JUDGMENT OF THE GENERAL COURT (Second Chamber)

25 October 2011 *

In Case T-348/08,

Aragonesas Industrias y Energía, SAU, established in Barcelona (Spain), represented by I.S. Forrester QC, and K. Struckmann, P. Lindfelt and J. Garcia-Nieto Esteva, lawyers,

applicant,

v

European Commission, represented by A. Biolan, J. Bourke and R. Sauer, acting as Agents,

defendant,

APPLICATION, primarily, for the annulment of Commission Decision C(2008) 2626 final of 11 June 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.695 — Sodium chlorate) to the extent to which

* Language of the case: English.

it concerns Aragonesas Industrias y Energía and, in the alternative, for the annulment or a substantial reduction of the fine imposed on it in that decision,

THE GENERAL COURT (Second Chamber),

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

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 10 September 2010,

gives the following

Judgment

Background to the dispute

1 The applicant, Aragonesas Industrias y Energía, SAU, is a company established under Spanish law. When formed in 1992 it belonged to the Chemical Division of the Uralita group, which was active in the sodium chlorate sector and was headed by Uralita, SA

('Uralita'). Until 1994, the applicant was a 100 % subsidiary of Uralita. In December 1994, Uralita created a holding company called Energía e Industrias Aragonesas EIA, SA ('EIA'), to which the entire chemical business was transferred. The applicant thus became a 100 % subsidiary of EIA. Initially, Uralita held 98.84 % of the shares in EIA, then, as of 1 January 1995 and until 31 December 2000, Uralita's shareholding in EIA ranged between 49.44 % and 50.71 %.

2 Sodium chlorate is a strong oxidising agent manufactured by the electrolysis of a sodium chloride water solution in a diaphragm-less cell. Sodium chlorate can be produced as a crystal product or as a solution product. Its largest application is for the manufacture of chlorine dioxide, which is used in the pulp and paper industry for the bleaching of chemical pulp. Other applications include, to a lesser degree, drinking water purification, textile bleaching, herbicides and uranium refining (recital 2 of Commission Decision C(2008) 2626 final of 11 June 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.695 — Sodium chlorate) ('the contested decision').

3 On 28 March 2003, representatives of EKA Chemicals AB ('EKA'), a company established in Sweden, made an application for immunity from fines or, alternatively, reduction of fines, under the Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3) ('the Leniency Notice') with regard to the existence of a cartel in the sodium chlorate industry. On 31 March 2003, EKA's application was supported by documentary evidence which it furnished and by oral statements from its representatives ('EKA's 2003 statements').

4 On 30 September 2003, the Commission of the European Communities (now 'the European Commission') adopted a decision granting EKA conditional immunity from fines in accordance with point 15 of the Leniency Notice.

5 On 10 September 2004, the Commission sent requests for information pursuant to Article 18(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) to Finnish Chemicals Oy ('FC'), a company established in Finland, Arkema France SA, a company established in France and referred to, in the contested decision, under the trade name 'Atochem' ('Arkema France'), and, lastly, the applicant.

6 On 24 September 2004, Mr L., an employee of Arkema France ('Mr L. (Arkema France')) was heard by the Commission ('Arkema France's statements').

7 On 18 October 2004, in its response to the Commission's request for information, Arkema France applied for immunity from fines or a reduction thereof under the Leniency Notice.

8 On 29 October 2004, at a meeting at the Commission's premises, FC applied to the Commission for reduction of fines under the Leniency Notice and provided the Commission with oral information concerning the sodium chlorate investigation. By letter of 2 November 2004, FC confirmed its application for a reduction of fines and at the same time provided documentary evidence concerning its involvement in the infringement alleged by the Commission.

9 On 4 November 2004, a meeting was held between the Commission and EKA's representatives. On 11 November 2004, EKA sent the Commission additional information concerning recent developments on the sodium chlorate market.

10 On 3 and 9 December 2004, the applicant responded to the Commission's requests for information of 10 September 2004.

11 On 6 July 2006, EKA made a new oral statement for the Commission's attention, which was followed by interviews with two of the company's employees on 19 and 20 July 2006. On 29 August 2006, EKA made further oral statements in the course of a meeting at the Commission's premises ('EKA's 2006 statements').

12 Between 13 November 2006 and 11 April 2008, the Commission sent requests for information pursuant to Article 18(2) of Regulation No 1/2003 to a number of companies and in particular to the applicant on 13 November 2006, 8 February 2007, 12 March 2007 and 11 April 2008.

13 On 27 July 2007, the Commission adopted a statement of objections, addressed in particular to EKA, FC, Arkema France, the applicant and Uralita.

14 Within the prescribed deadline, the applicant communicated to the Commission its observations on the statement of objections. The applicant was granted access, first, to the Commission's file in the form of a DVD sent by the Commission and containing public documents and, second, to the transcript of oral statements of leniency applicants gathered by the Commission in the course of the investigation.

15 On 20 November 2007, several of the companies concerned, including Uralita but not the applicant, exercised their right to be heard orally by the Commission.

16 On 11 June 2008, the Commission adopted the contested decision and on 16 June 2008 notified it to the applicant.

17 In recital 69 of the contested decision, the Commission finds, in substance, that EKA, FC, Arkema France and the applicant participated in meetings and had contacts aimed at sharing markets by allocating their sales volumes and fixing the prices of sodium chlorate on the market of the European Economic Area ('EEA'). On that basis, the Commission drew up a list of 72 anti-competitive contacts, taking the form either of meetings or telephone calls ('the 72 anti-competitive contacts'). That list is attached in Annex I to the contested decision. Annex II to the contested decision contains a list of the persons cited in that decision. Among the names cited are those of Mr S. and Mr W., employees of EKA ('Mr S. (EKA)' and 'Mr W. (EKA)'), Mr A. and Mr S. ('Mr S. (FC)'), employees of FC, Mr L. (Arkema France) and Mr A., an employee of the applicant ('Mr A. (FC) (Aragonesas)'). Also in recital 69 of the contested decision, the Commission states that the anti-competitive practices took place from 21 September 1994 for EKA and FC, from 17 May 1995 for Arkema France and from 16 December 1996 for the applicant. They lasted until 9 February 2000 at least for EKA, FC, Arkema France and the applicant.

18 In recitals 70 and 71 of the contested decision, the Commission stated that compliance with decisions taken within the cartel was monitored primarily in bilateral meetings and telephone conversations during which the parties exchanged commercially sensitive information on the negotiations with customers, in particular, on contracted sales volumes and prices. It added that the participants to the cartel pursued a strategy of stabilising the sodium chlorate market, the ultimate aim of which was to

allocate the sodium chlorate sales volumes among themselves, to coordinate the pricing policy towards the customers and thereby to maximise their margins.

19 In addition, in recitals 73 to 78 of the contested decision, the Commission described the fundamental principles and functioning of the cartel. In that regard, it noted that numerous contacts had taken place between the main sodium chlorate producers with the main aim of negotiating among themselves in order to distribute their sales volumes on the geographic markets concerned and to set the prices they intended to charge in contracts concluded with customers. According to the Commission, the exchange of commercially sensitive information formed a significant aspect of the collusive behaviour, since the participants were then able to foresee their competitors' market behaviour. As regards the functioning of the cartel, the Commission affirms that the sodium chlorate producers maintained frequent contacts in the form of bilateral and multilateral meetings and telephone calls, yet without following a fixed scheme. However, it states that, at the top management level, discussions took place during multilateral meetings, often at the fringes of the meetings of the working group on sodium chlorate of the European Council of the Chemical Industry ('the CEFIC'). Finally, according to the Commission, in respect of the calendar of negotiations, the contacts among competitors were usually intensified towards the end of each year (between October and December) to reflect the annual negotiations of contracts between sodium chlorate producers and their customers for the year to come. However, the Commission reports that, in the period under investigation, those negotiations were often carried out following the start of the following year, and in particular in January and February.

20 As regards the applicant's unlawful conduct, it is apparent from recitals 350 and 356 of the contested decision that, to assess its participation in the unlawful agreements, the Commission based its decision, first, on the applications for immunity from, or

reduction of, fines, second, on the contemporaneous documents which, in the Commission's view, establish that the applicant colluded with other parties to the cartel and, finally, on the applicant's acknowledgement that it participated in an unlawful meeting at the fringes of an official meeting of the CEFIC of 28 January 1998 in Brussels ('the unlawful meeting of 28 January 1998').

21 As regards, more specifically, the contemporaneous evidence of the infringement, the Commission notes the following in recitals 349 and 350 of the contested decision:

'349 On three occasions, [the] notes of [Mr S. (FC)] refer to a telephone conversation with [the applicant]. First, on 16 December 1996, Mr [S. (FC)] confirmed in a conversation with Mr [S. (EKA)] that [FC] would abide by the agreed prices for Spain and Portugal. At the same time, he referred to discussions with [the applicant]: [CONFIDENTIAL] [1] … (emphasis added, see recital (130)). The quote [CONFIDENTIAL] shows that Mr [S. (FC)] previously had had a personal discussion with [the applicant] on prices, which was part of the overall arrangement among the cartel participants. Second, [the] notes [of Mr S. (FC)] refer to a telephone conversation [with Mr S. (EKA)]: [CONFIDENTIAL] (emphasis added, see recital (219)). The quote shows that [Arkema France] had directly discussed prices with [the applicant] and that this formed again part of the overall coordination on prices. Finally, concerning a phone call on 9 December 1999, [the notes of] Mr [S. (FC)] …state: [CONFIDENTIAL] … This quote shows that Mr S. (FC) made notes of either what Mr L. [(Arkema France)] reported to him over the phone or that he reported his own conversation with [the applicant] to Mr [L.]. It is not relevant [which one of them] actually spoke to [the applicant] since it transpires from the content of the notes that the discussion with [the applicant] was unlawful in nature.

1 – Confidential information omitted.

350 These references clearly indicate that direct telephone contacts with [the applicant] took place and that thereby [the applicant] contributed directly to the overall arrangements on prices. Moreover, [the applicant] confirmed that it participated in [the unlawful meeting of 28 January 1998], where illegal discussions among competitors took place (see recitals (182) — (184)). The Commission therefore concludes, on the basis of the oral statements received in this case and contemporaneous evidence clearly suggesting anti-competitive behaviour on its side, that [the applicant] participated in the overall infringement. In such circumstances, it is for [the applicant] to produce evidence that explains its conduct in a way that is consistent with competitive behaviour.'

22 In recital 352 of the contested decision, the Commission stated the following:

'As regards the other instances in [the contested decision] where reference is made to [the applicant], the Commission accepts [its] argument that the information may have come from third parties and not from [the applicant] itself. The Commission does not have sufficient evidence in its file to show conclusively that, in these instances, the information came directly from [the applicant]. That will be reflected in the duration of the infringement for which [the applicant] is held liable.'

23 As regards the duration of the infringement, and in particular the dates on which the applicant started and ended its participation therein, the Commission stated and concluded the following in recitals 487 to 489 of the contested decision:

'487 EKA and [FC] participated in the anti-competitive arrangements … as of … and [the applicant] at least as of 16 December 1996 (see recital 130) …

488 As to the end of the infringement, to the Commission's knowledge the last anticompetitive meeting — in which EKA, Atochem and [the applicant] participated — was held on 9 February 2000. In this meeting, EKA distanced itself publicly from the cartel by announcing its refusal to participate in any further discussions with the competitors. This was a clear communication of one of the participants not to continue its involvement in the cartel and was, to the Commission's knowledge, the last relevant contact among the [sodium chlorate] producers (see also recital 283). While EKA, Atochem and [the applicant] directly participated in the meeting of 9 February 2000, there is no evidence in the Commission's file that [FC] would have openly distanced itself from the cartel before that date (nor was such a distancing claimed by any of the parties). Consequently, the Commission considers 9 February 2000 to be the end date of the cartel for all undertakings involved, that is to say, for EKA, [FC], Atochem and [the applicant].

489 If follows that the total duration of the infringement, as described in [the contested decision], is … 3 years and 1 month for [the applicant] and Uralita.'

24 In recitals 444 and 455 to 468 of the contested decision, the Commission takes the view, first, that Uralita exercised a decisive influence over the applicant's strategic orientation and general trading policy and that, following EIA's absorption by Uralita, EIA's liability for the infringement, as the applicant's sole shareholder, was transferred to Uralita. Consequently, in recitals 469 and 487 to 489 of the contested decision, the Commission holds the applicant and Uralita jointly and severally liable for the infringement committed by the former between 16 December 1996 and 9 February 2000 ('the infringement at issue'), that is to say for a total duration of three years and one month.

25 As regards the calculation of the fines to be imposed, it is apparent from recital 498 of the contested decision that the Commission took as its basis the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003

(OJ 2006 C 210, p. 2) ('the 2006 Guidelines'). In addition, in the present case, it is apparent from recital 509 of that contested decision that, in calculating sales volumes, the Commission took account of the sales of sodium chlorate made by each undertaking in the EEA during the business year corresponding to the last full business year of the infringement, which ended on 31 December 1999.

26 In so far as concerns the calculation of the basic amount of the fine, it is apparent from recitals 509 to 524 of the contested decision that the Commission found, in relation to the gravity of the infringement at issue, first, that the infringement was particularly serious in that it was based on market-sharing and price-fixing agreements (recital 512 of the contested decision), second, that the combined market share of the undertakings participating in the infringement was more than 90 % within the EEA in 1999 (recital 513 of the contested decision), and that that infringement produced its effects in a substantial part of the territory of the EEA (recital 514 of the contested decision) and, finally, that the agreements were generally implemented although not always successfully (recital 515 of the contested decision). Consequently, the Commission determined the proportion of the sales volumes of each undertaking involved, which was used to establish the basic amount, at 19 %.

27 Second, on the basis of point 24 of the 2006 Guidelines, the Commission fixed at 3.5 the multiplier for the duration of the infringement committed by the applicant.

28 Third, in recital 523 of the contested decision, the Commission decided, on the basis of point 25 of the 2006 Guidelines and in order to deter the undertakings at issue from entering into horizontal price-fixing agreements such as the agreements dealt with in

the contested decision, to increase the basic amount of the fine by an additional fixed amount of 19 %, taking account of the factors examined in recitals 512 to 515 of the contested decision.

