

The Parent-subsidiary Relationship in EU Antitrust Law and the *AEG Telefunken* Presumption: Between the Effectiveness of Competition Law and the Protection of Fundamental Rights

by

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Abstract

The increasingly frequent reference to the protection of fundamental rights in the application of EU antitrust law is a trend that has grown significantly alongside the reforms brought about by Regulation 1/2003. Greater attention being given to fundamental rights is evident in the development of the application of the AEG Telefunken presumption, whereby a parent company may be penalized for the antitrust infringements of its wholly-owned subsidiary on the ground that the parent and the subsidiary constitute a single economic entity, and hence a single “undertaking”. Recently, the Court of Justice has confirmed the lawfulness of that presumption. However, increasing attention is now given to the adequacy of the Commission’s reasoning, particularly when the Commission rejects arguments made by parent companies to rebut the presumption. These developments suggest that the growing importance of fundamental rights protection may under certain conditions be a limit the principle of the effectiveness of EU competition law as well as a new legal tool to rectify (as much as possible) the EC’s “conflict of interests” with regard to its two “souls”, the “prosecutor” and the “judge”.

Résumé

La référence de plus en plus fréquente à la protection des droits fondamentaux dans l’application du droit antitrust de l’UE est une tendance qui a augmenté de façon significative avec des réformes apportées par le règlement N° 1/2003. L’attention plus grande accordée aux droits fondamentaux est évidente dans le développement de l’application de la présomption AEG Telefunken, par laquelle une société-mère peut être sanctionnée pour les infractions antitrust de sa filiale en propriété exclusive au motif que la société-mère et la filiale constituent une seule entité économique, et donc une seule «entreprise». Récemment, la Cour de justice a confirmé la légalité de cette présomption. Cependant, une attention croissante est maintenant dirigée vers la pertinence du raisonnement de la Commission, en particulier lorsque la Commission rejette les arguments présentés par les sociétés-mères pour réfuter cette présomption. Ces développements suggèrent que l’importance croissante de la protection des droits fondamentaux peut, sous certaines conditions, tempérer le principe de l’effectivité du droit communautaire de la concurrence.

Classifications and key words: relationship between competition law and fundamental rights; concept of undertaking; parent-subsidiary relationship in corporate groups; imputability of sanctions in corporate groups; standard of reasoning of the Commission

1. Introduction

The reform of Regulation 1/2003¹ has enabled the European Commission (hereafter: EC) to focus its enforcement primarily on cartels. This trend has been accompanied by a number of changes in the application of antitrust rules including a new, and more harsh fining policy with higher sanctions imposed on companies². At the cornerstone of what one could call an effective and until now successful “war on cartels” was, *inter alia*, the *AEG Telefunken* presumption. The presumption deals with the imputation of the sanctions for the breach of *antitrust* rules to a parent company that holds a 100% shareholding of the subsidiary whereby it is the latter that has actually violated European competition law. Because of its features, this case-law has raised much criticism and was challenged in some fifty judgments in the last few years³.

The EC’s new policy on the “war on cartels” has led to the interesting trend of increasingly frequent complaints, also *vis a vis* the *AEG Telefunken* case-law, from companies subject to European antitrust proceedings claiming an alleged violation of their fundamental rights. This phenomenon – unknown to this extent in the US experience – is related to the specific characteristics of the European Union (EU) antitrust enforcement system.

On this background, the aim of this article is, first, to assess briefly the evolution of the application of fundamental rights protection in European *antitrust* law. Second, it is to give an overview of the imputation of antitrust law in corporate groups. Third, the article also aims to take into account the development of the so-called *AEG Telefunken* presumption in European jurisprudence and, fourth, to assess the effect of the application of fundamental rights protection to that presumption.

2. The protection of fundamental rights and European antitrust law: a brief overview

Although the discussion of the relationship between competition law and the protection of fundamental rights has developed only recently⁴, the

¹ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.01.2003, p. 1.

² See W. Bosch, “The Role of Fines in the Public Enforcement of Competition Law” [in:] K. Heschelrath, H. Schweitzer (eds), *Public and Private Enforcement of Competition Law in Europe*, Springer Verlag 2014, p. 53.

³ For full list of judgments see ANNEX.

⁴ See generally M. Bronckers, A. Vallery, “No Longer Presumed Guilty: The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law” (2011) *World Competition* 535.

application of fundamental rights in this area started in much earlier times and can be organized into three phases.

The first phase begun with the recognition of fundamental rights protection within the EU legal order. The Court of Justice recognized already in the *Nold* case (1974) (one of the first rulings considering this issue) that even in the absence of a catalogue of rights in the Treaty, the protection of fundamental rights was part of European law⁵. That judgment was, in fact, a competition law case. It concerned a plea against an EC decision taken under Article 66(1) and (2) ECSC Treaty, that is, the rules on the control of concentrations covered in the ECSC Treaty⁶.

The second phase begun in the 1980s when claims were made concerning the illegality of the European system of competition law enforcement for its violation of Article 6 ECHR⁷. In particular, this phase arose as a consequence of the EC's nature of a "supranational" body, that is, independent from the Member States, as stated in Article 17 TUE. The "independence" feature was necessary, in the opinion of the drafters of the Treaty, in order to create a body which, operating independently from the Member States (but also from individuals), could protect the general interest of the Community, and not the interests of Member States or individuals⁸. However, the structure of the EC – set out so as to be independent – brings about negative consequences for investigative and penalty proceedings relating to Article 101 and 102 TFEU. That is due to the double role that the EC plays, in its independence, as both the "prosecutor" (in the identification of possible antitrust violations) as well as the "judge" (in ascertaining the infringement and imposing the relevant penalty)⁹. Hence, claims put forward in the 1980s – but held even now as in the case of the 2013 *Schindler* case¹⁰ – stated that the entire system

⁵ See also Judgment of the Court of 17 December 1970 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11-70, Reports of Cases 1970, p. 1125.

⁶ Judgment of the Court of 14 May 1974 *J. Nold, Kohlen- und Baustoffgrosshandlung v Commission of the European Communities*, Case 4-73, ECR 1974, p. 491, para 13. In particular, Mr. Nold alleged here the infringement of his right to property, recognized by the German *Grundgesetz*, by the decision of the Commission on Protection of Competition.

