency Notice

330 The applicant claims that the Commission made errors of fact and of law in not granting it a reduction of its fine under the 2002 Leniency Notice. This plea is divided into two parts.

First part, relating to the refusal to grant a reduction of the fine under the 2002 Leniency Notice

— Arguments of the parties

331 The applicant maintains that the Commission breached the 2002 Leniency Notice by not reducing the fine imposed jointly and severally on the applicant and Arkema France, on the ground that the evidence adduced by Arkema France was insufficient. The applicant contends in that regard that, in so far as the Commission is bound by the provisions of that notice, it was not entitled to reject, either without stating reasons, or in an abstract and 'capricious' manner, any reduction for the two fines imposed on the applicant.

332 In the first place, as is apparent from recitals 554, 561, 581 and 584 to the contested decision, it is common ground that Arkema France was the first undertaking, after EKA, to have provided the Commission with evidence of the cartel.

333 In the second place, in the applicant's submission, it is apparent from the actual grounds of the contested decision that, contrary to the findings made by the Commission at recitals 568 to 580 to the contested decision, the Commission relied on the evidence supplied by Arkema France to establish the infringement in question. The applicant refers in that regard, in the contested decision, to recitals 38 and 46 and footnote 63, to recital 76 and footnote 116, to recital 94 and footnote 136, to recital 98 and footnote 142, to recitals 243 and 251 and footnote 302, to recitals 254, 255, 259, 260, 273, 314, 344, 355, 589, 593 and 594 and footnotes 118, 259, 293, 337, 540 and 542. Furthermore, in the applicant's submission, the evidence produced by Arkema France made it possible to confirm a number of facts relating to the infringement in question, as is clear from recitals 568, 569, 571 to 573, 575 and 576 to the contested

decision. It follows from recital 344, *in limine*, to the contested decision, moreover, that Aragonesas considered that the information supplied by Arkema France had significant added value.

334 The Commission contests the applicant's arguments.

— Findings of the Court

335 The applicant claims, in substance, that the Commission breached the provisions of the 2002 Leniency Notice by not granting Arkema France a reduction of 30 to 50% of its fine although it was the first undertaking, after EKA, which obtained immunity from a fine, to provide it with evidence having significant added value.

336 Under point 20 of the 2002 Leniency Notice, '[u]ndertakings that do not meet the conditions [to obtain exemption from a fine] may be eligible to benefit from a reduction of any fine that would otherwise have been imposed'.

337 Point 21 of the 2002 Leniency Notice provides that, '[i]n order to qualify [for a reduction of its fine under point 20 of that notice], an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence'.

338 The first paragraph of point 23(b) of the 2002 Leniency Notice provides for three bands of reduction of the fine.. The first undertaking to meet the condition laid down at point 21 of that notice is entitled to receive a reduction of the fine of between 30 and 50 %, the second undertaking is entitled to a reduction of its fine of between 20 and 30 % and subsequent undertakings are entitled to a reduction of up to 20 % of their fines.

339 The second paragraph of point 23(b) of the 2002 Leniency Notice provides that, '[i]n order to determine the level of reduction within each of these bands, the Commission will take into account the time at which the evidence fulfilling the condition in point 21 [of that notice] was submitted and the extent to which it represents added value' and that '[i]t may also take into account the extent and continuity of any cooperation provided by the undertaking following the date of its submission'.

340 According to the case-law, moreover, the Commission has a wide discretion as regards the method of calculating fines and it may, in that regard, take account of numerous factors, including the cooperation provided by the undertakings concerned during the investigation conducted by its departments. In that context, the Commission is required to make complex assessments of fact, such as those relating to the cooperation provided by the individual undertakings concerned (Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 81, and Joined Cases T-456/05 and T-457/05 *Gütermann and Zwicky* v *Commission* [2010] ECR II-1443, paragraph 219).

341 Furthermore, in assessing the cooperation given by members of a cartel, only a manifest error of assessment on the part of the Commission is open to censure, since the Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, especially in comparison with the contributions made by other undertakings (*SGL Carbon* v *Commission*, paragraph 340 above,

paragraph 88). It should also be borne in mind in that regard that, while the Commission is required to state the reasons for which it considers that information provided by undertakings under the Leniency Notice constitutes a contribution which does or does not justify a reduction of the fine, it is incumbent on undertakings wishing to contest the Commission's decision in that regard to show that, in the absence of such information provided voluntarily by the undertakings, the Commission would not have been in a position to prove the essential elements of the infringement and therefore adopt a decision imposing fines (*Erste Group Bank and Others* v *Commission*, paragraph 60 above, paragraph 297).

