JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
12 December 2007 *

In Case T-112/05,

Akzo Nobel NV, established in Arnhem (Netherlands),

Akzo Nobel Nederland BV, established in Arnhem,

Akzo Nobel Chemicals International BV, established in Amersfoort (Netherlands),

Akzo Nobel Chemicals BV, established in Amersfoort,

Akzo Nobel Functional Chemicals BV, established in Amersfoort, represented initially by C. Swaak and J. de Gou, and subsequently by C. Swaak, M. van der Woude and M. Mollica, lawyers,

applicants,

* Language of the case: English.

Commission of the European Communities, represented by A. Whelan and F. Amato, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision 2005/566/EC of 9 December 2004 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.533 — Choline chloride) (summary published in OJ 2005 L 190, p. 22),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of A.W.H. Meij, acting as President, N.J. Forwood and S. Papasavvas, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 13 February 2007,

gives the following

Judgment

Background and contested decision

1 By Decision 2005/566/EC of 9 December 2004 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.533 — Choline chloride) (summary published in OJ 2005 L 190, p. 22; 'the Decision'), the Commission found that a number of undertakings had infringed Article 81(1) EC and Article 53 of the Agreement on the European Economic Area (EEA) by participating in a complex of agreements and concerted practices consisting of price fixing, market sharing and agreed actions against competitors in the choline chloride sector in the EEA (Article 1 of the Decision).

2 The Commission states that the product concerned, choline chloride, is a member of the B-complex group of water-soluble vitamins (vitamin B4). It is mainly used in the animal feed industry (poultry and swine) as a feed additive and is marketed in two forms: it may take the form of an aqueous solution of 70% choline chloride or be sprayed on a dry cereal or silica carrier to give a choline chloride potency of 50 to 60%. Choline chloride which is not used as an animal feedingstuff additive is refined to provide a higher purity food grade (pharmaceutical grade). In addition to producers, the choline chloride market is made up of converters, who buy the product from producers in liquid form and convert it into choline chloride on a carrier, either on behalf of the producer or on their own behalf, and distributors.

3 Recital 3 to the Decision states that the Commission initiated an investigation into the global choline chloride industry after it received a leniency application in April 1999 from the United States producer Bioproducts. The investigation covered the period from 1992 to the end of 1998. At recital 45 to the Decision, the Commission states that the Canadian producer Chinook had already approached it about the cartel in question on 25 November and 16 December 1998 but that it had not opened an investigation at that time.

4 So far as the EEA is concerned, according to recital 64 to the Decision the choline chloride cartel operated at two different but closely-related levels: the global level and the European level. At the global level, the producers Bioproducts (United States), Chinook (Canada), Chinook Group Limited (Canada), DuCoa (United States), BASF AG (Germany), UCB SA (Belgium) and the applicants, five companies in the Akzo Nobel group (Netherlands), participated (directly or indirectly) in anti-competitive activities between June 1992 and April 1994. Those activities were designed, essentially, to increase prices worldwide, including in the EEA, and to control converters, including in the EEA, in order to ensure that converters would not undermine the agreed increases, and to allocate markets worldwide: the North American producers would withdraw from the European markets and, in return, the European producers would withdrawing from the North American markets. The Commission identifies nine meetings of the cartel at global level between June 1992 (in Mexico City, Mexico) and April 1994 (in Johor Bahru, Malaysia). The most important meeting was the one held in Ludwigshafen (Germany) in November 1992.

5 Only the European producers (BASF, UCB and the applicants) are stated to have participated in the meetings implementing the cartel at European level, which continued from March 1994 to October 1998. The Commission identifies 15 meetings in that regard, between March 1994 (in Schoten, Belgium) and October 1998 (in Brussels, Belgium, or Aachen, Germany). According to recital 65 to the Decision, those meetings served to continue the agreement reached at the global level. The purpose of the meetings was to ensure regular price increases across the

EEA and to share markets and allocate individual customers, and also to control converters in Europe in order to protect the higher price levels.

6 The Commission found that the worldwide arrangements and the European arrangements all formed part, so far as the EEA was concerned, of a global plan which determined the conduct of the members of the cartel and restricted their individual commercial conduct in order to pursue a single anti-competitive economic objective, namely to distort the normal conditions of competition in the EEA. Accordingly, in the Commission's view, the arrangements concluded at worldwide level and at European level must be considered to constitute a single complex and continuous infringement concerning the EEA, in which the North American producers participated for a certain time and the European producers participated throughout the whole of the period in question.

7 As regards the identification of the addressees of the Decision, the Commission stated at recital 166 that the applicants, BASF, Bioproducts, Chinook, DuCoa and UCB must bear responsibility for the infringement. Ertisa, a Spanish company with 50% of the Spanish market, on the other hand, was not an addressee of the Decision, as the Commission concluded at recital 178 that the evidence was, on the whole, insufficient to hold that undertaking liable for the alleged facts.

8 In Article 3 of the Decision the Commission ordered the undertakings to which the Decision was addressed to bring immediately to an end the infringements referred to in Article 1 of the Decision, in so far as they had not already done so, and to refrain from repeating any of the anti-competitive acts or conduct established and from any act or conduct having the same or similar object or effect.

9 For the purpose of imposing fines, the Commission considered that the North American producers (Bioproducts, Chinook and DuCoa) had ceased to participate in the infringement no later than 20 April 1994, following the Johor Bahru meeting (see paragraph 4 above). According to recital 165 to the Decision, the Commission had no evidence of further meetings or contacts involving North American producers whereby they fixed prices for the EEA or confirmed their original commitment not to export to Europe. Since the first measure taken by the Commission with respect to that infringement was taken on 26 May 1999, or more than five years after the North American producers ceased to participate in the infringement, the Commission did not impose fines on those producers, in accordance with Article 1 of Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1) and Article 25 of Council Regulation 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).

