Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber)

11 July 2014*

(Competition — Agreements, decisions and concerted practices — Paraffin waxes market — Slack wax market — Decision finding an infringement of Article 81 EC — Price fixing and market sharing — Liability of a parent company for the infringements of the competition rules committed by its subsidiary and by a joint venture partially owned by it — Decisive influence exercised by the parent company — Presumption where the parent company holds 100% of the shares — Succession of undertakings — Proportionality — Equal treatment — 2006 Guidelines on the method of setting fines — Unlimited jurisdiction)

In Case T-543/08,

RWE AG, established in Essen (Germany),

RWE Dea AG, established in Hamburg (Germany),

represented by C. Stadler, M. Röhrig and S. Budde, lawyers,

applicants,

v

European Commission, represented by A. Antoniadis and R. Sauer, acting as Agents,

defendant,

APPLICATION for, primarily, annulment of Articles 1 and 2 of Commission Decision C(2008) 5476 final of 1 October 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/39.181 — Candle Waxes) in so far as it concerns the applicants and, in the alternative, a reduction of the amount of the fine imposed on them,

THE GENERAL COURT (Third Chamber),

composed of O. Czúcz (Rapporteur), President, I. Labucka and D. Gratsias, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 20 March 2012,

gives the following

* Language of the case: German.

Judgment

Background to the dispute and contested decision

1. *Administrative procedure and adoption of the contested decision*

1 By Decision C(2008) 5476 final of 1 October 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/39.181 — Candle Waxes) ('the contested decision'), the Commission of the European Communities found that the applicants, RWE AG and RWE Dea AG (together 'RWE') had, with other undertakings, infringed Article 81(1) EC and Article 53(1) of the Agreement on the European Economic Area (EEA) by participating in a cartel relating to the paraffin waxes market in the EEA and the German market for slack wax.

2 The addressees of the contested decision are, in addition to the applicants, the following companies: ENI SpA, Esso Deutschland GmbH, Esso Société anonyme française, ExxonMobil Petroleum and Chemical BVBA et Exxon Mobil Corp. (together 'ExxonMobil'), H&R ChemPharm GmbH, H&R Wax Company Vertrieb GmbH and Hansen & Rosenthal KG (together 'H&R'), Tudapetrol Mineralölerzeugnisse Nils Hansen KG, MOL Nyrt., Repsol YPF Lubricantes y Especialidades SA, Repsol Petróleo SA and Repsol YPF SA (together 'Repsol'), Sasol Wax GmbH, Sasol Wax International AG, Sasol Holding in Germany GmbH and Sasol Ltd (together 'Sasol'), Shell Deutschland Oil GmbH, Shell Deutschland Schmierstoff GmbH, Deutsche Shell GmbH, Shell International Petroleum Company Ltd, The Shell Petroleum Company Ltd, Shell Petroleum NV and The Shell Transport and Trading Company Ltd (together 'Shell') and also Total SA and Total France SA (together 'Total') (recital 1 to the contested decision).

3 Paraffin waxes are manufactured in refineries from crude oil. They are used for the production of a variety of products such as candles, chemicals, tyres and automotive products as well as in the rubber, packaging, adhesive and chewing gum industries (recital 4 to the contested decision).

4 Slack wax is the raw material required for the manufacture of paraffin waxes. It is produced in refineries as a by-product in the manufacture of base oils from crude oil. It is also sold to end-customers, to producers of particle boards for instance (recital 5 to the contested decision).

5 The Commission began its investigation after Shell Deutschland Schmierstoff informed it, by letter of 17 March 2005, of the existence of a cartel and submitted an application to it for immunity under the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the 2002 Leniency Notice') (recital 72 to the contested decision).

6 On 28 and 29 April 2005, the Commission, pursuant to Article 20(4) 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), conducted unannounced inspections at the premises of 'H&R/Tudapetrol', ENI, MOL and also the premises of companies in the Sasol, ExxonMobil, Repsol and Total groups (recital 75 to the contested decision). No inspection was carried out at the applicants' premises.

7 On 25 May 2007, the Commission sent a statement of objections to the companies referred to at paragraph 2 above, including the applicants (recital 85 to the contested decision). By letter of 13 August 2007, the applicants replied to the statement of objections.

8 On 10 and 11 December 2007, the Commission held a hearing in which the applicants took part (recital 91 to the contested decision).

9 In the contested decision, in the light of the evidence available to it, the Commission considered that the addressees, which constituted the majority of the producers of paraffin waxes and slack wax in the EEA, had participated in a single, complex and continuous infringement of Article 81 EC and Article 53 of the EEA Agreement, covering the EEA territory. That infringement consisted in agreements or concerted practices relating to price fixing and the exchange and disclosure of sensitive business information affecting paraffin waxes. As regards RWE (later Shell), ExxonMobil, MOL, Repsol, Sasol and Total, the infringements relating to paraffin waxes also concerned customer sharing or market sharing. Furthermore, the infringement committed by RWE, ExxonMobil, Sasol and Total also related to slack wax sold to end-customers on the German market (recitals 2, 95 and 328 to and Article 1 of the contested decision).

10 The unlawful practices took form at anticompetitive meetings called 'technical meetings' or sometimes 'Blauer Salon' meetings by the participants and at 'slack wax meetings' devoted specifically to questions relating to slack wax.

11 The fines imposed in the present case were calculated on the basis of 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 2006 Guidelines'), which were in force when the statement of objections was notified to the companies referred to at paragraph 2 above.

12 The contested decision includes, in particular, the following provisions:

'Article 1

The following undertakings have infringed Article 81(1) [EC] and — from 1 January 1994 — Article 53 of the EEA Agreement by participating, for the periods indicated, in a continuing agreement and/or concerted practice in the paraffin waxes sector in the common market and, as of 1 January 1994, within the EEA:

…

RWE-Dea AG: from 3 September 1992 to 30 June 2002;

RWE AG: from 3 September 1992 to 30 June 2002;

…

For the following undertakings, the infringement also includes slack wax sold to end-customers on the German market for the periods indicated:

…

RWE-Dea AG: from 30 October 1997 to 30 June 2002;

RWE AG: from 30 October 1997 to 30 June 2002;

…

Article 2

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

ENI SpA: EUR 29 120 000;

Esso Société anonyme française: EUR 83 588 400,

of which jointly and severally with:

ExxonMobil Petroleum and Chemical BVBA and ExxonMobi1 Corporation for EUR 34 670 400, of which jointly and severally with Esso Deutschland GmbH for EUR 27 081 600;

Tudapetrol Mineralölerzeugnisse Nils Hansen KG: EUR 12 000 000;

Hansen & Rosenthal KG jointly and severally with H&R Wax Company Vertrieb GmbH: EUR 24 000 000,

of which jointly and severally with:

H&R ChemPharm GmbH for EUR 22 000 000;

MOL Nyrt.: EUR 23 700 000;

Repsol YPF Lubricantes y Especialidades SA jointly and severally with Repsol Petróleo SA and Repsol YPF SA: EUR 19 800 000;

Sasol Wax GmbH: EUR 318 200 000,

of which jointly and severally with:

Sasol Wax International AG, Sasol Holding in Germany GmbH and Sasol Limited for EUR 250 700 000;

Shell Deutschland Oil GmbH, Shell Deutschland Schmierstoff GmbH, Deutsche Shell GmbH, Shell International Petroleum Company Limited, The Shell Petroleum Company Limited, Shell Petroleum NV and The Shell Transport and Trading Company Limited: EUR 0;

RWE-Dea AG jointly and severally with RWE AG: EUR 37 440 000;

Total France SA jointly and severally with Total SA: EUR 128 163 000.'

2. *Structure of the RWE group and of the joint venture Shell & Dea Oil*

13 The applicants' liability was incurred on account of the conduct of employees of Dea Mineraloel AG, which became Dea Mineraloel GmbH ('Dea Mineraloel').

14 From 3 September 1992 until 2 January 2002, Dea Mineraloel was a wholly-owned subsidiary of RWE-Dea Aktiengesellschaft für Mineraloel und Chemie, subsequently renamed RWE Dea. RWE Dea was a subsidiary owned as to 99.4% by RWE AG.

15 On 2 January 2002, Deutsche Shell assumed joint control of Dea Mineraloel with RWE Dea, by acquiring 50% of the shares in Dea Mineraloel. The merger was authorised by Commission Decision C(2001) 4526 final of 20 December 2001 declaring a concentration compatible with the common market and the EEA Treaty (Case COMP/M.2389 — Shell/Dea) ('the decision authorising the merger'). Dea Mineraloel therefore became a joint venture, renamed Shell & Dea Oil, held as to 50% by Deutsche Shell and RWE Dea, combining their oil and petrochemical businesses.

16 On 1 July 2002, Shell acquired the remaining 50% of the shares in the joint venture Shell & Dea Oil. Shell & Dea Oil was renamed Shell Deutschland Oil in 2003. As of 1 April 2004, the 'wax' business of Shell Deutschland Oil was transferred to its wholly-owned subsidiary, Shell Deutschland Schmierstoff.

Procedure and forms of order sought

17 By application lodged at the Court Registry on 15 December 2008, the applicants brought the present action.

18 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure. In the context of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, the Court invited the parties to answer in writing a number of questions and to produce certain documents. The parties complied with that request within the prescribed period.

19 The parties presented oral argument and answered the questions put by the Court at the hearing on 20 March 2012.

20 Owing to the factual links with Cases T-540/08 *Esso and Others* v *Commission*, T-541/08 *Sasol and Others* v *Commission*, T-544/08 *Hansen & Rosenthal and H&R Wax Company Vertrieb* v *Commission*, T-548/08 *Total* v *Commission*, T-550/08 *Tudapetrol* v *Commission*, T-551/08 *H&R ChemPharm* v *Commission*, T-558/08 *Eni* v *Commission*, T-562/08 *Repsol Lubricantes y especialidades and Others* v *Commission* and T-566/08 *Total Raffinage Marketing* v *Commission*, and to the fact that the legal points raised were closely related, the Court decided not to deliver judgment in the present case until after the hearings in those related cases, the last of which was held on 3 July 2013.

21 The applicants claim that the Court should:

— annul Article 1 of the contested decision in so far as it finds that they have infringed Article 81(1) EC and Article 53 of the EEA Agreement;

— annul Article 2 of the contested decision, in so far as it imposes on them a fine of EUR 37 440 000;

— in the alternative, reduce the amount of the fine imposed on them;

— order the Commission to pay the costs.

22 The Commission contends that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Law

23 In support of their action, the applicants put forward three pleas in law. The first plea alleges infringement of Article 81(1) EC and Article 23(2)(a) of Regulation No 1/2003, owing to what they claim to be the incorrect finding that the applicants, on the one hand, and Dea Mineraloel or Shell & Dea Oil, on the other, formed an economic unit. The second plea, put forward in the alternative, alleges breach of the principle of equal treatment owing to the incorrect application of the 2002 Leniency Notice, and in particular to the failure to extend the benefit of Shell's application for

leniency to the applicants. The third plea, put forward in the alternative, alleges infringement of Article 23(2) and (3) of Regulation No 1/2003 owing to the failure to comply with the principles governing the determination of the amount of the fine.

1. *First plea, alleging an incorrect finding that the applicants and Dea Mineraloel or Shell & Dea Oil formed an economic unit*

24 The applicants claim that in imputing to them liability for the infringement committed by Dea Mineraloel during the period from 3 September 1992 to 2 January 2002 and for the infringement committed by Shell & Dea Oil during the period from 2 January until 30 June 2002 ('the joint venture period'), the Commission infringed Article 81(1) EC and Article 23(2)(a) of Regulation No 1/2003, since it misconstrued the concept of 'undertaking' within the meaning of Article 81 EC.

Preliminary observations

25 As regards the joint and several liability of a parent company for the conduct of its subsidiary or of a joint venture owned by it, it should be borne in mind that the fact that a subsidiary or a joint venture has separate legal personality is not sufficient to preclude the possibility that its conduct may be imputed to the parent company (see, to that effect, Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, paragraph 132).

26 European Union competition law refers to the activities of undertakings, and the concept of 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraph 54, and Joined Cases T-141/07, T-142/07, T-145/07 and T-146/07 *General Technic-Otis and Others* v *Commission* [2011] ECR II-4977, paragraph 53).

27 The Courts of the European Union have also stated that the concept of an undertaking, in that context, must be understood as designating an economic unit even if in law that economic unit consisted of several persons, natural or legal (see Case 170/83 *Hydrotherm Gerätebau* [1984] ECR 2999, paragraph 11; *Akzo Nobel and Others* v *Commission*, paragraph 26 above, paragraph 55 and the case-law cited; and Case T-234/95 *DSG* v *Commission* [2000] ECR II-2603, paragraph 124). The Courts have thus emphasised that, for the purposes of applying the rules on competition, the formal separation between two companies resulting from their separate legal personality is not conclusive, the decisive test being the uniformity or otherwise of their conduct on the market. Thus, it may be necessary to establish whether two or more companies that have distinct legal identities form, or fall within, one and the same undertaking or economic entity adopting the same course of conduct on the market (*Imperial Chemical Industries* v *Commission*, paragraph 25 above, paragraph 140; Case T-325/01 *DaimlerChrysler* v *Commission* [2005] ECR II-3319, paragraph 85; and *General Technic-Otis and Others* v *Commission*, paragraph 26 above, paragraph 54).

28 When such an economic entity infringes the competition rules, it is for that entity, according to the principle of personal responsibility, to answer for that infringement (*Akzo Nobel and Others* v *Commission*, paragraph 26 above, paragraph 56, and *General Technic-Otis and Others* v *Commission*, paragraph 26 supra, paragraph 55).

29 The conduct of a subsidiary may be imputed to the parent company, on the ground that they belong to the same undertaking, where that subsidiary does not decide independently upon its conduct on the market, because it is under the decisive influence of the parent company in that respect, taking into account in particular the economic, organisational and legal links between the two legal entities (see, to that effect, *Akzo Nobel and Others* v *Commission*, paragraph 26 above, paragraph 58, and Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 527).