342 Furthermore, the reduction of fines in cases where the undertakings which participated in infringements of competition law have offered cooperation is justified only where it is considered that the cooperation made it easier for the Commission to establish an infringement and, as the case may be, to put an end to it (*Dansk Rørindustri and Others* v *Commission*, paragraph 45 above, paragraph 399, and Case T-338/94 *Finnboard* v *Commission* [1998] ECR II-1617, paragraph 363). In view of the rationale for the reduction, the Commission cannot disregard the usefulness of the information provided, which inevitably depends on the evidence already in its possession (*Gütermann and Zwicky* v *Commission*, paragraph 340 above, paragraph 220).

343 It follows from the case-law, moreover, that where an undertaking providing cooperation does no more than confirm, in a less precise and explicit manner, certain information that has already been provided by another undertaking by way of cooperation, the extent of the cooperation provided by the former undertaking, while possibly of some benefit to the Commission, cannot be treated as comparable with that provided by the undertaking which was the first to supply that information. A statement which merely corroborates to a certain degree a statement which the Commission already had at its disposal does not facilitate the Commission's task significantly. Accordingly, it cannot be sufficient to justify a reduction of the fine for cooperation (see, to that effect, Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223,

paragraph 301; Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, 'the judgment of this Court in *Groupe Danone* v *Commission*', paragraph 455; and *Gütermann and Zwicky* v *Commission*, paragraph 340 above, paragraph 222).

344 Last, the cooperation of an undertaking in the investigation gives no entitlement to a reduction in a fine where that cooperation went no further than the cooperation incumbent on it under Article 18 of Regulation No 1/2003 (see, to that effect, Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraphs 341 and 342, and the judgment of this Court in *Groupe Danone* v *Commission*, paragraph 343 above, paragraph 451).

345 In the present case, it should be observed at the outset that it is common ground that, as is apparent from recital 561 to the contested decision, Arkema France was the second undertaking to have submitted an application under the 2002 Leniency Notice after EKA. The Court must therefore examine whether, as the applicant maintains, it is apparent upon reading each of the recitals to the contested decision which it lists, and which are set out at paragraph 333 above, that Arkema France provided the Commission with evidence of significant added value within the meaning of point 21 of the 2002 Leniency Notice.

346 In the first place, as regards the applicant's complaint that, in substance, it ought to have obtained a reduction of its fine in accordance with the 2002 Leniency Notice, in so far as it was the first undertaking to provide the information set out at recitals 38, 46, 344, 355 and 589 to the contested decision, and also to the related footnote 63, it must be held that the Commission did not commit any manifest error of assessment in considering that such information did not have significant added value.

347 First, as regards recitals 38 and 46 to the contested decision, and the associated footnote 63, it must be observed that they concern information supplied by Arkema

France in relation to its production capacities and also to the value of sales and the market shares of the undertakings present on the sodium chlorate market in the EEA. Since that information does not go further, within the meaning of the case-law cited at paragraph 344 above, than that which Arkema France was required to provide under Article 18 of Regulation No 1/2003, it must be held that it does not have significant added value.

348 Second, as regards recital 344 to the contested decision, it should be noted that the Commission refers at that recital to an argument put forward by Aragonesas, claiming that '[t]he evidence presented by the Commission is based primarily on the … applications [under the 2002 Leniency Notice] made by EKA, Finnish Chemicals and [Arkema France]'. In that regard, it should be observed that since the Commission merely refers at that recital to an argument formulated by Aragonesas, that argument cannot be regarded as recognition by the Commission that Arkema France provided the Commission with information having significant added value or as establishing that the Commission made a manifest error of assessment in deciding that the information provided by Arkema France did not have significant added value.

349 Third, as regards recital 355 to the contested decision, the Commission observes at that recital, in substance, that 'statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence'. In that regard, it must be held that it cannot be concluded from such a general assessment on the part of the Commission that the information provided by Arkema France made it possible, in the present case, to facilitate the Commission's task significantly by enabling it to establish the facts of the infringement and, accordingly, that it had significant added value.