10 Since the European producers' participation had lasted until 30 September 1998, on the other hand, the Commission imposed on them fines totalling EUR 66.34 million.

11 With regard more particularly to the Akzo Nobel group, the Commission decided to address the Decision to Akzo Nobel NV, Akzo Nobel Functional Chemicals BV, Akzo Nobel Chemicals BV, Akzo Nobel Chemicals International BV and Akzo Nobel Nederland BV jointly and severally. The last three undertakings (or their legal predecessors) all participated directly in the infringement. Akzo Nobel Functional Chemicals was created in June 1999 as a subsidiary of Akzo Nobel Chemicals, at which time the latter became a holding company. Therefore, the Commission considered that Akzo Nobel Functional Chemicals is the legal successor to most of the choline chloride activities previously carried on by its parent company and should, accordingly, also be an addressee of the Decision.

12 Akzo Nobel forms an economic unit with the other legal entities in the Akzo Nobel group to which the Decision is addressed. It was this economic unit that was responsible for the production of chlorine chloride in the EEA and which participated in the cartel. The conclusion could be different only if the operational subsidiaries of Akzo Nobel were able to operate an autonomous commercial policy in the period concerned and actually did so. Akzo Nobel, far from being simply an investment vehicle, serves as the corporate centre of the Akzo Nobel group of companies which coordinates its main activities with regard to general group strategy, finances, legal affairs, and human resources. The Commission assumed that, through these functions, Akzo Nobel exerted a decisive influence over the commercial policy of its subsidiaries, all of which were directly or indirectly wholly owned by it. The Commission therefore found that the subsidiaries of Akzo Nobel lacked commercial autonomy, which entitled the Commission to address the Decision to Akzo Nobel, notwithstanding that it had not participated individually in the cartel (recital 172 to the Decision).

13 The lack of commercial autonomy of the Akzo Nobel group's operating companies or business units is also clear from the documents entitled 'Authority Schedules' which Akzo Nobel submitted during the administrative procedure. Those documents show that the corporate objectives for the Akzo Nobel group as a whole and guidelines for the strategic plans of business units are set by the Board of Management of Akzo Nobel. The strategic plan of an individual business unit can be endorsed only if it fits within the corporate strategic plan. Portfolio positioning within that strategic plan is also decided by the Board of Management of Akzo Nobel, whereas the operational plan of each business unit must comply with the guidelines and group targets set by the Board of Management. Last, any investments of more than EUR 2.5 million need the approval of the Board Committee, the Full Board of Management or the Supervisory Board of Akzo Nobel, depending on their financial impact. The Board of Management also decides on the allocation of profits and on dividends, and also on appointments, remuneration and dismissals (recital 173 to the Decision).

14 Akzo Nobel Chemicals SpA, which was an addressee of the statement of objections because it was suspected of having participated in certain activities regarding choline chloride in Spain, was not an addressee of the Decision because the Commission considered that the evidence gathered was insufficient to hold it liable (recital 176 to the Decision).

15 The amount of the fines was determined by the Commission on the basis of its Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3) and the Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4) ('the Leniency Notice').

16 For the purpose of determining the starting amount of the fines, the Commission stated that it would apply differential treatment to the companies involved in order to take account of differences in their effective economic capacity to cause significant damage to competition. Thus, in view of the fact that the infringement had begun at the global level, with the participation of North American companies which agreed, inter alia, to withdraw from the European market, the Commission considered that it should take as a basis the global market shares of the participants in the infringement in order to determine their individual importance (recitals 200 and 201 to the contested decision).

17 Thus, on the basis of the global market shares in 1997, the Commission placed the applicants in the third category, with a market share of 12%. In order to ensure sufficient deterrence, the Commission, by reference to Akzo Nobel's turnover in 2003 (EUR 13 000 million), multiplied the starting amount by a factor of 1.5.

18 Next, the Commission increased the starting amount by 10% for each full year of the infringement and by 5% for each additional period of six months or more but less than one year. As the infringement had lasted for 5 years and 11 months (from 13 October 1992 until 30 September 1998), the Commission increased the starting amount by 55%. Thus, the basic amount of the fine imposed jointly and severally on the applicants was fixed at EUR 29.99 million.

19 As regards the application of the Leniency Notice to the applicants, the Commission emphasised the importance of a voluntary submission of 8 January 2002, concerning five further meetings at European level. That, according to recital 233 to the Decision, was what enabled the Commission to prove the full scope and duration of the infringement at European level. Furthermore, the applicants did not substantially contest the facts relied on by the Commission. The Commission therefore considered that the applicants were entitled to a 30% reduction in the amount of the fine that would otherwise have been imposed on them (recitals 233 to 236 to the Decision).

20 At the end of that procedure, the fine imposed on the applicants was fixed at EUR 20.99 million.

Procedure and forms of order sought by the parties

21 By application lodged at the Registry of the Court of First Instance on 2 March 2005, the applicants brought the present action.

22 By applications lodged at the Court Registry on 25 February (registered as Case T-111/05) and 1 March 2005 (registered as Case T-101/05), UCB and BASF, which were also addressees of the Decision, each brought an action against it.

23 By order of 7 September 2006, the President of the Second Chamber of the Court decided, after hearing the parties, to join Cases T-101/05, T-111/05 and the present case for the purposes of the oral procedure and the judgment, in accordance with Article 50 of the Rules of Procedure of the Court of First Instance.

24 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure, and, in the context of the measures of organisation of procedure, put a question in writing to the parties.