29 The Commission concluded, in Article 1(g) and (h) of the contested decision, that the applicant and Uralita infringed Article 81 EC and Article 53 of the EEA Agreement by participating, from 16 December 1996 to 9 February 2000, in a complex of agreements and concerted practices with a view to allocating sales volumes, fixing prices, exchanging commercially sensitive information on prices and sales volumes and monitoring the execution of the anti-competitive arrangements for sodium chlorate in the EEA market.

30 In Article 2(f) of the contested decision, the Commission imposed a fine of EUR 9 900 000 on the applicant and Uralita, jointly and severally.

31 In Article 3 of the contested decision, the Commission ordered the undertakings listed in Article 1 of the decision to bring to an end the infringement found, insofar as they had not already done so, and to refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or similar object or effect.

32 Article 4 of the contested decision lists the addressees, among which the applicant.

Procedure and forms of order sought by the parties

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

34 On hearing the report of the Judge-Rapporteur, the Court (Second Chamber) decided to open the oral procedure. The Court also put a number of questions to the parties and asked the Commission to provide it with certain documents. The parties replied to those questions and complied with the requests within the time allocated.

35 By letter of 3 September 2010, the Commission lodged its observations on the report for the hearing in Case T-348/08.

36 At the hearing, the Court provided the parties with a copy of pages 1159 and 1160 of the Commission's file. They confirmed that, aside from the handwritten numbering by the Court of the indents on those two pages, the copies were strictly identical to the originals in the Commission's file.

37 The oral procedure was closed on 10 September 2010.

38 The applicant claims that the Court should:

— principally, annul the contested decision in so far as it relates to it;

— in the alternative, amend Articles 1 and 2 of the contested decision to annul or substantially to reduce the fine imposed on it;

— order the Commission to pay the costs.

39 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

A — *The application for annulment of the contested decision*

40 In support of its action, the applicant raises two pleas in law. The first plea alleges errors of law and assessment in that the Commission failed to establish to the requisite legal standard that the applicant participated in the infringement at issue. The second plea alleges errors of law and assessment committed by the Commission when setting the amount of the fine imposed on the applicant.

1. *The first plea, alleging errors of law and assessment in that the Commission found the applicant to have participated in the infringement from 16 December 1996 to 9 February 2000*

41 Under the first plea raised, the applicant submits that the evidence relied on by the Commission in the contested decision does not establish to the requisite legal standard that it participated in the infringement at issue. That first plea is divided into two parts. First, the Commission failed to show that the applicant directly participated in the infringement at issue from 16 December 1996 to 9 February 2000 and, second, that it participated in a single and continuous infringement covering the whole of the EEA.

(a) Arguments of the parties

42 According to the applicant, the body of evidence invoked by the Commission to impute liability for the infringement to it relies on the following three types of evidence. The first resides in the fact that the applicant acknowledged having participated in the unlawful meeting of 28 January 1998 with EKA, FC and Arkema France. The second is based on handwritten notes of Mr S. (FC) ('the notes of Mr S. (FC)'). The third is based on EKA's 2003 and 2006 statements. However, none of those three items of evidence, taken individually or collectively, establishes beyond reasonable doubt that it participated in an unlawful cartel.

43 In the first place, with regard to the unlawful meeting of 28 January 1998, the applicant does not deny having participated therein. According to the applicant, it was a very informal gathering, in the corridors of a hotel. The applicant points out, however, that, as is apparent from the notes of Mr S. (FC), such as they appear on page 1159 of the Commission's file, the cartel's ringleaders asked the applicant's employee to leave

shortly after the group had gathered. Thus, the applicant submits that attendance at part of one single meeting out of the 72 anti-competitive contacts identified by the Commission between the members of the cartel is not sufficient to show liability for participation in the very complex and frequent arrangements of the other addressees of the contested decision.

44 In the second place, the contemporaneous evidence drawn from the notes of Mr S. (FC) consists of only three indirect references to the applicant, made in recital 349 of the contested decision. It follows both from that recital and from recital 352 of the decision that those three references drawn from the notes of Mr S. (FC) are the only contemporaneous evidence of the facts used as evidence against the applicant. Moreover, it follows from the wording of recital 352 of that decision that the Commission itself took the view that it was not possible to show conclusively that the other information in the notes of Mr S. (FC) concerning the applicant came directly from the latter.

45 The applicant adds that the other statements which appear in the applications for leniency, to which the Commission, in its pleadings, attempts to give precedence over the three references cited in recital 349 of the contested decision, may be interpreted differently from the Commission's suggestion and do not lead to the conclusion that the applicant participated in a single and continuous infringement. Finally, the Commission also relies on other items of evidence which were not referred to in the contested decision and do not demonstrate the applicant's guilt, which explains why it was omitted from that decision. More specifically, the applicant submits that the Commission claims, in the defence, that the decision was based not only on the three references in recital 349 of the contested decision but also on other references to the applicant extracted from the notes of Mr S. (FC). The applicant considers that that amounts to taking the view that each reference to it must be interpreted as a direct allegation against it. Although the Commission invokes the 'plain terms of the

[contested] decision' with regard to those other references drawn from the notes of Mr S. (FC) to make its case against the applicant, the latter considers, on the contrary, either that they are evidence which exonerates it or that they do not prove that it participated in the infringement in question.

46 Finally, the applicant takes the view that, contrary to what is stated in recital 352 of the contested decision, namely that the information in the notes of Mr S. (FC) may have come from third parties and not from the applicant itself 'will be reflected in the duration of the infringement for which [the applicant] is held liable', the Commission has not altered its calculation of the duration of the applicant's participation in the infringement at issue from that set out in the statement of objections. It infers from this that the duration determined in the contested decision does not accurately reflect the extent of its alleged participation in the infringement at issue and that it has not been subject to any adaptation or concession on the part of the Commission to fit the trivial nature of the items of evidence.

47 The first reference to the applicant, made in recital 349 of the contested decision, relates to a telephone conversation on 16 December 1996 between Mr S. (FC) and Mr S. (EKA), in the course of which the former mentioned a conversation which he had had with the applicant on prices in Spain. The applicant argues that that initial reference does not show beyond any reasonable doubt that it was part of a cartel. First, the employee concerned denied having had any contact with Mr S. (FC) other than during official CEFIC general assemblies. Second, that reference only reports the subject of a conversation with EKA about the applicant. Finally, the other evidence does not suggest that the applicant was involved in an agreement about prices during the negotiation period for the signature of sodium chlorate contracts for the first quarter of 1997. If the applicant had been involved in an agreement at that time, it would have been mentioned more frequently and also not only indirectly in the notes of Mr S. (FC).

48 The second reference to the applicant relates to a telephone conversation on 4 December 1998 between Mr S. (FC) and Mr S. (EKA), in the course of which the latter mentioned a conversation which he had had with Arkema France on prices in Portugal. It appears from that conversation that Arkema France indicated to Mr S. (EKA) that it had spoken to an employee of the applicant. The applicant takes the view that that extract does not show that it was part of the cartel and, to the contrary, it could suggest that the applicant was asked not to cut its prices. Moreover, the applicant observes that the leniency application by Arkema France (made at the hearing of Mr L. (Arkema France) on 24 September 2004) does not mention the applicant's name at all in the context of the discussions that took place from mid-1998 to May 2000. Furthermore, that extract reports a statement made by Arkema France, a direct competitor of FC. The applicant therefore suggests that, when Arkema France spoke to Mr S. (EKA), it could have had an interest, as an aggressive competitor of FC, in making him believe that the price would not decrease and that FC had to respect the level of the previous year. Finally, the applicant states that, in 1998, it reduced its selling price for sodium chlorate in Portugal. Therefore, not only does the second reference not prove that the applicant was involved in discussions during the period concerned, but also it is an exculpatory element as it suggests that the applicant did not coordinate its conduct with the members of the cartel.

49 The third reference to the applicant relates to a telephone conversation on 9 December 1999 between Mr S. (FC) and Mr L. (Arkema France), in the course of which one of them said that he had spoken to the applicant. The applicant submits that the fact that someone spoke to it does not in itself imply illicit conduct. In fact, if it was perceived as a company which was not willing to cooperate, possibly the other cartel members needed to speak to it to try 'to get it in line'. Moreover, the applicant again points out that that third reference is contradicted by the statements gathered during the hearing of Mr L. (Arkema France), in which he no longer includes the applicant as a party to the agreement for the period between mid-1998 and May 2000.

50 In the third place, with regard to EKA's 2003 and 2006 statements, the applicant states that, according to the Commission, they explain '[the applicant's] involvement regarding customers in Spain, France and Portugal'. However, FC and Arkema France make no such accusation.

51 First, with regard to EKA's 2003 statements, it is apparent from them that the main participants to the cartel were EKA, FC and Arkema France. The applicant was involved in the agreements to a lesser extent. Moreover, in recital 358 of the contested decision and related footnote 391, the Commission refers specifically to EKA's 2003 statements. On that basis, the applicant reproduces and comments on three excerpts from those statements on Spain, France and Portugal. Those three excerpts are sample excerpts from EKA's statement explaining the latter's allegation that the applicant participated in the cartel according to its market position and market interest with regard to Spanish, French and Portuguese customers.

52 With regard to the first excerpt, concerning Spain, EKA stated in particular that [CONFIDENTIAL]. In that regard, the applicant argues that, if it were to lose market share in Spain, it would only be natural that it would try to find customers in neighbouring markets, such as France or Portugal. This is consistent with normal market behaviour with functioning competition. There is therefore an alternative interpretation to that adopted by the Commission, one which is in line with ordinary market behaviour.

53 With regard to the second excerpt, concerning France, EKA stated in particular that [CONFIDENTIAL]. The applicant submits that the Commission relies on that statement to suggest that in France there were bilateral dealings between Arkema France and producers other than EKA about volumes. The applicant then argues that EKA's statement relies solely on hearsay as it claims that the applicant took part in arrangements to which EKA itself was not a party. The information contained in that statement could therefore have been obtained only from third parties such as Arkema

France. The applicant points out that, in its leniency application, Arkema France makes no reference to separate arrangements with the applicant. A statement by a third party in which it alleges that an agreement existed which was 'apparently' concluded by other producers does not prove that such an agreement existed. Therefore, that excerpt from EKA's statement does not meet the requisite standard of clarity to implicate the applicant in the infringement at issue.

54 With regard to the third excerpt, concerning Portugal, it appears from it that EKA stated in particular that [CONFIDENTIAL]. The applicant states that it does not understand how that statement can constitute evidence against it when it implicates only EKA, Arkema France and FC with regard to an agreement about volumes.

55 Second, with regard to EKA's 2006 statements, they were made in response to a request from the Commission. The applicant states and, notwithstanding the Commission's arguments in defence, maintains that those statements correct certain errors, and contradict certain assertions, contained in EKA's previous statements, in particular those of 2003. Thus, in its 2006 statements, EKA indicated that the applicant had attended only one meeting and not five. EKA also no longer states that the applicant and Arkema France had organised their market shares in a separate agreement. Moreover, the applicant points out that, with regard to the Spanish market, the new statement by EKA confirms the applicant's opinion that the conduct observed by the Commission is quite natural. Similarly, EKA's 2006 statements do not contain any further specific reference to the applicant with regard to the Spanish, Portuguese and French markets. The applicant submits that, although EKA states that the applicant was part of the arrangements, it does not produce any specific reference to its participation. In fact it notes that, while EKA's statements wrongly implicate the applicant as having taken part in five meetings, the Commission wisely does not refer to them in

the contested decision. The only mention of its name is an exculpatory factor for the applicant as it indicates that EKA and FC had decided not to increase their prices if the applicant, Arkema France and [CONFIDENTIAL] did not follow suit.

56 The applicant concludes from this that the differences between EKA's 2003 and 2006 statements put their accuracy and evidential value in doubt. Thus they cannot provide evidence beyond reasonable doubt for the Court of an infringement committed by the applicant. Moreover, those statements contain no references to meetings or telephone contact with the applicant. They are therefore insufficient to attribute to the applicant liability for an infringement of Article 81 EC.

57 Moreover and in the fourth place, the applicant submits that the Commission erred in indicating 9 February 2000 as the ending date of its alleged participation in the cartel. In fact, the evidence produced in the contested decision demonstrates only that the applicant attended the official CEFIC assembly on 9 February 2000, which it does not dispute. By contrast, the Commission has not proven that the applicant participated in a meeting at the fringes of the CEFIC assembly of 9 February 2000 ('the unlawful meeting of 9 February 2000'). Thus, first, the applicant takes the view that the statement by Mr S. (EKA) at the unlawful meeting of 9 February 2000 concerning EKA's refusal to participate in any new discussion with the competitors is insufficient to establish the applicant's participation in that meeting. Second, the applicant argues, on the one hand, that neither Arkema France nor FC mentioned such a statement and, on the other hand, that its employee confirmed that he did not hear that statement. Third, the discussions on 20, 21 and 24 January 2000 to which the Commission refers in recital 283 of the contested decision cannot be considered to be evidence against the applicant or as capable of proving that it participated in the unlawful meeting of 9 February 2000. Fourth, the applicant observes that it follows from Annex I to the

contested decision that it was not identified as having participated in the unlawful meeting of 9 February 2000 and that that lack of identification cannot result from a mere clerical error.

58 To conclude the first part of the first plea, the applicant argues that the evidence relied on against it in the contested decision is not sufficiently precise and coherent to prove beyond reasonable doubt that it participated in the infringement at issue.

59 In those circumstances, first, in the light of the principle of the presumption of innocence, as there is doubt in the present case as regards the applicant's participation in the infringement at issue, the Commission should have refrained from holding it liable for that infringement.

60 Second, the applicant points out that the Commission's ability to establish the existence of infringements of Article 81 EC is now greater, in that Regulation No 1/2003 confers new and strengthened powers on it. Moreover, the new leniency programmes mean that it now receives substantial documentary evidence. Similarly, progress in information technology also enables the Commission to carry out sophisticated electronic searches. Finally, the applicant points out that, in the present case, the Commission did not consider it necessary to extend its investigation and, for that purpose, to make arrangements to search its premises or those of the other companies addressed by the contested decision.

61 In relation to those strengthened powers, the Commission should be held to a high evidential standard. In the present case, having failed to satisfy such an evidential

standard, the Commission should, as it did in the case of other small producers whose situation was similar to that of the applicant, have given it the benefit of the doubt. Accordingly, the Commission should not have accused it of participation in the infringement referred to in the contested decision or imposed a fine on it. In any event, the applicant submits that, while the level of information exchanged by the three main producers concerning [CONFIDENTIAL] was similar to that exchanged on the applicant, the Commission decided to impose a fine only on it. The applicant therefore argues that the Commission infringed the principle of equal treatment.