350 Fourth, as regards recital 589 to the contested decision, the Commission observes at that recital that, '[i]n assessing the value of the evidence provided by Finnish Chemicals, it should be pointed out that at the time Finnish Chemicals approached the Commission, the Commission already possessed evidence submitted by EKA, Finnish Chemicals (in its reply to the information request dated 10 September 2004, as far as Finnish Chemicals did not go beyond the scope of that request) and [Arkema France]'. In that regard, it should be observed that, while the wording of that recital might be interpreted as meaning that the Commission considered that Arkema France provided 'probative elements', such an interpretation cannot be upheld in the present case, in view of the context in which that assessment was formulated by the Commission and the findings which it makes elsewhere in the contested decision. First of all, in so far as that assessment by the Commission was made in the context of the evaluation of the added value of the information submitted by Finnish Chemicals, it is intended to emphasise that it is in the light of the information already available in its file that the Commission is required to consider whether the information provided by Finnish Chemicals has significant added value, but not to indicate that Arkema France has provided information having significant added value. Furthermore, that assessment does not call in question the findings made by the Commission, at recitals 561 to 580 to the contested decision, that all the arguments of the applicant and Arkema France set out in the contested decision, whereby they claim that Arkema France supplied information having significant added value, must be rejected. Last, and in any event, the assessment made by the Commission at recital 589 to the contested decision is not capable of establishing that, in the light of the information provided by Arkema France, the Commission made a manifest error of assessment when it considered that that information did not have significant added value.

351 In the second place, as regards recitals 76, 254, 255, 259 and 273 to the contested decision, and also the related footnotes 116 and 337, to which the applicant refers, it must be held that the Commission did not make any manifest error of assessment when it considered that they did not have significant added value.

352 First, as regards recital 76 to the contested decision and the related footnote 116, the Commission describes there the general operation of the cartel, which was characterised in particular by 'frequent contacts in the form of bi- and multilateral meetings and telephone calls without, however, following a fixed scheme'. The Commission also states that, '[a]ccording to [Arkema France], a list of shared customers and of the sales volumes which each of the participating [sodium chlorate] producers was allowed to supply to those customers was drawn up [at] the very beginning of the cartel' and that '[Arkema France] has not, however, presented any such list to the Commission'. In that regard, apart from the fact that it follows from EKA's oral application for immunity that EKA had already informed the Commission of the nature of the contacts between the undertakings in question, that information, which Arkema France did not substantiate by any documentary evidence, did not, within the meaning of the case-law cited at paragraph 343 above, have significant added value.

353 Second, as regards recital 254 to the contested decision and the related footnote 305, the Commission observes there that Arkema France stated that '[its representative, Mr L.] believes to remember a meeting between Finnish Chemicals and [Arkema France] aimed at finding out why the volume-sharing rules applicable to [the customer] MODO were not respected any more' and that '[d]uring this meeting, which [Mr L.] thinks to have taken place in the first quarter [of] 1999 in Finland, Finnish Chemicals stated [that it had] become exclusive supplier of MODO, following an agreement of its parent company with MODO, thus breaching the existing agreement between EKA, Finnish Chemicals and [Arkema France], in connection with this customer'. In that regard, it should be observed that, at recital 255 to the contested decision, the Commission further notes that, '[h]owever, since the contract between MODO and Finnish Chemicals was concluded only in September 1999, the Commission considers that [Mr L.] confused the dates and venues and in fact referred to the meeting of 9 November 1999 in Copenhagen'. Therefore, apart from the fact that the oral information provided by Arkema France is, on its own admission, uncertain ('[Mr L.] believes to remember') but also imprecise, it must be held, in any event, that the Commission expressly observes, at recital 255 to the contested decision, that that information is inaccurate, which the applicant, moreover, does not dispute. Therefore

the Commission did not make any manifest error of assessment in deciding that such information did not have significant added value.