25 After hearing the parties' views on the matter at the hearing, the Court decided, by its judgment in Cases T-101/05 and T-111/05, to disjoin the present case from Cases T-101/05 and T-111/05 for the purposes of the judgment, in accordance with Article 50 of the Rules of Procedure.

26 The applicants claim that the Court should:

— annul the Decision;

— order the Commission to pay the costs.

27 The Commission contends that the Court should:

— dismiss the action as inadmissible or as manifestly unfounded with respect to Akzo Nobel Nederland, Akzo Nobel Chemicals International and Akzo Nobel Chemicals;

— dismiss the remainder of the action;

— order the applicants to pay the costs.

Law

28 The applicants raise three pleas in law, alleging, first, that the Commission wrongly attributed joint and several liability for the infringement to Akzo Nobel; second, breach of Article 23(2) of Regulation No 1/2003 in that the amount of the fine exceeds 10% of Akzo Nobel Functional Chemicals' turnover for 2003; and, third, breach of the obligation to state reasons for attributing joint and several liability for the infringement to Akzo Nobel.

1. *Admissibility of the action as regards Akzo Nobel Nederland, Akzo Nobel Chemicals International and Akzo Nobel Chemicals*

Arguments of the parties

29 The Commission submits that the action, which must be analysed as five individual actions, contains no pleas capable of justifying annulment of the Decision or a

reduction in the amount of the fine as regards Akzo Nobel Nederland, Akzo Chemicals International and Akzo Nobel Chemicals. It is therefore consistent with neither Article 21 of the Statute of the Court of Justice nor Article 44 of the Rules of Procedure so far as those three applicants are concerned. In any event, the action should be dismissed with respect to those applicants as manifestly unfounded in law.

30 The applicants contend that the action is admissible with respect to Akzo Nobel Nederland, Akzo Nobel Chemicals International and Akzo Nobel Chemicals. They maintain that the action fulfils the conditions of Article 21 of the Statute of the Court of Justice and Article 44 of the Rules of Procedure of the Court of First Instance and claim that the possibility that the Decision will be annulled shows that they have an interest in bringing the action.

Findings of the Court

31 It should be noted at the outset that, since the present case concerns one and the same action which is admissible so far as Akzo Nobel and Akzo Nobel Functional Chemicals are concerned, there is no need to examine the plea of inadmissibility raised by the Commission (see, to that effect and by analogy, Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 30 and 31).

32 In that regard, the argument put forward by the Commission at the hearing, that the assessment in the preceding paragraph applies only where annulment benefits every person irrespective of whether that person brought an action, is not sufficient to make it necessary to examine the plea of inadmissibility. While it is true that the annulment of a decision imposing fines on a number of entities under Article 81 EC must not operate to the advantage of those who did not bring an action (see, to that effect, Case C-310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363, paragraph 63), or whose action is inadmissible, the fact remains that the

Commission did not explain in what way annulment of the Decision on the basis of the pleas set out at paragraph 30 above might operate to the advantage of Akzo Nobel Nederland, Akzo Nobel Chemicals International and Akzo Nobel Chemicals. The Commission itself, moreover, maintains in the rejoinder that in light of the pleas raised in the application, any annulment could affect only the liability of the top holding company in the group or the amount of the fine imposed on Akzo Nobel Functional Chemicals. Furthermore, even on the assumption that Akzo Nobel Nederland, Akzo Nobel Chemicals International and Akzo Nobel Chemicals are not admissible, the Court must none the less examine the action in its entirety. In those circumstances, for reasons of procedural economy the Court should not examine the plea of inadmissibility raised by the Commission.

2. *Substance*

First plea: incorrect attribution of joint and several liability to Akzo Nobel

Arguments of the parties

33 The applicants submit that the Commission erred in law in imposing the fine jointly and severally on Akzo Nobel, the parent company of the group, holding, directly or indirectly, 100% of the capital of its subsidiaries. They explain the organisational and legal structures of the Akzo Nobel group as follows. The organisational structure is composed of a corporate centre (Akzo Nobel NV), business units and sub-units. The group's activities are in fact organised in such a way that a business unit (or sub-unit) undertakes activities carried on by various Akzo Nobel subsidiaries (for example the methylamines and choline chloride sub-unit encompasses activities by various Akzo Nobel subsidiaries). The legal structure includes Akzo Nobel as 'top

holding' company in the group and more than 1 000 different legal entities wholly owned directly or indirectly by Akzo Nobel. Those legal entities must be regarded as portfolio holders, carrying on commercial activities managed by the business units (and sub-units). In this case, Akzo Nobel Chemicals International, Akzo Nobel Chemicals and Akzo Nobel Functional Chemicals are the owners of, inter alia, the activity carried out by the methylamines and choline chloride sub-unit. It follows that the organisational and legal structures of the Akzo Nobel group are parallel.

34 The Akzo Nobel group is therefore a two-tier organisational structure: a corporate centre that deals with strategic issues (major investments, finance, legal affairs, human resources) and 20 business units directly below. Each unit has a general manager, a management team and supporting services, responsible for the entire operational management. Provided that the management of the business unit stays within the financial and strategic targets set and approved by Akzo Nobel, the management of that unit is entirely independent and bound solely by the 'business principles' (the core values of the business world, such as entrepreneurial spirit, personal integrity, social responsibility, etc.) and 'corporate directives' (the directives of the undertaking, on legal and tax matters, human resources, health and safety and environmental matters, etc.) applicable to the entire Akzo Nobel group. Each unit is divided into sub-units with their own management. In this case, the business activities relating to choline chloride were conducted by Akzo Nobel Chemicals, Akzo Nobel Functional Chemicals and Akzo Nobel Chemicals SpA.