62 The Commission disputes the merits of the arguments set out by the applicant.

63 It maintains that the evidence set out in the contested decision shows that the applicant participated in the infringement at issue. It points out that that evidence is of three types, namely, first, statements made by the members of the cartel incriminating the applicant, second, copious contemporaneous notes taken by Mr S. (FC) and, finally, the applicant's acknowledgment that it attended the unlawful meeting of 28 January 1998, which is supported by further evidence of that meeting.

64 In the first place, with regard to the statements made by the members of the cartel, the Commission observes that they were provided shortly after the termination of the cartel and there is a high level of consistency between them and with the contemporaneous notes of Mr S. (FC). It adds that, contrary to the applicant's submission, the companies which have applied for leniency do not necessarily have an incentive to distort the evidence relating to the other participants in the alleged cartel.

65 In the second place, with regard to the contemporaneous notes taken by Mr S. (FC), the Commission disputes the applicant's claim, in the light of recital 349 of the contested decision, that only three excerpts from the notes of Mr S. (FC) were used to make the case against the applicant such that all other references could be ignored. The Commission points out that, apart from the three excerpts which the applicant focuses on, it repeatedly relies on other references to the applicant in the notes of Mr S. (FC) and cites for example recitals 150, 220, 229, 256, 305, 319 and 347 of the contested decision. The Commission points out in the reply that the applicant was content to limit its attack, with regard to those items of evidence, to the excerpt from the notes of Mr S. (FC) invoked in recital 150, both truncating the quote and taking it out of context. With regard to the other six recitals, the applicant admits that they are directly incriminatory, but claims that the contested decision does not refer to it in its findings of fact with respect to 1997. The latter claim is inaccurate and the Commission was entitled to conclude, in the defence, that the applicant's regular telephone contacts with the members of the cartel were ongoing in 1997.

66 Recital 349 of the contested decision rebuts the applicant's arguments about its lack of involvement in the cartel and should not be confused with recitals, such as recitals 305 and 319, where the Commission sets out in full its case against the applicant. Moreover, the Commission focuses on those three extracts referred to in recital 349 because, first, they are particularly convincing, and therefore essential, evidence against the applicant showing that it participated in a single and continuous infringement, which was European in scope, second, the applicant did not challenge those statements and, finally, the contemporaneous evidence is particularly strong in inculpating the applicant, without, however, being the only evidence gathered by the Commission.

67 In the third place, with regard to recital 352 of the contested decision, the Commission states that it expressly drew a distinction between the different excerpts from the

notes of Mr S. (FC), on the basis of their probative value, specifically with a view to delimiting the duration of the applicant's participation in the infringement at issue. In recital 352, it indicated that, if it had limited itself only to the references to the applicant other than those set out in recital 349, it would have found it more difficult to conclusively prove cartel behaviour. It therefore decided not to rely on them to extend the duration of the applicant's participation in the cartel. None the less, although those other references to the applicant are not conclusive in themselves, at the very least they form part of a set of coincidences and indicia upon which the Commission was entitled to base its analysis of the applicant's participation in the cartel.

68 In the rejoinder, still in relation to recital 352 of the contested decision, the Commission submits that the applicant ignores recitals 305 and 319 of the contested decision, which explicitly invoke the other excerpts from the notes of Mr S. (FC) as evidence against it. It also ignores recitals 357 and 358 of the contested decision, which make it clear that the Commission based its complaints against the applicant on the notes of Mr S. (FC), taken as a whole, and was not limiting itself to the three excerpts set out in recital 349 of the contested decision. According to the Commission, it is apparent from the case-law that the fact that information is reported indirectly or is circumstantial does not prevent its use as evidence. The contemporaneous evidence of the infringement which consists of the notes of Mr S. (FC) is consistent with the other evidence in the file against the applicant and has been widely accepted by the parties, including the applicant.

69 Finally, recital 352 of the contested decision in no way promises to alter the duration of the applicant's participation in the infringement at issue by comparison with the duration in the statement of objections. Moreover, contrary to the applicant's assertions, the evidence used in the contested decision is the same as that in the statement of objections.

70 In the fourth place, the Commission argues, as a first point, that the contested decision relies on general evidence provided by EKA, Arkema France and FC, which demonstrates categorically the applicant's participation in the cartel and the characteristics of that cartel.

71 As a second point, the Commission lists a number of specific pieces of evidence showing the applicant's contacts with the other members of the cartel.

72 First, it is apparent from the notes of Mr S. (FC) regarding his telephone call with Mr S. (EKA) on 16 December 1996 that he had had a previous conversation with the applicant. The Commission points out that the applicant did not contest that evidence in its reply to the statement of objections. Moreover, it challenges the arguments now raised by the applicant against that evidence.

73 Second, with regard to the evidence relating to the calendar year 1997, the Commission takes the view that the excerpts from the contemporaneous notes of Mr S. (FC) dated 10 and 14 January 1997 illustrate how the applicant was annoyed by FC's attempts to take a larger market share in Spain and Portugal. Similarly, it is apparent from a note made by Mr S. (FC) on 14 October 1997 concerning a bilateral meeting between EKA and FC which took place in Turku (Finland) ('the Turku meeting of 14 October 1997') that FC and EKA were having difficulty making the applicant in particular understand that a price increase of 1.5 % was necessary to compensate for inflation. Again in connection with the Turku meeting of 14 October 1997, it is apparent from a statement by EKA that, in view of FC's increased sales in Spain, there was a risk of retaliation by the Spanish producers and that EKA and FC agreed not to increase their prices if the applicant, in particular, did not follow suit.

74 Third, with regard to the unlawful meeting of 28 January 1998, the Commission points out that the applicant admitted having attended that meeting. The notes of Mr S. (FC) show that the parties discussed the sodium chlorate markets in a number of countries, as well as market shares and prices. Initially, the Commission claimed, in its pleadings, that there was nothing in the file to suggest that the applicant's attendance at that meeting was a new or exceptional development. However, subsequently, in its observations on the report for the hearing, the Commission expressly recognised that the applicant's participation constituted a new development. However, the Commission considers that the applicant did not show that it participated in that meeting in a spirit different from that of the other cartel members or that it publicly distanced itself from the cartel. The applicant's claim as to the informal nature of the meeting is contradicted by the fact that the meeting was planned some weeks in advance and by the detailed notes of Mr S. (FC). Contrary to the applicant's misunderstanding, it is apparent from recital 183 of the contested decision that the parties discussed Belgium, Spain, France and Portugal exhaustively (and not exclusively). It does not appear from the notes of Mr S. (FC) that the cartel's ringleaders asked the applicant to leave. On the contrary, those notes show that the examination of the Spanish, French and Portuguese markets was interspersed with discussions of other markets throughout most of the meeting, so it is likely that the applicant was in attendance throughout the meeting. Finally, the Commission states that Annex I to the contested decision is necessarily limited to only those contacts for which it knows the actual date; there were other contacts involving the applicant which are supported by the evidence, albeit without a precise date being known.

75 Fourth, in October and November 1998, Mr L. (Arkema France) and Mr S. (FC) had several phone calls during which the applicant's market share in Portugal was discussed.

76 Fifth, with regard to the telephone contact on 4 December 1998 between Mr S. (FC) and Mr S. (EKA), the Commission takes the view that the applicant does not explain how such contacts could have taken place in the ordinary course of business and, in

addition, it admits that it was asked not to cut its price, which is an anti-competitive request, to which the applicant acceded. Contrary to the applicant's submission, it does not appear from the statement of Mr L. (Arkema France) that the applicant left the cartel at the end of the first period, which ran from October 1994 to mid-1998, or for an alleged second period which ran from mid-1998 to May 2000, particularly as that reading is contradicted by the copious evidence.

77 Sixth, the Commission points out that the applicant refers only to price decreases in Portugal in 1999 and 2000, omitting to mention that its prices increased between 1993 and 1997 and were sustained in 1998. It adds that the price decrease in 1999 can be explained by the price war which broke out in Portugal as a result of the conflict over a customer. Again, notwithstanding the cartel's faltering in 1999, it remained active and, as is apparent from the notes of Mr S. (FC) on his telephone conversations with Mr L. (Arkema France) on 16 June, 6, 9 and 22 December 1999, the applicant continued to be involved in it. Those three sets of notes relate to the existence of direct contact with the applicant and, contrary to the applicant's submission, there is nothing to indicate that the applicant was not cooperating and that the other participants were trying to get it in line.

78 Seventh, the Commission adds that it is apparent from the notes of Mr S. (FC) on his telephone call of 22 December 1999 with Mr L. (Arkema France) that the applicant was still engaged in illicit contacts with its competitors in late December 1999. Similarly, those notes on telephone conversations throughout January 2000, as summarised in the contested decision, show the members of the cartel continued to coordinate their positions.

79 Eighth, and finally, the Commission states that the fact that the applicant is not listed in Annex I to the contested decision as being among those who attended the unlawful

meeting of 9 February 2000 results from a clerical error since, in recitals 283 and 488 of the contested decision, it concluded that the applicant was present at that meeting. It does not matter that the applicant did not hear a statement made by EKA, at the fringes of the official CEFIC assembly, concerning its refusal to participate in any further discussions with the competitors, since the cartel ended on that date. Moreover, the fact that it states that it did not hear that statement strongly suggests that it attended the unlawful meeting of 9 February 2000.

80 As a third point, the Commission disputes the merits of the arguments set out by the applicant concerning the oral statements made by EKA.

81 First, in recital 319 of the contested decision, the Commission referred to the statements made by EKA in 2003 as a whole and not to the three quotes "cherry-picked' by the applicant in its application.

82 With regard to the first quote referred to by the applicant, concerning the Spanish market, the conduct described as being likely to be adopted by the applicant on the French market, if it were to lose some of its share of the Spanish market, is not equivalent to normal market behaviour but is a threat in the context of the cartel arrangements, which clearly presupposes a general agreement with respect to market shares. Moreover, the Commission points out that, according to the case-law, the fact that an undertaking at times does not abide by what is agreed within the auspices of the cartel is not such as to relieve it from responsibility if it has not publicly distanced itself from what was agreed and the fact that it is knowingly able to deceive the other cartel members does not absolve it from committing an infringement.

83 With regard to the second quote referred to by the applicant, concerning the French market, the applicant wrongly claims that EKA's statement is based on hearsay from EKA. The excerpt used, taken as a whole, shows that EKA knew of the existence of a separate bilateral arrangement on the French market.

84 As for the third quote referred to by the applicant, concerning the Portuguese market, there is no mention of it in the contested decision and it neither inculpates nor exculpates the applicant.

85 Second, contrary to what the applicant claims, EKA's 2006 statements do not correct those made in 2003. The purpose of the first statements was to confirm in detail some of the statements that had previously been made. All of the statements were consistent with those made in 2003 which provided further details. The Commission states that it is apparent from EKA's 2006 statements that EKA referred again to the applicant among the parties to the cartel, described in detail how those parties fixed target prices and divided up the market, suggested that the applicant was involved well before the starting date fixed by the contested decision and confirmed that it retaliated on the French market in response to FC's conduct. EKA's 2006 statements thus do not contain anything which might exculpate the applicant.

86 As a fourth point, the Commission disputes that, in imposing a fine on the applicant, it infringed the principle of equal treatment. The applicant was not in a similar situation to other small sodium chlorate producers. In particular, (i) it admits to its participation in a cartel meeting, (ii) unlike the other small producers, the other members of the cartel identified it as a cartel member and, (iii) the contemporaneous notes of Mr S. (FC) of the infringement provide evidence against it, which is not true of the other small undertakings. In any event, the case-law shows that the fact that a trader

who is in a position similar to that of an applicant was not found by the Commission to have committed an infringement cannot constitute a ground for setting aside the finding that the applicant participated in the infringement of which it is accused, provided that that infringement was properly established.

87 The Commission considers that the body of the evidence relied on thus shows that the applicant participated in the infringement at issue and that the first part of the first plea must therefore be rejected.

(b) Findings of the Court

88 It is apparent from their pleadings that the parties dispute (i) which items of evidence were relied on by the Commission in the contested decision to show that the applicant participated in the infringement at issue and (ii) the probative value of that evidence for concluding that the applicant participated in that infringement.

89 First, certain general considerations need to be set out in relation to the evidence, second, the evidence relied on in the contested decision in relation to the applicant's participation in the infringement at issue needs to be identified, third, the probative value of that evidence needs to be assessed and, fourth, on the basis of that assessment, the Court must rule on whether the body of evidence relied on by the Commission to show that the applicant participated in the infringement at issue is precise and consistent.

General considerations regarding evidence

90 In relation to adducing evidence of an infringement of Article 81(1) EC, it should be pointed out that the Commission must prove the infringements which it has found and adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 58, and Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 86).

91 Moreover, in proceedings for annulment brought under Article 230 EC, all that is required of the Courts of the European Union is to verify the legality of the contested measure (Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 174).

92 Thus, the role of a Court hearing an application for annulment of a Commission decision finding the existence of an infringement of the competition rules and imposing fines on the addressees is to assess whether the evidence and other information relied on by the Commission in its decision are sufficient to establish the existence of the alleged infringement (see, to that effect, Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission ('PVC II')* [1999] ECR II-931, paragraph 891).

93 Moreover, where there is doubt, the benefit of that doubt must be given to the undertakings accused of the infringement (see, to that effect, Case 27/76 *United Brands and United Brands Continentaal* v *Commission* [1978] ECR 207, paragraph 265). The Court cannot therefore conclude that the Commission has established the existence of the infringement at issue to the requisite legal standard if it still entertains doubts on that point, in particular in proceedings for the annulment of

a decision imposing a fine (*JFE Engineering and Others* v *Commission*, paragraph 91 above, paragraph 177).

94 In the latter situation, it is necessary to take account of the principle of the presumption of innocence resulting in particular from Article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, which is one of the fundamental rights which, according to the case-law of the Court of Justice and as reaffirmed in the preamble to the Single European Act, by Article 6(2) of the Treaty on European Union and by Article 47 of the Charter of Fundamental Rights of the European Union proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p 1), are protected in the legal order of the European Union. Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, to that effect, in particular the judgments of the European Court of Human Rights of 21 February 1984 in *Öztürk*, Series A No 73, and of 25 August 1987 in *Lutz*, Series A No 123-A, and of the Court of Justice in Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraphs 149 and 150, and Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraphs 175 and 176).