30 The conduct on the market of the subsidiary is under the decisive influence of the parent company, in particular, where the subsidiary carries out, in all material respects, the instructions given to it by the parent company in that respect (*Imperial Chemical Industries* v *Commission*, paragraph 25 above, paragraphs 133, 137 and 138, and Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, paragraph 27).

31 The subsidiary's conduct on the market is, in general, also under the decisive influence of the parent company where the latter retains only the power to define or approve certain strategic commercial decisions, where appropriate by its representatives in the bodies of the subsidiaries, while the power to define the commercial policy *stricto sensu* of the subsidiary is delegated to the managers responsible for its operational management, chosen by the parent company and representing and promoting the parent company's commercial interests (see, to that effect, Case T-25/06 *Alliance One International* v *Commission* [2011] ECR II-5741, paragraphs 138 and 139).

32 Where the uniformity of the conduct on the market of the subsidiary and the parent company is ensured, in particular in the cases described at paragraphs 30 and 31 above, or by other economic, organisational and legal links between the companies, they form part of the same economic unit and, accordingly, form a single undertaking, according to the case-law referred to at paragraph 27 above. 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, to that effect, *Akzo Nobel and Others* v *Commission*, paragraph 26 above, paragraph 59).

33 The case-law set out at paragraphs 25 to 32 above is also applicable to the imputation of liability to one or more parent companies for an infringement committed by their joint venture (*General Technic-Otis and Others* v *Commission*, paragraph 26 above, paragraphs 52 to 56).

34 It is in the light of those rules that the Court will consider the applicants' arguments and the correctness of the findings in the contested decision as regards the imputation to the applicants of liability for the acts of Dea Mineraloel, wholly owned by the applicants (first part), and of Shell & Dea Oil, owned as to 50% by the applicants (second part).

First part, concerning the imputation to the applicants of liability for the infringement committed by Dea Mineraloel (the period before 2 January 2002)

The contested decision

35 In the contested decision, the Commission considered as follows:

'…

(545) … the exercise of decisive influence on the commercial policy of a subsidiary does not require day-to-day management of the subsidiary's operation. The subsidiary's management may well be entrusted with the subsidiary, but this does not rule out that the parent company imposes objectives and policies which affect the performance of the group and its coherence and disciplines any behaviour which may depart from those objectives and policies. In fact, RWE acknowledges that RWE AG concentrated on the overall issues for the RWE group, such as strategy, planning, controlling and financing and received technical reports. RWE also states that although neither the management nor the supervisory boards of [RWE Dea] influenced the business of Dea Mineraloel, they did focus on those businesses of Dea Mineraloel which required capital, development of margins/profits, risks etc. and that they relied on the reports they received which, as they seemed accurate, rendered it unnecessary to actively monitor the business … These statements do in fact show that [the applicants] had an interest and the

ability to exercise control over at least the strategy and financial aspects of its subsidiaries, and that they in fact exercised (some) control on certain strategic issues as well as through a reporting system.

(546) The arguments that paraffin wax is of very limited importance to RWE and that reports received seemed accurate and thus RWE AG or [RWE Dea] did not actively monitor the businesses of Dea Mineraloel, [are] not conclusive with respect to the effective autonomy of a subsidiary. The fact that the parent company itself is not involved in the different businesses is not decisive as regards the question whether it should be considered to constitute a single economic unit with the operational units of the group. The division of tasks is a normal phenomenon within a group of companies. An economic unit by definition performs all of the main functions of an economic operator within the legal entities of which it is composed. …

(553) The Commission therefore concludes that RWE AG and [RWE Dea] exercised decisive influence and effective control over [Dea Mineraloel] from 3 September 1992 until 1 January 2002 [with the consequence that they] form part of the undertaking that committed the infringement.'

The presumption of the existence of an economic unit between the subsidiary and its sole parent company

36 It should be borne in mind that in the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed the European Union competition rules, first, the parent company can exercise decisive influence over the conduct of the subsidiary and, second, there is a rebuttable presumption that the parent company does in fact exercise decisive influence over the conduct of its subsidiary. 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 26 above, paragraphs 60 and 61 and the case-law cited).

37 Furthermore, according to the case-law, the presumption of liability based on the holding, by a company, of the entire share capital of another company applies not only in the case where there is a direct relationship between the parent company and its subsidiary, but also in the case where, as in the present case, that relationship is indirect due to the interposition of another company (Case C-90/09 P *General Química and Others* v *Commission* [2011] ECR I-1, paragraph 90).

38 A parent company which holds almost all the capital of its subsidiary is, as a general rule, in a similar situation to that of a sole owner as regards its power to exercise a decisive influence over the conduct of its subsidiary, having regard to the economic, organisational and legal links which join it to that subsidiary. Consequently, the Commission is entitled to apply to that situation the same evidential regime, namely to rely on the presumption that that parent company makes effective use of its power to exercise a decisive influence over the conduct of its subsidiary. Admittedly, it cannot be excluded that, in certain cases, minority shareholders may have, in respect of the subsidiary, rights which call the abovementioned analogy in question. However, apart from the fact that such rights are not usually attached to quite minor shareholdings, such as those at issue in the present case, no evidence of that nature was produced by the applicants in the present case (see, to that effect, Case T-217/06 *Arkema France and Others* v *Commission* [2011] ECR II-2593, paragraph 53).

39 Where the presumption is not rebutted, the Commission can establish that the subsidiary and the direct and indirect parent companies form part of the same economic unit and, accordingly, form a single undertaking, within the meaning of the case-law referred to at paragraph 27 above. The fact that the parent companies and the subsidiary constitute a single undertaking within the meaning of Article 81 EC enables the Commission to address a decision imposing fines to the parent companies, without having to establish the personal involvement of the parent companies in the infringement (see the case-law cited at paragraph 32 above).

40 According to the case-law, in order to rebut the presumption described at paragraph 36 above, the applicants were required to adduce any evidence relating to the organisational, economic and legal links between them and Dea Mineraloel which they considered to be capable of demonstrating that they did not constitute a single economic entity. When making its assessment, the Court must take into account all the evidence adduced, the nature and importance of which may vary according to the specific features of each case (Case T-112/05 *Akzo Nobel and Others* v *Commission* [2007] ECR II-5049, paragraph 65).

41 The presumption in question is based on the fact that, save in quite exceptional circumstances, a company holding all the capital of a subsidiary can, by dint of that shareholding alone, exercise decisive influence over that subsidiary's conduct and, furthermore, that it is within the sphere of operations of those entities against whom the presumption operates that evidence of the lack of actual exercise of that power to influence is generally apt to be found (Case C-521/09 P *Elf Aquitaine* v *Commission* [2011] ECR I-8947, paragraph 60).

42 In addition, the application of such a presumption is justified by the fact that, when the parent company is the sole shareholder in the subsidiary, it has at its disposal every possible means of ensuring that the subsidiary's commercial conduct is aligned with its own. In particular, it is the sole shareholder that defines, in principle, the extent of the subsidiary's autonomy by establishing the latter's articles of association, chooses its management and takes or approves the subsidiary's strategic commercial decisions, if necessary by having representatives on the subsidiary's bodies. Likewise, the economic unity between the parent company and its subsidiary is normally further protected by obligations arising under the company law of the Member States, such as the obligation to keep consolidated accounts, the obligation for the subsidiary to account periodically for its activities to the parent company and also by the approval of the subsidiary's accounts in general meeting, consisting solely of the parent company, which necessarily means that the parent company follows, at least in broad terms, the commercial activities of the subsidiary.

43 Thus, the application of the presumption that the parent company does in fact exercise decisive influence over the commercial conduct of its subsidiary is justified in so far as it covers typical situations as regards the relationship between a subsidiary and its sole parent company, by providing that the ownership of all or virtually all the capital of the subsidiary by a sole parent company means in principle that they pursue the same conduct on the market.

44 The fact none the less remains that, following the statement of objections, the companies concerned have every opportunity to show that the mechanisms described at paragraph 42 above, normally leading to the alignment of the commercial conduct of the subsidiary with that of its parent company, did not operate in the ordinary manner, so that the economic unity of the group was severed.

The applicants' arguments concerning the rebuttal of the presumption

45 In the present case, the applicants do not dispute that, on the ground that Dea Mineraloel's entire capital was held by RWE Dea and 99.4% of RWE's capital was held by RWE AG, the Commission was entitled to presume that, in the absence of proof to the contrary, they had in fact exercised decisive influence over Dea Mineraloel's commercial conduct.

46 However, they maintain that, in their reply to the statement of objections, they adduced sufficient evidence to rebut the presumption.

– Dea Mineraloel's operational autonomy

47 The applicants claim that the Commission was wrong to take the view in the contested decision that the exercise of decisive influence by the parent company over the commercial conduct of the subsidiary did not require that it 'took charge' of the management of the subsidiary's day-to-day business. Thus, the arguments which they put forward in their replies to the statement of objections are sufficient to rebut the presumption.

48 In the first place, the applicants observe that, as the main company in the group, RWE AG focuses on the group management tasks, such as strategy, planning, control and finance. RWE AG did not exercise any influence on the operational part of RWE Dea's or Dea Mineraloel's business.

49 In that regard, the Court has already held that the fact that a subsidiary has its own local management and its own resources does not prove, in itself, that that company decides upon its conduct on the market independently of its parent company. The division of tasks between subsidiaries and their parent companies and, in particular, the fact that the local management of a wholly-owned subsidiary is entrusted with operational management is normal practice in large undertakings composed of a multitude of subsidiaries ultimately owned by the same holding company. Consequently, where a parent company or holding company owns all or virtually all the capital of the subsidiary directly involved in the infringement, the evidence adduced in that regard cannot rebut the presumption that decisive influence was in fact exercised over the conduct of the subsidiary by the parent company and by the holding company (see, to that effect, *Alliance One International* v *Commission*, paragraph 31 above, paragraphs 130 and 131).

50 That approach is justified, moreover, by the fact that, in the case of a subsidiary which is wholly, or almost wholly, owned by a sole parent company, there is in principle a single commercial interest and the members of the subsidiary's bodies are designated and appointed by the sole shareholder, which may give them at least informal instructions and impose performance criteria on them. In such a case, therefore, there is necessarily a relationship of confidence between the management of the subsidiary and the management of the parent company and the management of the subsidiary necessarily act by representing and promoting the only commercial interest that exists, namely the interest of the parent company (see also paragraph 31 above). Thus, the unity of the market conduct of the parent company and of its subsidiary is ensured in spite of any autonomy conferred on the management of the subsidiary as regards its operational direction, which comes within the definition of the parent company's commercial policy in the strict sense. As a general rule, moreover, it is the sole shareholder that defines, on its own and according to its own interests, the procedure whereby the subsidiary takes decisions and that determines the extent of the subsidiary's operational autonomy, which it may change on its own initiative by amending the rules governing the functioning of the subsidiary or in the context of a restructuring, or indeed by setting up informal decision-taking structures. Therefore, as a general rule, the management of the subsidiary thus ensures that the subsidiary's commercial conduct complies with that of the rest of the group in the exercise of their autonomous powers.

51 In the second place, it should be added that the evidence on which the applicants rely is inherent in the concept of decentralised management, which is typical of large undertakings with diversified activities and is not the consequence of any exceptional circumstance. Conversely, the applicants acknowledge that RWE AG devoted itself to matters such as strategy, planning, control and finance, on behalf of the group, and received technical reports from Dea Mineraloel, while RWE Dea was concerned with the businesses of Dea Mineraloel which required capital, development of margins/profit and risks.

52 In the third place, in the applicants' submission, the Commission took an inconsistent approach in the contested decision, since it examined operational management in the context of the imputation of liability for the acts of the joint venture owned by BP and Mobil (recital 374 to the contested decision) to those parent companies. However, it refused to take Dea Mineraloel's operational autonomy into account.

53 In that regard, it should be emphasised (see also the examination of the second part of the present plea) that the respective powers of each of the parent companies in the operational management of a joint venture constitute a relevant element in the assessment of the imputability to the parent companies of liability for the infringement committed by the joint venture, since the joint management of the joint venture testifies to the economic unity between the joint venture and the parent companies exercising that joint management. In the case of Dea Mineraloel, however, this was not a joint venture but a subsidiary wholly owned by RWE Dea, to which a different evidential procedure applies owing to the existence of a single shareholder, a single commercial interest and the fact that all the managers are nominated and appointed, directly or indirectly, by the sole parent company (see paragraphs 42 and 50 above).

54 Accordingly, the argument based on the fact that examination of the imputation of liability for the infringement committed by the joint venture set up by BP and Mobil is irrelevant.

55 It follows that the arguments which the applicants derive from the operational autonomy of Dea Mineraloel, which are not capable of demonstrating that the economic unit between that undertaking and the applicants was severed, must be rejected.

– The absence of influence over the activities connected with paraffin waxes and the small percentage of Dea Mineraloel's turnover which sales of those products represent

56 The applicants claim that RWE AG gave no instructions to Dea Mineraloel concerning the management of its day-to-day business. It was only the implementation of large projects of major importance for the whole group that required the consent of the management and the supervisory board of RWE AG. As the 'paraffin waxes' business was never of importance for the group as a whole, however, those bodies of RWE AG never had to deal with issues relating to management in that area.

57 Likewise, the applicants observe that neither the management nor the supervisory board of RWE Dea exercised influence over Dea Mineraloel's 'paraffin waxes' business, or gave that company instructions concerning that business. Furthermore, as regards the production of paraffin waxes, the management of RWE Dea were aware only that accounts were submitted on a weekly basis, consisting of a summary of the results of Mineralölwerk Grasbrook's business. That weekly submission of the accounts corresponded essentially to the monthly results supplied by the accounts department. There was thus no need, from the viewpoint of the RWE Dea's management, to be actively involved in the 'paraffin waxes' business.

58 According to the applicants, the activity affected by the cartel represents only 0.1% to 0.2% of Dea Mineraloel's turnover, which is a 'strong indication' of the absence of decisive influence on the part of the management of the group.