35 It is the business units (and sub-units) responsible for the relevant product area that determine, autonomously from Akzo Nobel, policy, strategy and business operations. However, that does not mean that the units (or sub-units) have the same decision-taking power with regard to the subsidiaries. The business policy of each business unit and sub-unit cannot be said to determine the business policy of the various subsidiaries.

36 According to Akzo Nobel's analysis of the case-law, the decisive influence which a parent company must exercise in order to be considered liable for the activities of its subsidiary must relate to the subsidiary's commercial policy in the strict sense. The Commission must therefore show, first, that the parent company has the power to direct the conduct of the subsidiary to the point of depriving it of any independence in determining its commercial course of action and, second, that it exerted that power.

37 However, the applicants claim that the case-law has created a presumption that a wholly-owned subsidiary has carried out the instructions of its parent company. In those circumstances, in order for the Commission to be required to find the subsidiary alone liable in such a case, the subsidiary must determine its commercial policy largely on its own. Where that is shown to be the case, the Commission must again show that the parent company did in fact exert a decisive influence in a specific case. It follows that organisation into units of the kind seen in the Akzo Nobel group does not in itself suffice to make proof of the actual involvement of the parent company unnecessary. Furthermore, Akzo Nobel claims that the Commission, in exercising its power to take decisions, and the Community judicature always employ facts in order to support the presumption in question.

38 Akzo Nobel's subsidiaries determine their commercial policy largely on their own, each having its own decision-taking body. Since Akzo Nobel does not carry on any commercial activity or produce or distribute any product, it does not have the power to direct its subsidiaries' conduct to the point of depriving them of any real independence in determining their own course of action in the market. Akzo Nobel merely determines the group's general macroeconomic strategy and claims no role in relation to purely commercial decisions. Decisions on pricing and price increases are in principle taken within each subsidiary by the marketing directors for the relevant products. Akzo Nobel therefore deals exclusively with major strategic questions (finance, legal affairs, health and safety and environmental rules and

policy, etc.), which excludes matters of commercial policy. Thus, responsibility for commercial policy matters lies with the business units and sub-units, which include all the operational subsidiaries of the group.

39 The international in-house magazine published by Akzo Nobel evidences a very detailed structure within the subsidiaries. That structure would serve no purpose if commercial policy had to be decided by the Board of Akzo Nobel. However, no parent company owning all the shares in its subsidiary would allow it to operate without any supervision. Thus, Akzo Nobel determines policies and rules on health and safety, the environment, corporate identity and collective labour agreements with which the subsidiaries must comply. That type of control cannot be assimilated to control *stricto sensu* of the subsidiaries' commercial strategy.

40 Furthermore, each of the subsidiaries involved in these proceedings has its own management board, while commercial policy (pricing, distribution) is determined at the level of the business units and sub-units responsible for the relevant products. Turnover in the choline chloride sector appears in the accounts of Akzo Nobel Chemicals, Akzo Nobel Functional Chemicals and Akzo Nobel Chemicals SpA.

41 The marketing director for choline chloride is, as his job title suggests, mainly responsible for preparing the draft sales plan with regard to quantities, prices, product range and marketing strategy. The fact that there is no documentary evidence to support all the factual claims does not diminish the value of the evidence produced by Akzo Nobel, especially since it produced copious evidence during the administrative procedure.

42 Since, on the basis of the foregoing, the presumption in question has been rebutted, the applicants contend that the Commission's arguments would have been correct if Akzo Nobel had given instructions with regard to price-fixing and sharing the choline chloride market. However, a parent company of more than 1 000 legal entities cannot materially instruct even just one of its subsidiaries with regard to pricing policy or commercial behaviour. The Commission has failed to prove that Akzo Nobel was aware of or directly involved in the infringement or that it had instructed its subsidiaries to commit it. The evidence on which the Decision relies in order to attribute joint and several liability for the infringement to Akzo Nobel does not relate to its subsidiaries' commercial policy in the strict sense. As the applicants have shown that the methylamines and choline chloride sub-unit was, at the very least, largely commercially autonomous, the Commission ought to have proved that Akzo Nobel had exercised decisive influence on the commercial policy of the other applicants or on the methylamines and choline chloride business sub-unit. However, the Commission has failed to satisfy that obligation, since Akzo Nobel had no reason to exercise such influence.

43 In that context, it is scarcely relevant to seek out the natural or legal person who appoints the vice-presidents of the group, the managers and other players in the methylamines and choline chloride business sub-unit and to whom those persons are accountable. The crucial question is whether Akzo Nobel exercised decisive influence on the commercial policy of its subsidiaries or the methylamines and choline chloride business sub-unit. It is therefore even arguable that the methylamines and choline chloride sub-unit should be the addressee of the Decision.

44 The applicants observe that if all the legal entities in the choline chloride sector were to be regarded as a single economic unit, there would be no reason to exclude Akzo Nobel Chemicals from the addressees of the Decision on the sole ground that the Commission did not have sufficient evidence to hold it liable. Its exclusion also contradicts the Commission's assertion that Akzo Nobel is the only link between choline chloride production in Italy and in the Netherlands.

45 The applicants emphasise that Akzo Nobel never held itself out as the Commission's only interlocutor during the administrative procedure. In addition, each of the applicants gave a separate authority to the lawyers representing them.

46 In light of the foregoing considerations, and since the evidence, other than the 100% shareholding, on which the Commission relied is either irrelevant or wrong, Akzo Nobel maintains that it has rebutted the presumption of the liability of the group's holding company. As the Commission has adduced no evidence showing that Akzo Nobel had exercised decisive influence on its subsidiaries' commercial policy, the present plea must be upheld.