⁷ See Judgment of the Court of 29 October 1980 *Heintz van Landewyck SARL and others v Commission of the European Communities*, Joined cases 209 to 215 and 218/78, Reports of Cases 1980 03125, page 10 and para 79.

⁸ On the nature and role of the EC in antitrust law enforcement, please see L.F. Pace, *European Antitrust Law*, Edward Elgar Publishing, 2007, p. 26 and 199.

⁹ See the proposal in 2010 of the separation of the EC's decisional from its prosecutorial power made in M. Merola, D. Waelbroeck (eds), *Towards an optimal enforcement of competition rules in Europe – Time to review of Regulation 1/2003?*, Bruylant 2010, p. 237.

¹⁰ Judgment of the Court (Fifth Chamber) of 18 July 2013, *Schindler Holding Ltd and Others v European Commission*, Case C-501/11 P, not yet reported, para 23. See also W. Wils,

was in breach of Article 6 ECHR¹¹ because, according to these arguments, decisions regarding a quasi-criminal law, such as *antitrust* law, were issued by an authority that did not have the characteristics of an independent judge.

The thesis of the illegality under Article 6 ECHR was the result of an overly strict reading of the law and did not take into consideration the “checks and balances” of the European system, as ascertained by the Court itself in the *Schindler* judgment¹². In spite of this, the above complaint was already in the 1980s a “cry of pain” by the companies resulting from the (alleged) “abuse” in the EC practice of its “conflict of interests”. It is no coincidence that in order to find a partial solution to this issue, the institution of the Hearing Officer was established in 1981 with the aim of better protecting the procedural rights of investigated companies¹³.

The third phase of the relationship between competition law and fundamental rights begun in the mid 2000s¹⁴. It concerns the claim of illegality for the breach of fundamental rights not of the European enforcement system as such, but of its individual aspects. This stage, as mentioned above, is in large part a consequence of the “war on cartels” waged by the EC and initiated after the reform of Regulation 1/2003. In the face of this, companies have sought – as a result of, *inter alia*, the high sanctions imposed by the EC – new forms of protection (or rather new grounds for the unlawfulness of the EC’s

The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker (2014) 37(1) *World Competition* 5.

¹¹ A statement is memorable delivered in 1996 by Claus-Didier Ehlermann – General Director of DG Comp at that time – during a conference organized by the Italian antitrust Authority in Rome, where he was one of the speakers, after an intervention in which the illegality of the role of the EC in the European antitrust enforcement system was alleged for the breach of Art. 6 ECHR. Ehlermann argued smiling: “*If this were true, a large part of the overall activities of the Commission would be unlawful*”.

¹² Judgment of the Court, *Schindler Holding Ltd* (supra footnote 10), para 30.

¹³ See G. DI FEDERICO, *The Role of the Hearing Officer in Antitrust Cases. A Critical Assessment of the New Mandate and Practice After 2011*, Edward Elgar, forthcoming 2015. The Court held that the EC must ensure respect for the rights of the defense in the performance of its functions and, in particular, in administrative proceedings where sanctions may be imposed, in particular fines or penalty payments; v., *inter alia*, Judgment of the Court of 13 February 1979 *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, Case 85/76, Reports of Cases 1979 00461, para 9; Judgment of the Court of 9 November 1983 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, Case 322/81, Reports of Cases 1983 03461 para 7; Judgment of the Court of 21 September 1989 *Hoehchst AG v Commission of the European Communities*, Joined cases 46/87 and 227/88, Reports of Cases 1989 02859, para 15; Judgment of the Court of 18 October 1989 *Orkem v Commission of the European Communities*, Case 374/87, Reports of Cases 1989 3283, para 32 and 33.

¹⁴ On the timing of the new EC policy, see Judgment of the Court of 8 May 2013 *ENI SpA* (infra footnote 54).

decisions). Another reason for this new “climate” was the introduction by the Treaty of Lisbon of Article 6(2) TEU that set forth, for the first time, the legally binding nature of the Charter of Fundamental Rights of the European Union. The *Menarini* judgment of the European Court of Human Rights¹⁵ constituted the third reason for the newest development of this relationship. It is well known that the Court argued in this case, by reference to an Italian *Antitrust* Authority’s decision, that the rules on competition were to be considered quasi-criminal in nature because of – *inter alia* – the size of the fines imposed for their violations. Hence the organs implementing that law had to respect the rights protected by the ECHR.

3. The imputability of the infringement of Article 101 and 102 TFEU in corporate groups and the AEG presumption

The *AEG Telefunken* presumption is closely linked to the problem of the imputability of the violation of *antitrust* prohibitions in corporate groups.

The imputability of the infringement in corporate groups is of particular importance for the EC and for the companies themselves. In fact, the concrete identification of the company liable for the breach is relevant to different aspects of the case: the size of the sanction pursuant to Article 23 c. 2 Regulation 1/2003 (the attribution of the infringement to the parent company, rather than the subsidiaries, makes it possible to increase the basis for computing the fine, and, in turn, increase the value of the penalty imposed as it would be calculated with the maximum penalty “roof” of 10% of the total turnover of the corporate group); the identification of the addressee of the EC decision for its execution; the identification of the company that has to submit a request for leniency and its consequences; the passive legitimacy in action for damages, etc.

The problem of imputation of sanctions in the case of corporate groups, with special reference to the imputation of liability to the parent company, is characterized by the concept of an “undertaking”.