354 Third, as regards recital 259 to the contested decision, the Commission refers there to travel expense records of Arkema France's representative, Mr L., which cover the period October to December 1999 and were supplied to the Commission by Arkema France. It is also stated at that recital that those documents contain an entry that reads '15/12 EKA Roissy' and that Arkema France infers that 'this entry could refer to a meeting with representatives of EKA at the Roissy-Charles de Gaulle airport in Paris on 15 December 1999'. It should be noted that, at that recital, the Commission states that EKA does not recall such a meeting. Accordingly, the Commission did not make any manifest error of assessment in considering that that information, about which Arkema France is not certain and which was not corroborated, did not have significant added value. It should be emphasised in that regard that the fact that the Commission, owing to the absence of evidence sufficient to corroborate that information, did not include the meeting at Roissy-Charles de Gaulle airport in the list of meetings and telephone calls relating to the cartel (see Annex 1 to the contested decision) confirms that the information does not have significant added value.

355 Fourth, as regards recital 273 to the contested decision, the Commission states there that Arkema France mentions a meeting between EKA, Finnish Chemicals and Arkema France in 'spring 2000'. However, it should be observed that the Commission also states at the same recital that neither EKA nor Finnish Chemicals confirmed that that meeting took place. In addition, the Commission states at that recital that, on the basis of the information provided by EKA as set out at recital 283 to the contested decision, the reference must be to the meeting held on 9 February 2000. Accordingly, apart from the fact that that information supplied by Arkema France is imprecise, the Commission observed, without being contested by the applicant, that it was not corroborated by other elements enabling the Commission to prove it. Accordingly,

the Commission did not make any manifest error of assessment in deciding that that information did not have significant added value.

356 Fifth, as regards footnote 337 to the contested decision, it must be noted that the Commission sets out at that footnote the content of recital 284 to the contested decision, where it observes, in particular, that, '[w]hile there were several telephone calls and meetings among competitors as late as January and February 2000 …, the usual level of cooperation entailing mainly efforts to allocate sales volumes and to fix prices ultimately was not restored [in 2000], either on account of the loss of mutual trust or for any of the interrelated reasons as indicated by the competitors in their various submissions'. At footnote 337 to the contested decision, the Commission states, vis-à-vis the date on which the cartel ended, that 'EKA and [Arkema France] refer to their respective internal competition law compliance programmes[,] which were introduced in 1999 and 2000' and that 'Finnish Chemicals states that contacts with competitors became obsolete once the contract with the customer MODO had been concluded'. In that regard, it should also be noted that the Commission states, at recital 575 to the contested decision, that Arkema France's representative, Mr L., 'only confirmed EKA's statement concerning the effect of the adoption of [competition law] compliance programmes, without submitting any new evidence in this regard'. Furthermore, at recital 593 to the contested decision and at footnote 540, the Commission notes that, 'at the time it received the reply to the request for information and the leniency application from Finnish Chemicals, it already had in the file information, obtained from two independent sources [EKA and Arkema France], indicating that the infringement did not cease before spring 2000'. Last, at recital 594 to the contested decision and at footnote 542 the Commission states that it had 'already concluded from EKA's submission' that EKA had distanced itself from the cartel in spring 2000.

357 In the light of the findings made by the Commission at the recitals to the contested decision referred to at paragraph 356 above, it must be considered that the information supplied by Arkema France in that regard did not have significant added value

at the time when it supplied it to the Commission. Apart from the fact that the information supplied by Arkema France to the effect that the cartel came to an end after competition law compliance programmes were introduced lacks precision as to the exact date taken by the Commission for the purpose of establishing the end of the infringement, namely 9 February 2000 (Article 1(e) of the contested decision), it was on the basis of the information provided by EKA, as is apparent from recital 290 to the contested decision, that the Commission was able to establish that the infringement had ended with the meeting of the trade association CEFIC, which was held on 9 February 2000.

358 In the third place, as regards, in the contested decision, recital 94 and footnote 136, recital 98 and footnote 142, recital 243 and footnote 293, recital 251 and footnote 302, recital 260 and recital 593 and footnote 540, recital 594 and footnote 542, and footnotes 118 and 259, it must be noted that they refer either to information which, as is clear from the contested decision, was already in the Commission's possession when Arkema France submitted its application under the 2002 Leniency Notice, or to information insufficiently precise or substantiated to enable the Commission to establish the facts of the infringement or, last, to information which the Commission was able to obtain pursuant to Article 18 of Regulation No 1/2003.