95 Thus, the Commission must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place (see, to that effect, Joined Cases 29/83 and 30/83 *Compagnie Royale asturienne des mines and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 20; Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 127; Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others* v *Commission* [1992] ECR II-1403, paragraphs 193 to 195, 198 to 202, 205 to 210, 220 to 232, 249, 250 and 322 to 328; and Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraphs 43 and 72).

96 However, it is important to emphasise that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect

of the infringement. It is sufficient if the body of evidence relied on by the Commission, viewed as a whole, meets that requirement (see, to that effect, *PVC II*, paragraph 92 above, paragraphs 768 to 778, and in particular paragraph 777, confirmed on the relevant point by the Court of Justice, on appeal, in its judgment in Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschaappij and Others* v *Commission* [2002] ECR I-8375, paragraphs 513 to 523).

97 Moreover, as anti-competitive agreements are known to be prohibited, the Commission cannot be required to produce documents expressly attesting to contacts between the traders concerned. The fragmentary and sporadic items of evidence which may be available to the Commission should, in any event, be capable of being supplemented by inferences which allow the relevant circumstances to be reconstituted. The existence of an anti-competitive practice or agreement may thus be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraphs 55 to 57, and Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank and Others* v *Commission* [2006] ECR II-3567, paragraphs 64 and 65).

98 In so far as concerns the types of evidence which may be relied on to establish an infringement of Article 81 EC and Article 53 of the EEA Agreement, the prevailing principle of European Union law is the unfettered evaluation of evidence (see, by analogy, Case T-50/00 *Dalmine* v *Commission* [2004] ECR II-2395, paragraph 72).

99 Consequently, an absence of documentary evidence is relevant only in the overall assessment of the body of evidence relied on by the Commission. It does not, in itself, enable the undertaking concerned to call the Commission's claims into question by

submitting a different version of the facts. The applicant may do so only where the evidence submitted by the Commission does not enable the existence of the infringement to be established unequivocally and without the need for interpretation (see, to that effect, the judgment of 12 September 2007 in Case T-36/05 *Coats Holdings and Coats* v *Commission*, not published in the ECR, paragraph 74).

100 In addition, no provision or general principle of European Union law prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings. If that were not the case, the burden of proving conduct contrary to Article 81 EC and Article 53 of the EEA Agreement, which is borne by the Commission, would be unsustainable and incompatible with its task of supervising the proper application of those provisions (see, by analogy, *JFE Engineering and Others* v *Commission*, paragraph 91 above, paragraph 192).

101 However, an admission by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter undertakings unless it is supported by other evidence, given that the degree of corroboration required may be lesser in view of the reliability of the statements at issue (*JFE Engineering and Others* v *Commission*, paragraph 91 above, paragraphs 219 and 220).

102 As regards the probative value of the various items of evidence, the sole criterion relevant in that evaluation is the reliability of the evidence (*Dalmine* v *Commission*, paragraph 98 above, paragraph 72).

103 According to the general rules relating to evidence, the credibility and, thus, the probative value, of a document depends on the person from whom it originates, the circumstances in which it came into being, the person to whom it was addressed and whether it appears sound and reliable (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraphs 1053 and 1838).

104 As regards statements, particularly great probative value may also be attached to those which, first, are reliable, second, are made on behalf of an undertaking, third, are made by a person under a professional obligation to act in the interests of that undertaking, fourth, go against the interests of the person making the statement, fifth, are made by a direct witness of the circumstances to which they relate and, sixth, were provided in writing deliberately and after mature reflection (see, to that effect, *JFE Engineering and Others* v *Commission*, paragraph 91 above, paragraphs 205 to 210).

105 Moreover, even if some caution as to the evidence provided voluntarily by the main participants in an unlawful agreement is generally called for, considering the possibility, in this case, that they might tend to play down the importance of their contribution to the infringement and maximise that of others, the fact of seeking to benefit from the application of the Leniency Notice in order to obtain a reduction in the fine does not necessarily create an incentive for the other participants in the offending cartel to submit distorted evidence. Indeed, any attempt to mislead the Commission could call into question the sincerity and the completeness of cooperation of the person seeking to benefit, and thereby jeopardise his chances of benefiting fully under the Leniency Notice (see, to that effect, Case T-120/04 *Peróxidos Orgánicos* v *Commission* [2006] ECR II-4441, paragraph 70).

106 The Court also notes, in that regard, that the potential consequences of the submission of distorted evidence to the Commission are even more serious since, as is apparent from paragraph 101 above, a statement of an undertaking that is disputed must be corroborated by other evidence. That being so, the likelihood of the Commission and the other undertakings accused of participating in the infringement of detecting the inaccurate nature of those statements is increased.

107 The case-law cited is applicable, by analogy, to Article 53(1) of the EEA Agreement.

Evidence relied on in the contested decision relating to the applicant's participation in the infringement at issue

— Preliminary observations

108 In the light of the case-law set out in paragraph 92 above, the Court considers that, in so far as it is the Court's task to assess whether the evidence and other factors referred to by the Commission in the contested decision are sufficient to establish the existence of an infringement of which the applicant is accused, it must, following a detailed examination of the grounds of the contested decision, also identify the evidence relied on by the Commission to show that the applicant participated in the infringement at issue.

109 The Court also notes, in that regard, that the administrative procedure under Regulation No 1/2003, which takes place before the Commission, is divided into two distinct and successive stages, each having its own internal logic, namely a preliminary

investigation stage and an *inter partes* stage. The preliminary investigation stage, during which the Commission uses the powers of investigation provided for in Regulation No 1/2003 and which covers the period up until the notification of the statement of objections, is intended to enable the Commission to gather all the relevant information tending to prove or disprove the existence of an infringement of the competition rules and to adopt an initial position on the course of the procedure and how it is to proceed. By contrast, the *inter partes* stage, which covers the period from the notification of the statement of objections to the adoption of the final decision, must enable the Commission to reach a final decision on the infringement concerned (see, by analogy, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 96 above, paragraph 183, and Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraph 38).

110 It is apparent from the case-law set out in paragraph 109 above that the identification by the Court of those items of evidence can only relate to the part of the grounds of the contested decision in which the Commission describes the *inter partes* stage of the administrative procedure. It is only after having received, at that stage, the applicant's observations on the Commission's initial position on conclusion of the preliminary investigation stage, as set out in the statement of objections, that the Commission may decide whether or not to maintain its initial position and thus reach its final decision on the alleged infringement.

111 It that regard, the Court notes that, in this case, point 5.4.1.1 of the contested decision, entitled 'The Commission's assessment and conclusion' (recitals 347 to 360 of the contested decision), forms part of Title 5 'Application of Article 81 [EC] and Article 53 of the EEA Agreement', subsection 5.3.2 of which, concerning the nature of the infringement, is followed by section 5.4 on 'The parties' arguments in response to the Statement of Objections as regards the facts and the Commission's assessment'.

Section 5.4 contains subsection 5.4.1 which sets out a summary of the 'Arguments raised by [the applicant]'. That subsection itself contains just one point, namely point 5.4.1.1 entitled 'The Commission's assessment and conclusion'. That point is not followed by a point 5.4.1.2 but directly by a new subsection, namely 5.4.2 on the 'Arguments raised by Uralita'.

112 Consequently, the Commission's assessment in point 5.4.1.1 concerns exclusively the applicant's observations in its response to the statement of objections. Moreover, the Court considers that the conclusions reached in point 5.4.1.1 constitute the Commission's final conclusions, on completion of the *inter partes* stage of the administrative procedure, regarding the applicant's participation in the infringement at issue.

113 It is apparent from the foregoing considerations and the case-law set out in paragraph 109 above that any direct or indirect reference in point 5.4.1.1 to recitals of the contested decision which precede those under that point, that is to say recitals 347 to 360, may enable the Commission to reuse, at that stage of stating the grounds of the contested decision, that is to say the *inter partes* stage, evidence referred to earlier in the decision. On the other hand, if there is no direct or indirect reference in point 5.4.1.1 to evidence referred to in recitals other than those which it contains, it must be found that, following the *inter partes* procedure which it carried out in relation to matters which might be attributable to the applicant, the Commission ultimately decided not to rely on them to show that the applicant participated in the infringement at issue. Finally, where, after having received the observations of an undertaking on the statement of objections, the Commission itself calls the probative value of that evidence into question in its assessment of the evidence which it had at its disposal at the end of the preliminary investigation stage in order to determine

whether that undertaking participated in an infringement, the Court cannot but take account of that assessment on the part of the Commission.

114 It is necessary to identify in the light of those preliminary observations the evidence which the Commission decided to use in this case, on conclusion of the *inter partes* proceedings, to show that the applicant participated in the infringement at issue and which, therefore, constitutes the body of evidence on which it relied.

115 In that regard, the Court notes that the parties agree that, in the contested decision, the body of evidence on which the Commission relied to show that the applicant had participated in the infringement at issue is made up of three types of evidence, namely:

— the applicant's acknowledgment that it attended the unlawful meeting of 28 January 1998;

— the notes of Mr S. (FC); and

— the statements of the other members of the cartel.

116 However, the parties are not in agreement, in particular in the light of the wording of recital 352 of the contested decision, as to the probative value of that evidence for assessing whether the applicant participated in the infringement at issue.

— The evidence initially relied on by the Commission in the contested decision at the preliminary investigation stage of the administrative procedure

117 It is apparent from a detailed examination of the grounds for the contested decision set out in section 4.3 thereof, concerning the cartel history, in so far as it relates to the period of the applicant's alleged participation in the cartel at issue, namely from 16 December 1996 to 9 February 2000, that the applicant's name, or the name of one of its employees, is identified directly or indirectly in connection with 21 events reported by the Commission ('the 21 events').

118 In the light of the observations made in paragraph 110 above, it is necessary to examine which of those 21 events the Commission decided to use as evidence, in point 5.4.1.1, at the end of the *inter partes* stage of the administrative procedure, in order to show, by means of a body of evidence, that the applicant participated in the infringement at issue.

119 For that purpose, after identifying the evidence expressly relied on in point 5.4.1.1, it will be necessary to interpret the wording of recital 352 of the contested decision, in order to identify whether the Commission implicitly relied on other items of evidence in support of its conclusions relating to the applicant's participation in the infringement at issue.

— The evidence expressly relied on by the Commission in the contested decision on conclusion of the *inter partes* stage of the administrative procedure

120 It is apparent from the grounds set out in point 5.4.1.1 of the contested decision, more precisely recitals 347 to 360 thereof, in which the Commission describes the

assessments it made and the conclusions which it drew following the *inter partes* stage of the administrative procedure, that the Commission expressly relied, either directly or indirectly, on five of the 21 events initially used as evidence during the preliminary stage of the administrative procedure to show that the applicant participated in the infringement at issue, namely:

— in recital 349 of the contested decision, inter alia, by citing the notes of Mr S. (FC), the telephone conversation of 16 December 1996 between Mr S. (FC) and Mr S. (EKA), initially referred to in recital 130 of the contested decision;

— in recitals 350 and 356, by referring to the oral statements gathered, the Turku meeting of 14 October 1997, initially referred to in recitals 162 to 164 of the contested decision;

— in recitals 350 and 356, by referring, first, to the applicant's acknowledgment and, second, by referring to recitals 182 and 184 of the contested decision, the notes of Mr S. (FC), and the unlawful meeting of 28 January 1998, initially referred to in recitals 182 to 186 of the contested decision;

— in recital 349, inter alia, by citing the notes of Mr S. (FC), and the telephone conversation of 4 December 1998, initially referred to in recital 219 of the contested decision;

— and, finally, in recitals 347 and 349, by citing the notes of Mr S. (FC), and the telephone conversation of 9 December 1999, initially referred to in recital 258 of the contested decision.

121 It needs to be determined whether, in point 5.4.1.1 of the contested decision, the Commission implicitly referred to other events capable of showing that the applicant participated in the infringement at issue and, to that end, to interpret the wording of recital 352 of the contested decision.

— Interpretation of recital 352 of the contested decision

122 As is apparent from the parties pleadings, the interpretation of recital 352 of the contested decision is decisive when it comes to identifying the items of evidence, other than those expressly referred to by the Commission in point 5.4.1.1 of the decision, which the Commission relied on to show that the applicant participated in the infringement at issue.

123 According to the applicant, in recital 352 of the contested decision, the Commission dismissed any reference to the notes of Mr S. (FC) other than the three references made in recital 349 of the decision. The Commission disputes that interpretation.

124 At the hearing, in response to the questions put by the Court regarding the interpretation to be given to the wording of recital 352 of the contested decision, the Commission stated in particular the following.

125 First, in that recital, it made a distinction between the three references to the notes of Mr S. (FC) expressly referred to in recital 349 of the contested decision, and the other items used as evidence against the applicant.

126 As regards the three references to the notes of Mr S. (FC) expressly referred to in recital 349 of the contested decision, which relate to the three events described in recitals 130, 219 and 258 of that decision, the Commission stressed that they constituted particularly probative evidence since they made it possible to establish direct contacts between the members of the cartel and the applicant.

127 It is true that the other items of evidence relied on against the applicant were not furnished directly by it. None the less, in the light of the case-law, that evidence was still not excluded from the body of evidence relied on by the Commission to show that the applicant participated in the infringement at issue.

128 Second, the Commission stated that the wording '[a]s regards the other instances in [the contested decision] where reference is made to [the applicant] …', at the beginning of recital 352 of the contested decision, had to be interpreted as relating to the references made to the applicant in recitals 220, 256, 305 and 319 and to the other recitals referred to in recitals 305 and 319.

129 Third, as regards the scope of the second and third sentences of recital 352 of the contested decision, in so far as it is stated therein that the Commission does not have sufficient evidence in its file and that that will be reflected in the determination of the duration of the infringement, the Commission stated that, contrary to what the applicant claims, it had enough evidence to prove the duration of the applicant's participation in the infringement at issue, namely from December 1996 to February 2000. It that regard, it stated that, although it had other evidence capable of establishing such participation in 1994, 1995 and early 1996, it decided to rely solely on the strongest evidence it had, that is to say the 'three excerpts' or 'those three passages', the first being 'the telephone call of 16 December 1996'.

130 In so far as concerns the arguments of the parties in their pleadings and at the hearing, the Court notes, first of all, that, of the 21 events referred to in paragraph 117 above, 19 of them are based on the notes of Mr S. (FC).