The TFEU defines the addressee of the prohibitions under Article 101 and 102 TFEU as being an “undertaking” without providing any specification of

¹⁵ ECHR Court, *A. Menarini Diagnostics Srl v. Italy*, second section, 27 September 2011. See C. Bellamy, “Menarini post ECHR and competition law: An overview of EU and national case-law”, *eCompetitions* N° 47946, 5 July 2012. See also D. Cardonnel, “The European Court of Human Rights rules on the standard of judicial review on ADOPTED cartel decisions by national competition authorities” (*Menarini Diagnostics v. Italy*), *Concurrences* N° 42011.

its meaning¹⁶. The Court of Justice later on clarified that the concept of an “undertaking” traditionally covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed¹⁷. The Court has stated also that in this context the term “undertaking” must be understood as designating an economic unit even if legally that economic unit consists of several natural or legal persons¹⁸ (as is the case in a corporate group). Moreover, if such an economic entity infringes competition rules, it is for that entity, consistently with the principle of personal liability, to answer for that infringement¹⁹. In other words, a legal person who is not the perpetrator of an infringement of competition rules may nevertheless be penalised for the unlawful conduct of another legal person, if both form part of the same economic entity and thus constitute the “undertaking” that infringed competition law²⁰. As a consequence, the parent company is itself deemed to have infringed European antitrust rules and its liability for the infringement is wholly derived from that of its subsidiary²¹. The EC will thus be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary²².

Regarding the imputability of sanctions in corporate groups, no doubt arises when both the parent and its subsidiary are involved in the *antitrust* violation. In such cases, it is indisputable that the responsibility is also on the part of the parent company²³.

¹⁶ On the interpretation of this notion see W. Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law & Economics*, Kluwer Law International 2002, p. 156.

¹⁷ Judgment of the Court, *Schindler Holding Ltd* (supra footnote 10) para 53.

¹⁸ *Ibidem*, para 53.

¹⁹ Judgment of the Court of 14 July 1972 *Imperial Chemical Industries Ltd. v Commission of the European Communities*, Case 48-69, ECR 1972, p. 619, Judgment of the Court of 25 October 1983 *Allgemeine Elektrizitäts- Gesellschaft AEG-Telefunken AG v Commission of the European Communities*, Case 107/82, ECR 1983 p. 3151, para 49. See also Case C-90/09 P *General Química and Others v Commission* (infra footnote 54) para 34 and 35, and Joined Cases C-201/09 P and C-216/09 *ArcelorMittal Luxembourg* (infra footnote 54) para 95; *Schindler Holding Ltd* (supra footnote 10) para 53.

²⁰ Judgment of the Court of 10 April 2014 *Siemens AG Österreich* (infra footnote 54) 45.

²¹ See, to this effect, *Commission v Tomkins*, Case C-286/11 P, 2013, para 43 and 49, and Judgment of the Court of 26 November 2013 *Kendrion v Commission*, Case C-50/12 P, 2013, para 55; Judgment of the Court of 10 April 2014, *Siemens AG Österreich* (infra footnote 54) para 47.

²² See, *inter alia*, *ArcelorMittal*, Joined Cases C-201/09 P and C-216/09 P (infra footnote 54) para 98; Judgment of the Court of 10 April 2014 *Siemens AG Österreich* (infra footnote 54) para 48.

²³ Judgment of the Court (Fifth Chamber) of 16 November 2000, *NV Koninklijke KNP BT v Commission of the European Communities*, Case C-248/98 P, Reports of Cases 2000 I-09641; Judgment of the CFI (Third Chamber, extended composition) of 14 May 1998, *NV Koninklijke*

The situation is different when the parent company is not directly involved in the conduct in violation of Articles 101 or 102 TFEU, which is, in fact, perpetrated by a subsidiary that the parent company controls. In this case, the imputation to the parent company is a consequence of the fact that both are part to the same “undertaking”.

In order to conclude that the two companies are part of the same “undertaking”, the parent company must not only be able to have a “decisive influence” on the subsidiary, but it must also have effectively exercised it. The mere possibility for the parent company to have a certain influence over the subsidiary is not sufficient to define the existence of an “undertaking” pursuant to Article 101 and 102 TFEU²⁴ and thus, in turn, it is relevant for the imputability of the penalty to the parent company. The burden of proof of these two elements (decisive influence and effective exercise thereof) remains with the EC.

The peculiarity of the *AEG Telefunken* presumption case-law lies in that fact that it relates to the specific situation where the parent company has a 100% (or almost 100%) shareholding in the subsidiary that violated antitrust law. According to the case-law, the possibility of the parent having a decisive influence on the subsidiary is clear. However, differently from the first hypothesis, the approach of *AEG Telefunken* presumes, through a rebuttable presumption, that such influence is actually exercised and that therefore the two companies indeed constitute an “undertaking”. The presumption places the EC, in order to charge the parent company for a violation perpetrated by its wholly owned subsidiary, in the “cosy” position of having only to prove that the parent owns a 100% (or almost 100%) shareholding in the subsidiary. The EC 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 market²⁵.

KNP BT v Commission of the European Communities, Case T-309/94, Reports of Cases, 1998 II-01007.

²⁴ Judgment of the GC (Eighth Chamber) of 13 July 2011 *ThyssenKrupp Liften Ascenseurs NV* (T-144/07), *ThyssenKrupp Aufzüge GmbH and ThyssenKrupp Fahrtreppen GmbH* (T-147/07), *ThyssenKrupp Ascenseurs Luxembourg Sàrl* (T-148/07), *ThyssenKrupp Elevator AG* (T-149/07), *ThyssenKrupp AG* (T-150/07) and *ThyssenKrupp Liften BV* (T-154/07) v *European Commission*, Cases T-144/07, T-147/07, T-148/07, T-149/07, T-150/07 and T-154/07, Reports of Cases 2011 II-05129; Judgment of the GC (Eighth Chamber) of 13 July 2011 *General Technic-Otis Sàrl* (T-141/07), *General Technic Sàrl* (T-142/07), *Otis SA and Others* (T-145/07) and *United Technologies Corporation* (T-146/07) v *European Commission*, Cases T-141/07, T-142/07, T-145/07 and T-146/07, Reports of Cases 2011 II-04977.

²⁵ See Case 286/98 P *Stora* (infra footnote 54) para 29; *Akzo Nobel* (infra footnote 54) para 61; *General Química* (infra footnote 54) para 40; *ArcelorMittal* (infra footnote 54) para 98.

At a closer look, the *AEG Telefunken* presumption was successfully challenged by parent companies only in a very limited number of cases which, moreover, related to practices dating back many years²⁶.