47 The Commission contends that, according to the case-law, a parent company may be presumed to exercise decisive influence over a subsidiary where the conduct of the subsidiary is essentially subject to instructions issued to it, that is to say, where the parent company decides the commercial strategy and operations of its subsidiary. The case-law imposes no requirement that the parent company instruct its subsidiary to commit an infringement in order for the Commission to address to it a decision imposing a fine. It is therefore sufficient that the parent company exercised decisive influence over the general commercial strategy of its subsidiaries in order for it to be held jointly and severally liable and the Commission does not have to show that the parent company was aware of or directly involved in the infringement.

48 It follows from the case-law that in order to rebut that presumption it must be proved that the parent company was not in a position to have decisive influence over the commercial policy of its subsidiary or that the subsidiary was autonomous. It must therefore be demonstrated by sufficiently persuasive evidence that the parent company was not in a position to exercise, or did not effectively exercise, decisive influence over its subsidiary's commercial strategy and operations, notwithstanding its 100% shareholding. It cannot, on the other hand, be sufficient for the parent

company to show that the subsidiary conducted its business largely on its own and that it had its own board of directors, which was not in any event proved in this case.

49 The applicants are wrong to claim that they rebutted the presumption against Akzo Nobel by the evidence produced in response to the statement of objections, nor can they challenge the legality of the Decision on the basis of documents which were not produced during the administrative procedure.

50 The evidence adduced by the applicants is not in any event sufficient to rebut the presumption against Akzo Nobel. The applicants did not identify the legal entities which appoint the group vice-presidents, the managers of the business units or the persons or bodies to whom the vice-presidents are accountable. The Commission therefore contends that it may reasonably suppose that the group vice-presidents are appointed by Akzo Nobel, to which they are accountable for their management.

51 According to the Commission, the applicant's state in the application that the subsidiaries' commercial policy is not determined by them but by the business units and sub-units, while the management of Akzo Nobel is responsible for coordination and for establishing general guidelines. The fact that the applicant subsidiaries have their own boards of directors does not necessarily mean that they take all basic commercial decisions on the production and marketing of choline chloride in complete autonomy. The fact that they belong to the methylamines and choline chloride business sub-unit, which has its own management bodies, suggests the opposite. On the basis of the applicants' assertion that the management of each business sub-unit is accountable to the management of a business unit, the Commission presumes that the management of each business unit is in turn accountable to the management of Akzo Nobel. It is precisely that obligation that justifies the characterisation of the Akzo Nobel group as an economic unit. Even on

the assumption that the marketing manager of the choline chloride business sub-unit acts in complete autonomy when determining the prices of the product, that confirms that the subsidiaries are not autonomous and does not preclude decisive influence on the part of Akzo Nobel.

52 The Commission further submits that the applicants' argument that it ought to have addressed the Decision to the methylamines and choline chloride business sub-unit cannot be accepted because that sub-unit is not a legal entity, the only legal entities being the subsidiaries of the group coordinated by Akzo Nobel. Those legal entities cannot avoid liability simply because they are structured as units without legal personality. In addition, the fact that Akzo Nobel is the sole shareholder in its subsidiaries by definition gives it the power to control their course of action in all essential respects.

53 The documents produced by the applicants, moreover, simply show that day-to-day commercial decisions on choline chloride are taken by members of the management of the methylamines and choline chloride business sub-unit and do not identify the persons who appoint and employ those members. The applicants have therefore failed to rebut the presumption that Akzo Nobel is liable.

54 In any event, Akzo Nobel may properly be held liable on the basis of factors other than the presumption created by its 100% shareholding in its subsidiaries. It is proved on the basis of the authority schedules that any project of a business unit involving investment requires the approval of the board committee, board of management or supervisory board of Akzo Nobel, depending on the size of the investment. The role played by Akzo Nobel in appointing the directors of each business unit and its administrative functions show that it operates as a single

economic unit with those business units. Commercial independence relates not only to decisions of secondary importance (such as day-to-day sales) but also to more important decisions, such as the appointment of managers, the determination of business objectives and investment decisions. Akzo Nobel is the entity responsible for settling those questions.

55 The fact that Akzo Nobel, Akzo Nobel Nederland, Akzo Nobel Chemicals International and Akzo Nobel Chemicals do not carry on any commercial activity also confirms the conclusion that none of those legal entities can be considered to constitute an autonomous economic player on its own.

56 Akzo Nobel also represents the only ownership link between the activities of the choline chloride sector in Italy and those in the Netherlands. That finding is not inconsistent with the fact that the Decision was not addressed to Akzo Nobel Chemicals SpA. The Commission does not have sufficient evidence to show that that undertaking participated in the infringement. Furthermore, Akzo Nobel Chemicals SpA is not a managing company liable for the behaviour of the entities that are directly involved. In any event, the Commission is not required to attribute liability to all the legal entities which together form an undertaking. The fact that the applicants are represented by the same lawyers also militates in favour of the Commission's analysis.

Findings of the Court

— Preliminary observations on the attributability to a parent company of the unlawful conduct of a subsidiary

57 It must be borne in mind, first of all, that the concept of undertaking within the meaning of Article 81 EC includes economic entities which consist of a unitary

organisation of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision (see Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 54 and the case-law cited).

58 It is therefore not because of a relationship between the parent company and its subsidiary in instigating the infringement or, *a fortiori*, because the parent company is involved in the infringement, but because they constitute a single undertaking in the sense described above that the Commission is able to address the decision imposing fines to the parent company of a group of companies. It must be borne in mind that Community competition law recognises that different companies belonging to the same group form an economic entity and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not determine independently their own conduct on the market (Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 290).