59 In the first place, according to the case-law, it is not because of a parent-subsidiary relationship in which the parent company instigates the infringement, nor *a fortiori* because of the parent company's involvement in the infringement, but because they constitute a single undertaking for the purposes of Article 81 EC that the Commission is able to address a decision imposing fines to the parent company of a group of companies. Thus, the imputation to the parent company of the unlawful conduct of a subsidiary does not require proof that the parent company influences its subsidiary's policy in the specific area in which the infringement occurred. It follows that the fact that the

management of the parent company were not aware of the infringement and that they did not give instructions concerning the production or sale of the products affected by the cartel is irrelevant from the aspect of the rebuttal of the presumption (*Akzo Nobel and Others* v *Commission*, paragraph 40 above, paragraphs 58 and 83, and Case T-38/07 *Shell Petroleum and Others* v *Commission* [2011] ECR II-4383, paragraphs 69 and 70).

60 Likewise, for the same reasons, the fact that the area or activity affected by the infringement represents only a small percentage of the entire business of the group or the parent company cannot prove that the subsidiary was independent of its parent company and, accordingly, has no effect on the application of the presumption that the parent company did in fact exercise decisive influence over the commercial conduct of its subsidiary on the market (judgment of 30 September 2009 in Case T-168/05 *Arkema* v *Commission*, not published in the ECR, paragraph 79; see also, to that effect, Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others* v *Commission* [2007] ECR II-947, paragraph 144).

61 In addition, the small proportion that sales of products affected by the cartel represent in the group turnover does not alter the fact that the results achieved in that area are generally included in the consolidated results of the parent companies. Thus, the profitability of those activities is of interest for the parent companies and for the group as a whole.

62 Furthermore, it should be borne in mind that the presence of formal instructions given by the parent company to the subsidiary is not necessarily required for the purpose of establishing that those companies form an economic unit (see paragraph 31 above). The economic unit formed by them is also ensured when the power to define the subsidiary's commercial policy in the strict sense is delegated to the management responsible for its operational management, who are chosen and maintained in their positions by the parent company and who represent and promote the only commercial interest in existence, that is to say, that of the parent company, which is the sole owner. That management thus ensure that the subsidiary's commercial conduct complies with that of the parent company in the exercise of their autonomous powers (see paragraph 50 above). Intervention by the parent company may therefore be reserved for situations in which the subsidiary's results do not match the parent company's expectations, while, in the case of normal performance, the parent company may confine itself to monitoring the subsidiary's activities through the reports prepared by the subsidiary and by approving any strategic decisions.

63 Thus, the arguments which the applicants derive from the assertion that they did not exercise direct influence in the field of paraffin waxes must be rejected.

64 The Court must therefore uphold the Commission's finding that the applicants and Dea Mineraloel formed part of the undertaking that committed the infringement during the period from 3 September 1992 until 1 January 2002. Consequently, the Commission did not err in holding them liable for the infringement.

The applicants' alleged strict liability

65 The applicants maintain that the approach taken by the Commission in the present case involves what is 'practically no-fault liability', which, in their submission, is incompatible with the principle of personal liability. The consequence of the rejection of the arguments which they put forward in order to rebut the presumption that they did in fact exercise decisive influence is that that presumption is transposed into an irrebuttable presumption of the existence of an economic unit in the case of subsidiaries wholly owned by a parent company.

66 It should be borne in mind that the application of the presumption that the parent company does in fact exercise decisive influence over the commercial conduct of its subsidiary is justified, in so far as it covers typical situations of the relationship between a subsidiary and its sole parent company, and that that presumption is not irrebuttable (see paragraphs 41 to 44 above).

67 The rebuttal of the presumption is not, however, a matter of the quantity and detail of the evidence where the evidence shows a normal situation in the organisation of a large multinational undertaking, where operational management powers are delegated to the managers of its local units. In order to rebut the presumption, it is necessary to present unusual circumstances which show that, although the parent companies own the entire share capital of the subsidiaries of the group, the economic unit formed by the group has been severed, since the mechanisms that ensure that the commercial conduct of the subsidiaries and the parent companies is aligned did not operate in the ordinary way.

68 Furthermore, in accordance with the principle that penalties must be specific to the offender, which is applicable in any administrative procedure which may lead to the imposition of penalties under the European Union competition rules, an undertaking may be penalised only for acts imputed to it individually (see, to that effect, Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 63).

69 However, that principle must be reconciled with the concept of 'undertaking' and with the case-law according to which the fact that the parent company and its subsidiary constitute a single undertaking for the purposes of Article 81 EC empowers the Commission to address the decision imposing fines to the parent company of a group of companies. Thus, it must be held that the applicants were penalised personally for the infringement which they are deemed to have committed themselves on account of their economic, organisational and legal links with Dea Mineraloel resulting from the fact that they held all the latter's capital (see, to that effect, *Metsä-Serla and Others* v *Commission*, paragraph 30 above, paragraph 34).

70 It follows from the foregoing that the Commission was entitled to find, on the basis of the presumption at issue, which has not been rebutted in the present case, that the applicants were part of the 'undertaking' that had infringed Article 81 EC. Accordingly, the principle of personal liability and the principle that penalties must be specific to the offender have been observed.

71 The present complaint must therefore be rejected.

72 In the light of the foregoing, it must be concluded that the Commission did not infringe Article 81 EC and Article 23(2) of Regulation No 1/2003 when it imputed to the applicants liability for the infringement committed by Dea Mineraloel.

73 Consequently, the first part of the first plea must be rejected.

Second part, concerning the imputation to the applicants of liability for the infringement committed by Shell & Dea Oil (the period from 2 January until 30 June 2002)

74 The applicants claim that the Commission was wrong to impute to them liability for the infringement committed by Shell & Dea Oil, a joint venture held equally by RWE Dea and Shell, during the period of the joint venture, from 2 January until 30 June 2002. They claim that Shell took operational control of the joint venture from the time when it was set up and that the Commission cannot therefore impose fines on the applicants for the infringement committed by that entity.

75 In the contested decision, the Commission held Shell and RWE jointly and severally liable for the anticompetitive actions of Shell & Dea Oil (recital 552 to the contested decision). It imputed liability for those actions to the applicants on the basis of the following considerations:

'…

(510) When Shell and [RWE Dea] created their joint venture in January 2002, the existing Dea Mineraloel … was used as the joint venture vehicle[,] which was renamed as of 2 January 2002 to Shell & Dea Oil GmbH, and simultaneously became a 50/50 subsidiary under joint control of Deutsche Shell GmbH and [RWE Dea]. The joint venture was set up with the intention that after an interim period, starting with the creation of the joint venture and ending at the latest on 1 July 2004, Shell would acquire sole control of the combined businesses. During the interim period, the members of the management board which were in charge of the joint venture's day-to-day operation would be equally appointed by each shareholder, however the chairman of the management board would have a casting vote and would be a nominee of Shell. Moreover, both parties had certain veto rights safeguarding their decisive influence of the joint venture, and thus during the interim period, Shell and RWE had joint control over the joint venture [footnote 666 to the contested decision referring in that regard to the decision authorising the joint venture].

…

(549) [It follows from the case-law, in particular from Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085] that the management power one company has over another can constitute the factual evidence that demonstrates decisive influence over another undertaking. In this case, the joint management power of Shell and RWE in the management board with respect to the management of the joint venture has been demonstrated (see recital (510)) on the basis of the agreement setting up the joint venture. The members of the management board, which was in charge of the joint venture's day-to-day operations, were equally appointed by each shareholder. Resolutions in the shareholders' meeting were to be taken by simple majority (as each party held 50% of the voting rights, decisions could be blocked by either party). During the relevant period certain decisions were to be taken by a Joint Venture Committee composed of six members, three nominated by each [shareholder] and decisions requiring unanimity. The Joint Venture Committee had the sole discretion and authority for a number of strategic decisions, such as the business plan, the annual operating budget, structural changes in the joint venture, investments above a certain threshold and the appointment of members of the management board (the so-called veto rights mentioned in recital (510)). Therefore, in the light of these veto rights of both parties safeguarding their decisive influence in the joint venture, the Commission concludes that during the relevant joint venture period, Shell and RWE had joint control over the joint venture company [see footnote 680 to the contested decision and the decision authorising the joint venture].

(550) Under these circumstances the fact that the chairperson of the management board[,] who was a Shell nominee[,] cannot be considered a significant, let alone the decisive, factor that would put into doubt the joint liability of Shell and RWE … because this does not affect the veto rights. Given the management structure for the joint venture, RWE's argument that the sales and pricing policy of the joint venture was decided and controlled by Shell only and that the management of the joint venture was integrated into Shell's structure cannot be followed. Similarly[,] the fact that it was foreseen from the creation of the joint venture that Shell would take full control of the business after the transitional period does not change the fact that during the transitional period, the joint venture was for the reasons stated above in recitals (510) and (549) under joint control by Shell and RWE.

(551) Thus, given that joint management power (including in particular the Joint Venture Committee) and the fact that Shell and RWE jointly controlled all the shares in the joint venture company, each holding a 50% share, the finding of liability of both parent companies in this case is in line with the judgment in [*Avebe* v *Commission*].

(553) … RWE AG and RWE-Dea AG exercised decisive influence and effective control over [the joint venture] from 2 January 2002 until 30 June 2002 (together with the Shell group). Consequently, RWE AG and RWE-Dea AG are to be held jointly and severally liable with the Shell Group for … Shell & Dea Oil's conduct between 2 January 2002 and 30 June 2002. For both periods, RWE AG and RWE-Dea AG form part of the undertaking that committed the infringement.'

76 In the first place, the applicants claim that, contrary to the Commission's assertion in the contested decision, the judgment in Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085 does not establish a general presumption that decisive influence is exercised on the commercial conduct of a joint venture held in equal shares by two parent companies.

77 In the second place, they submit that in the contested decision the Commission did not establish that the joint venture was under the 'joint management' of Shell and RWE. They emphasise that joint management was established in *Avebe* v *Commission*, paragraph 76 above, on the basis of indicia which are not present in this case.

78 In particular, in *Avebe* v *Commission*, paragraph 76 above, the parent companies were 'jointly responsible' for the undertaking's policy and they were represented equally in all bodies, including the management bodies (managers). In the present case, on the other hand, although the management was carried out jointly, the chairperson of the management board, nominated by Shell, had a casting vote where the votes were equally divided.

79 Furthermore, in *Avebe* v *Commission*, paragraph 76 above, the joint venture had to report regularly to persons appointed by the two parent companies. In the present case, the management was integrated from the outset in the decision-making and reporting structures of the Shell group.

80 In the third place, the applicants maintain that the characteristics of the management of Shell & Dea Oil resulting from its transitional nature precluded joint management.

81 They claim in that regard that, according to the provisions of the agreement setting up the joint venture, Shell was to acquire the majority of the shares of the joint venture with effect from the expiry of a certain period, when RWE acquired the right to offer to Shell its shares in the joint venture. In the procedure that led to the adoption of the decision authorising the merger (on which the Commission relied at recitals 510, 530 and 549 to the contested decision), the Commission verified and established not the acquisition of joint control, but directly the acquisition of exclusive control by Shell.

82 The integration of the management of Shell & Dea Oil in Shell's decision-making and reporting structures follows, in particular, from the procedural rules established for its management. In accordance with paragraph 1.1 of those rules, the management board of Shell & Dea Oil was to be integrated in Shell Europe Oil Products Ltd. In accordance with paragraph 1.2 of those procedural rules, the chair of the management board of Shell & Dea Oil was required to organise the management board according to Shell's international standards. Under paragraph 3 of those rules, each member of the management board was part of Shell's decision-making and reporting structures. Under paragraph 4 of those rules, the chair of the management board was required to cooperate with the President of Shell Europe Oil Products.

83 Those decision-making and reporting structures were introduced and applied from the creation of the joint venture. For example, Mr S., who, following the creation of the joint venture, had been given responsibility for the management of sales of paraffin waxes, did not report to the management board of the joint venture. He reported directly to Mr G., who bore the title of Shell group manager responsible for waxes in Europe in Shell UK Oil Products Ltd. As regards Shell & Dea Oil's distribution policy and operational activity in the field of paraffin waxes, there was no involvement of the body through which RWE Dea could have exercised influence by virtue of its power of appointment as a shareholder. From the time when the joint venture was created, the distribution policy and operational activity were, in practice, managed solely by Shell.

84 The fact that the joint venture was integrated in Shell's structures is also apparent in other important areas of the undertaking. Thus, a project called 'Financial Controlling Procurement' was set up, with the objective of applying Shell's accounts presentation systems to Shell & Dea Oil as well and preparing for the application of those systems to the accounts of the former Dea Mineraloel. In that regard, Shell & Dea Oil was — as is apparent from a document entitled 'Kurzinformationen zum FCP-Projekt' (brief information on the FCP project) — already regarded as part of Shell's European organisation. According to that document, 'the principle of the agreement setting up the joint venture mean[t] that the joint venture [should], as part of Shell's European organisation, adopt Shell's standards, systems, processes and culture' and that 'for that reason, in the context of the creation of the joint venture, Shell [&] Dea Oil, all the operational processes of Shell and Dea [should] be harmonised', it being stated that 'Shell's operational processes constituted[d] the standard to be achieved'.

85 Next, the applicants observe that, throughout the life of the joint venture, RWE's accounts department did not have access to Shell & Dea Oil's accounts.

86 Therefore, in the applicants' submission, the evidence gathered by the Commission in the contested decision does not prove the existence of 'joint management' within the meaning of *Avebe* v *Commission*, paragraph 76 above, but at the most 'joint control' within the meaning of Article 3(1) and Article 4(2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1). Proof of joint management goes much further in qualitative terms than proof of joint control and such proof assumes that the parent companies effectively and actively manage the business jointly.

87 Since the Commission has not adduced evidence of joint management in the present case, the contested decision should be annulled in so far as the Commission imputed to the applicants liability for the infringement committed by Shell & Dea Oil.