4. The *AEG Telefunken* presumption, the principle of independence of the EU legal system and the principle of effective application of competition law

The heated discussions around the *AEG Telefunken* presumption are a consequence of its characteristics²⁷. The effect of the presumption is that a company which has not directly perpetrated an antitrust violation may be sanctioned, on the basis of a presumption, with an amount of up to 10% of its worldwide turnover for the behaviour of a subsidiary, which is legally distinct from the parent company although wholly owned by it (in the Schindler case, the overall fine of the Schindler's group was more than 145 millions EUR)²⁸.

²⁶ Commission Decision of 16 December 2003 Case COMP/E-1/38 240 *Industrial tubes*, para 479; Commission Decision of 20 October 2004 Case COMP/C.38.238/B.2 *Raw Tobacco Spain*, para 251; Commission Decision of 11 June 2002 Case COMP/36.571/D-1: *Austrian banks – 'Lombard Club'* (2004/138 / EC), para 376.

²⁷ See A. Montesa Lloreda, A. Givaja Sanz, "When Parents Pay for their Children's Wrongs: Attribution of Liability for EC Antitrust Infringements in Parent-subsidiary Scenarios" [in:] J. Rivas (ed.), (2006) 29(4) *World Competition Law and Economic Review*, Kluwer Law International 555-574; R. Burnley, "Group Liability for Antitrust Infringements: Responsibility and Accountability" (2010) 33(4) *World Competition* 595-614; K. Hofstetter, M. Ludescher, "Fines against parent Companies in EU Antitrust Law: Setting Incentives for 'Best Practice Compliance'" (2010) 33(1) *World Competition* 55-76; M. Beretta, P.M. Ferrari, "La presunzione di responsabilità delle società madri per le infrazioni alle regole di concorrenza commesse dalle proprie controllate" (2010) *Contratto e Impresa/Europa* 1; A. Riesenkampff, U. Krauthausen, "Liability of Parent Companies for Antitrust Violations of their Subsidiaries" (2010) 31(1) *ECLR* 38-41; L. La Rocca, "The controversial issue of the parent-company liability for the violation of EC competition rules by the subsidiary" (2011) 32 *ECLR* 68; A. Svetlicinii, N. Sad, "Parental Liability for the Antitrust Infringements of Subsidiaries: A Rebuttable Presumption or Probatio Diabolica?" (2011) *ELR* 10; W. van Weert, A.L. Hamilton, "Parental liability. The General Química case adds another smallish piece to the puzzle" (2011) *Competition Law Insight* 3; N. Jalabert-Doury, "Imputabilité – Relations mère-filiale" (2011) *Concurrences* n. 2; L. De Sanctis, "L'imputabilità della responsabilità delle violazioni antitrust e i gruppi di società" [in:] L.F. Pace (a cura di), *Dizionario sistematico del diritto della concorrenza*, Jovene 2013; B. Cortese, "The Notion of Undertaking: Piercing the Corporate Veil in EU Competition Law – Parent Subsidiaries Relationship and Antitrust Liability" [in:] B. Cortese (ed.), *EU Competition Law – Between Public and Private Enforcement*, Wolters Kluwer 2014, p. 73.

²⁸ Judgment of the Court, *Schindler Holding Ltd* (supra footnote 54) para 13.

The *AEG Telefunken* presumption is a typical example (like the term “undertaking”²⁹) of a legal notion defined in order to ensure the effective application of Treaty rules, and in particular those on competition, taking advantage of the principle of the independence of the European legal system³⁰. Their interpretation can be understood only if one keeps in mind the specific nature of competition law, that is, to ascertain the “*actual conduct of undertakings on the market*”³¹.

Regarding the term “undertaking”, the *fictio iuris* of the term “undertaking”, as a “single economic entity” composed of different legal entities, was intended from the outset to define a common concept in Europe with reference to the addressees of Treaty competition rules. This was meant to ensure, *inter alia*, that the laws of individual Member States would not prevent (or would reduce) the application of the prohibitions³².

The *AEG Telefunken* presumption is a consequence of the concept of “undertaking” within the meaning of European law. In other words, it establishes a presumption that a separate legal person, as a result of its whole ownership of the subsidiary and thus being part of a “single economic entity”, can be penalized for the wrongdoings of its subsidiarity. In this case, the *fictio iuris* is again aimed to ensure effective enforcement of competition law. What the presumption avoids in particular is, in the first place, the parent company taking advantage of the legal autonomy of its wholly owned subsidiary to (secretly) delegate to it the actual execution of an antitrust violation. If not prevented, this would have extremely favourable consequences for the parent company and the corporate group itself, since the fine for the infringement would be calculated within the 10% of the turnover limit of the subsidiary and not that of the parent. This would have resulted, in turn, in a substantial limitation (if not elimination) of the effectiveness of competition rules³³.

²⁹ E.g., it was indeed difficult for Member States to accept that single individuals or even Member States’ public bodies could fall into the definition of “undertaking” within the meaning of EU law when they, under the relevant national law, did not constitute an “undertakings”. See e.g. Judgment of the Court (Sixth Chamber) of 23 April 1991 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, Case C-41/90, ECR 1991 I-1979.

³⁰ See, *inter alia*, *Van Gend & Loos v. Netherlands Inland Revenue Administration*, Case 26/62, ECR. English special edition 1963, p. 1, p. 3; *Flaminio Costa v. ENEL*, Case 6/64, ECR 1964, p. 1129; *Amministrazione delle finanze dello Stato v. SpA Simmenthal*, Case 106/77, ECR 1978, p. 629; *Molkerei – Zentrale Westfalen/Lippe GmbH v. Hauptzollamt Paderborn*, Case 28/67, ECR 1968, p. 192; *Andrea Francovich e Danila Bonifaci v. Italian Republic*, Joined Cases C-6/90, C-9/90 and C.R. 1991, p. I-5357.

³¹ Opinion of AG Kokott, *Schindler Holding Ltd* (infra footnote 54) para 66.

³² On See also Judgment of the Court of 1 February 1972, 49/71, *Hagen*, para 6.

³³ This is a key issue (often underestimated) for understanding the *AEG Telefunken* presumption jurisprudence. See, e.g., B. Cortese, “The Notion...” where he claims that the only aim of the *AEG Telefunken* case-law is to enhance the level of fines of the EC.