59 It should also be noted that, for the purpose of applying and enforcing Commission competition law decisions, it is necessary to identify, as addressee, an entity having legal personality (see, to that effect, Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Maatschappij and Others* v *Commission* (*'PVC II'*) [1999] ECR II-931, paragraph 978).

60 In the specific case of a parent company holding 100% of the capital of a subsidiary which has committed an infringement, there is a simple presumption that the parent company exercises decisive influence over the conduct of its subsidiary (see, to that effect, Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 50, and *PVC II*, cited in paragraph 59 above, paragraphs 961 and 984), and that they therefore constitute a single undertaking within the meaning of Article 81 EC (Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, not published in the ECR, paragraph 59). It is thus for a parent company which disputes

before the Community judicature a Commission decision fining it for the conduct of its subsidiary to rebut that presumption by adducing evidence to establish that its subsidiary was independent (Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 136; see also, to that effect, Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925 ('*Stora*'), paragraph 29).

61 In that regard, it must be made clear that, while it is true that at paragraphs 28 and 29 of *Stora*, cited in paragraph 60 above, the Court of Justice referred, as well as to the fact that the parent company owned 100% of the capital of the subsidiary, to other circumstances, such as the fact that it was not disputed that the parent company exercised influence over the commercial policy of its subsidiary or that both companies were jointly represented during the administrative procedure, the fact remains that those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the elements on which the Court of First Instance had based its reasoning before concluding that that reasoning was not based solely on the fact that the parent company held the entire capital of its subsidiary. Accordingly, the fact that the Court of Justice upheld the findings of the Court of First Instance in that case cannot have the consequence that the principle laid down in paragraph 50 of *AEG* v *Commission*, cited in paragraph 60 above, is amended.

62 That being so, it is sufficient for the Commission to show that the entire capital of a subsidiary is held by the parent company in order to conclude that the parent company exercises decisive influence over its commercial policy. The Commission will then be able to hold the parent company jointly and severally liable for payment of the fine imposed on the subsidiary, unless the parent company proves that the subsidiary does not, in essence, comply with the instructions which it issues and, as a consequence, acts autonomously on the market.

63 The Court must also examine, in the context of these preliminary observations, the argument central to the applicants' pleadings that the influence which the parent company is presumed to exercise because it holds the entire capital of its subsidiary relates to the latter's commercial policy in the strict sense (see paragraph 36 above).

That policy, in the applicants' submission, includes, for example, distribution and pricing strategy. Accordingly, so the argument goes, the parent company could rebut the presumption by showing that it is the subsidiary that manages those specific aspects of its business policy, without receiving instructions.

64 On that point, it should be noted that, when analysing the existence of a single economic entity among a number of companies forming part of a group, the Community judicature has examined whether the parent company was able to influence pricing policy (see, to that effect, Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 137, and Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraph 45), production and distribution activities (see, to that effect, Joined Cases 6/73 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223, paragraphs 37 and 39 to 41), sales objectives, gross margins, sales costs, cash flow, stocks and marketing (Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraph 48). However, it cannot be inferred that it is only those aspects that are covered by the concept of the business policy of a subsidiary for the purposes of the application of Articles 81 EC and 82 EC with respect to the parent company.

65 On the contrary, it follows from that case-law, read together with the considerations set out at paragraphs 57 and 58 above, that it is for the parent company to put before the Court any evidence relating to the economic and legal organisational links between its subsidiary and itself which in its view are apt to demonstrate that they do not constitute a single economic entity. It also follows that when making its assessment the Court must take into account all the evidence adduced by the parties, the nature and importance of which may vary according to the specific features of each case.

66 It is by reference to those considerations that the Court must ascertain whether Akzo Nobel and its subsidiaries to which the Decision was addressed constitute a single economic entity.

— The existence of a single economic entity between Akzo Nobel and its subsidiaries to which the Decision was addressed

67 In the present case, the parties are agreed that Akzo Nobel directly or indirectly holds 100% of the capital of its subsidiaries to which the Decision was addressed. It is therefore for Akzo Nobel, on the basis of the foregoing considerations, to show that those subsidiaries determine their business policy autonomously in such a way that they and their parent company do not constitute a single economic entity and therefore a single undertaking for the purposes of Article 81 EC (see paragraph 57 above).

68 In that regard, the authority schedules produced by Akzo Nobel during the administrative procedure (see paragraph 13 above) and briefly analysed at recital 173 to the Decision contain, in the introduction, a description of the allocation of powers relating to the decision-taking procedure within the Akzo Nobel group on 14 topics.

69 Those schedules cover, more particularly, Strategy, Operational Plan, Investments, Acquisition/divestment, Restructuring plans, General policies on functional issues, Finance, Control/Accounting, Human Resources, Legal Affairs, Risk and Insurance Management, Technology & Environment, Informational Technology and a subject headed 'Miscellaneous'.

70 The introduction to the authority schedules states:

'Detailed authorities and instructions (possibly also for items not mentioned in the Akzo Nobel Authority Schedules) are laid down in separate directives and/or

charters or are agreed upon between the [business unit/sub-unit] manager and the responsible Board Member.

As to subsidiaries not wholly owned by Akzo Nobel, either directly or indirectly, this allocation of authorities shall be integrally enforced as much as possible.'

71 The Court must also examine a number of aspects of the authority schedules, namely strategy, investment, general policies on functional issues, control and accounting, human resources and legal affairs.

72 As regards strategy, it follows from the authority schedules that each business unit or sub-unit prepares and submits its strategic plan for an opinion to [*confidential*] [1] of Akzo Nobel, which subsequently submits it to [*confidential*] for review within guidelines set by Akzo Nobel's Board of Management, which, within the context of [*confidential*], decides on major strategic moves.