131 Next, of the 19 events taken from the notes of Mr S. (FC), as stated in paragraph 120 above and noted by the Commission at the hearing, three of them are referred to expressly in recital 349 of the contested decision. As regards those three events, the parties agree that they do not form part of the 'other instances [in the contested decision] where reference is made to [the applicant]', within the meaning of recital 352 of that decision.

132 Finally, as is apparent from paragraph 120 above, the notes of Mr S. (FC), in so far as they concern the unlawful meeting of 28 January 1998, are referred to expressly, under point 5.4.1.1, in recitals 350 and 356 of the contested decision by reference to recitals 182 and 184 of that decision. Therefore, the fourth reference taken from the notes of Mr S. (FC) can also not form part of the 'other instances [in the contested decision] where reference is made to [the applicant]', within the meaning of recital 352 of that decision.

133 However, it should be noted that the 15 other events taken from the notes of Mr S. (FC) ('the 15 other references to the applicant in the notes of Mr S. (FC)') are not referred to expressly under point 5.4.1.1 of the contested decision.

134 In the first place, in so far as concerns the explanation given by the Commission that the wording '[a]s regards the other instances in [the contested decision] where reference is made to [the applicant]', at the beginning of recital 352 of the contested decision, refers to recitals 220, 256, 305 and 319 of the contested decision and to the other recitals referred to in recitals 305 and 319 (namely recitals 130, 150, 184, 219, 229, 256 and 258), that interpretation is indeed plausible in so far as recitals 305 and 319 of the

contested decision refer, inter alia, to four other recitals of that decision mentioning the wording of the notes of Mr S. (FC) regarding four events, namely those referred to in recitals 150, 220, 229 and 256 of the contested decision. However, such an explanation is, for the purposes of interpreting the wording '[a]s regards the other instances in [the contested decision] where reference is made to [the applicant]', either incomplete, in so far as it refers to only 4 of the 15 other references to the applicant in the notes of Mr S. (FC), or irrelevant, since, in recitals 305 and 319, reference is also made to recitals 130, 184, 219 and 258 of the contested decision, three of which are the three express references to the applicant taken from the notes of Mr S. (FC), referred to in recital 349, or, in so far as concerns recital 184 of the contested decision, reproduce the wording of the notes of Mr S. (FC) concerning the unlawful meeting of 28 January 1998, which the applicant expressly acknowledges having attended, at least in part. As a result, since the explanation provided by the Commission, from which it follows that the wording referred to above relates only to recitals 130, 150, 184, 219, 220, 229, 256, 258, 305 and 319 of the contested decision, is partially incomplete and partially irrelevant, it cannot be accepted by the Court.

135 Consequently, it must be considered that the only acceptable interpretation of the wording '[a]s regards the other instances in [the contested decision] where reference is made to [the applicant]', at the beginning of recital 352 of the contested decision is that it refers to the 15 other references to the applicant in the notes of Mr S. (FC).

136 In the second place, the Court finds that it is apparent from the actual wording of the second part of the first sentence of recital 352 of the contested decision that the Commission also agrees with the applicant as to the probably indirect origin, in relation to the applicant, of the information contained in the other 15 references to the applicant in the notes of Mr S. (FC). According to the wording of that second part, 'the Commission accepts [the applicant's] argument that the information may have come from

third parties and not from [the applicant] itself'. Consequently, it must be found that it expressly accepts the applicant's argument, as set out in recital 345 of the contested decision (under subsection 5.4.1, entitled 'Arguments raised by [the applicant]') and initially set out in point 44 of its response to the statement of objections.

137 In that respect, the explicit wording of the second part of the first sentence of recital 352 of the contested decision is decisive in this case since it came about at the *inter partes* stage of the administrative procedure, a stage which, as noted in paragraph 109 above, enables the Commission to reach a final decision on the alleged infringement and which brings that procedure to an end, in this instance in favour of an argument of the applicant set out in its response to the statement of objections.

138 In the third place, the Court notes that the second sentence of recital 352 of the contested decision confirms the assessment regarding the scope of the first sentence. The Commission states therein, just as explicitly, that its file did not contain 'sufficient evidence … to show conclusively that … the information [at issue]', thus the 15 other references to the applicant in the notes of Mr S. (FC), 'came directly from [the applicant]'. Therefore, it must be considered that, with that finding, the Commission was stating that the evidence in its file did not enable it to substantiate, to the requisite legal standard, the 15 other references to the applicant in the notes of Mr S. (FC).

139 Moreover, that finding is confirmed, in part, by the description which the Commission gave of its approach, noted in paragraph 129 above, to the items of evidence at its disposal. The Commission expressly states therein that it ultimately decided to limit the period the applicant was involved in the infringement on the basis of that evidence, by focusing on the strongest evidence at its disposal, namely the three

references, the first of which concerns the telephone conversation of 16 December 1996, that is to say, in clear and precise terms, the three express references in recital 349 of the contested decision.

140 Thus, the Commission acknowledges that, contrary to what it did in relation to those three references and the notes of Mr S. (FC) concerning the unlawful meeting of 28 January 1998, it could not rely on the 15 other references to the applicant in the notes of Mr S. (FC) to show the applicant's participation in the infringement at issue.

141 Consequently, it must be found that, in recital 352 of the contested decision, the Commission itself expressed doubts as to the credibility of the 15 other references to the applicant in the notes of Mr S. (FC) to show that the applicant participated in the infringement at issue.

142 In the fourth place, the Court notes that that latter consideration is confirmed by the wording of the third sentence of recital 352 of the contested decision, in which the Commission itself draws very clear conclusions from its own findings in relation to the lack of credibility of the 15 other references to the applicant in the notes of Mr S. (FC) to show that the applicant participated in the infringement at issue. Accordingly, the Commission stated that 'that [would] be reflected in the duration of the infringement for which [the applicant] [was] held liable'. Such a conclusion clearly shows that the Commission considered that, in the light of the evidence in its file, the 15 other references to the applicant in the notes of Mr S. (FC) did not constitute sufficiently credible evidence to show the applicant's participation in the infringement at issue.

143 That assessment is not altered by the explanations provided by the Commission at the hearing in response to the questions put by the Court as to the meaning, in its view, of the third sentence of recital 352 of the contested decision. The Commission suggested that the last sentence of recital 352 of the contested decision, namely 'that will be reflected in the duration of the infringement for which [the applicant] is held liable', had been acted upon since it did not rely on the evidence at its disposal in respect of the period prior to 16 December 1996 as a means of determining that the applicant's participation in the infringement had been from 1994 to early 1996.

144 Such an interpretation, which implies that the evidence rejected in recital 352 of the contested decision related to a period predating 16 December 1996, cannot be upheld for the following two reasons.

145 First, the Court finds that none of the recitals referred to in recitals 305 and 319 of the contested decision and to which the Commission refers in order to interpret the wording '[a]s regards the other instances in [the contested decision] where reference is made to [the applicant]', concerns an event which took place prior to the date on which the applicant's participation in the infringement at issue began, that is, in the Commission's view, on 16 December 1996. It is apparent from all of the considerations set out by the Commission in recital 352 of the contested decision that it was the lack of evidence in the Commission's file in relation to the 'other instances in [the contested decision] where reference is made to [the applicant]' which led it to state that the lack of sufficient evidence would be 'reflected in the duration of the infringement for which [the applicant was to be] held liable'.

146 Second, that interpretation contradicts the Commission's most recent approach which it described at the hearing, set out in particular in paragraph 139 above.

147 Thus, the clear wording adopted by the Commission in recital 352 of the contested decision shows that, in the grounds concerning, in accordance with the heading of point 5.4.1.1 itself, the Commission's assessment and conclusion in relation to the applicant's observations, grounds which brought the *inter partes* stage of the administrative procedure to a close, it had decided to exclude the 15 other references to the applicant in the notes of Mr S. (FC) from the evidence which could be used against the applicant.

148 In the fifth place, the Court adds that, contrary to what the Commission claims, at no point in either recital 352 of the contested decision, or even in the other recitals under point 5.4.1.1, did the Commission state that it considered, despite the lack of credibility of the 15 other references to the applicant in the notes of Mr S. (FC), that they formed part of the body of evidence on which it had relied to show the applicant's participation in the infringement at issue.

149 On the contrary, it is apparent from the general context of the reasoning set out under point 5.4.1.1 that, firstly, in recitals 349 to 351 of the contested decision, as stated in paragraph 131 above, the Commission made a distinction between the three references made in recital 349 of the contested decision and those relating to the unlawful meeting of 28 January 1998, on the one hand, and the 15 other references to the applicant in the notes of Mr S. (FC), on the other. Similarly, the Court also notes that, in recital 351 of the contested decision, the Commission comments on the applicant's reactions to the three references made in recital 349 of the contested decision.

150 Secondly, in recital 352 of the contested decision, the Commission made a very explicit reference to 'the other instances … where reference is made to [the applicant]', that is to say the 15 other references to the applicant in the notes of Mr S. (FC), with the result that it is clear from that wording, at the beginning of the first sentence of that recital, that the Commission had a clear intention to identify another category of references to the applicant in the notes of Mr S. (FC). Moreover, the Court notes that, in its pleadings, the Commission stated that it did not dispute having categorised the

references taken from the notes of Mr S. (FC) 'on the basis of their probative value' (see paragraph 67 above). It confirms, also in its pleadings, as stated in paragraph 147 above, that the 15 references to the applicant in the notes of Mr S. (FC) other than those referred to in recital 349 of the contested decision were dismissed as they were insufficient to show its collusive conduct.

151 However, the Commission considers that, in spite of the lack of credibility of the 15 other references to the applicant in the notes of Mr S. (FC), it could have included them as part of the bundle of evidence on which it relied.

152 First, in support of that claim, the Commission referred, at the hearing, in particular to recitals 305 and 319 of the contested decision, in which the other extracts from the notes of Mr S. (FC) were expressly set out as items of evidence against the applicant.

153 Such an argument cannot be upheld since recitals 305 and 319 of the contested decision precede the applicant's observations on the statement of objections (subsection 5.4.1) and, in recital 352 of the contested decision, in response to the applicant's observations, the Commission, as it confirmed in its pleadings, acknowledges that it was not able to rely on the 15 other references to the applicant in the notes of Mr S. (FC) to show the applicant's participation in the infringement at issue. Thus, the Court finds that the wording of recital 352 of that decision leaves no doubt as to the treatment by the Commission of those other references at the end of the *inter partes* administrative procedure.

154 Second, the Commission states that, in recitals 357 and 358 of the contested decision, it based its complaints against the applicant on the notes of Mr S. (FC) in a general manner and did not limit itself to the three references made in recital 349 of the contested decision.

155 In that regard, first of all, as regards recital 357 of the contested decision, it should be noted that express reference is indeed made in that recital to the notes of Mr S. (FC). However, such a reference cannot be taken as meaning that the Commission was thereby referring to all of the 19 references made to the applicant in the notes of Mr S. (FC). In the light of the conclusion drawn by the Commission in recital 352 of the contested decision, such a general reference does not satisfy the requirements of precision, under the case-law set out in paragraph 96 above, in relation to the bundle of evidence on which the Commission relied. That is all the more the case in this instance since the notes of Mr S. (FC) account for the lion's share of the Commission's evidence against the applicant, namely 19 of the 21 events at which the applicant was referred to by name. In any event, if the Commission's argument regarding the reference to the notes of Mr S. (FC) which it made in recital 357 of the contested decision were upheld, the result would be an insurmountable level of incoherence between those two recitals and the clear wording of recital 352 of the contested decision.

156 Consequently, the Court finds that the reference in recital 357 of the contested decision to the notes of Mr S. (FC) relates only to the three references made in recital 349 of the contested decision and to the notes of Mr S. (FC) on the unlawful meeting of 28 January 1998.

157 Next, in recital 358 of the contested decision, the Commission refers, in an abstract and general manner, to all the 'contemporaneous documentary evidence (referred to in section 4.3)'. Yet it is apparent from the 21 events referred to in paragraph 117 above that, during the period of infringement determined by the Commission in respect of the applicant, only the notes of Mr S. (FC) constituted such contemporaneous evidence referring expressly, either directly or indirectly, to the applicant. It

should be noted that the excerpts from the notes of Mr S. (FC) referred to by the Commission in recitals 162 to 164 of the contested decision, in relation to the Turku meeting of 14 October 1997, do not refer to the applicant in any way. Therefore, as with the reference to the notes of Mr S. (FC) in recital 357 of the contested decision, it must be found that such an abstract and general reference to the notes of Mr S. (FC) does not enable it to be inferred, as claimed by the Commission, that it thus relied on all the references taken from those notes, including the 15 other references to the applicant in the notes of Mr S. (FC), which it none the less rejected in recital 352 of the contested decision, in concluding that the applicant participated in the infringement at issue. In any event, for the same reasons as those set out in relation to recital 357 of the contested decision, if the Commission's argument were to be upheld, the result would be an insurmountable level of incoherence between the conclusions which it drew in recital 352 of the contested decision and the other grounds set out under point 5.4.1.1 of that decision.

158 Consequently, the Court considers that the reference, in recital 358 of the contested decision, to all the 'contemporaneous documentary evidence (referred to in section 4.3)' relates only to the three references made in recital 349 of the contested decision and to the notes of Mr S. (FC) on the unlawful meeting of 28 January 1998.

159 Third and finally, the Commission submits that it follows from the case-law that the fact that the information is reported indirectly or that it is of secondary importance has no influence on whether it can be used as evidence or not. None the less, in this case, as is apparent from both the clear wording of recital 352 of the contested decision and the Commission's actual pleadings, the Commission decided to reject without reservation the 15 other references to the applicant in the notes of Mr S. (FC) during the *inter partes* stage of the administrative procedure.

160 Consequently, in so far as, in recital 352 of the contested decision, the Commission not only recognised, in the first two sentences of that recital, the weak probative value of the 15 other references to the applicant in the notes of Mr S. (FC), but above all concluded, in the third sentence of that recital, that it could not rely on those references in the notes of Mr S. (FC) to show the applicant's participation in the infringement at issue, it must be considered that it was required to state explicitly, if it was its subsequent intention, that it none the less considered that the same references could be relied on as part of its bundle of evidence.

161 However, at no point, between recitals 353 and 356 of the contested decision, did the Commission attempt to reuse the 15 other references to the applicant in the notes of Mr S. (FC) as evidence that the applicant participated in the infringement at issue.