On the other hand, this presumption has a positive effect on the fining policy of the EC. Because of the participation of the parent company and the subsidiary in a “single economic entity” (an “undertaking”), and within the limits of the “rebuttal” provided by the subsidiary, it allows the EC to penalize “also” the parent company for the behaviour of its subsidiary. The EC can thus ensure the maximum deterrence effect of its infringement decisions, *inter alia* by calculating the value of the penalty up to the 10% of the worldwide turnover of the corporate group, rather than of the turnover of the subsidiary. In this sense, joint and several liability for penalties is of key importance to companies. Indeed, the objective of joint and several liability resides in the fact that it constitutes an additional legal device available to the EC in order to strengthen the effectiveness of its actions taken for the recovery of fines imposed for antitrust infringements. For the EC as the creditor of the debt represented by such fines, this mechanism reduces the risk of insolvency, which is part of the objective of deterrence generally pursued by competition law³⁴.

However, the possibility for the Court to draw from a legal term (such as “undertaking”) autonomous concepts needed for the effectiveness of competition law is not without limits. For instance, as recently stated by the Court, the concept of joint and several liability for the payment of fines is not an autonomous concept in the EU legal system to be interpreted by reference to the objectives and system of competition law³⁵. Hence, the internal allocation of the debt for the payment of which the companies concerned are held jointly and severally liable is determined by applying national law³⁶.

5. The AEG Telefunken presumption and the protection of fundamental rights

The clarity of the boundaries of the *AEG Telefunken* presumption jurisprudence is not immune to criticism. By pursuing the aim to ensure the effectiveness of competition law, European law (or rather, the jurisprudence of the Court of Justice) has deleted, with “a stroke of the pen” so to speak, traditional principles defined in EU Member States, first of all, the company-law principle of separation of liability³⁷.

³⁴ Judgment of the Court of 10 April 2014, *Siemens AG Österreich* (infra footnote 54) para 59.

³⁵ *Ibidem*, para 67.

³⁶ *Ibidem*, para 61.

³⁷ Opinion of AG Kokott, *Schindler Holding Ltd* (infra footnote 54) para 64.

It is no coincidence that in the relevant jurisprudence from 2011 onwards, in what might be seen as the third phase of the development of the *AEG Telefunken* presumption jurisprudence³⁸, pleas and grounds of appeals relating to breaches of fundamental rights are regularly to be found. These were proposed specifically with reference to those post-2005 decisions where the EC had begun to use the *AEG Telefunken* presumption in a systematic manner alongside a significant increase of the level of its sanctions.

Already in the *General Química* case of January 2011, the Court states that the *AEG Telefunken* presumption, “given its rebuttable nature, (...) does not lead to the automatic attribution of liability to the parent company holding 100% of the capital of its subsidiary, [because this] would be contrary to the principle of personal responsibility on which EU competition law is based”³⁹. This way, the reference to general principles of Union law, also protected by fundamental rights (e.g. the principle of personal responsibility), enters for the first time into the Court’s reasoning. It is worth keeping in mind that the Court annulled here the preceding judgment of the General Court due to lack of reasoning, and yet dismissed the original appeal on other grounds.

However, it is in the *Elf Aquitaine* judgment of September 2011⁴⁰ where, two days after the *Menarini* case was handed, the lawfulness of the *AEG Telefunken* presumption was challenged for the first time on the grounds of

³⁸ Indeed in a first phase (the phase of the definition of the presumption), the Court limited itself to define the content of the presumption in the *AEG Telefunken* judgment (Judgment of the Court of 25 October 1983 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission of the European Communities*, Case 107/82, ECR 1983, p. 3151). In the *Stora* judgment, the Court emphasized afterwards its nature as a rebuttable presumption (Judgment of the Court of 16 November 2000 *Stora Kopparbergs Bergslags AB v Commission of the European Communities*, Case C-286/98 P, ECR 2000 I-9925).

In a second phase, the Court was asked to clarify the obligations of the EC regarding the presumption. In *Bolloré*, the CFI (now GC) had changed the structure of the presumption and claimed that in order to fulfill the presumption the EC had to prove not only the decisive influence by the parent but also its actual exercise (Judgment of the CFI (Fifth Chamber) of 26 April 2007 *Bolloré SA and Others v Commission of the European Communities*, 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, ECR 2007 II-00947). Moreover both AG Mischo in the *Stora* judgment (Opinion of Mr AG Mischo delivered on 18 May 2000 *Stora*, infra footnote 54) and AG Bot in *Arcelor Mittal* (Opinion of Mr AG Bot delivered on 26 October 2010 *ArcelorMittal*, infra footnote 54) had raised criticisms on the matter. The question was then resolved by the Court in its judgment in *Akzo Nobel* (infra footnote 54) where it clarified that in order to fulfill the burden of proof pursuant to the presumption, the EC had to prove that the parent company holds a 100% shareholding in the subsidiary, an approach also suggested by AG Kokott in her Opinion (Opinion of AG Kokott delivered on 23 April 2009 *Akzo Nobel NV*, infra footnote 54).

³⁹ Judgment of the Court of 20 January 2011 *General Química* (infra footnote 54) para 52.

⁴⁰ Judgment of the Court (Second Chamber) of 29 September 2011 *Elf Aquitaine SA v European Commission*, Case C-521/09 P, ECR 2011 I-8947.

violation of fundamental rights. In particular, the *Elf Aquitaine* case gave rise to the allegation of illegality of the *AEG Telefunken* presumption for its violation of Article 6 ECHR, but also for the “*the institutional amalgamation of powers within the prosecuting authority*” (42), that is, the “conflict of interests” between the two souls of the EC (prosecutor and judge) mentioned above. Presented in this case were also other appeal grounds related to principles protected by fundamental rights. However, these were seen by the Court as new, and therefore inadmissible. This showed, on the other hand, that between the time of the action for annulment and that of the appeal, the discussion on the relationship between *antitrust* law and fundamental rights had led lawyers to formulate new grounds for the illegality of EC decisions, grounds not initially identified.