88 In the first place, the Commission contends that there is a presumption that the two parent companies did in fact exercise decisive influence over the commercial conduct of the joint venture where it is shown not only that there was joint control of (almost) 100% of the shares but also that the two parent companies had a power of joint management over the commercial policy of the joint venture.

89 In the second place, the Commission maintains that it demonstrated the existence of joint management power by referring to the provisions of the agreement setting up the joint venture. The applicants do not deny that the circumstances on which the Commission relies establish that the two parent companies had decisive influence over the strategic decisions of Shell & Dea Oil. Since the parent companies are best placed to judge the actual arrangement of the relationships of control within the joint venture, it is for them to adduce evidence to the contrary when, on the basis of circumstances which it has established, the Commission demonstrates the existence of a power of joint control over the commercial policy of the joint venture, thus establishing the presumption that decisive influence was exercised by the two parent companies.

90 The Commission maintains that the applicants argue only that they did not exercise any influence over the distribution policy and pricing policy, that is to say, over the operational management of Shell & Dea Oil. They assert that the day-to-day management of the joint venture was integrated in the 'decision-making and hierarchical structures' of the Shell group. In the Commission's submission, however, in order to establish the existence of an economic entity, it is sufficient that the decisive influence exercised by the parent companies extends to the commercial policy of the subsidiary in the broad sense, and in particular to strategic decisions. Consequently, the argument that the Shell group was in a privileged position when it came to exercising influence over Shell & Dea Oil's distribution and pricing policy does not suffice to prove that the two parent companies did not jointly exercise influence.

91 Furthermore, it is apparent from the provisions of the agreement setting up the joint venture that the two parent companies jointly exercised the management of the joint venture. RWE Dea and Deutsche Shell were represented equally in the shareholders' meeting because they held equal shares in the capital of the joint venture. In the same way, the composition of the joint venture committee and of the management board was shared equally between the two parent companies. Both parent companies also had the same number of representatives on the supervisory board.

92 While RWE nominated the chair of the joint venture committee and the chair of the supervisory board, the chair of the management board was appointed by Shell with RWE's consent. In the case of equal votes, the chair had a casting vote, while the representatives of the management board were required to make all reasonably foreseeable efforts to reach agreement when adopting decisions. Furthermore, a number of members of the applicants' management were appointed to the supervisory board of the joint venture.

93 As regards the division of powers, the management council had sole responsibility for the operational management of the joint venture, but was under the control and management power of the joint venture committee and the shareholders' meeting. In addition to that arrangement, there were obligations to provide information and to submit reports and the parent companies had a right of audit. Consequently, contrary to the applicants' assertions, the applicants received information of concern to them and could themselves have implemented controls.

94 According to the Commission, strategic questions were reserved for the joint venture committee and, ultimately, to the shareholders' meeting, in which decisions were taken by a simple majority. Within the shareholders' meeting and the joint venture committee, the two parent companies had to endeavour to 'avoid situations of equal votes' and, ultimately, a solution had to be found by the holding companies of each group.

95 According to the Commission, the joint venture did not have a management independent of the parent companies and the two parent companies had to agree on a common course of action on all questions. Furthermore, the two parent companies were informed in the same way about the activities of the joint venture and could, on the basis of the reports communicated to them, exercise their influence in the bodies of the joint venture. This factual situation forms the basis of the presumption that the two parent companies had in fact exercised decisive influence over the commercial policy of Shell & Dea Oil.

96 The applicants' response is that the management of Shell & Dea Oil had from the outset been 'fully integrated in the decision-making and hierarchical structures of the Shell group'. As regards the procedural rules for operational management, it follows from those rules that, with a view to the possible assumption of exclusive control by Shell, it was envisaged from the outset that the activities of the joint venture and Shell's activities would be harmonised. In the Commission's submission, however, what was envisaged was only the organisational integration of the joint venture in the Shell

group, while the joint management of the joint venture was not called into question. Thus, Shell was to give support to the joint venture as a partner and adviser. The procedural rules none the less make clear that that function was without prejudice to RWE's management power.

97 Furthermore, the Commission claims that the applicants' assertion that the sales manager of the joint venture reported not to the management of the joint venture but only to the Shell manager responsible for waxes in Europe is not supported by any evidence. The applicants' assertion relates, in any event, only to the structure of the reporting activities, which may have been organised in such a way that the sales figures were collected and processed within Shell — which still had its own 'wax' business while RWE's former 'wax' business was concentrated in the joint venture. In any event, the sales manager was a member of the management council or, at any rate, in his capacity as 'first-tier manager', would have been required to cooperate with and inform the management council. In the Commission's submission, the management council was thus directly informed by the manager or via Shell's reporting activities, which was necessary, moreover, since, in accordance with paragraph 13.4 of the agreement setting up the joint venture, the manager was required to report to the joint venture committee.

98 Nor, the Commission adds, does the adaptation of the accounts systems indicate that the Shell group had exclusive management power. RWE Dea had access to Shell & Dea Oil's accounting data. The document entitled 'Brief information on the FCP project' confirms, moreover, that the joint venture had a unitary organisation, adapted to 'Shell's business processes', and not that decision-making powers were transferred to Shell. Contrary to the applicants' assertions, that document shows that it was necessary to 'submit reports to both partners'.

Joint control and joint exercise of decisive influence over the commercial conduct of the joint venture

99 The applicants deny that proof of joint control is sufficient to establish that the two parent companies jointly exercised decisive influence over the commercial conduct of the joint venture. The Commission maintains that the exercise of such influence can be presumed where the two parent companies hold 100% of the capital of the joint venture in equal shares and where there is a power of joint management. In addition, the Commission maintains that the power of joint management can be demonstrated on the basis of the material in the agreement setting up the joint venture.

100 In the first place, it should be borne in mind that, according to Article 3(3) of Regulation No 139/2004, '[c]ontrol shall be constituted by rights, contracts or by any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking'.

101 According to the case-law, in order to impute the anticompetitive conduct of one company to another company in application of Article 81 EC, the Commission cannot rely on the mere ability to exercise decisive influence, such as that applied in the context of the application of Regulation No 139/2004 when establishing control, without its being necessary to ascertain whether that influence was in fact exercised (*General Technic-Otis and Others* v *Commission*, paragraph 26 above, paragraph 69).

102 On the contrary, it is, in principle, for the Commission to demonstrate such decisive influence on the basis of factual evidence (see *Avebe* v *Commission*, paragraph 76 above, paragraph 136 and the case-law cited). Such evidence includes the accumulation of posts by the same natural persons in the management of the parent company and that of its subsidiary or joint venture (Case T-132/07 *Fuji Electric* v *Commission* [2011] ECR II-4091, paragraph 184; see also, to that effect, 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 paragraphs 119 and 120), or the fact that those companies were

bound to follow the instructions issued by their single management and could not adopt conduct on the market independently of it (see, to that effect, *HFB and Others* v *Commission*, paragraph 29 above, paragraph 527).

103 In the present case, the Commission did not rely on direct proof of the exercise by RWE and Shell of decisive influence over the commercial conduct of Shell & Dea Oil.

104 The assertion, at recital 510 to the contested decision, that, 'during the interim period, Shell and RWE had joint control over the joint venture', was based on the decision authorising the concentration, as is apparent from footnote 666 to the contested decision. Next, at recital 549 to the contested decision, the Commission stated that, '[i]n this case, the joint management power of Shell and RWE in the management board of the joint venture ha[d] been demonstrated (see recital (510)) on the basis of the agreement setting up the joint venture'. Likewise, at recital 549 to the contested decision, the Commission examined the arrangements for the taking of decisions within the other bodies of the joint venture in the abstract, that is to say, solely on the basis of the agreement setting up the joint venture. It was on that basis that the Commission concluded, at the end of that recital, that during the relevant joint venture period, Shell and RWE had joint control over the joint venture and referred expressly, at footnote 680 to the contested decision, to the decision authorising the concentration.

105 It follows that, in the present case, the Commission concluded that Shell and RWE jointly exercised decisive influence over the commercial conduct of Shell & Dea Oil on the sole basis of an abstract analysis of the agreement setting up the joint venture, signed before Shell & Dea Oil commenced operations, in the same way as an analysis carried out in accordance with the rules on the authorisation of concentrations.

106 In the second place, the Court is thus required to consider to what extent such an abstract and prospective analysis, carried out in the field of concentrations, where the adoption of the decision authorising a concentration precedes the commencement of the joint venture's operations, can also serve as proof that decisive influence was in fact exercised over the commercial conduct of the joint venture in a decision imputing to the parent companies liability for an infringement of Article 81 EC committed in the past by that joint venture.

107 In that regard, it follows from the case-law that, even if the power or the possibility to determine the commercial decisions of the joint venture does arise, as such, solely from the mere ability to exercise decisive influence over its commercial policy and thus from the concept of 'control' within the meaning of Regulation No 139/2004, the Commission and the Courts of the European Union may presume that the legislative provisions and the terms of the agreements relating to the functioning of that undertaking, in particular the terms of the contract setting up the joint venture and the shareholders' agreement on votes, were implemented and observed. To that extent, examination of the actual exercise of decisive influence over the commercial conduct of the joint venture may consist in an abstract analysis of the documents signed before it began to function, like the analysis concerning control. In particular, where those provisions and terms state that the votes of each parent company were necessary for the adoption of a resolution within a body of the joint venture, the Commission and the Courts of the European Union may establish, in the absence of evidence to the contrary, that those resolutions were determined jointly by the parent companies (see, to that effect, *Avebe* v *Commission*, paragraph 76 above, paragraphs 137 to 139; *Fuji Electric* v *Commission*, paragraph 102 above, paragraphs 186 to 193; and *General Technic-Otis* v *Commission*, paragraph 26 above, paragraphs 112 and 113).

108 However, since the examination relating to the actual exercise of decisive influence is retrospective and may then be based on specific evidence, both the Commission and the parties concerned may adduce evidence that the commercial decisions of the joint venture were determined according to different procedures from those arising solely from the abstract examination of the agreements relating to the functioning of the joint venture (see, to that effect, *Fuji Electric* v *Commission*, paragraph 102 above,

paragraphs 194 and 195, and *General Technic-Otis and Others* v *Commission*, paragraph 26 above, paragraphs 115 to 117). In particular, the Commission or the parties concerned may adduce evidence that, notwithstanding the power of a sole parent company to adopt the decisions in question via its representatives in the bodies of the joint venture, they were in fact taken unanimously by some or all of the parent companies.

The merits of the Commission's finding concerning the imputation to RWE and Shell of liability for the infringement committed by Shell & Dea Oil

109 It is appropriate, therefore, to examine, in the light of the considerations set out at paragraphs 99 to 108 above, whether the Commission put forward sufficient evidence in the contested decision to enable liability for the infringement committed by Shell & Dea Oil to be imputed to the applicants.

110 It follows from the contested decision that the Commission based its finding that the applicants and the Shell group were jointly liable for the infringement committed by Shell & Dea Oil on two factors: first, the existence of joint management power, which it established by examining the agreement setting up the joint venture, referring to the decision authorising the concentration, in which Shell and RWE had first of all acquired joint control of Shell & Dea Oil, then, on expiry of an interim period, Shell would acquire sole control of the joint venture; second, the fact that the two parent companies jointly held, in equal shares, all the capital of the joint venture.

111 In the first place, as regards the applicants' observation that the 'joint management power' arises from the mere possibility of exercising decisive influence, that is to say, control within the meaning of Article 2 of Regulation No 139/2004, rather than from the actual exercise of such control, it is sufficient to observe that de facto joint management may be inferred from the power of joint management provided for in the agreements governing the functioning of the joint venture, in the absence of proof to the contrary (see paragraphs 107 and 108 above).

112 In the second place, as regards the nature of joint management, in *Avebe* v *Commission*, paragraph 76 above (paragraphs 136 to 138), the Court held that the indicia showing that the members of the bodies of the joint venture appointed by each of the parent companies, representing their business interests, were to work in close collaboration when defining and implementing the commercial policy of the joint venture, and that the decisions adopted by them necessarily had to reflect a concurrence of the wills of each of the parent companies held liable by the Commission, were relevant. In addition, the Court also pointed to evidence showing that regular contacts concerning the commercial policy of the joint venture took place between the parent companies and the members of the bodies of the joint venture appointed by each of them. The Court examined not only the adoption of strategic decisions within the joint venture but also the management of day-to-day matters and stated that the two managers appointed by the two parent companies were to work in close collaboration in that respect too (*Avebe* v *Commission*, paragraph 76 above, paragraphs 136 to 138).

113 In addition, in *General Technic-Otis and Others* v *Commission*, paragraph 26 above (paragraphs 112 and 118), the Court emphasised that the joint venture was held as to 75% by Otis Belgique, the remaining 25% being held by General Technic, and that, under the articles of association of the joint venture, each shareholder was represented on the joint venture's board in proportion to its shareholding. Since the decisions of the board had to be taken with a majority of 80% of votes, Otis had necessarily, through its representatives on the board, signalled its agreement to all such decisions throughout the infringement period.

114 In the third place, in the present case, while it is true that RWE had a power of veto in the joint venture's board and the shareholders' meeting, that did not apply to all decisions relating to the management of the joint venture. On the other hand, the casting vote of the chairman of the board, appointed by Shell, indicates that the members appointed by Shell could adopt decisions within the

management board in spite of any objections on the part of the members appointed by RWE. Accordingly, it could not be established, on the sole basis of the terms of the agreement setting up the joint venture referred to in the contested decision, that the two parent companies had managed the joint venture in close collaboration and that the adoption of decisions of the management board of the joint venture necessarily reflected the will of each of the parent companies held liable.

115 Last, it should be observed that the Commission has not adduced any firm evidence, such as, in particular, the minutes of meetings of the management board, to show that the joint venture had been managed in close collaboration by the two parent companies and that the decisions taken within the management board reflected the will of each of the parent companies held liable.

116 Accordingly, the indicia on the basis of which the Court established joint management in *Avebe* v *Commission*, paragraph 76 above, and *General Technic-Otis and Others* v *Commission*, paragraph 26 above, were absent in the present case.