162 It is apparent from all of the above considerations that it is rightly claimed that, in recital 352 of the contested decision, the Commission decided to reject the 15 other references to the applicant in the notes of Mr S. (FC) from the incriminating evidence against the applicant and from the body of evidence on which it relied.

— Conclusion regarding the identification of the evidence relied on against the applicant in respect of its alleged participation in the infringement at issue

163 First, the Court notes that, at no point in point 5.4.1.1 of the contested decision, did the Commission mention the date 9 February 2000 as marking the end of the applicant's participation in the infringement at issue. Nor does it produce a shred of

evidence therein regarding the determination of the end date of the applicant's participation in the infringement.

164 Second, in response to the applicant's arguments in that regard (see paragraph 57 above), the Commission states that it is of little relevance that the applicant did not hear EKA's statement at the meeting at the fringes of the official meeting of the CEFIC of 9 February 2000, since the cartel ended on that date. In any event, in its view, the fact that the applicant states that it did not hear that statement constitutes a serious indication that it participated in that unlawful meeting.

165 However, it should be noted first of all that the Commission's argument, which seeks to qualify the importance of the determination of the end date of the applicant's alleged participation in the cartel at issue, cannot be upheld. The duration of an infringement, which implies that the end date thereof is known, is an intrinsic element of an infringement, the burden of proof of which is borne by the Commission (*Peróxidos Orgánicos* v *Commission*, paragraph 105 above, paragraph 52). Consequently, in the present case, it was for the Commission to furnish evidence that the applicant participated in the unlawful meeting of 9 February 2000.

166 In addition, the Commission's determination of the end date of the applicant's alleged participation in the infringement at issue was all the more necessary in this case since it is apparent from points 48 and 49 of the applicant's observations on the statement of objections and its pleadings in this case that the applicant expressly disputed having participated in the unlawful meeting of 9 February 2000. Consequently, the Court finds that the Commission failed to set out, under point 5.4.1.1, in which it was supposed to assess the applicant's observations on the statement of objections and, ultimately, draw conclusions from the administrative procedure, the reasons why it

ultimately considered, in spite of the applicant's observations, that the applicant had participated in the unlawful meeting of 9 February 2000.

167 Third, and in any event, the Court notes that, as the Commission itself acknowledges, it is not until recital 488 of the contested decision, which forms part of section 7.1 (entitled 'Starting and end dates', under Title 7 'Duration of the infringement'), that it claims to have determined, by reference in particular to recital 283 of the contested decision (which forms part of section 4.3 on the cartel history), the end date of the participation of the members of the cartel in the infringement and to have drawn conclusions in that regard.

168 Both in recital 488 of the contested decision and in recital 283 thereof, to which the former refers, the Commission states 9 February 2000 as being the date of the unlawful meeting of the members of the cartel at the fringes of the official meeting of the CEFIC held on the same day in Brussels. However, the grounds set out by the Commission for using 9 February 2000 as marking the end of the period of infringement in relation to the applicant are ambiguous and contradictory.

169 Accordingly, in recital 283 of the contested decision, the Commission states that, on 9 February 2000, an official meeting of the CEFIC took place in Brussels, which the applicant attended. It is apparent from the same recital that, at the fringes of that meeting, Mr S. (EKA) told 'his counterparts that he refused to participate in any further discussions with competitors'. Thus, although the Commission states clearly, in recital 283 of the contested decision, that the participation in the official meeting of the CEFIC of EKA, Arkema France and the applicant is apparent from the evidence in the file, it does not, however, furnish any evidence of the applicant's participation in the unlawful meeting of 9 February 2000, during which Mr S. (EKA) is claimed to have made his statement on behalf of EKA. Moreover, in recital 283 of the contested decision, the Commission does not even state that an unlawful meeting took place

at the fringes of the official CEFIC meeting of 9 February 2000. It merely refers to a statement on behalf of EKA 'at the fringes of [the official] meeting' of the CEFIC on the same day.

170 Consequently, it is apparent from the foregoing that, in recital 283 of the contested decision, the Commission merely assumed that the applicant's participation in the unlawful meeting of 9 February 2000 resulted from its participation in the official meeting of the CEFIC of 9 February 2000. Such an assumption is insufficient since, in its observations on the statement of objections, the applicant expressly disputed having participated in the unlawful meeting of 9 February 2000. Moreover, at no point in the contested decision does the Commission claim that the participants at the official meetings of the CEFIC necessarily participated in the cartel meetings held at the fringes. At the very most, it states in recital 76 of the contested decision that, at the top management level, discussions took place during multilateral meetings, often at the fringes of the CEFIC sodium chlorate working group meetings.

171 The Commission's amalgamation of the official meeting of the CEFIC of 9 February 2000 and the unlawful meeting held on the same day is reproduced in recital 488 of the contested decision, where it states, without any evidence to support its position, and in reference solely to recital 283 of the contested decision, that 'the last anti-competitive meeting — in which EKA, [Arkema France] and [the applicant] participated — was held on 9 February 2000' and that '[the applicant] directly participated in the meeting of 9 February 2000'. However, it must be found, once again, that, since the Commission did not claim at any point or, *a fortiori*, establish that participation in the official meetings of the CEFIC implied involvement in the anti-competitive meetings held at their fringes, the applicant rightly claims that the Commission has

not furnished any evidence of its participation in the unlawful meeting of 9 February 2000, which was the only cartel meeting held on that day.

172 Finally, it is very clear from Annex I to the contested decision that the applicant is not identified as having participated in the unlawful meeting of 9 February 2000. In its pleadings, the Commission pleads a material error in that regard. However, it is apparent from recital 69 of the contested decision and footnote No 114 thereof that Annex I to that decision contains a list of the 72 anti-competitive contacts in which the members of the cartel at issue were involved. Consequently, the last line of the table reproduced in Annex I to the contested decision necessarily refers to the unlawful meeting of 9 February 2000 identified by the Commission, and not the official meeting of the CEFIC held on the same day. In the light of the grounds of the contested decision and the evidence in the file, it cannot be found, as claimed by the Commission, that the applicant participated in that cartel meeting and consequently, be considered that the fact that the applicant was not identified in Annex I to the contested decision as having participated in the unlawful meeting of 9 February 2000 results from a mere material error.

173 It follows from all of the foregoing preliminary considerations that, in the absence of any evidence furnished by the Commission in that regard, the latter wrongly submits that the applicant's participation in the cartel ended on 9 February 2000. Consequently, the Court must uphold, as founded, the applicant's argument that the Commission did not prove that it participated at the unlawful meeting of 9 February 2000. The Commission was thus not able to take that date as marking the end of the applicant's participation in the infringement at issue.

174 In the second place, as regards the handwritten contemporaneous evidence of the facts, it is apparent from all of the considerations set out above that the only references made are those taken from the notes of Mr S. (FC). In addition, of the 19 references taken from the notes of Mr S. (FC), initially relied on following the preliminary

stage of the administrative procedure, regarding the period of infringement at issue, only the three references taken from the notes of Mr S. (FC), referred to in recital 349 of the contested decision, and the reference to the unlawful meeting of 28 January 1998 were expressly relied on by the Commission, following the *inter partes* stage of the administrative procedure, in the body of evidence used to prove the applicant's participation in the infringement at issue. As regards the 15 other references to the applicant in the notes of Mr S. (FC), it must be found that they were excluded from that body of evidence in recital 352 of the contested decision, due to their lack of probative value.

175 Second, as regards, the statements of the applicant's competitors which the Commission included as part of the body of evidence as a means of proving that the applicant participated in the infringement at issue, it is apparent from the evidence relied on by the Commission, referred to in paragraphs 117 and 120 above, that, in respect of the period during which the Commission determined that the applicant participated in the infringement, those statements were made by EKA and FC and no other company. It must thus be found that, neither during the preliminary stage nor following the *inter partes* stage of the administrative procedure, did the Commission rely on Arkema France's statements, as referred to in paragraph 6 above and attached in Annex 3 to the application, to establish that the applicant participated in the infringement at issue.

176 Third, the Commission used the applicant's acknowledgment of its participation in the unlawful meeting of 28 January 1998 as evidence. In order to determine the extent of that participation, the Commission relied on the notes of Mr S. (FC) concerning that meeting and on the statements of FC and EKA.

177 The probative value of the evidence relied on by the Commission must first be assessed in the light of the conclusions set out in paragraphs 163 to 176 above, and

an assessment then made of whether that evidence constitutes sufficient evidence to show that the applicant participated in the infringement at issue.

The probative value of the evidence relied on against the applicant

— The written contemporaneous evidence of the applicant's direct participation in the infringement at issue

178 First of all, the examination of the probative value of the notes of Mr S. (FC) on the unlawful meeting of 28 January 1998 will be made together with the examination of the applicant's acknowledgment of its participation in that meeting (see paragraphs 216 to 218 below).

179 As regards the three references to the applicant taken from the notes of Mr S. (FC), referred to in recital 349 of the contested decision, the Court notes, first of all, that, in the light of the observations made by the parties in their pleadings and in their responses to the questions put to them by the Court either in writing or at the hearing, the notes of Mr S. (FC), such as presented in the Commission's file, namely as typed notes, were typed and translated from Finnish into English by Mr S. (FC) from the handwritten notes in Finnish which he himself took at the events which he reports and describes. In that regard, notwithstanding a few adjustments of a formal or terminological nature made to certain passages, to which the Court drew the Commission's attention at the hearing, the Court finds that, in so far as the notes in the file faithfully translate and transcribe the handwritten notes taken originally by Mr S. (FC), and were taken at the time of the facts by Mr S. (FC), the typed English version

of them must be regarded as written contemporaneous evidence of the infringement. Consequently, the three references to the notes of Mr S. (FC), as referred to in recital 349 of the contested decision, constitute such evidence.

180 More precisely, as regards, first, the notes taken by Mr S. (FC) in relation to the telephone conversation of 16 December 1996 with Mr S. (EKA), Mr S. (FC) stated that he had had discussions with the applicant. In the passage of the typed notes of Mr S. (FC) of that conversation of 16 December 1996 set out by the Commission in paragraph 349 of the contested decision, it is stated that: [CONFIDENTIAL]. Reference is also made, in that part of recital 349 concerning that conversation, to recital 130 of the contested decision. In that recital, the Commission states that it considers this to be evidence of the applicant's participation in the cartel, in that it shows that it participated in illicit contact with a competitor.

181 As regards, second, the notes taken by Mr S. (FC) in relation to his telephone conversation of 4 December 1998 with Mr S. (EKA), the latter stated that Arkema France had a discussion with the applicant. The passage, set out by the Commission in recital 349 of the contested decision, from the typed notes of Mr S. (FC) of that conversation of 4 December 1998, reads as follows: [CONFIDENTIAL]. Reference is also made, in that part of recital 349 concerning that conversation, to recital 219 of the contested decision, in which that same quotation is reproduced.

182 As regards, third, the notes taken by Mr S. (FC) in relation to his telephone conversation of 9 December 1999 with Mr L. (Arkema France), one of them is said to have stated that he had had a discussion with the applicant. In respect of that telephone conversation, the Commission notes, in recital 349 of the contested decision, that it

was not able to state which of the two interlocutors had had a discussion with the applicant. However, contrary to what the Commission implies in recital 349 of the contested decision, such a lack of precision is not irrelevant. The multiplication of the number of intermediaries involved results in a reduction in the credibility of the item of evidence relating to the contacts at issue. Consequently, the degree of credibility of the typed notes would be greater if Mr S. (FC) had actually had that telephone conversation with the applicant than if it were Mr L. (Arkema France) who had that conversation with the applicant.

183 Moreover, still in relation to that telephone conversation of 9 December 1999, the Court notes that the passage from the notes of Mr S. (FC) in that regard, as reproduced by the Commission in recital 349 of the contested decision, reads as follows: [CONFIDENTIAL]. In that part of recital 349 concerning that conversation, reference is also made to recital 258 of the contested decision. In recital 258, the Commission states that, on that occasion, the two interlocutors discussed the need to find a new general agreement between competitors. In addition to the passage referred to above, as set out by the Commission in recital 349 of the contested decision, it appears that the notes of Mr S. (FC) reproduced in recital 258 of the contested decision stated the following:

[CONFIDENTIAL]

184 Secondly, the Court notes that, as is apparent from recital 350 of the contested decision, the three references to the applicant, taken from the notes of Mr S. (FC), made in recital 349 to the contested decision clearly show, in the Commission's view, that direct telephone conversations took place with the applicant and makes it apparent that the applicant contributed directly to the general price agreements. Moreover, it is apparent from the Commission's pleadings and its responses to the questions put by the Court at the hearing, first, that those three items of evidence are particularly conclusive and thus constitute the main incriminating evidence against the applicant to show that it participated in the single, continuous and Europe-wide infringement

being pursued by the Commission and, second, that the applicant did not dispute those statements and, finally, that that contemporaneous evidence of the facts is particularly incriminating for the applicant, without being the only evidence gathered by the Commission. However, as regards its alleged participation in the infringement at issue, the applicant disputes the probative value of that contemporaneous evidence of the facts.

185 In that regard, the Court notes, first of all, that, contrary to what the Commission claims, the applicant disputes, in its response to the statement of objections (see in particular point 76 of its response to the statement of objections), the probative value of the notes of Mr S. (FC) and, in particular, the notes relating to the telephone conversation of 16 December 1996.

186 Second, generally, contrary to what the Commission claims, those three references to the applicant, taken from the notes of Mr S. (FC), as set out in recital 349 of the contested decision, constitute indirect evidence of the applicant's alleged participation in the infringement at issue.

187 Those three references show that, during the telephone conversations between Mr S. (FC) and Mr S. (EKA) (conversations of 16 December 1996 and 4 December 1998) or between Mr S. (FC) and Mr L. (Arkema France) (conversation of 9 December 1999), either a discussion took place between Mr S. (FC) and the applicant (see the notes of Mr S. (FC) on his conversations of 16 December 1996 and 9 December 1999, if it is to be considered, as a result of the Commission's hesitation in that regard, that the latter telephone conversation took place between Mr S. (FC) and the applicant), or that a discussion took place between Arkema France and the applicant (see the notes of Mr S. (FC) on his telephone conversation of 4 December 1998).