In the *Elf Aquitaine* case, the Court resolved the issue of the legality of the *AEG Telefunken* presumption by arguing that the aim of the appeal ground was not that of declaring the presumption unlawful as such. The objective of the parties, in the opinion of the Court, was to challenge an interpretation of *AEG Telefunken* that would violate the principle of the presumption of innocence⁴¹. Considering the appeal ground alleging the infringement of fundamental rights in particular, the Court invoked not only its own earlier jurisprudence but also the relevant rulings of the ECHR Court⁴². Concretely, dismissing the claim of illegality, the Court held that “*a presumption, even where it is difficult to rebut, remains within acceptable limits so long as it is proportionate to the legitimate aim pursued, it is possible to adduce evidence to the contrary and the rights of the defence are safeguarded*”⁴³. It was said in particular that the presumption wants to strike a balance between different objectives, that is, on the one hand the importance of “*the objective of combatting conduct contrary to the competition rules, in particular to Article 101 TFEU, and of preventing a repetition of such conduct*”⁴⁴. On the other hand, “*the importance of the requirements flowing from certain general principles of EU law such as the principle of the presumption of innocence, the principle that penalties should be applied solely to the offender, the principle of legal certainty and the principle of the rights of the defence, including the principle of equality of arms*”⁴⁵. According to the Court, “*it is for that reason, among others, that (...) the presumption is rebuttable*”⁴⁶. Justifying the purpose and the reasons for the features of the presumption, the Court argued also that the “*presumption is based on the fact*

⁴¹ Ibidem, para 52.

⁴² Ibidem, para 62.

⁴³ Ibidem.

⁴⁴ Ibidem, 59.

⁴⁵ Ibidem, 59.

⁴⁶ Ibidem, 59.

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"⁴⁷. The reason, in particular, of the necessity of such presumption lies in the fact 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"⁴⁸.

Considering the *Elf Aquitaine* judgment so far, the claim relating to the illegality of the *AEG Telefunken* presumption for breaches of fundamental rights would seem to be *prima facie* of no use for the appellant. Its effectiveness is revealed later on, however, when the issue is raised as to which level of reasoning is necessary for the EC to reject the elements in fact and in law submitted by the parent company in order to rebut the presumption. The Court held here that when "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"⁴⁹. From here, referring expressly to the *AEG Telefunken* presumption, the Court added that "as regards, more specifically, a Commission decision which relies exclusively, with respect to certain addressees, on the presumption that they actually exercised decisive influence, the Commission is in any event required – if it is not to render that presumption in reality irrebuttable – to explain adequately to those addressees the reasons why the elements of fact and of law put forward did not suffice to rebut that presumption"⁵⁰. This way, the importance of the reference to the protection of fundamental rights is clearly shown, in particular in order to compel the EC to provide an "adequate" level of reasoning to keep that presumption in line with the protection of fundamental rights.

The importance of the position taken by the Court in this case was shown in subsequent EU jurisprudence. Indeed, after the the *Elf Aquitaine* ruling, the Court of Justice annulled a number of judgments of the General Court specifically because of the lack of reasoning on the part of both the EC and the

⁴⁷ *Ibidem*, 60.

⁴⁸ *Ibidem*, 60.

⁴⁹ *Ibidem*, para 152 *emphases added*.

⁵⁰ *Ibidem* (*emphasis added*). The Court then concludes that: "For example, owing to the formulation of recital 258, it appears very difficult – impossible even – to ascertain in particular whether the body of indicia submitted by *Elf Aquitaine* in an attempt to rebut the presumption applied to it by the Commission was rejected because it failed to convince or because, in the Commission's eyes, the mere fact that *Elf Aquitaine* held 98% of *Atofina's* capital was sufficient for liability for *Atofina's* actions to be imputed to it, whatever the indicia that might have been provided by *Elf Aquitaine* in response to the statement of objections".

General Court in relation to the information submitted by parent companies in order to rebut the presumption⁵¹.

The plea of illegality of the *AEG Telefunken* presumption for the breach of Article 6 ECHR was presented again in the *Schindler* case of 2013⁵² and in the recent *FLSmidth* judgment of 2014⁵³. In both cases, the plea on this point was rejected.

6. Conclusions

The increasingly frequent reference to the protection of fundamental rights in the application of European *antitrust* law is a trend that has grown strongly since the reform of Regulation 1/2003. The application of fundamental rights to antitrust law – unknown to this extent in the *antitrust* law experience of the United States – is caused by three main reasons.

First, the significant increase in the level of penalties imposed by the European Commission for violations of *antitrust* law resulting, *inter alia*, from the innovations contained in the guidelines on the matter.

⁵¹ See in particular, Judgment of the GC of 16 June 2011 *L’Air liquide* (infra footnote 54); Judgment of the GC of 15 September 2011 *Koninklijke Grolsch NV* (infra footnote 54); Judgment of the GC of 16 June 2011 *Edison SpA* (infra footnote 54); Judgment of the GC of 16 June 2011 *Gosselin Group NV* (infra footnote 54).

⁵² Judgment of the Court (Fifth Chamber) of 18 July 2013 *Schindler Holding Ltd and Others v European Commission*, Case C-501/11 P, not yet reported. In this case, the plea has been raised on the assumption that it had not yet been assessed by the Court. Just as in the judgment in *Elf Aquitaine*, and not surprisingly, also *Schindler’s* first ground of appeal related to the radical illegality for breach of Art. 6 ECHR of the decision of the EC in view of its “conflict of interest” in its “two souls” (prosecutor and judge). At para 24 of the judgment, the Court said: “The appellants contest the GC’s response to the plea concerning infringement of Article 6 of the ECHR, by which they contended that the Commission’s procedure infringes the principle of the separation of powers and does not comply with the principles of the rule of law that are applicable to criminal procedures under that provision”. This ground was later held as unfounded recalling *expressis verbis* the *Menarini* judgment (para 30-38). Regarding the plea of illegality of the *AEG Telefunken* presumption for the violation of Art. 6 ECHR, the Court expressly refers to the motivation and reasoning as well as the EU and ECHR case-law of the *Elf Aquitaine* case (para 107-110).