117 In the third place, the Commission claims, however, that in order to establish the existence of an economic entity, it is sufficient that the decisive influence exercised by the parent companies extends to the subsidiary's commercial policy in the wide sense, and in particular to strategic decisions.

118 First, in that regard, it should be emphasised that the management board had an important role in defining the commercial policy of Shell & Dea Oil. According to paragraph 13.2 of the agreement setting up the joint venture, that board was the only body responsible for the management of the activities of the joint venture and had the power and authority to implement the objectives of the joint venture, without prejudice to the strategic powers reserved to the joint venture committee. According to paragraph 12.5 of that agreement, those reserved powers were limited, in essence, to the adoption of the budget and the business plan, to decisions concerning investments and to contracts with third parties having a value above a certain threshold, to the appointment of members of the management board and also to restructuring.

119 Second, it follows from the case-law cited at paragraphs 112 and 113 above that the parent companies' influence on the operational management of the joint venture, exercised through the members of the management board of the joint venture whom they had appointed, is wholly relevant for the appraisal of the existence of an economic unit between the parent companies and the joint venture.

120 Third, it is true that the question of operational management may be irrelevant in the case of a subsidiary that is wholly owned by a sole parent company, since the fact that the subsidiary is shown to have operational autonomy is not in itself capable of rebutting the presumption of the exercise of decisive influence (see the case-law cited at paragraph 49 above).

121 However, in the case of a single shareholder, all decisions — including those relating to the operational management of the subsidiary — are taken by managers nominated and appointed either directly or indirectly (by the bodies whose members have been appointed by the parent company) by the parent company alone. Likewise, in the absence of another shareholder, the only commercial interests to be found within the subsidiary are in principle the commercial interests of the sole shareholder. Thus, the Commission may presume the effective exercise of decisive influence even where the operational management is carried out autonomously by the managers of the subsidiary.

122 In the case of joint ventures, there are a number of shareholders and the decisions of the bodies of the joint venture are taken by the members representing the commercial interests of the different parent companies, which may coincide but may also diverge. Accordingly, the question whether the parent company has exercised genuine influence over the operational management of the joint venture, in particular through managers who have been appointed by the parent company, continues to be relevant.

123 In the fourth place, it should be borne in mind that the applicants had already put forward in their reply to the statement of objections relevant evidence as regards the appraisal of the existence of joint management. They had claimed that the commercial and pricing policy of the joint venture, that is to say, in essence, the operational management, was decided upon and controlled by Shell alone and that the management of the joint venture had been integrated into the structure of Shell. However, the only arguments put forward by the Commission in the contested decision in order to rebut that evidence was based on the veto powers which RWE enjoyed in the joint venture committee and the meeting of partners. As is clear from, in particular, paragraph 118 above, the operational management of the joint venture was not within the powers of those bodies. On the contrary, decisions which are relevant from the viewpoint of the appraisal of joint management were taken essentially by the management board.

124 Accordingly, the Commission did not establish in the contested decision that the management of the joint venture was exercised jointly.

125 It should be pointed out, moreover, that in the contested decision, in addition to joint management, the Commission did not rely on any indicium based on the economic, organisational and legal links demonstrating that RWE did in fact exercise decisive influence over the commercial conduct of the joint venture.

126 The fact that RWE and Shell together held 100% of the capital of Shell & Dea Oil does not mean that the facts of the present case are similar to those of *Avebe* v *Commission*, paragraph 76 above, since in that judgment the Court had concluded that the joint venture was jointly managed and had based its finding that decisive influence was exercised on other relevant indicia, which are absent in the present case.

127 In its defence, the Commission provided a list concerning the combination of posts in Dea Mineraloel, Shell & Dea Oil and the applicants, showing that three members of the management of RWE Dea were, between 2 January and 30 June 2002, at the same time members of the supervisory board of Shell & Dea Oil. In that regard, it should be observed that, before becoming members of the supervisory board of Shell & Dea Oil, those persons were members of the management of Dea Mineraloel. During the joint venture period, however, no overlap could be established between, on the one hand, the members of the management board or the joint venture committee and, on the other hand, the members of the applicants' bodies.

128 Even on the assumption that the combination of posts to which the Commission refers in the present case might affect the appraisal of the actual exercise of decisive influence, that factor cannot support the findings of the contested decision in that regard. In effect, the statement of reasons must in principle be notified to the person concerned at the same time as the act adversely affecting him. The absence of reasoning cannot be legitimised by the fact that the person concerned becomes aware of the reasons for the decision during the procedure before the Courts of the European Union (Case 195/80 *Michel* v *Parliament* [1981] ECR 2861, paragraph 22, and *Elf Aquitaine* v *Commission*, paragraph 41 above, paragraph 149).

129 In the light of all of the foregoing, it must be concluded that the evidence set out by the Commission in the contested decision is not sufficient to establish that the applicants and Shell jointly determined Shell & Dea Oil's conduct on the market, and the Commission could not therefore validly conclude that the applicants and Shell & Dea Oil formed an economic unit. Consequently, the Commission infringed Article 81 EC when it found, on the sole basis of the evidence set out in the contested decision, that the applicants were jointly and severally liable for the infringement committed by Shell & Dea Oil.

130 Accordingly, the second part of the first plea must be upheld and the contested decision must be annulled in so far as the Commission found that the applicants participated in the cartel during the period from 2 January until 30 June 2002. The consequences which the illegality found will have on the amount of the fine will be examined at paragraph 260 et seq. below.

2. *Second plea, alleging failure to apply the 2002 Leniency Notice to the applicants*

131 The applicants claim, in the alternative, that the Commission misapplied the 2002 Leniency Notice and breached the principle of equal treatment, in so far as it did not exempt the applicants from the fine imposed or reduce the amount of that find, taking account of the leniency application submitted by Shell Deutschland Schmierstoff on behalf of, among others, Shell Deutschland Oil. The fine imposed on the applicants should therefore 'be cancelled or, at least, be significantly reduced', in accordance with the spirit of that notice and Shell's intention, set out in its leniency application.

First part, alleging failure to extend the benefit of Shell's leniency application to the applicants

The contested decision

132 In the contested decision the Commission stated the following:

'…

(732) Shell was … the first undertaking to submit evidence on the infringement subject to the present Decision. The submitted evidence enabled the Commission to adopt a decision to carry out an investigation with regard to the alleged infringement in this sector. …

(736) Shell therefore benefits from immunity from fines pursuant to Point 8 of the 2002 Leniency Notice. Consequently, Shell's fine is reduced by 100%. This reduction also applies to Shell's joint and several liability regarding the conduct of Shell Deutschland Oil GmbH/Shell & Dea Oil. Consequently, RWE is solely liable for part of the fine which results from this conduct.'

133 As regards the inapplicability to the applicants of Shell Deutschland Schmierstoff's cooperation, the Commission set out the following considerations in the contested decision:

'…

(524) Shell argues that during the period in which Dea Mineraloel was part of the RWE undertaking ([that is to say] from the beginning of the infringement 3 September 1992 until 20 June 2002), RWE must also benefit from Shell's conditional immunity.

(525) Shell further states that it cannot and should not be held jointly and severally liable together with RWE for the period from 2 January to 30 January 2002 if the Commission decides to impose a fine on RWE. In such a case, Shell and RWE should be held separately accountable. …

(527) The Commission cannot, under these circumstances, accept a general statement as a reason to include RWE as a beneficiary of Shell's conditional immunity. Article 81 [EC] concerns anticompetitive conduct on the market at a given time period while the [2002] Leniency Notice concerns applications for cooperation during an administrative procedure. For the latter, the Commission must therefore assess what was the undertaking to which the applicant belonged … at the time of the application. At the time of Shell's immunity application, Shell and RWE did not belong to the same undertaking. Shell is therefore the only undertaking which meets the requirements under the 2002 Leniency Notice and can therefore benefit from immunity.'

First complaint, based on failure to extend the immunity from fines granted to Shell with respect to the infringement committed by Dea Mineraloel

134 The applicants claim that the Commission did not extend the effect of Shell's leniency application with respect to the infringement committed by Dea Mineraloel between 1992 and 2 January 2002 when that company was wholly owned by the applicants. They maintain that Dea Mineraloel is the company to which Shell Deutschland Oil succeeded following its acquisition by Shell. Furthermore, the company that submitted the leniency application, Shell Deutschland Schmierstoff, is the subsidiary of Shell Deutschland Oil.

135 In the applicants' submission, when the 2002 Leniency Notice is applied, the undertaking benefiting from immunity from fines should be taken into account as it existed at the time when the infringement was committed, which means that the Commission breached that notice when it refused to extend to them the benefit of the leniency application submitted by Shell Deutschland Schmierstoff. That is apparent, in particular, from Article 23(3) of Regulation No 1/2003, according to which, in the determination of the amount of the fine imposed on undertakings for infringements of Article 81 EC, it is appropriate to take into account the gravity and duration of the infringement. In the applicants' submission, as the gravity and the duration of the infringement refer to the state of the undertaking as it existed during its participation of the infringement, the same definition of the undertaking should be used when the 2002 Leniency Notice is applied.

136 In the first place, it should be observed that, according to the case-law, the possibility of imposing a penalty on the parent company for its subsidiary's conduct does not affect the legality of a decision addressed only to the subsidiary that participated in the infringement. Accordingly, the Commission is entitled to choose to penalise either the subsidiary that participated in the infringement or the parent company which controlled it during the period of its participation in the infringement. That choice is also available to the Commission where there are successive changes in the economic control of the subsidiary and it may therefore impute the conduct of the subsidiary to the former parent company for the period prior to the transfer and thereafter to the new parent company (see Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraphs 331 and 332 and the case-law cited).

137 It follows from that case-law that the Commission is entitled to examine and establish separately the liability of the former parent company and the new parent company of the subsidiary that was directly involved in the infringement.

138 In the present case, therefore, the Commission did not make an error of assessment when it established separately RWE's liability for the infringement committed by Dea Mineraloel (between 1992 and 2 January 2002) and Shell's liability for the infringement committed by the companies that succeeded to Dea Mineraloel, that is to say, by Shell Deutschland Oil and the latter's subsidiary, Shell Deutschland Schmierstoff (from 30 June 2002).

139 In the second place, it is appropriate to consider the purpose of the Commission's leniency programme.

140 In that regard, it has already been held that the reduction of the amount of fines in the event of cooperation of the undertakings participating in infringements of European Union competition law had its basis in the consideration that such cooperation facilitates the Commission's task of establishing an infringement and, where appropriate, putting an end to that infringement (*Dansk Rørindustri and Others* v *Commission*, paragraph 102 above, paragraph 399, and Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik* v *Commission* [2008] ECR II-2567, paragraph 225).

141 It should also be borne in mind that the 2002 Leniency Notice, at points 3 and 4, states the following:

'The Commission is aware that certain undertakings involved in … illegal agreements are willing to put an end to their participation and inform it of the existence of such agreements, but are dissuaded from doing so by the high fines to which they are potentially exposed. … The Commission considered that it is in the … interest [of the European Union] to grant favourable treatment to undertakings which cooperate with it. The interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices.'

142 It therefore follows from the 2002 Leniency Notice that the culpability and liability of undertakings in the infringement are not called in question by the application of that notice and that only the financial consequences of that liability are eliminated or reduced in order to encourage them to disclose secret cartels.

143 It follows that the sole aim of the leniency programme is to facilitate the detection of such practices, in the interest of consumers and European citizens, by giving the participants in those cartels an incentive to disclose them. Accordingly, the benefits that may be obtained by undertakings participating in such practices cannot go beyond what is necessary in order to ensure that the leniency programme is fully effective.

144 In the third place, according to paragraph 8 of the 2002 Leniency Notice, the Commission will grant an undertaking immunity from any fine which would otherwise have been imposed if, first, the undertaking is the first to submit evidence which enables it to adopt a decision to carry out an investigation of an alleged cartel or, second, the undertaking is the first to submit evidence which enables it to find an infringement of Article 81 EC in connection with an alleged cartel.

145 Therefore, unlike Article 23(2) and (3) of Regulation No 1/2003, which refers to the duration of the infringement and thus to the different compositions of the undertaking that included the company directly liable or the activity affected throughout the duration of the infringement, the 2002 Leniency Notice focuses on the time when the leniency application is submitted, so that the concept of 'undertaking' designates, in principle, the economic entity as it exists at the time of submission of that application.

146 That interpretation, moreover, is consistent with the aim of the 2002 Leniency Notice, which is to facilitate the detection of cartels by providing the participants with an incentive to disclose them. Since the possibility of imputing the liability of a company participating directly in the infringement to other companies with which it forms a single economic entity, it is necessary, in order to preserve the incentive to reveal information also involving the liability of that company, to enable all the companies belonging to the undertaking at the time of submission of the leniency application to be immune from the penalties that would otherwise be imposed.

147 On the other hand, the extension of the scope of the benefit of the leniency application to the undertakings to which the company directly involved in the cartel or the activity affected belonged does not in normal circumstances affect the legal position of the companies which form an undertaking with the company submitting the application at the time of its submission. Accordingly, such an extension cannot in principle serve the sole purpose of the 2002 Leniency Notice, which is to provide an incentive to undertakings to reveal secret cartels in the interest of consumers in the European Union.

148 It follows that the Commission did not breach the 2002 Leniency Notice in considering, at recital 527 to the contested decision, that the perimeter of the undertaking to which immunity should be granted must be defined on the basis of the facts as they existed at the time of submission of the leniency application.

149 In the fourth place, it should be observed that, in the context of the present part of the plea, the applicants claim only that they should benefit from the immunity from fines obtained by Shell because of the information that Shell Deutschland Schmierstoff, a company belonging to the Shell group at the time when the leniency application was submitted, had provided to the Commission.