359 First, as regards recital 94 to the contested decision and footnote 136, the Commission states there that '[a]ccording to Finnish Chemicals, a meeting was held on 17 May 1995 at the SAS Royal Hotel in Copenhagen and was attended by [EKA, Finnish Chemicals and Arkema France]'. The Commission observes there that the travel expense records of Arkema France's representative, Mr D., confirm his presence at that meeting. In that regard, first, it should be observed that it follows from recitals 95 and 96 to the contested decision that the Commission established the existence of that meeting on the basis of the evidence supplied by Finnish Chemicals, which the applicant does not dispute. At recital 96 to the contested decision, the Commission states that the notes taken at the meeting of 17 May 1995 by Finnish Chemicals'

representative, Mr S., '[show] that [Arkema France] participated in [the cartel]'. Second, and in any event, it should be observed that the fact of supplying only the travel expense records of Arkema France's representative, which serve to confirm his presence at the meeting in question, is cooperation which does not go beyond, within the meaning of the case-law set out at paragraph 344 above, that which results from Arkema France's obligations under Article 18 of Regulation No 1/2003. Accordingly, the Commission did not make a manifest error of assessment in considering that Arkema France had not provided elements of significant added value in that regard.

360 Second, as regards recital 98 to the contested decision and footnote 142, the Commission states there, in particular, that 'EKA further reports that around 1995, together with Finnish Chemicals and [Arkema France], it "decided to make a huge price increase, which worked out" for Portugal in the context of the escudo losing value' and adds that '[t]he evidence submitted by EKA shows that, in 1995, EKA increased its prices charged to customers in Portugal by 31 % and 44 % compared to the prices in 1993'. In addition, the Commission states that '[a] successful price increase in 1995 is also confirmed by [Arkema France]'. It is therefore clear from the content of the contested decision that that price increase in 1995 was established on the basis of oral information and documents supplied by EKA, which the applicant does not dispute. Therefore, even though the oral information provided by Arkema France confirms that supplied by EKA, it must be held, as the Commission concluded, that that information cannot be regarded, in accordance with the case-law cited at paragraph 343 above, as having significant added value, since Arkema France did not provide further details of that price increase by comparison with those provided by EKA.

361 Third, as regards recital 243 to the contested decision and footnote 293, the Commission observes there that 'EKA and [Arkema France] indicated in their submissions that a meeting between their representatives took place in February or March 1999' and that '[Arkema France] confirmed that Mr [W.] represented EKA in this meeting'.

In that regard, it must be noted that, at that recital, the Commission expressly uses the oral information supplied by EKA. Furthermore, it must also be noted that the Commission also observed, at recital 245 to the contested decision, that '[e]ven though it was not possible to establish with full certainty that the meeting took place, the Commission considers it credible that the discussions among the competitors were continued in the manner as reported by EKA'. Therefore, apart from the fact that it is solely on the basis of the information provided by EKA that the Commission was able to know about that meeting and what was discussed there, it considers, without being contradicted by the applicant, that that information does not enable the facts of the infringement to be established with certainty. Accordingly, it must be held that the Commission did not err in deciding that the information supplied by Arkema France in that regard did not have significant added value.

362 Fourth, as regards recital 251 to the contested decision and the related footnote 302, the Commission observes there that 'Finnish Chemicals informed the Commission about a meeting which took place in Copenhagen on 9 November 1999', attended by representatives of Arkema France and Finnish Chemicals. That recital also states that Arkema France 'confirmed that this meeting had taken place and provided the Commission with [its representative Mr L.'s] travel expense records[,] which show that he had travelled to Copenhagen on 9 November 1999'. In that regard, it should be observed, first, that the fact of supplying only the travel expense records of Arkema France's representative confirming his presence at the meeting in question constitutes cooperation not going beyond, within the meaning of the case-law set out at paragraph 344 above, that which results from its obligations under Article 18 of Regulation No 1/2003. Second, the Commission reproduces verbatim, at recital 252 to the contested decision, the precise information supplied by Finnish Chemicals describing what was discussed at that meeting, whereas recital 254 to the contested decision contains imprecise statements on the part of Arkema France concerning that meeting. Last, it follows from those recitals that the information supplied by Arkema France did not make it possible to corroborate the evidence in the Commission's file at the time when it was supplied, but that it was the information supplied by Finnish Chemicals that enabled the Commission to establish the facts. Accordingly, the Commission did not make any manifest error of assessment in considering that the

information supplied by Arkema France in that regard did not have significant added value.