⁵³ Judgment of the Court (First Chamber) of 30 April 2014 *FLSmidth & Co. A/S v European Commission*, Case C-238/12 P, not yet reported. In this case, the plea was raised for the third time alleging the illegality of the *AEG Telefunken* presumption for breach of fundamental rights. In this case, the Court answered succinctly in order to clarify that the question was to be considered solved. It argued “*it should be pointed out that that presumption results from settled case-law (...) and that it does not in any way infringe the rights conferred by Article 48 of the Charter and Article 6(2) of the ECHR*” (para 25).

Second, because of the EC's nature as a "supranational/independent" authority and the existence of a "conflict of interests" with regard to its two "souls" – the "prosecutor" and the "judge". The increase in the level of fines has made (once again) some critical aspects of the European antitrust enforcement system even clearer. On closer inspection, the EU had tried to mitigate this issue (especially with reference to the protection of procedural rights) already as early as the 1980s through the establishment of the Hearing Officer.

Third, it is caused by the introduction of Article 6(2) TEU, as amended by the Lisbon Treaty, and the related binding nature of the Charter of Fundamental Rights of the European Union which is set out therein. Hence, greater importance and attention is now given to the control of violations of rights protected by the Charter (as well as the ECHR) in EC decisions, also with regard to competition law.

The importance of this trend is evident in the development of the application of the *AEG Telefunken* presumption. The presumption is based on the concept of "undertaking" in European Competition Law and it takes advantage of the principle of the independence of the EU legal system. The *AEG Telefunken* presumption, as well as the term "undertaking", were both devised in order to ensure effective application of EU competition law. The relevant consequence of the *AEG Telefunken* presumption is that a parent company (distinct from the wholly owned subsidiary that actually violated antitrust rules) could be penalised with a fine of up to 10% of its worldwide turnover for the behaviour of its subsidiary only on the basis of a presumption that the parent company constitutes with the given subsidiary a single economic entity, that is an "undertaking" pursuant to Article 101 and 102 TFEU.

The Court of Justice has recently ascertained the legality of such a presumption even under the ECHR. Still, review grounds based on the protection of fundamental rights have generated positive consequences for companies that have claimed such violation, especially with regard to the level of the EC's reasoning. In fact, reference in the jurisprudence of the Court to the protection of fundamental rights has compelled the EC to provide a higher standard of reasoning in its decisions. This is true in particular with reference to the reasoning related to the rejection of the elements of fact and law presented by parent companies in order to rebut the *AEG Telefunken* presumption. The fact is telling that the Court sees limited reasoning by the EC or by the GC as a risk of transforming *AEG Telefunken* from a presumption to a case of strict liability (a violation of the principle of the presumption of innocence). It shows the importance that the Court places on fundamental rights, also in the form of general principles of EU law, *vis a vis* the principle of the effectiveness of competition law.

In this sense, the protection of fundamental rights in the application of European antitrust rules is a new legal tool to rectify (as much as possible) the EC's "conflict of interests" in the European antitrust enforcement system⁵⁴.

⁵⁴ ANNEX (the cases are listed chronologically) Opinion of AG Mischo delivered on 18 May 2000 *Stora Kopparbergs Bergslags AB v Commission of the European Communities*, Case C-286/98 P, ECR 2000 I-09925; Judgment of the Court (Fifth Chamber) of 16 November 2000 *Stora Kopparbergs Bergslags AB v Commission of the European Communities*, Case C-286/98 P, ECR 2000 I-09925; Judgment of the Court (Fifth Chamber) of 2 October 2003 *Siderúrgica Aristrain Madrid SL v Commission of the European Communities*, Case C-196/99 P, ECR 2003 I-11005; Judgment of the CFI (Fifth Chamber) of 15 September 2005 *DaimlerChrysler AG v Commission of the European Communities*, Case T-325/01, ECR 2005 II-03319; Judgment of the CFI (Third Chamber) of 27 September 2006 *Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA v Commission of the European Communities*, Case T-314/01, ECR 2006 II-03085; Judgment of the CFI (Fifth Chamber) of 26 April 2007 *Bolloré SA and Others v Commission of the European Communities*, 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, ECR 2007 II-00947; Judgment of the Court (Third Chamber) of 3 September 2009 *Papierfabrik August Koehler AG (C-322/07 P)*, *Bolloré SA (C-327/07 P)* and *Distribuidora Vizcaína de Papeles SL (C-338/07 P) v Commission of the European Communities*, Joined cases C-322/07 P, C-327/07 P and C-338/07 P, ECR 2009 I-07191; Opinion of AG Kokott delivered on 23 April 2009 *Akzo Nobel NV and Others v Commission of the European Communities*, Case C-97/08 P, ECR 2009 I-08237; Judgment of the Court (Third Chamber) of 10 September 2009 *Akzo Nobel NV and Others v Commission of the European Communities*, Case C-97/08 P, ECR 2009 I-08237; Judgment of the Court (Third Chamber) of 3 September 2009 *Papierfabrik August Koehler AG (C-322/07 P)*, *Bolloré SA (C-327/07 P)* and *Distribuidora Vizcaína de Papeles SL (C-338/07 P) v Commission of the European Communities*, Joined cases C-322/07 P, C-327/07 P and C-338/07 P, ECR 2009 I-07191; Judgment of the Court (Second Chamber) of 1 July 2010 *Knauf Gips KG v European Commission*, Case C-407/08 P, ECR 2010 I-06375; Opinion of Mr AG Mazák delivered on 14 September 2010 *General Química SA and Others v European Commission*, Case C-90/09 P, ECR 2011 I-00001; Opinion of Mr AG Bot delivered on 26 October 2010 *ArcelorMittal Luxembourg SA v European Commission (C-201/09 P)* and *European Commission v ArcelorMittal Luxembourg SA and Others (C-216/09 P)*, Joined cases C-201/09 P and C-216/09 P, ECR 2011 I-02239; Judgment of the Court (Grand Chamber) of 29 March 2011 *ArcelorMittal Luxembourg SA v European Commission (C-201/09 P)* and *European Commission v ArcelorMittal Luxembourg SA and Others (C-216/09 P)*, Joined cases C-201/09 P and C-216/09 P, ECR 2011 I-02239; Judgment of the Court (First Chamber) of 20 January 2011 *General Química SA and Others v European Commission*, Case C-90/09 P, ECR 2011 I-00001; Judgment of the GC (Eighth Chamber) of 24 March 2011 *Pegler Ltd v European Commission*, Case T-386/06, ECR 2011 II-01267; Judgment of the GC (Eighth Chamber) of 24 March 2011, *Tomkins plc v European Commission*, Case T-382/06, ECR 2011 II-01157; Judgment of the Court (Grand Chamber) of 29 March 2011 *ArcelorMittal Luxembourg SA v European Commission (C-201/09 P)* and *European Commission v ArcelorMittal Luxembourg SA and Others (C-216/09 P)*, Joined cases C-201/09 P and C-216/09 P.; Judgment of the GC (Fourth Chamber) of 7 June 2011 *Arkema France, Altuglas International SA and Altumax Europe SAS v European Commission*, Case T-217/06, ECR 2011 II-02593; Judgment of the GC (Sixth Chamber, extended composition) of 16 June 2011 *SNIA SpA v European Commission*, Case T-194/06, ECR 2011 II-03119; Judgment of the GC (Sixth Chamber, extended composition) of 16 June 2011 *L'Air liquide, société anonyme pour l'étude et l'exploitation des procédés Georges Claude v European*