1 — Confidential data omitted.

73 When drawing up its operational plan, each business unit must obtain advice from [*confidential*] of Akzo Nobel, which, in turn, submits each question to the management of Akzo Nobel for a decision within the guidelines and group targets.

74 With respect to investments (including rentals, leases, disposal or acquisition of intangible assets), each business unit or sub-unit has the power to take decisions, but within limits previously agreed upon with [*confidential*] of Akzo Nobel. The latter decides on projects up to EUR [*confidential*], while decisions are taken by [*confidential*], [*confidential*] or [*confidential*], depending on whether the value is between EUR 2.5 million and EUR 10 million, between EUR 10 million and EUR 20 million or above EUR 20 million.

75 For general policies on functional issues, [*confidential*] of Akzo Nobel submits a proposal for a functional area and the decision is taken by [*confidential*], within [*confidential*].

76 For the purposes of control and auditing, each business unit or sub-unit reports its results periodically, while [*confidential*] of Akzo Nobel, [*confidential*] and [*confidential*] periodically review corporate performance at unit (or sub-unit) and group level.

77 In connection with human resources, the business units or sub-units are required to submit their proposals on main organisational changes to the [*confidential*] of Akzo Nobel for approval of conformity with organisational concepts, while the final decision is taken by [*confidential*] of Akzo Nobel. It is important to note that where the proposal does not conform to the organisational concept, it is for [*confidential*] of Akzo Nobel to adopt a definitive decision.

78 As regards legal affairs, in the case of important contracts concerning know-how, patents, trade marks, research cooperation and strategic alliances, each unit or sub-unit submits proposals to [*confidential*] of Akzo Nobel, which, in turn, depending on the value of the operation, advises [*confidential*], [*confidential*] or [*confidential*], which decides the matter. Powers are allocated in a similar fashion for the purpose of important long-term supply and purchasing contracts, depending on their duration and the financial commitment involved.

79 It is apparent from the authority schedules, moreover, that Akzo Nobel is involved, through [*confidential*], [*confidential*], [*confidential*] or [*confidential*], in the decision-taking procedure for all of the matters concerned (see paragraph 69 above).

80 Questioned on that point at the hearing, the applicants maintained that the authority schedules illustrated the allocation of powers within the Akzo Nobel group but did not demonstrate that those powers were actually used in connection with the infringement in question. However, it must be held that that last assertion is inoperative at this stage of the examination, which seeks to establish whether Akzo Nobel exercised influence over the business policy of its subsidiaries and not whether Akzo Nobel played a specific role in connection with the infringement in question (see paragraph 58 above).

81 As regards the organisational relationship between the subsidiaries of the Akzo Nobel group to which the Decision was addressed and the methylamines and choline chloride business sub-unit, it is sufficient to observe that, as the applicants stated (see paragraph 33 above), Akzo Nobel Chemicals International, Akzo Nobel Chemicals and Akzo Nobel Functional Chemicals are the 'owners' of, inter alia, the activity carried out by that sub-unit. Since the Decision could be addressed only to entities having legal personality (see paragraph 59 above), which, moreover, participated directly in the infringement or are the successors in law to the entities

which participated therein (see paragraph 11 above), the applicants cannot claim that the Commission ought to have distinguished the determination of the policy of the business units or sub-units of the group from the determination of the policy of the subsidiaries of Akzo Nobel. In any event, the applicants stated at paragraphs 16, 17 and 54 of their reply that the crucial question was whether they had been able to rebut the presumption that Akzo Nobel had exercised decisive influence either over the business sub-unit concerned or over the subsidiaries to which the Decision was addressed.

82 In those circumstances, it must be concluded that, as stated at recital 173 to the Decision, the competent personnel, and in particular the management of Akzo Nobel, play a significant role in several essential aspects of the strategy of the subsidiaries in question and reserve the power of final decision with respect to a range of matters that define their course of conduct on the market.

83 The argument that decisions relating to pricing and price increases are in principle taken by the marketing managers for the products concerned, who act within their respective subsidiaries, and in particular by the choline chloride marketing manager (see paragraphs 38 and 41 above), cannot refute that conclusion. The same applies to the arguments based on the two-level structure of the Akzo Nobel group, which is claimed to have the objective of removing commercial policy in the strict sense from the control of Akzo Nobel (see paragraph 38 above). As stated at paragraph 58 above, attribution of an infringement by a subsidiary to the parent company does not require proof that the parent company influences its subsidiary's policy in the specific area in which the infringement occurred, in the present case distribution and pricing. On the other hand, the economic and legal organisational links between the parent company and its subsidiary may establish that the parent exercises influence over the subsidiary's strategy and therefore that they can be viewed as a single economic entity.

84 The argument based on the fact that each subsidiary has its own management board (see paragraph 40 above) lacks conviction. Every incorporated company has a management board appointed by its shareholders, in this case by Akzo Nobel. Furthermore, the applicants stated in that regard at paragraph 45 of their reply that the group vice-presidents (who manage the business units) are appointed by the division presidents of the chemical divisions of the group, after approval of the responsible member of the Board of Management of Akzo Nobel. They report to the President of Akzo Nobel Chemicals, who in turn reports to the responsible member of the Board of Management of Akzo Nobel. Furthermore, Akzo Nobel's in-house magazine (see paragraph 39 above) states that the group vice-president at the head of a business unit maintains hierarchical control within that unit.