150 It should be considered that, as regards the period before 2 January 2002, the extension of the benefit of immunity from fines to the applicants could not have made the application of the Commission's leniency programme more effective and thus been of benefit to European consumers. The applicants' liability was established separately from Shell's and the fine imposed on them could not cause any financial disadvantage to Shell and thus deter it from submitting all the information which it wished to share with the Commission in order to obtain immunity from fines under the 2002 Leniency Notice.

151 Furthermore, as the Commission rightly observes, it is not unfair to reward, by granting it immunity from fines, the new parent company of a subsidiary which, by carrying out internal investigations, discovers an infringement and then decides to cooperate with the Commission, and not to extend the benefit of that measure to the former owner of the undertaking, which did not make those efforts and did not help to shed light on the infringement.

152 Accordingly, in the present case the Commission applied the 2002 Leniency Notice in accordance with its objective.

153 In the fifth place, last, it should be borne in mind that, according to the case-law, the principle of equal treatment, which 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, is a general principle of EU law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union (see, to that effect, Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission and Others* [2010] ECR I-8301, paragraphs 54 and 55).

154 In the present case, there is a marked difference between the applicants' situation and the situation of the companies belonging to the Shell group that benefited from the immunity from fines granted following Shell Deutschland Schmierstoff's leniency application, namely that, unlike the applicants, the latter companies formed an undertaking within the meaning of Article 81 EC with Shell Deutschland Schmierstoff at the time when that application was submitted. That difference is relevant from the aspect of the extension of the benefit of immunity from fines, as is clear from the analysis set out at paragraphs 145 to 148 above.

155 Accordingly, the Commission treated different situations differently and thus did not breach the principle of equal treatment.

156 It follows from the foregoing that the Commission's finding that the applicants could not benefit from the immunity from fines granted to Shell with respect to the infringement committed by Dea Mineraloel must be upheld.

Second complaint, based on failure to extend the immunity from fines granted to Shell with respect to the infringement committed by Shell & Dea Oil

157 By their second complaint, the applicants take issue with the failure to extend the immunity from fines obtained by the Shell group with respect to the fine imposed on the applicants for the infringement committed by Shell & Dea Oil, the joint venture owned jointly by Shell and RWE during the period between 2 January and 30 June 2002.

158 In that regard, it is sufficient to point out that, after analysing the second part of the first plea, the Court concluded that the contested decision must be annulled in so far as the Commission had held the applicants liable for the infringement committed by Shell & Dea Oil. There is thus no longer any need to examine the present complaint.

159 In the light of the foregoing, the complaint based on the failure to extend the immunity from fines granted to Shell for the infringement committed by Dea Mineraloel must be rejected and there is no need to rule on the failure to extend the immunity from fines granted to Shell for the infringement committed by Shell & Dea Oil.

Second part, based on the applicants' right to total exemption or a significant reduction of the amount of the fine on the basis of the 2002 Leniency Notice

160 The applicants claim that they ought to have benefited from immunity from fines or a significant reduction of the amount of the fine under the 2002 Leniency Notice. They maintain that the information supplied by Shell came from former employees of Dea Mineraloel and Shell & Dea Oil, both of which became Shell Deutschland Oil, the parent company of Shell Deutschland Schmierstoff.

161 The applicants submit that, in any event, they also supplied significnt evidence during the administrative procedure and that the only reason why they were unable to submit that evidence sooner was that the Commission had been very late in informing them that the investigation had also been carried out against them.

162 First of all, it should be borne in mind that, according to the case-law, the Commission has a discretion to assess whether the information or documents voluntarily supplied by the undertakings rendered its task easier and whether the undertakings should be granted immunity from fines or a reduction of the amount of the fine within the meaning of the 2002 Leniency Notice (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 102 above, paragraph 394, and 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 248). The fact none the less remains that the Court cannot use the Commission's margin of discretion as a basis for dispensing with the conduct of an in-depth review of the law and of the facts relating to the Commission's discretion in that regard (see, by analogy, Case C-386/10 P *Chalkor* v *Commission* [2011] ECR I-13085, paragraph 62).

163 Next, according to the case-law cited at paragraph 140 above, the reduction of the amount of fines in the event of cooperation by the undertakings participating in infringements of European Union competition law has its basis in the consideration that such cooperation renders easier the Commission's task of finding an infringement and, where necessary, putting an end to it.

164 In addition, as the Court considered at paragraph 143 above, the sole purpose of the leniency programme is to facilitate the detection of secret cartels, in the interest of consumers and European citizens, by providing the cartel participants with an incentive to reveal the cartels. Accordingly, the benefits that may be obtained by the undertakings participating in such practices cannot go beyond what is necessary in order to ensure that the leniency programme is fully effective.

165 Last, it should be borne in mind that, unlike Article 23(2) and (3) of Regulation No 1/2003, which refers to the duration of the infringement and thus to the various compositions of the undertaking that included the company directly liable or the activity affected throughout the duration of the infringement, the 2002 Leniency Notice focuses on the time when the leniency application is submitted, so that the concept of 'undertaking' used designates, in principle, the economic entity as it existed at the time when the application was introduced.

166 It follows from those considerations that the fact that the information that enabled Shell to benefit from the leniency programme was provided by employees who, before Dea Mineraloel was acquired by Shell, had been employed by the RWE group is not relevant in the assessment of the applicants' eligibility to benefit from immunity from fines or a reduction of the amount of the fine.

167 The applicants do not plead any legal rule that would require the Commission to exempt them from payment of the fine on account of the fact that the employees who contributed to the detection of the cartel, or of the activity covered by the cartel, of the company that submitted the leniency application formed part, during a period in the past, of a company owned by the applicants.

168 On the contrary, it follows from the 2002 Leniency Notice, which focuses on the time when the leniency application is submitted, that the disclosures of the employees of the company that submitted the leniency application can be of benefit only to the undertaking to which that company belonged at the time when the leniency application was submitted. Only such an interpretation ensures that the extent of the immunity from fines or the reduction of the amount of the fine granted under the leniency programme does not go beyond what is necessary in order to achieve its aim, which is to provide the participants in secret cartels with an incentive to reveal them.

169 The applicants' first complaint must therefore be rejected.

170 In the second place, the applicants claim that the Commission ought to have granted them a significant reduction of the amount of the fine on account of the evidence which they had supplied during the administrative procedure.

171 In that regard, it is sufficient to observe that the applicants mention only the rejection of an argument of MOL set out at recital 222 to the contested decision, in respect of which they supplied additional evidence. As the Commission observes, MOL's participation in the cartel was established on the basis of abundant evidence. In addition, it should be noted that the applicants submitted that information in response to a request for information from the Commission at a time when at least three other undertakings had already voluntarily submitted evidence and information concerning the functioning of the cartel. The Commission therefore did not commit an error or illegality when it refused to allow the applicants to benefit from immunity from fines or a reduction of the amount of the fine under the 2002 Leniency Notice.

172 In any event, the Court, in the exercise of its unlimited jurisdiction, considers that, in the light of all of the circumstances of fact and of law of the case, the evidence put forward by the applicants does not warrant such a reduction.

173 In the light of the foregoing, the second part of the second plea must be rejected.

Third part, alleging breach of the applicants' rights of defence

174 In the context of the third part of the second plea, the applicants claim, in essence, that their possibilities of submitting a leniency application were reduced from the outset, as the activity affected by the infringement at issue had been transferred to Shell. The fact that the Commission did not inform them before the statement of objections was issued that they were also the subjects of the investigation deprived them of the possibility of submitting a leniency application in good time. The Commission thus breached their rights of defence.

175 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).

176 Article 27(1) of Regulation No 1/2003 reflects that principle in so far as it provides that the parties are to be sent a statement of objections which must clearly set out all the essential matters on which the Commission relies at that stage of the procedure (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 67), to enable the parties concerned properly to identify the conduct complained of by the Commission and to defend themselves properly before the Commission adopts a final decision. That obligation is satisfied if the final decision does not allege that the persons concerned have committed infringements other than those referred to in the statement of objections and takes into consideration only facts on which the persons concerned have had the opportunity of stating their views (see, to that effect, Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 109 and the case-law cited).

177 In the present case, the applicants do not claim that the statement of objections addressed to them did not contain all the evidence used against them in the contested decision. They merely claim that Commission's failure to warn them that it was initiating the administrative procedure placed them at a disadvantage by comparison with the undertakings which had been the subject of investigations by the Commission.

178 The Court of Justice has already held that, provided that the entity to which a statement of objections is addressed is put in a position to submit its views effectively during the administrative *inter partes* procedure as to the reality and relevance of the facts and circumstances alleged by the Commission, the Commission was not required as a matter of principle to address a measure of investigation to that entity before issuing the statement of objections (*Elf Aquitaine* v *Commission*, paragraph 41 above, paragraph 122).

179 The applicants cannot therefore validly claim that there has been a breach of their rights of defence.

180 That finding cannot be called into question by the applicants' reliance on the Commission Decision of 3 September 2004 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/38.069 - Copper Plumbing Tubes). It should be borne in mind that decisions concerning other cases can be no more than indicative when the circumstances of the cases are not the same (see, to that effect, Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraphs 201 and 205, and Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 60).

181 Nor, likewise, can the applicants validly rely on the fact that the transfer of the activity covered by the cartel to Shell had rendered cooperation with the Commission more difficult.

182 As the Commission correctly observes, there was nothing to prevent the applicants from submitting a leniency application during the period when Dea Mineraloel formed an economic entity with them.

183 Likewise, it should be borne in mind that the aim of the leniency programme is not to provide undertakings participating in secret cartels, alerted to the fact that the Commission has initiated the procedure, with the possibility of escaping the financial consequences of their liability, but to facilitate the detection of such practices, in the interest of consumers and European citizens, by providing the participants with an incentive to reveal them. Accordingly, the benefits that may be obtained by the undertakings participating in such practices cannot go beyond what is necessary in order to ensure that the leniency programme is fully effective.

184 In fact, there is no interest of European consumers that requires that the Commission should allow a greater number of undertakings to benefit from immunity from fines or a reduction of the amount of the fine than is necessary in order to ensure the full effectiveness of the leniency programme, by allowing undertakings other than those that were first to provide the Commission with evidence that enabled the Commission to order inspections or to find an infringement to benefit from such immunity or such a reduction.

185 Therefore, the third part of the second plea and, accordingly, the second plea in its entirety, must be rejected.

3. *Third plea, concerning the determination of the turnover taken into account in calculating the amount of the fine imposed on the applicants*

186 In the applicants' submission, when fixing the turnover to be taken as the basis for the calculation of the amount of the fine, the Commission infringed Article 23(2) and (3) of Regulation No 1/2003 by failing to observe the essential principles governing the determination of the amount of the fine, notably the principles of equal treatment and proportionality. They claim, in essence, that the Commission took as a basis the average of turnovers on the markets affected by the cartel during the years 1999 to 2001, which it calculated on the basis of the data supplied by Shell and not on those submitted by the applicants. Last, they claim that the Commission breached its obligation to state reasons in that respect.

First part, alleging insufficiency of the reasons stated in the contested decision with respect to the calculation of the value of the applicants' sales

187 The applicants claim that the Commission breached its obligation to state reasons with respect to the calculation of the value of their sales. First, the reason why it chose as a reference period the last three years of their participation in the infringement is not clear from the contested decision. Second, the Commission does not state sufficient reasons for taking into account the data supplied by Shell with respect to the value of the applicants' sales.

188 As a preliminary point, it should be borne in mind, in that regard, that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review (Case C-17/99 *France* v *Commission* [2001] ECR I-2481 and *Elf Aquitaine* v *Commission*, paragraph 41 above, paragraph 146).

189 Thus, the purpose of the obligation to state reasons for an individual decision is, in addition to permitting review by the Courts, to provide the person concerned with sufficient information to ascertain whether the decision is vitiated by a defect which may permit its legality to be contested (see, to that effect, Case C-199/99 P *Corus UK* v *Commission* [2003] ECR I-11177, paragraph 145, and *Dansk Rørindustri and Others* v *Commission*, paragraph 102 above, paragraph 462).

190 The statement of reasons must in principle be notified to the person concerned at the same time as the act adversely affecting him. A failure to state reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the Courts of the European Union (*Michel* v *Parliament*, paragraph 128 above, paragraph 22; *Dansk Rørindustri and Others* v *Commission*, paragraph 102 above, paragraph 463; and *Elf Aquitaine* v *Commission*, paragraph 41 above, paragraph 149).

191 It is settled case-law that the requirement to state reasons must be assessed by reference to the circumstances of the case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. 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 all the legal rules governing the matter in question (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraphs 166 and 178).

192 Where, as in the present case, a decision taken in application of the EU competition law rules relates to several addressees and raises a problem with regard to the imputability of the infringement, it must include an adequate statement of reasons with respect to each of its addressees, in particular those of them who, according to the decision, must bear the liability for the infringement. Thus, in respect of a parent company held liable for the infringement committed by its subsidiary, such a decision must in principle contain a detailed statement of reasons for imputing the infringement to that company (see *Elf Aquitaine* v *Commission*, paragraph 41 above, paragraph 152 and the case-law cited).

First complaint, alleging insufficiency of the reasons stated in the contested decision for choosing the average value of sales during the last three years of participation in the infringement

193 In the first place, the applicants observe that, according to the 2006 Guidelines, the reference period for the determination of relevant turnover is the last year of participation in the infringement. According to recitals 629 and 631 to the contested decision, that year corresponds to 2001 for the RWE group. The contested decision does not enable them to understand the reasons why the Commission chose as a general method to take into account the average value of sales achieved during three years instead of the value of sales in a single year.

194 In that regard, it should be borne in mind that, in accordance with point 13 of the 2006 Guidelines, the Commission stated, at recital 629 to the contested decision, that in determining the basic amount of the fine to be imposed, it normally takes as a basis the value of the undertaking's sales on the market to which the cartel relates during the last full year of its participation in the infringement.