Commission, Case T-185/06, Reports of Cases, 2011 II-02809; Judgment of the GC (Eighth Chamber) of 16 June 2011 *Gosselin Group NV* (T-208/08) and *Stichting Administratiekantoor Portielje* (T-209/08) v *European Commission*, Joined cases T-208/08 and T-209/08, ECR 2011 II-03639; Judgment of the GC (Sixth Chamber, extended composition) of 16 June 2011 *Edison SpA v European Commission*, Case T-196/06, ECR 2011 II-03149; Judgment of the GC (Sixth Chamber, extended composition) of 16 June 2011 *FMC Foret SA v European Commission*, Case T-191/06, ECR 2011 II-02959; Judgment of the GC (Eighth Chamber) of 13 July 2011 *Schindler Holding Ltd and Others v European Commission*, Case T-138/07, ECR 2011 II-04819; Judgment of the GC (First Chamber) of 13 July 2011 *Polimeri Europa SpA v European Commission*, Case T-59/07, ECR 2011 II-04687; Judgment of the GC (First Chamber) of 13 July 2011 *Polimeri Europa SpA v European Commission*, Case T-59/07, ECR 2011 II-04687; Judgment of the GC (First Chamber) of 13 July 2011 *Eni SpA v European Commission*, Case T-39/07, ECR 2011 II-04457; Judgment of the GC (Third Chamber) of 9 September 2011 *Deltafina SpA v European Commission*, Case T-12/06, ECR 2011 II-05639; Judgment of the GC (Sixth Chamber, extended composition) of 15 September 2011 *Koninklijke Grolsch NV v European Commission*, Case T-234/07, ECR 2011 II-06169; Judgment of the Court (Second Chamber) of 29 September 2011 *Elf Aquitaine SA v European Commission*, Case C-521/09 P, ECR 2011 I-08947; Judgment of the GC (Third Chamber) of 5 October 2011 *Transcatab SpA v European Commission*, Case T-39/06, ECR 2011 II-06831; Opinion of AG Kokott delivered on 12 January 2012 *Alliance One International Inc. and Standard Commercial Tobacco Co. Inc. v European Commission and European Commission v Alliance One International Inc. and Others*, Joined cases C-628/10 P and C-14/11 P; Judgment of the Court (Grand Chamber) of 19 July 2012 *Alliance One International Inc. and Standard Commercial Tobacco Co. Inc. v European Commission and European Commission v Alliance One International Inc. and Others*, Joined cases C-628/10 P and C-14/11 P; Judgment of the Court (Grand Chamber) of 22 January 2013 *European Commission v Tomkins plc*, Case C-286/11 P; Judgment of the GC (Sixth Chamber) of 27 September 2012 *Nynäs Petroleum AB and Nynas Belgium AB v European Commission*, Case T-347/06; Judgment of the GC (Sixth Chamber) of 27 September 2012 *Ballast Nedam NV v European Commission*, Case T-361/06; Judgment of the GC (Sixth Chamber) of 27 September 2012 *Ballast Nedam Infra BV v European Commission*, Case T-362/06; Opinion of AG Kokott delivered on 28 February 2013 *Bundeswettbewerbshörde and Bundeskartellanwalt v Schenker & Co. AG and Others*, Case C-681/11; Opinion of AG Kokott delivered on 18 April 2013 *Schindler Holding Ltd and Others v European Commission*, Case C-501/11 P; Judgment of the Court (First Chamber) of 8 May 2013 *ENI SpA v European Commission*, Case C-508/11 P; Judgment of the Court (First Chamber) of 13 June 2013 *Versalis SpA v European Commission*, Case C-511/11 P; Judgment of the Court (Third Chamber) of 11 July 2013 *European Commission v Stichting Administratiekantoor Portielje and Gosselin Group NV*, Case C-440/11 P; Judgment of the Court (Fifth Chamber) of 18 July 2013 *Schindler Holding Ltd and Others v European Commission*, Case C-501/11 P; Opinion of Mr AG Mengozzi delivered on 19 September 2013 *European Commission v Siemens AG Österreich and Others* (C-231/11 P) and *Siemens Transmission & Distribution Ltd and Others v European Commission* (C-232/11 P and C-233/11 P), Joined cases C-231/11 P to C-233/11 P; Judgment of the Court (Ninth Chamber) of 26 September 2013 *The Dow Chemical Company v European Commission*, Case C-179/12 P; Judgment of the Court (Fourth Chamber) of 10 April 2014 *European Commission v Siemens AG Österreich and Others* (C-231/11 P) and *Siemens Transmission & Distribution Ltd and Others v European Commission* (C-232/11 P and C-233/11 P), Joined cases C-231/11 P to C-233/11 P; Judgment of the Court (First Chamber) of 30 April 2014 *FLSmidth & Co. A/S v European Commission*, Case C-238/12 P.