188 Consequently, as the applicant submits, those three references in recital 349 of the contested decision, taken from the notes of Mr S. (FC), merely report, in an indirect manner, alleged discussions, prior to the event to which each reference directly relates, between the applicant and one of its competitors. Accordingly, the probative value of that evidence is reduced, since it does not, in itself, provide direct evidence of the applicant's participation in the infringement. For such notes to be able to constitute direct evidence of such participation, they would have to have been obtained by the Commission directly from the applicant (while searching its premises, for example, though no such search was carried out in this instance) or, perhaps, be a handwritten contemporary note of the facts (such as the notes of Mr S. (FC)) recounting what was discussed between the author of that note and the applicant. However, in the present case, none of the three references taken from the notes of Mr S. (FC) and relied on by the Commission in recital 349 of the contested decision constitutes such direct evidence of the applicant's participation in the alleged infringement.

189 Therefore, although the three references to the applicant, taken from the notes of Mr S. (FC), as set out in recital 349 of the contested decision, constitute contemporaneous evidence of the infringement in that they relate to events capable of proving that infringement, they do not, however, constitute contemporaneous evidence of events directly involving the applicant. Accordingly, in spite of the fact that those three references refer to evidence which came into being during the period of the infringement, to be able to regard it as probative it is necessary to assess whether it is confirmed to a sufficient degree by other evidence.

190 Third, as regards the alleged discussions between Mr S. (FC) and the applicant, as referred to in the notes of Mr S. (FC) in relation to the telephone conversations of 16 December 1996, or of 9 December 1999, and inasmuch as, once again, in the light of the Commission's hesitation in that regard, it is to be considered that the latter

telephone conversation took place between Mr S. (FC) and the applicant, it is indeed surprising that Mr S. (FC) did not note down what was discussed.

191 As is apparent from the documents in the file, and in particular from the extract from his notes, Mr S. (FC) had a clear tendency to note down contacts which he had had (whether on the telephone or at meetings) with FC's competitors. Moreover, that is what the Commission implies in the last sentence of recital 351 of the contested decision, where it states that 'the notes [of Mr S. (FC)] constitute minutes or records of meetings and telephone conversations which he himself attended'. However, it is clear that, in those notes, there are no minutes or records of any form of direct contact by telephone between Mr S. (FC) and the applicant.

192 Fourth, it must be found that it is apparent from the Commission's transcript of the hearing with Mr S. (FC) that, on that occasion, he did not mention, and thus did not confirm, those two telephone conversations with the applicant, as referred to in the notes concerning his telephone conversations of 16 December 1996 and 9 December 1999. Similarly, the Court observes that the Commission did not even deem it necessary, during that hearing, to ask Mr S. (FC) to shed some light on the absence of minutes in his notes of his alleged telephone conversations with the applicant, or on the content of those discussions or even on the meaning to be given to the three references made to the applicant, taken from his notes and set out in recital 349 of the contested decision.

193 In the third place, with respect to the considerations set out in paragraphs 184 to 192 above, an assessment is required of the probative value which may be attributed to each of the three references set out in recital 349 of the contested decision.

194 First, as regards the notes of Mr S. (FC) on the telephone conversation of 16 December 1996, it is possible to recognise that the statement in those notes, as highlighted by the Commission in recital 349 of the contested decision, namely [CONFIDENTIAL], may constitute prima facie evidence of the existence of direct contacts between a cartel member and the applicant.

195 However, as stated in the general considerations set out in paragraphs 186 to 192 above, none of the notes of Mr S. (FC) relates directly to his alleged discussion with the applicant, to which reference is made in his notes on the telephone conversation of 16 December 1996. Also, in the transcript of his hearing, there is no information whatsoever on either the telephone conversation of 16 December 1996 or on that alleged earlier conversation with the applicant. Moreover, in recital 130 of the contested decision, which relates to that telephone conversation, the Commission did not furnish any other item of evidence capable of giving the notes of Mr S. (FC) sufficient probative value in that regard. Furthermore, it must be found that there is no evidence in EKA's statements which is capable of confirming the content of the telephone conversation of 16 December 1996, as reported in the notes of Mr S. (FC).

196 Consequently, it must be found that, in the absence of any evidence to confirm the content of the notes of Mr S. (FC) on the telephone conversation of 16 December 1996, during which the applicant's name was mentioned, but in which the applicant was not involved directly, the reference to the applicant in those notes does not constitute evidence which is sufficiently reliable to prove that it participated in the infringement at issue.

197 Second, as regards the notes of Mr S. (FC) concerning the telephone conversation of 4 December 1998 between Mr S. (FC) and Mr S. (EKA), in spite of the vague nature of the terms used by the Commission to report the alleged discussion between Arkema France and the applicant, it may be considered that the statement in those notes, as highlighted by the Commission in recital 349 of the contested decision, namely

[CONFIDENTIAL], may also constitute prima facie evidence of the existence of direct contacts between a cartel member and the applicant.

198 None the less, the Court points out, first of all, that those notes do not concern a discussion between one of the interlocutors of that telephone conversation of 4 December 1998 and the applicant, but refer to a discussion with a third person, Arkema France, and the applicant. Next, there is nothing in the Commission's transcript of the hearing with Mr S. (FC) which casts any light on the content of that conversation of 4 December 1998, as transcribed in his notes. Moreover, in recital 219 of the contested decision, which relates to that telephone conversation, the Commission did not refer to any other evidence capable of granting sufficient probative value to those notes in that regard. Similarly, the Court finds, once again, that there is no evidence in EKA statements capable of confirming the content of the telephone conversation of 4 December 1998, as reported in the notes of Mr S. (FC). Finally, Arkema France's statements (that is those of Mr L. (Arkema France)), made at the hearing with the Commission on 24 September 2004, contain no evidence capable of corroborating the content of the telephone conversation of 4 December 1998, as reported in the notes of Mr S. (FC), namely that Arkema France had held discussions with the applicant. Moreover, that finding is not surprising since, as the applicant submits, it is apparent from the transcript of Arkema France's hearing that the latter identified the applicant as a cartel member solely during the first period from October 1994 to mid-1998, and not during the second period, from mid-1998 to May 2000.

199 Consequently, it must be found that, in the absence of any evidence confirming the wording of the notes of Mr S. (FC) in relation to the telephone conversation of 4 December 1998, the reference to the applicant in those notes does not constitute sufficiently reliable evidence of the applicant's participation in the infringement at issue.

200 Third, as regards the notes of Mr S. (FC) concerning the telephone conversation of 9 December 1999 between Mr S. (FC) and Mr L. (Arkema France), it may once again be found that the statement in those notes, as highlighted by the Commission in recital 349 of the contested decision, namely [CONFIDENTIAL], may constitute prima facie evidence of the existence of direct contacts between a cartel member and the applicant.

201 None the less, one the one hand, supposing that it was Mr S. (FC) who spoke with the applicant, as has already been stated in the general considerations set out in paragraphs 186 to 192 above, it must be found that none of the notes of Mr S. (FC) relates directly to his alleged discussion with the applicant, to which reference is made in his notes. Also no information is to be found in the transcript of his hearing regarding that alleged discussion with the applicant. In addition, in recital 258 of the contested decision, which relates to that telephone conversation, the Commission did not furnish any other evidence capable of conferring sufficient probative value on the notes of Mr S. (FC) in relation to the telephone conversation of 9 December 1999. Finally, just as with the telephone conversation of 4 December 1998, there is no evidence in the statements of Arkema France (that is those of Mr L. (Arkema France)) made during its hearing with the Commission on 24 September 2004 which is capable of providing guidance to the Court on the notes taken by Mr S. (FC) during his telephone conversation of 9 December 1999.

202 On the other hand, even supposing that it was Mr L. (Arkema France) who spoke with the applicant, there would then be inconsistency between what was said during that conversation, as recounted by Mr S. (FC) in his notes, and the statements of Mr L. (Arkema France) made during the hearing of 24 September 2004. Not only is there no evidence from the statements of Arkema France made during that hearing that there was any contact between that undertaking and the applicant, but above all, and once again, as the applicant claims, it is apparent that, although Arkema France identified

the applicant as a cartel member during the first period from October 1994 to mid-1998, that was not the case as regards the period from mid-1998 to May 2000.

203 Consequently, it must be found that, in the absence of any evidence capable of confirming the content of the notes of Mr S. (FC) concerning the telephone conversation of 9 December 1999, the reference made to the applicant in those notes does not constitute sufficiently reliable evidence that the applicant participated in the infringement at issue.

204 In the light of all of the considerations set out in paragraphs 178 to 203 above, in the absence of any evidence to confirm the terms of the three references to the applicant, taken from the notes of Mr S. (FC) and set out in recital 349 of the contested decision, it must be found that those three items of evidence relied on by the Commission are not sufficiently reliable, as such, to serve as evidence of unlawful conduct on the part of the applicant.

— FC's and EKA's statements

205 In so far as concerns the statements of the applicant's competitors, as noted in paragraph 175 above, the examination of their probative value concerns only EKA's and FC's statements.

206 In the first place, it is necessary to examine the argument raised by the applicant challenging the reliability of the statements made by the competitors with a view to their benefiting from the Leniency Notice. The Court notes, in that regard, that, as is apparent from the case-law set out in paragraphs 100 to 106 above, no provision or general principle of European Union law prohibits the Commission from relying, as

against an undertaking, on statements made by other undertakings similarly accused, even if only gathered in the context of a leniency application seeking to obtain immunity from, or a reduction of, a fine. None the less, it is apparent from those paragraphs that a statement by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence, although the degree of corroboration required may be lesser in view of the reliability of the statements at issue. Such a requirement for corroboration of statements of an undertaking is also to be met where such a statement is contested by an undertaking similarly accused. In this instance, the applicant disputes the accuracy of EKA's and FC's statements.

207 In the second place, the reliability of EKA's and FC's statements must therefore be assessed.

208 First, EKA's statements are set out by the Commission under section 4.3 of the decision, regarding the Turku meeting of 14 October 1997 and the unlawful meeting of 28 January 1998.

209 EKA's statements regarding the Turku meeting of 14 October 1997 between FC and EKA are set out in recital 162 of the contested decision, under section 4.3. In that extract from EKA's statements, reproduced in recital 162, it is stated that FC constantly increased its supplies in Spain and Portugal, and that the risk was that Spanish producers would consequently move to France. EKA then stated that [CONFIDENTIAL].

210 Next, in recitals 163 and 164 of the contested decision, the Commission cites the notes of Mr S. (FC) and those of Mr W. (EKA). However, the Court points out that, although those notes show that Arkema France and EKA were worried about the future of the Spanish market, at no point was the applicant's name mentioned either directly or indirectly.

211 Finally, in its conclusion in recital 165 of the contested decision in relation to the Turku meeting of 14 October 1997, the Commission noted the following:

'[T]he issue of [FC's] failure to respect the market shares in Portugal, Spain and France was addressed. EKA and [FC] also agreed to increase prices in these countries, subject to obtaining the support of other competitors.'

212 That latter interpretation on the part of the Commission in relation to EKA's statements in recital 162 of the contested decision cannot be upheld. It is only apparent from the wording of that statement that EKA and FC agreed to observe the reactions of the other competitors in the event that they increased their prices. However, in the light of the evidence in the file and contrary to what the Commission considered in recital 165 of the contested decision, it cannot be inferred that the support of competitors such as the applicant was required to be able to increase prices. Moreover, as stated above, although the notes of Mr S. (FC) and Mr W. (EKA), cited in recitals 163 and 164 respectively of the contested decision, show that there was tension on the Spanish and Portuguese markets, which could have had repercussions on the French market, those notes do not mention any involvement of the applicant or confirm EKA's statement relating to the existence of an agreement to increase prices, which was conditional upon the support of competitors such as the applicant.

213 Finally, in any event, as the applicant submits, it cannot be ruled out that, as a result of the conduct of the participants on a competitive market, if one of them were to lose some of its market share as a result of the entry onto the market of a competitor, it would naturally try to find customers on neighbouring markets. Accordingly, the Court considers that, contrary to what the Commission submits, the fact that FC and EKA were able to note, at the Turku meeting of 14 October 1997, that FC's increased deliveries on the Spanish market could have repercussions on the French market cannot, without any supporting evidence, be interpreted as evidence of the participation of a competitor such as the applicant in an infringement for the purposes of Article 81 EC. Thus, in the absence of additional evidence to corroborate EKA's statement, the Court considers that the applicant rightly challenges the reliability of that statement.

214 EKA's statements in relation to the unlawful meeting of 28 January 1998 are referred to by the Commission in section 4.3 of the contested decision. More precisely, in recital 182 of the contested decision the Commission states that '[i]n their submissions, EKA, [FC] and [the applicant] indicated that [Mr S. (EKA), Mr L. (Arkema France), Mr A. (Aragonesas) and Mr S. (FC)] had been present at the meeting'. Consequently, in so far as, as stated above, the third type of evidence gathered by the Commission is the applicant's acknowledgment of its participation in the unlawful meeting of 28 January 1998, the examination of the reliability of EKA statements on that meeting must be reserved and analysed as part of the assessment of the probative value of that acknowledgement.

215 Second, FC's statements are referred to by the Commission in section 4.3 only in relation to the unlawful meeting of 28 January 1998. More precisely, it is also in recital 182 of the contested decision that the Commission states that '[i]n their submissions, EKA, [FC] and [the applicant] indicated that [Mr S. (EKA), Mr L. (Arkema France), Mr A. (Aragonesas) and Mr S. (FC)] had been present at the meeting'. Consequently, for the same reasons as those set out in paragraph 214 above in relation to EKA's

statement on the unlawful meeting of 28 January 1998, the examination of the reliability of FC's statements on that meeting must be reserved and analysed as part of the assessment of the probative value of that acknowledgement.

— The applicant's acknowledgment of its participation in the unlawful meeting of 28 January 1998

216 The applicant does not dispute having participated in the unlawful meeting of 28 January 1998. However, it submits that, as is apparent from the notes of Mr S. (FC), it participated only partially and at only one of the 72 anti-competitive contacts listed in Annex I to the contested decision, which is insufficient proof that it participated in the infringement at issue.

217 The Court notes, in relation to the applicant's acknowledgment of its participation in the unlawful meeting of 28 January 1998, that it is apparent from the case-law that an undertaking's express or implicit acknowledgement of matters of fact or of law during the administrative procedure before the Commission may constitute additional evidence when determining whether an action is well founded (Case C-407/08 P *Knauf Gips* v *Commission* [2010] ECR I-6375, paragraph 90).