195 At recitals 632 and 633 to the contested decision, the Commission referred to the arguments whereby ExxonMobil and MOL allege that enlargements of the European Union, and in particular the enlargement in 2004, had had a strong impact on the value of sales of a number of participants. It should be added that even the applicants stated in that regard in their reply to the statement of objections that in their view only the value of Dea Mineraloel's sales achieved in the 15 Member States constituting the European Union before 1 May 2004 should be taken into account. The Commission answered those arguments at recital 634 to the contested decision, as follows:

'The Commission acknowledges that the year 2004 was, due to the enlargement of the European Union in May, an exceptional year. [It] considers it appropriate not to use the value of sales in the year 2004 as the only basis for the calculation of the fine but to use the value of sales in the last three business years of the entity's involvement in the infringement.'

196 The reason why the Commission took into account the average value of sales during the period of the last three years of participation in the infringement, instead of the value of sales during the last full year of participation, is thus clear from the contested decision.

197 In the second place, the applicants none the less claim that the Commission did not state the reasons for its choice to take into account the value of sales made by them during the period between 1999 and 2001 instead of the value of sales during 2001 alone. They further submit that the Commission rejected their argument that the business year 2001-2002 was an exceptional year and that it was appropriate, on the contrary, to rely on the average turnover achieved throughout the infringement period by Dea Mineraloel, that is to say, during the years 1992-1993 to 2000-2001 (recital 639 to the contested decision). However, the Commission provided no explanation whatsoever of why, instead of choosing that reference period, it relied on the average turnover for 1999 to 2001.

198 In that regard, it is appropriate to recall the case-law cited at paragraph 191 above, according to which the statement of reasons must be assessed by reference to the circumstances of the case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. 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 all the legal rules governing the matter in question.

199 Furthermore, first, it should be borne in mind that, according to the case-law, the Commission is required to define the period to be taken into consideration in such a way that the resulting turnovers are as comparable as possible (Case T-319/94 *Fiskeby Board* v *Commission* [1998] ECR II-1331, paragraph 42). Second, it must be pointed out that in the contested decision the Commission systematically used the value of sales achieved during the last three years of participation in the cartel for each of the undertakings concerned, in accordance with the method which it established at recital 634 to the contested decision.

200 Consequently, the contested decision, as interpreted as a whole and in its context, having regard to all the legal rules governing the matter concerned, made it possible to understand the reasons why the Commission had taken the period 1991 to 2001, instead of only 2001, as the reference period to be taken into account in the applicants' case. The complaint alleging insufficiency of reasons in that regard must therefore be rejected.

Second complaint, alleging insufficiency of reasons in the contested decision as regards the determination of the value of sales

201 The applicants claim that the reasoning in the contested decision did not enable them to ascertain the accuracy of the Commission's determination of the value of their sales for the period 1999 to 2001.

202 The applicants were not in a position to ascertain, on the basis of the grounds of the contested decision, whether the Commission had correctly determined their average turnovers for the period 1999 to 2001. It would appear that the Commission relied on the information supplied by Shell, as it believed that RWE could not provide the turnover for 2001 broken down according to paraffin wax and slack wax. According to recital 628 to the contested decision, the figures provided by the Shell group corresponded to the total sales figures stated by the applicants. However, the applicants were not in a position to ascertain that assertion, as the turnovers supplied by Shell were not made available to them during the administrative procedure. In any event, according to their figures, the 'paraffin waxes' business of the former Dea Mineraloel achieved, on average, during the business years 1998-1999 to 2000-2001, sales revenues amounting to around EUR 18.2 million. That figure is around EUR 280 000 below the figure estimated by the Commission.

203 It should be borne in mind that, according to recital 59 to the contested decision:

'[The RWE group's] average value of sales of paraffin waxes in the EEA was EUR 13 785 353 in the years 1999 [to] 2001 according to Shell. The yearly average value of sales of slack wax in the EEA was EUR 4 670 083 in the years 1999 [to] 2001.'

204 According to recital 628 to the contested decision:

'The Commission has used the figures provided by the undertakings for the calculations. As RWE has not been able to provide the value of sales specified according to products for 2001, the Commission has used in this regard the information submitted by Shell[,] which appears to be consistent with the total sales figures which RWE was able to submit.'

205 In that regard, it has already been held that, as regards the determination of fines for infringements of European Union competition law, the Commission fulfilled its obligation to state reasons where it indicated, in its decision, the factors on the basis of which the gravity and duration of the infringement were assessed, and is not required to include in it a more detailed account or the figures relating to the method of calculating the fines (see, to that effect, Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraphs 38 to 47, and Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 1532). Statements of figures relating to the calculation of the fines, however useful such figures may be, are not essential to compliance with the obligation to state reasons (see Case C-182/99 P *Salzgitter* v *Commission* [2003] ECR I-10761, paragraph 75, and Case T-68/04 *SGL Carbon* v *Commission* [2008] ECR II-2511, paragraph 31).

206 It should be observed, moreover, that in their reply of 31 January 2008 to the Commission's request for information the applicants stated that they were unable to produce figures for the business year 2001-2002. In the absence of those figures, the value of sales for the calendar year 2001, taken systematically into account by the Commission in the contested decision, could not be ascertained. Likewise, the applicants stated in that reply that they were unable to produce separate figures for paraffin waxes and slack wax for the previous years. However, such a breakdown was necessary for the calculation of the amount of the fine, having regard to the fact that the coefficient applied to reflect the gravity of the infringement was different for the two groups of products, namely 18% for paraffin waxes and 15% for slack wax.

207 Last, it must be stated that, in their reply of 5 March 2008 to the Commission's request for information, the applicants stated that they had contacted Shell in order to obtain information about the latter's sales figures that were available and that they were aware that Shell had already supplied the Commission with sales figures for the business year 2001-2002. They referred to figures produced by Shell for that business year and admitted that such reliable figures for the RWE group were not available.

208 It must therefore be observed that during the correspondence after the reply to the statement of objections, the applicants did not dispute the Commission's use of the sales figures supplied by Shell, but, on the contrary, encouraged the Commission to make use of them for the business year 2001-2002.

209 Having regard to the foregoing, it must be held that the contested decision, as interpreted in its entirety and in its context, notably in the light of the correspondence between the applicants and the Commission and having regard to all the legal rules governing the matter concerned, made it possible to understand the reasons why the Commission had made use of the figures supplied by Shell.

210 As regards the applicants' argument that it is impossible to understand from the contested decision the method which Shell had used when allocating its sales figures between paraffin waxes and slack wax, it should be noted that the Commission fulfilled its obligation to state reasons when it indicated in its decision the factors on the basis of which the gravity and the duration of the infringement were assessed, and it was not required to include in that decision a more detailed account or the figures relating to the method of calculating the fines (see the case-law cited at paragraph 205 above).

211 Furthermore, the Commission was entitled to assume, on the basis of the information provided by the applicants during the administrative procedure, that the figures supplied by Shell would not be challenged by them, given that they had mentioned contacts between the two groups and had even referred to the figures supplied by Shell. As it was under no general obligation to specify all the relevant facts and points of law and since the extent of the obligation to state reasons depends, in particular, on the context in which the contested measure was adopted, the Commission was entitled not to include in the contested decision a detailed analysis relating to the figures supplied by Shell, having regard in particular to the fact that the applicants had stated that they had been in contact with Shell in that respect and had referred to a part of the data held by Shell.

212 In answer to a written question put by the Court, moreover, the applicants stated that on 25 January 2008 Shell had in fact made available to them the data relating to turnover, which came from the same data bank as the data communicated to the Commission by Shell. The mere fact that the data obtained from Shell do not refer to calendar years, but to business years starting at the beginning of July and finishing at the end of June of each year, was not capable of preventing the applicants from understanding the Commission's calculation method, since the contested decision stated that the value of sales had been calculated on the basis of data relating to calendar years. The applicants were therefore able to understand, on the basis of the contested decision and the context in which it was adopted, that the Commission had adjusted the figures relating to business years to its method, which consisted in taking calendar years into account.

213 The first part of the third plea must therefore be rejected.

Second part, alleging breach of the principle of proportionality and infringement of Regulation No 1/2003 when setting the amount of the fine imposed on the applicants

The choice of the reference period (calendar years 1999 to 2001)

214 The applicants claim that the amount of the fine imposed on them is disproportionate by reference to the gravity of the infringement, since the value of their sales was considerably higher during the reference period chosen by the Commission (1999 to 2001) than during the preceding reference period (1992 to 1998) and the subsequent reference period (2002 to 2004). The amount of the fine calculated on the basis of the value of sales as thus determined does not reflect the gravity of the infringement committed by them, since the value of sales during the reference period is not representative for the whole infringement period. Accordingly, the Commission has infringed Article 23 of Regulation No 1/2003 and breached the principle of proportionality.

215 In the applicants' submission, in order better to reflect the gravity of the infringement, the Commission ought to have taken into account the average value of sales on the markets affected by the infringement throughout the entire period of their participation in the infringement. If the Commission had relied on the average turnover for the business years 1992-1993 to 2000-2001, it would, all other things being equal, have arrived at a fine of EUR 30.95 million instead of the EUR 37 440 000 which it imposed on them.

216 According to the case-law, the principle of proportionality requires that measures of the institutions do not go beyond what is appropriate and necessary for achieving the objectives legitimately pursued by the measure in question, it being understood that, where there is a choice between several appropriate measures, recourse must be had to the least restrictive and that the disadvantages caused must not be disproportionate to the aims pursued (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13; Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 96; and judgment of 12 September 2007 in Case T-30/05 *Prym and Prym Consumer* v *Commission*, not published in the ECR, paragraph 223).

217 In the procedures initiated by the Commission in order to penalise infringements of the competition rules, the application of that principle requires that fines must not be disproportionate to the objectives pursued, that is to say, by reference to compliance with those rules, and that the amount of the fine imposed on an undertaking for an infringement in competition matters must be proportionate to the infringement, seen as a whole, having regard, in particular, to the gravity and duration thereof (see, to that effect, *Prym and Prym Consumer* v *Commission*, paragraph 216 above, paragraphs 223 and 224 and the case-law cited). In particular, the principle of proportionality requires the Commission to set the fine proportionately to the factors taken into account for the purposes of assessing the gravity of the infringement and also to apply those factors in a way which is consistent and objectively justified (Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraphs 226 to 228, and Case T-446/05 *Amann & Söhne and Cousin Filterie* v *Commission* [2010] ECR II-1255, paragraph 171).

218 As regards the choice of the reference period, moreover, it follows from the case-law that the Commission is required to choose a calculation method that enables it to take account of the size and economic power of each undertaking concerned and also of the scope of the infringement committed by each of them, in the light of the economic reality as it appeared at the time when the infringement was committed. Furthermore, the period to be taken into consideration should be ascertained in such a way that the resulting turnovers, and market shares, are as comparable as possible. It follows that the reference year need not necessarily be the last full year during which the infringement continued (Case T-11/06 *Romana Tabacchi* v *Commission* [2011] ECR II-6681, paragraph 177; see also, to that effect, judgment of 13 September 2010 in Case T-26/06 *Trioplast Wittenheim* v *Commission*, not published in the ECR, paragraphs 81 and 82 and the case-law cited).

219 It follows that an individual undertaking cannot compel the Commission to rely, in its case, upon a period different from that generally used unless it proves that, for reasons peculiar to it, its turnover in the latter period does not reflect its true size and economic power or the scale of the infringement which it committed (*Fiskeby Board* v *Commission*, paragraph 199 above, paragraph 42, and judgment of 30 September 2009 in Case T-175/05 *Akzo Nobel and Others* v *Commission*, not published in the ECR, paragraph 142).

220 In the first place, it should be observed that, in taking the average of the last three years of the participation of each undertaking involved in the infringement, the Commission chose a reference period that satisfied, overall, the requirement, established in the case-law cited at paragraph 216 above, that the period taken into consideration must be defined in such a way that the figures obtained are as comparable as possible.

221 In the second place, the applicants have not shown that the turnover which they had achieved during the latter period did not, for reasons peculiar to them, constitute an indication of their true size and economic power or the scale of the infringement which they had committed.

222 While it is the case that the relevant average value of sales for the years 1999 to 2001 was higher than the annual figures for the preceding years of participation, it is apparent from paragraph 130 of the application that that was essentially attributable to the fact that the applicants' turnover on the markets to which the cartel applied had shown a continuous increase during the period of their participation in the infringement. In fact, such an increase may be the typical corollary of a cartel, one

of the main objectives of which is to increase the prices of the relevant products. Likewise, such an increase may also result, at least in part, from general factors such as inflation or the fact that the price of the raw materials used in the products had also tended to rise on the world market, which was the case in this instance, since, according to the data supplied by the Commission, the price of crude oil rose considerably between 1992 and 2001.

223 Moreover, the applicants do not mention any exceptional circumstance that would have caused the increase in the value of their sales for the period 1992 to 2001. Furthermore, it should be observed that the increase represents a trend and shows a high degree of correlation with the price of crude oil.

224 Nor can the applicants properly rely on the fact that the annual average value of their sales during the reference period was higher than that for the period between 2002 and 2004. During the latter period, with the exception of the first half of 2002, the applicants no longer owned the company directly involved in the infringement. Accordingly, the fall in the value of Shell Deutschland Oil's sales by comparison with the value of Dea Mineraloel's sales bore no relationship to the applicants' commercial policy and cannot therefore be invoked in their favour.

225 Consequently, the applicants have not shown that the value of their sales during the reference period did not, for reasons peculiar to them, constitute an indication of their genuine size and economic power or of the scale of the infringement which they had committed.

226 As the Commission's choice of reference period satisfied the requirements established by the case-law, the applicants' arguments relating to the possibility of reconstructing the data for the year 1993-1994 must be rejected as ineffective.

227 In the light of the foregoing, it must be held that the Commission did not infringe Article 23(3) of Regulation No 1/2003 or breach the principle of proportionality in taking as the basis for calculation the annual average value of the applicants' sales for the period 1999 to 2001.

228 In any event, in the exercise of its unlimited jurisdiction, the Court considers that the choice of reference period in the applicants' case is justified by all the factual and legal circumstances of the case.

The fact that the figures supplied by Shell were taken into account

229 By their second complaint, the applicants claim that the Commission relied on the figures relating to the value of sales supplied by Shell and not on the figures which they had submitted.