363 Fifth, as regards recital 260 to the contested decision, the Commission states there that 'Finnish Chemicals stated [through its representative, Mr S.,] that the representatives of [Arkema France] and Finnish Chemicals met one more time on 21 December 1999 … in Stockholm' and that '[t]his meeting is also confirmed by the travel expense records of Mr [L.] provided by [Arkema France]'. It must be observed in that regard that, apart from the fact that, as that recital shows, the Commission proved that meeting solely on the basis of the information supplied by Finnish Chemicals, the fact of supplying only the travel expense records of Arkema France's representative confirming his presence at the meeting in question constitutes cooperation not going beyond, within the meaning of the case-law set out at paragraph 344 above, that resulting from its obligations under Article 18 of Regulation No 1/2003.

364 Sixth, as regards footnote 118 to the contested decision, the Commission states there that '[Arkema France] confirmed the existence of the market-sharing mechanism and the compensation scheme as described by EKA'. In that regard, it should be observed that, apart from the fact that that recital shows that the Commission relied on EKA's oral statements to establish the facts of the infringement, which the applicant does not dispute, the mere oral and imprecise corroboration of that information cannot be regarded, as is clear from the case-law cited at paragraph 343 above, as having significant added value.

365 Seventh, as regards recital 207 to the contested decision and the related footnote 259, the Commission states there that '[i]t is to be noted that, in the context of the discussion between Finnish Chemicals and [Arkema France] regarding the customer MODO, Mr [L., Arkema France's representative] called Mr [B.] (the representative

of Quadrimex, Finnish Chemicals' importing company in France) in order to discuss [Arkema France's] volume losses' and that '[d]uring these phone calls on 2 and 5 October 1998, Mr [L.] complained about the Scandinavian aggressivity and claimed volume compensations for [Arkema France]'. In that regard, it follows from the documents cited at footnote 257 and from point 4.3.1.20, entitled '1998 — Conflict concerning the customer MODO', at recitals 205 to 216 to the contested decision, that, in order to establish the precise nature of the contacts between competitors concerning supplies to the customer MODO, the dates of those contacts and the volumes allocated, the Commission relied wholly on the precise information which Finnish Chemicals had supplied to it. The Commission therefore did not make a manifest error of assessment in deciding that the information supplied by Arkema France in that regard did not have significant added value.

366 In the fourth place, as regards recitals 568, 569, 571 to 573, 575 and 576 to the contested decision, on which the applicant relies, it should be observed that it follows from those recitals that the Commission had received that information 'from two sources' at the time when Arkema France supplied it (recital 568 to the contested decision), that Arkema France 'confirm[ed] the scheme in general terms, [but] did not provide any written evidence originating from the time to which the facts pertain which would have been capable of strengthening the Commission's ability to prove the facts in question' (recital 569 to the contested decision), that the information provided by Arkema France concerning contacts with its competitors was 'very basic.. and did not strengthen the Commission's ability to prove the facts in question' (recital 571 to the contested decision), that the information relating to price increases in 1993, 1994 and 1995 confirmed 'in very general terms' the information already in the Commission's possession (recital 572 to the contested decision), that the information relating to the supply of the customer MODO was 'well documented already by EKA' (recital 573 to the contested decision), that Arkema France 'only confirmed EKA's statement concerning the effect of the adoption of compliance programmes, without submitting any new evidence in this regard' (recital 575 to the contested decision) and also the Commission's assessment that '[w]hile [Arkema France] was able to confirm some

aspects of the functioning of the cartel in a very general way, it nevertheless failed to do this in a manner that would have significantly strengthened the Commission's ability to prove the infringement' (recital 576 to the contested decision). Accordingly, it must be held that none of those recitals establishes that the information supplied by Arkema France had significant added value.

367 In the light of all the foregoing considerations, it must be concluded that the Commission did not make a manifest error of assessment in not granting Arkema France a reduction of its fine under the 2002 Leniency Notice. Accordingly, the first part of the tenth plea must be rejected as unfounded.

Second part, alleging breach of the principle of equal treatment

— Arguments of the parties

368 The applicant claims that the Commission breached the principle of equal treatment by not granting Arkema France, unlike Finnish Chemicals, any 'credit' for the information which it supplied to the Commission and which the Commission none the less acknowledged, at recitals 568, 569, 571, 572, 573, 575 and 576 to the contested decision, as having enabled it to confirm the facts of the infringement. That difference in treatment has the effect of 'bidding up' the fines imposed on the applicant, which ought to have received, with Arkema France, a reduction of the amount of the fine of

between 30 and 50 % by comparison with the fines imposed on the undertakings in question and in particular with Finnish Chemicals.