85 Therefore, even on the assumption that the applicants' reasoning in respect of the burden of proof, illustrated at paragraph 37 above, is correct, the fact remains that they have not succeeded in rebutting the presumption that Akzo Nobel, the parent company owning 100% of the capital of the subsidiaries to which the Decision was addressed, exercised decisive influence over its subsidiaries' policies. It must therefore be concluded that Akzo Nobel, together with those subsidiaries, constitutes an undertaking for the purposes of Article 81 EC, without there being any need to ascertain whether Akzo Nobel exercised influence over the conduct at issue. Consequently, the first plea must be rejected.

Second plea: breach of Article 23(2) of Regulation No 1/2003

Arguments of the parties

86 The applicants claim that by imposing the fine jointly and severally on Akzo Nobel Functional Chemicals, the Commission exceeded the ceiling of 10% of turnover laid

down in Article 23(2) of Regulation No 1/2003. As Akzo Nobel Functional Chemicals' turnover in 2003 was EUR 124.5 million, the amount of the fine (EUR 20.99 million) was in excess of that ceiling.

87 Consequently, since liability was wrongly attributed to Akzo Nobel, there is no single economic entity capable of justifying the 10% ceiling being calculated on the basis of its consolidated turnover. According to the Decision, Akzo Nobel Chemicals, Akzo Nobel Chemicals International and Akzo Nobel Nederland also participated directly in the infringement, yet the Commission failed to establish that one of them exercised decisive influence over another.

88 The Commission states that it calculated the 10% ceiling on the basis of Akzo Nobel's consolidated turnover. The word 'undertaking' has the same meaning in Regulation No 1/2003 and in Articles 81 EC and 82 EC. Akzo Nobel was held liable on the ground that, together with the subsidiaries to which the Decision was addressed, it formed an undertaking within the meaning of Article 23(2) of Regulation No 1/2003. The Commission therefore did not err in calculating the ceiling.

89 Even on the assumption that the Commission was wrong to attribute joint and several liability to Akzo Nobel, first, the fact remains that the applicants did not base their second plea on such an error. The fact that they developed their second plea in that way for the first time in the reply constitutes, in reality, a new plea which is inadmissible under Article 48(2) of the Rules of Procedure. Second, the applicants did not seek a reduction in the amount of the fine, in the exercise of the Court's unlimited jurisdiction, in the event that the Court should consider that the Commission ought not to have addressed the Decision to Akzo Nobel. Third, the applicants did not claim that Akzo Nobel's subsidiaries did not form an undertaking for the purposes of Regulation No 1/2003.

Findings of the Court

90 The fact that several companies are held jointly and severally liable for a fine on the ground that they form an undertaking for the purposes of Article 81 EC does not mean, as regards the application of the maximum amount of 10% of turnover laid down by Article 23(2) of Regulation No 1/2003, that the obligation of each of them is limited to 10% of the turnover which it achieved during the last business year. The maximum amount of 10% of turnover within the meaning of that provision must be calculated on the basis of the total turnover of all the companies constituting the single economic entity acting as an undertaking for the purposes of Article 81 EC, since only the total turnover of the component companies can constitute an indication of the size and economic power of the undertaking in question (*HFB and Others* v *Commission*, cited in paragraph 57 above, paragraphs 528 and 529).

91 Accordingly, regard being had to the considerations which gave rise to the rejection of the first plea, the Commission did not err by taking Akzo Nobel's consolidated turnover as a reference for the calculation of the ceiling in question. The second plea must therefore be rejected, without there being any need to adjudicate on the plea of inadmissibility raised by the Commission.

Third plea: breach of the obligation to state reasons

Arguments of the parties

92 The applicants contend that the reasoning which the Commission employed in order to establish Akzo Nobel's liability was based on incorrect grounds, in that the

facts on which it relied are inadequate and inappropriate to justify that conclusion. Nor did the Commission explain why it ordered Akzo Nobel Functional Chemicals to pay a fine greater than 10% of its turnover. Those flaws render the reasoning in the Decision insufficient if not absent, which in itself constitutes sufficient ground for annulment of the Decision.

93 The Commission disputes the correctness of those arguments. The Decision contains clear grounds with regard to the liability of Akzo Nobel at recitals 172 to 175. So far as the fine imposed on Akzo Nobel Functional Chemicals is concerned, the Commission submits that it was not bound to state reasons for its calculation, since the 10% ceiling was not exceeded. In any event, the Decision provided the applicants with all the information necessary to bring their action and to submit their arguments. In the Commission's submission, the third plea must therefore also be rejected in its entirety.

Findings of the Court

94 As regards the reasons for Akzo Nobel's liability, it must be borne in mind that the obligation to provide a statement of reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure (see Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 35 and the case-law cited).

95 In the present case, it must be held that the part of the present plea relating to the liability of Akzo Nobel goes to the correctness of the reasons for the decision, which have been examined in the context of the first plea (see paragraphs 67 to 85 above). In so far as that part of the present plea does not claim or substantiate a breach of essential procedural requirements, moreover, it is wholly unfounded in fact.

96 Furthermore, in so far as the present plea concerns the turnover of Akzo Nobel Functional Chemicals, it must be rejected on the ground that, as the turnover that could be lawfully taken into account was not exceeded (see paragraphs 90 and 91 above), the Commission was under no obligation to state reasons for the amount of the fine with particular regard to that company. The third plea must therefore be rejected.

97 It follows from the foregoing considerations that the application must be dismissed in its entirety.

Costs

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

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the application;

2. **Orders Akzo Nobel NV, Akzo Nobel Nederland BV, Akzo Nobel Chemicals International BV, Akzo Nobel Chemicals BV and Akzo Nobel Functional Chemicals BV to pay the costs.**

Meij Forwood Papasavvas

Delivered in open court in Luxembourg on 12 December 2007.

E. Coulon A.W.H. Meij

Registrar Acting President

Table of contents