230 As a preliminary point, it should be borne in mind that, according to points 15 and 16 of the 2006 Guidelines, in determining the value of sales by an undertaking, the Commission will take that undertaking's best available figures. Where the figures made available by an undertaking are incomplete or not reliable, the Commission may determine the value of its sales on the basis of the partial figures it has obtained and/or any other information which it regards as relevant and appropriate.

231 In that regard, in the first place, it should be observed that the applicants repeatedly stated during the administrative procedure that they were not in a position to produce data for the business year 2001-2002. The first half of that business year concerned the calendar year 2001, which was part of the reference period taken into account by the Commission (the calendar years 1999 to 2001).

232 Next, the applicants repeatedly stated, in answer to the Commission's requests for information, that they were not in a position to produce turnovers broken down according to product groups. Since the coefficients for gravity used by the Commission were different for paraffin waxes and for slack wax, figures broken down by product were indispensable for the calculation of the amount of the fines (see paragraph 206 above).

233 The figures provided by the applicant were therefore incomplete and the Commission was thus able to use other data in order to be able to calculate the amount of the fine to be imposed on them.

234 In the second place, it follows from Shell's answer of 31 January 2008 to the Commission's requests for information that the data produced by Shell were consistent and complete and sufficient in themselves for the Commission's calculation.

235 In the third place, it should be borne in mind (see paragraphs 207 and 208 above) that the applicants stated in their reply of 5 March 2008 to the Commission's request for information that they had contacted Shell in order to receive information about the sales figures available for it and that they were aware that Shell had already supplied the Commission with sales figures for the business year 2001-2002. They referred to Shell's figures produced for that business year, and acknowledged that such reliable figures for the RWE group were not available.

236 In the fourth place, the applicants do not expressly claim that the value of sales taken into consideration by the Commission for the calendar years 1999 to 2001 for paraffin waxes and slack wax is incorrect. They merely observe that the 'paraffin waxes' business of the former Dea Mineraloel achieved, on average, during the business years 1998-1999 to 2000-2001, sales revenues of around EUR 18.2 million and that that figure is some EUR 280 000 lower than the figure estimated by the Commission. That argument is not capable of showing an error by the Commission, since the data communicated by the applicants relate to the business years 1998-1999 to 2000-2001 and not the calendar years systematically taken into account by the Commission in the contested decision. Furthermore, it follows from the figures communicated by the applicants at paragraph 130 of the application that the value of sales for paraffin waxes during the business year 1998-1999 was EUR 16 304 000, while for the business year 1999-2000 that figure was EUR 19 543 000. During the business year 2000-2001, the value of sales for paraffin waxes was EUR 18 677 000. It is therefore plausible that the difference of EUR 280 000 was attributable to the fact that the period chosen by the applicants included the second half of 1998, when the value of sales was lower than that achieved during the second half of 2001, which, however, was not included in the applicants' calculations.

237 In the fifth place, the applicants cannot validly take issue with the Commission for not having supplemented the figures supplied by Shell by their partial figures and their estimates. Where the Commission is in possession of complete, consistent and reliable figures, from a source to which the applicants themselves make reference for a part of the figures, it cannot be required to combine them with figures from another source which were calculated on the basis of a different methodology, with the consequence that the accounting procedure used is not certain.

238 Consequently, the complaint which the applicants base on the fact that figures relating to the value of sales supplied by Shell were taken into account must be rejected.

239 The second part of the third plea must therefore be rejected.

Third part, alleging breach of the principle of equal treatment and of the 2006 Guidelines

240 The applicants observe that, when determining the basic amount of the fine imposed on them, the Commission relied on the average turnover for the years 1999 to 2001, whereas for Shell the average turnover for the years 2002 to 2004 (for paraffin waxes) and 2001 to 2003 (for slack wax) was taken into account. That difference in the calculation had the consequence that there was a breach of the principle of equal treatment in two respects.

241 First, the applicants observe that they were held liable for the infringement committed by Dea Mineraloel and by Shell & Dea Oil during the period from 3 September 1992 until 30 June 2002. Shell was held liable for the infringement during the same period and, in addition, also for the infringement committed by the companies which had succeeded to Shell & Dea Oil, for a total period of 3 September 1992 until 17 March 2005. However, owing to the difference in the reference period, the basic amount of the fine calculated for Shell was lower than that established for RWE, even though the period of participation in the cartel was almost three years longer in Shell's case. Setting the basic amount of the fine in that way is 'discriminatory'.

242 Second, the unequal treatment of the applicants and of Shell during the period of their mutual involvement in Shell & Dea Oil, that is to say during the period from 2 January until 30 June 2002, is also manifest. The basic amount of the fine which, prorata temporis, was applied to the applicants for that period comes to EUR 1.6 million. For Shell, the basic amount is less than EUR 1.2 million, although Shell was fined for the same infringement committed by Shell & Dea Oil, and held jointly and severally liable with the applicants, as is apparent from recital 530 to the contested decision.

243 In the applicants' submission, if the Commission had — as it did for Shell — determined the basic amount of their fine on the basis of the average turnover for the years 2002 to 2004 for paraffin waxes and the average turnover for the years 2001 to 2003 for slack wax, it would have arrived at an amount of around EUR 24.93 million and, other things being equal, at a fine of an amount of around EUR 29.92 million. That more or less corresponds to the amount of the fine resulting from the calculation based on average turnover for the business years 1992-1993 to 2000-2001. Accordingly, only the determination of the relevant average turnover on the basis of average turnover for the business years 1992-1993 to 2000-2001 is consistent with the 2006 Guidelines and the principle of equal treatment.

244 In the first place, as regards the applicants' general complaint concerning the application of a reference period instead of a calculation of the basic amount on the basis of the values of sales relating to each of the years of the infringement, reference is made to the considerations set out at paragraphs 216 to 225 above. It follows that the Commission was entitled to determine the value of sales on the basis of a reference period that makes the figures relating to all the undertakings concerned as comparable as possible, unless an undertaking shows that, for reasons peculiar to it, the value of its sales during the reference period does not constitute an indication of its genuine size and its genuine economic power or of the scale of the infringement which it committed: and the applicants have not shown that that was so in the present case.

245 In the second place, there is no need to consider the breach of the principle of equal treatment as regards the period of the existence of the joint venture Shell & Dea Oil, since in the contested decision the Commission did not gather sufficient evidence to impute to the applicants liability for the acts of that company (see paragraph 130 above).

246 In the third place, it is appropriate to examine the complaints which the applicants base on the fact that, although the basic amount of the fine calculated for Shell was based on the same infringement, committed by the same company, as in their case, and although the duration of Shell's participation

in the infringement was longer than the duration of the applicants' participation, the basic amount of the fine calculated for Shell was lower (EUR 30 million) than the basic amount of the fine calculated for the applicants (EUR 31.2 million).

247 It should be borne in mind that the fact that the basic amount of the fine established for the applicants was higher than that established for Shell is attributable solely to the fact that the reference period was different. The average annual value of Shell Deutschland Oil's sales during the period from 2002 until 2004 for paraffin waxes and during the period from 2001 until 2003 for slack wax was lower than that of Dea Mineraloel during the period from 1999 until 2001.

248 According to settled case-law, when setting the amount of fines, the Commission must comply with the principle of equal treatment, according to which it is prohibited to treat similar situations differently and different situations in the same way, unless such treatment is objectively justified (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 219).

249 It is true that the Court of Justice has held, first, that the use of a reference year common to all the undertakings involved in the same infringement meant that each undertaking was assured of being treated in the same way as the others, since the penalties were determined in a uniform manner, and, second, that the fact that the reference year was part of the infringement period enabled the scale of the infringement committed to be assessed in the light of the economic reality as it appeared during that period (Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11005, paragraph 129).

250 However, it does not follow that the choice of a common reference period is the only means of determining penalties in a way that complies with the principle of equal treatment. In particular, the Commission may lawfully take account of the fact that, for a given undertaking, the common reference year is outside the infringement period found in relation to it and is not therefore a useful indication of its individual weight at the time of the infringement, and may therefore take into account that undertaking's turnover for a year other than the common reference year, provided that the calculation of the basic amount of the fine for the different members of the cartel is still consistent and objectively justified.

251 In the present case, in taking into account the average value of sales for the last three years of their participation in the infringement, the Commission applied a uniform criterion to all members of the cartel in an objective manner, with the specific aim of complying with the principle that the participants had to be treated equally.

252 In addition, it must be stated that the fall in the value of sales which had the consequence that the basic amount of the fine established for Shell was lower than that established for RWE came about during the period from 2002 to 2004. As regards the first six months of that period, it was not established that RWE did in fact exercise decisive influence over Shell & Dea Oil. For the remaining two years and nine months, it is common ground that Shell Deutschland Oil and Shell Deutschland Schmierstoff operated entirely independently of RWE. Accordingly, the Commission was correct to take the view that the applicants should not benefit from the fact that Shell's contribution to the cartel had become less economically significant towards the end, when the applicants no longer participated in the cartel, especially in the light of the fact that, during their participation in the infringement, the value of the applicants' sales on the markets affected by the cartel had continuously risen.

253 Accordingly, it must be concluded that the fact that the basic amount of the fine calculated for the applicants is higher than that calculated for the Shell group is attributable solely to the fact that the value of sales on the markets affected by the cartel fell significantly following Shell's acquisition of Dea

Mineraloel. As the applicants were therefore in a different situation from Shell as regards an aspect relevant from the point of view of the setting of the amount of the fine, their complaint alleging unequal treatment must be rejected.

254 In any event, in the exercise of its unlimited jurisdiction, the Court considers that the basic amount established by the Commission correctly reflects the gravity and duration of the infringement committed by Dea Mineraloel, regard being had to all the factual and legal circumstances of the case.

255 In the light of all of the foregoing considerations, the third part of the third plea must also be rejected, as must, accordingly, the third plea in its entirety.

4. *The exercise of unlimited jurisdiction and the determination of the final amount of the fine*

256 It should be borne in mind that review of the lawfulness of decisions adopted by the Commission is supplemented by the unlimited jurisdiction conferred on the Courts of the European Union by Article 31 of Regulation No 1/2003, in accordance with Article 229 EC. That jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the amount of the fine or penalty payment imposed. The review provided for in the Treaties therefore implies, in accordance with the requirements of the right to effective judicial protection set out in Article 47 of the Charter of Fundamental Rights, that the Courts of the Union exercise their review both de lege and de facto and that they are empowered to assess the evidence, annul the contested decision and vary the amount of the fines (see, to that effect, Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraphs 60 to 62, and Case T-368/00 *General Motors Nederland and Opel Nederland* v *Commission* [2003] ECR II-4491, paragraph 181).

257 It is therefore for the Court, in the exercise of its unlimited jurisdiction, to assess, on the date on which it adopts its decision, whether the applicant received a fine the amount of which properly reflects the gravity and the duration of the infringement in question, in such a way that the fines are proportionate in the light of the criteria set out in Article 23(3) of Regulation No 1/2003 (see, to that effect, Case T-156/94 *Aristrain* v *Commission* [1999] ECR II-645, paragraphs 584 to 586, and Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 93).

258 It must, however, be pointed out that the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, and that proceedings before the Courts of the European Union are *inter partes* (*Chalkor* v *Commission*, paragraph 162 above, paragraph 64).

259 In the present case, in order to calculate the amount of the fine imposed on the applicants, the Commission took into account, to reflect the gravity of the infringement, 18% of the annual value of sales of paraffin waxes and 15% of the annual value of sales of slack wax. The amounts thus obtained were multiplied, to reflect the duration of the infringement, by a coefficient of 10 for paraffin waxes and 5 for slack wax. In total, including the 'entry fee' applied to reflect the gravity of the infringement, the rate of which was also 18% of the value of sales of paraffin waxes and 15% of the value of sales of slack wax, the Commission used multipliers of 11 for paraffin waxes and 6 for slack wax.

260 It should be recalled that the applicants' participation in the infringement was not established for the period from 2 January until 30 June 2002 and that the contested decision must be annulled in respect of that period so far as the applicants are concerned (see paragraph 130 above). Therefore, following the reduction by that period of the duration of the applicants' participation in the infringement, the multipliers used by the Commission should be reduced from 11 to 10.5 for paraffin waxes and from 6 to 5.5 for slack wax.

261 The coefficient thus fixed is without prejudice to any fresh analysis that the Commission might undertake following the present judgment as regards the imputability to the applicants of the infringement committed by Shell & Dea Oil.

262 Moreover, for the part of the fine imposed for the period from 3 September 1992 until 2 January 2002, the Court, in the exercises of its unlimited jurisdiction, considers that the amount of the fine imposed on the applicants is appropriate, in view of the gravity and duration of the infringement.

263 In the light of the foregoing, the amount of the fine is set at EUR 35 888 562.

Costs

264 Under Article 87(3) of the Rules of Procedure, the Court may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads.

265 In the present case, only the second part of the applicants' first plea has been upheld by the Court. Consequently, the amount of the fine imposed on them was reduced by 4.1%. Accordingly, it is fair in the circumstances of the case to decide that the applicants are to bear four fifths of their own costs and pay four fifths of the Commission's costs. The Commission will bear one fifth of its own costs and pay one fifth of the costs incurred by the applicants.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. **Annuls Article 1 of Commission Decision C(2008) 5476 final of 1 October 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/39.181 — Candle Waxes), in so far as the European Commission found in that article that RWE AG and RWE Dea AG had participated in the infringement after 2 January 2002;**

2. **Sets the amount of the fine imposed on RWE and RWE Dea at EUR 35 888 562;**

3. **Dismisses the action as to the remainder;**

4. **Orders the Commission to bear one fifth of its own costs and to pay one fifth of the costs incurred by RWE and RWE Dea. RWE and RWE DEA are ordered to bear four fifths of their own costs and to pay four fifths of the Commission's costs.**

Czúcz Labucka Gratsias

Delivered in open court in Luxembourg on 11 July 2014.

[Signatures]