369 The Commission contests those arguments.

— Findings of the Court

370 The applicant maintains, in substance, that the Commission breached the principle of equal treatment, since it granted Finnish Chemicals, but not Arkema France, a reduction of the fine under the 2002 Leniency Notice.

371 According to the case-law referred to at paragraph 196 above, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.

372 In the present case, since, first, as was concluded at the close of the examination of the first part of the tenth plea (see paragraph 367 above), the Commission did not make a manifest error of assessment in considering that the evidence adduced by Arkema France did not have significant added value and, second, the applicant does not dispute, in that context, the Commission's finding that the information provided by Finnish Chemicals did have significant added value, it must be held that Arkema France and Finnish Chemicals were not in the same situation from the aspect of the grant of a reduction of the fine under the 2002 Leniency Notice.

373 It must therefore be held that the applicant has not established that the Commission breached the principle of equal treatment by not granting Arkema France any reduction of the fine under the 2002 Leniency Notice.

374 Therefore, the second part of the tenth plea, and, accordingly, the tenth plea in its entirety and the applicants' first head of claim, must be rejected as unfounded.

2. *The claims, submitted in the alternative, for variation of the amount of the fines*

Arguments of the parties

375 In the context of its 11th plea, the applicant claims that, if the Court should not annul the contested decision in so far as it concerns the applicant, the fines imposed on it should be annulled or reduced.

376 First, the applicant maintains that it would be unfair to impose on it the highest fine of those imposed on the undertakings referred to in the contested decision, when Arkema France's liability for the infringement is considerably less than that of EKA and Finnish Chemicals. The applicant observes, in that regard, that the two main players in the cartel were EKA and Finnish Chemicals, as is clear from the grounds of the contested decision, and that it was notably in reaction to the fight between those two competitors to share the Nordic markets that the other parties to the cartel such as Arkema France were induced to react and protect their markets in their regions.

377 Second, the applicant contends that, within the framework of its general power of appraisal, the Court should take account, on the one hand, of Arkema France's lesser liability for the infringement in question by comparison with that of EKA and Finnish Chemicals and, on the other hand, of the factors which it invoked in the first and second complaints of the eighth plea (see paragraphs 267 to 273 above), in the first and second parts of the ninth plea (see paragraphs 310 to 312 and 320 to 323 above) and in the tenth plea (see paragraphs 331 to 333 and 368 above).

378 The Commission contests the applicant's arguments.

Findings of the Court

379 It must be borne in mind that, according to the case-law, as regards the review carried out by the European Union judicature in respect of Commission decisions on competition matters, more than a simple review of legality, which merely permits dismissal of the action for annulment or annulment of the contested measure, the unlimited jurisdiction conferred on the General Court by Article 31 of Regulation No 1/2003 in accordance with Article 229 EC authorises the Court to vary the contested measure, even without annulling it, by taking into account all the factual circumstances, so as to amend, for example, the amount of the fine (see Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraph 86 and the case-law cited).

380 As regards, first, the application for variation of the amount of the fine imposed jointly and severally on the applicant and Arkema France owing to the fact that it fails to take sufficient account of Arkema France's lesser involvement in the cartel by comparison with that of EKA and Finnish Chemicals, the Court considers that that application should not be granted since, as stated at paragraph 328 above, the applicant puts

forward no argument or evidence to establish that Arkema France played a minor role in the cartel that would justify a reduction of the amount of the fine on that basis.

381 As regards, second, the application for variation of the fines imposed jointly and severally on Arkema France and the applicant and also personally on the applicant, in the light of the arguments raised in the first and second complaints of the eighth plea, in the first and second parts of the ninth plea and in the tenth plea, the Court considers, in the light of all the grounds set out above and in the absence of other arguments put forward by the applicant in that respect, that there is nothing to justify such a reduction.

382 The applicant's second head of claim must therefore be rejected and the action must be dismissed in its entirety.

Costs

383 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. Dismisses the action;

2. Orders Elf Aquitaine SA to pay the costs.

Pelikánová Jürimäe Soldevila Fragoso

Delivered in open court in Luxembourg on 17 May 2011.

[Signatures]

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