218 Consequently, for such an acknowledgement to be able to constitute reliable evidence, the Court must, when assessing whether an action is well founded, consider whether the terms of that acknowledgment complement other items of evidence gathered by the Commission in relation to the unlawful meeting of 28 January 1998.

219 In the first place, as regards the applicant's participation in the unlawful meeting of 28 January 1998, it is not disputed that the applicant explicitly acknowledged, during the administrative procedure before the Commission, having participated in that meeting.

220 Next, the Court notes that, contrary to what the Commission initially submitted in its pleadings and as it expressly recognised in its observations of 3 September 2010 on the report for the hearing, the applicant's participation in the unlawful meeting of 28 January 1998 constituted its first participation in a meeting of the cartel at issue. The Court also notes that that finding is explicitly apparent from FC's statements, as set out in the Commission's file. According to those statements, in so far as concerns the unlawful meeting of 28 January 1998, that cartel meeting was comparable to previous ones 'except that it also involved [the applicant]'.

221 In the second place, it can be seen from recitals 182 to 186 of the contested decision that, in addition to the applicant's explicit acknowledgement that it participated in the unlawful meeting of 28 January 1998, the Commission expressly referred to other items of evidence in concluding that the applicant participated in that meeting. In that regard, it referred to the notes of Mr S. (FC) on that meeting, as reproduced on pages 1159 and 1160 of the Commission's file and to EKA's statements.

222 In so far as concerns the pages of the file which contain the notes of Mr S. (FC), the Court notes that, in response to a question put to the applicant at the hearing, the latter stated that it was no longer sure that the notes reproduced on those pages of the file actually related to the unlawful meeting of 28 January 1998 and that, if that were the case, they were describing a meeting at which Mr A. (Argonesas) did not participate.

223 In that regard, the Court observes that it is clear, firstly, from point 24 of the applicant's response to the statement of objections that the applicant cited in inverted commas the excerpts taken from the notes of Mr S. (FC) and, more specifically, those taken from indents 14 to 22 and 24 to 32 of those notes. Moreover, also in point 24 of its response to the statement of objections, the applicant expressly identifies point 163 of the statement of objections as reproducing the wording of the notes of Mr S. (FC) on the unlawful meeting of 28 January 1998. Finally, the Court points out that, in point 25 of its response to the statement of objections, the applicant makes observations on the wording of the notes cited in point 163 of the statement of objections, but at no point disputes that those notes relate to exchanges which took place during the unlawful meeting of 28 January 1998, in the presence of Mr A. (Aragonesas).

224 Second, the Court finds that it is apparent from the second introductory paragraph to the notes of Mr S. (FC) on the unlawful meeting of 28 January 1998, as set out at the top of page 1159 of the Commission's file, that Mr S. (FC) and Mr L. (Arkema France) added the applicant to the list of participants for that meeting.

225 Third, it is apparent from the notes of Mr S. (FC) taken at the unlawful meeting of 28 January 1998, as reproduced on pages 1159 and 1160 of the Commission's file, that in the exchanges which took place between the participants at that meeting the applicant's name appears either implicitly in abbreviated form as 'Arag' or 'Ara', or indirectly via the name of its representative Mr A. (Aragonesas); the applicant did not dispute this either in its pleadings or at the hearing.

226 Consequently, it must be considered first of all that, contrary to what the applicant currently argues, the notes of Mr S. (FC) on pages 1159 and 1160 of the Commission's file relate to the unlawful meeting of 28 January 1998, which it acknowledged having attended. Thus, those notes constitute contemporaneous evidence of an event at which the applicant participated directly.

227 Next, since the applicant's acknowledgement of its participation in the unlawful meeting of 28 January 1998 complements, for the purposes of the case-law cited in paragraph 217 above, the notes of Mr S. (FC) and EKA's and FC's statements relating to the applicant's participation in that meeting (see paragraphs 214 and 215 above), that acknowledgment and those notes and statements constitute sufficiently reliable evidence to be used against the applicant.

The precise and consistent nature of the body of evidence relied on by the Commission to show that the applicant participated in the infringement at issue

228 In the light of the case-law set out in paragraphs 95 and 96 above and the foregoing conclusions on the items of evidence gathered by the Commission and the probative value of each of them, it is now necessary for the Court to carry out an overall assessment as to whether the body of evidence relied on by the Commission to prove that the applicant participated in the infringement at issue is sufficiently precise and consistent as to found a firm conviction that the applicant participated in the infringement at issue.

229 In the first place, the Court notes that, in so far as concerns the unlawful meeting of 28 January 1998, in which the applicant acknowledges having participated, it is apparent from both the notes of Mr S. (FC) and FC's and EKA's statements that the participants exchanged sensitive information on their EEA-wide activities and negotiated among themselves their market shares and sale prices.

230 In that regard, as the Commission rightly noted in recitals 183 to 186 of the contested decision, the participants examined, in depth, the sodium chlorate markets in Spain, France and Portugal, and also discussed their situations on the Belgian market.

231 Accordingly, first of all in relation to those markets, it is apparent from indents 9 to 32 of the notes of Mr S. (FC) that the participants exchanged data on their production volumes, their sales prices and their market shares in respect of 1996 and 1997, in particular. It is true that the applicant disputes the sums attributed to it, as set out in indents 14 and 19 of the notes of Mr S. (FC) in relation to the unlawful meeting of 28 January 1998. However, the Court notes that the applicant (i) acknowledges having participated in that meeting; (ii) does not dispute the subject of the discussions reported in indents 9 to 28 of those notes; (iii) does not dispute having participated in the exchanges reported in indents 14 and 19 of those notes, but solely the sums relating to it set out therein; and (iv) does not dispute that [CONFIDENTIAL] (indent 22).

232 Next, as is apparent from the notes of Mr S. (FC) in relation to the unlawful meeting of 28 January 1998, from his statements and those of EKA of 2003, the participants, in particular the applicant, also entered into negotiations to divide up market shares, or to fix prices. Accordingly, it is stated in indent 23 of the notes of Mr S. (FC) on the unlawful meeting of 28 January 1998 that, as regards the Spanish market, [CONFIDENTIAL]. Similarly, it can be seen from indents 29 and 30 of the notes of Mr S. that, in so far as concerns the French market, [CONFIDENTIAL].

233 Consequently, those notes show that, as confirmed in FC's and EKA's statements, the purpose of the unlawful meeting of 28 January 1998 was anti-competitive and the

negotiations related to several markets within the EEA. Therefore, in the light of the applicant's substantial participation in that meeting, in particular since it voiced its aspirations in terms of volumes on the Spanish and French markets and confirmed that it would maintain its prices on the French market, it cannot claim that it was not aware of, or not in an position to notice, the anti-competitive nature of that meeting. Finally, it must be found that, when the applicant participated at the unlawful meeting of 28 January 1998, it clearly intended to participate and there is no evidence that it distanced itself publicly from the anti-competitive purpose of that meeting.

234 Second, the above findings cannot be called into question by the applicant's claim that it did not participate fully at the unlawful meeting of 28 January 1998. In response to the questions put by the Court at the hearing in relation to the purpose of its participation and whether it participated fully or in part, the applicant neither showed that it participated with a different intention from the other participants at that meeting, nor that it publicly distanced itself from its content, nor has it furnished any evidence to establish with a degree of certainty that, as it claims, it did not participate fully in that meeting.

235 At the most, in so far as concerns the alleged partial nature of its participation in the unlawful meeting of 28 January 1998, the applicant, first, insists that that meeting was very informal and very brief, second, relies on the wording of the second introductory paragraph at the top of page 1159 of the file and, finally, submitted, at the hearing, that Mr A. (Aragonesas), who represented the applicant at that meeting, had to leave the meeting to fly to Madrid.

236 As regards the informal nature of the unlawful meeting of 28 January 1998, it is sufficient to note that, as is evident from the findings set out in paragraphs 230 to 233 above, irrespective of the form of the meeting, its object was anti-competitive and the applicant could not have failed to have been aware of that object or of the geographic scope of the infringement at issue.

237 In so far as concerns the wording of the second introductory paragraph, the Court notes, first of all, that, as the Commission admitted at the hearing, that paragraph did not form part of the handwritten notes originating from Mr S. (FC), but was added by him when he typed those notes in English. Next, it is manifestly clear from its wording that, in the second introductory paragraph, Mr S. set out a telephone conversation which took place between Mr S. (FC) and Mr L. (Arkema France) on 14 January 1998.

238 It is true that it is clear from that paragraph and the notes of Mr S. (FC) which he took during that telephone conversation on 14 January 1998, which are reproduced on page 1147 of the Commission's file, that, during that conversation, Mr S. (FC) and Mr L. (Arkema France) referred to the applicant's participation in the unlawful meeting of 28 January 1998 and assumed that it would participate only in relation to the discussions concerning the Spanish, French and Portuguese markets. However, the Court finds that it is clear neither from the notes of Mr S. (FC) nor EKA's statements that the applicant did not participate in full.

239 In so far as concerns the applicant's claim at the hearing, in response to questions put by the Court, that Mr A. (Aragonesas) left the unlawful meeting of 28 January 1998 very quickly so as not to miss his flight back to Madrid, that claim cannot be relied on to show that the applicant did not participate in that meeting in full. As pointed out by the Commission at the hearing, which the applicant did not dispute at that point, it is apparent from the applicant's written responses to the Commission's questions regarding the unlawful meeting of 28 January 1998, which are set out on pages 12856

and 12857 of the Commission's file (see Annex E.1), that the applicant expressly stated that it was clear from a bank statement of a bank card belonging to Mr A. (Aragonesas) that he stayed at the Sheraton Hotel in Brussels on the night of 28 January 1998 and from markings on that statement, first, that the purpose of his trip to Brussels was to attend the official meeting of the CEFIC in that very hotel and, second, that he participated at a meeting at the fringes of that official meeting, which most likely took place on the same day as the latter. Consequently, the applicant wrongly submits that Mr A. (Aragonesas) left the official meeting to catch a flight to Madrid that same evening.

240 Finally, the applicant also wrongly submits, in its responses to the question put by the Court, that it was clear from indent 40 of the notes of Mr S. (FC) concerning the unlawful meeting of 28 January 1998 that Mr A. (Aragonesas) was absent from the meeting. That indent states that: [CONFIDENTIAL] …' Although that indent indeed refers to a third-party evaluation of the applicant's capacity, it must none the less be found that it does not enable it to be found that Mr A. (Aragonesas) had left the meeting, and even less so given that the only item of evidence furnished by the applicant to show that it did not participate in full, as noted in paragraph 239 above, is manifestly unfounded.

241 Therefore, the applicant's argument that it did not participate in full at the unlawful meeting of 28 January 1998 must be rejected as unfounded.

242 Third, in so far as the applicant participated in full at the unlawful meeting of 28 January 1998, the Court considers that, as the participants at that meeting took advantage of the occasion to exchange, by reference to the markets on which they were present, information not only on their activities outside of the EEA (see indents 1 to 7 and 33 to 38 of the notes of Mr S. (FC) concerning the unlawful meeting of 28 January 1998), but also on several markets within the EEA, namely those in Belgium, Spain, France

and Portugal (see indents 9 to 32 of the notes of Mr S. (FC) concerning the unlawful meeting of 28 January 1998) and those in Finland, Sweden, the UK and Norway (see indents 26 and 42 to 48 of the notes of Mr S. (FC) concerning the unlawful meeting of 28 January 1998), the applicant could not claim to be unaware that, as submitted by the Commission inter alia, in recital 347 of the contested decision, the cartel in which it participated covered a substantial part of the EEA.

243 It is apparent from the considerations set out above, first, that, as regards the evidence gathered by the Commission concerning the content of the discussions which were held at the unlawful meeting of 28 January 1998 at which the applicant participated, and the applicant's acknowledgement that it participated at that meeting, the Commission furnished evidence to the requisite legal standard that the applicant participated in the unlawful meeting of 28 January 1998. Since, as is clear from recital 78 of the contested decision (see paragraph 19 above), the contacts aimed at determining the conduct of the cartel members on the market in contemplation of the annual renegotiation of contracts between the sodium chlorate producers and their customers generally intensified at the end of the preceding year, or were carried out right at the beginning of the year in question — a fact which was not disputed during the administrative procedure or before the Court — the Court considers that the evidence furnished of the applicant's participation in the unlawful meeting of 28 January 1998 was sufficient for the Commission to conclude that the applicant participated in the cartel throughout 1998.

244 Second, as regards the other items of evidence which constitute the body of evidence, namely the three references made to the applicant in recital 349 of the contested decision and EKA's statements, the Court notes that, as is apparent from recital 78 of the contested decision, the contacts between the cartel members generally took place at the end of each calendar year, or right at the beginning of the year to which the discussions related, and concerned the division of the markets at issue on an annual basis. It is clear from that recital, which the applicant did not challenge, that the other items of evidence which constitute the body of evidence relate to isolated contacts which were relatively far apart (namely, the telephone conversations of 16 December

1996, 4 December 1998 and 9 December 1999, and the meeting of 14 October 1997), which may have related to years other than those of the infringement at issue (namely, as regards the telephone conversations referred to above, 1997, 1999 and 2000, and, as regards the meeting of 14 October 1997, 1998).

245 Accordingly, in addition to the fact that, as noted in paragraphs 204, 212 and 213 above, the other items of evidence are unreliable and, notwithstanding the considerations set out in paragraph 243 above in relation to evidence concerning 1998, that evidence is excessively sporadic and fragmented.

246 Therefore, in the light of the case-law set out in paragraphs 96 and 97 above, the Court finds that the bundle of evidence relied on by the Commission, taken as a whole, is not sufficiently precise and conclusive and, in particular, does not show any coincidences or indicia to found a firm conviction, even by inference, that the applicant participated in the entire infringement at issue, that is from 16 December 1996 to 9 February 2000. However, the Court considers that the Commission did furnish evidence of the applicant's participation in the cartel at issue in respect of 1998.

247 Consequently, the first part of the first plea in law must be upheld as being founded in part, in that the Commission erred in concluding, in the contested decision, that the applicant participated in the infringement at issue from 16 December 1996 to 27 January 1998 and from 1 January 1999 to 9 February 2000. The first part of the first plea must be rejected as to the remainder.

248 In conclusion, without there being any need to examine the merits of the arguments raised by the applicant in support of the second part of the first plea, alleging insufficient evidence of the applicant's alleged participation in the infringement at issue, as a single and continuous infringement covering the whole of the EEA, that part being now devoid of purpose, the Court upholds, in part, the first plea raised by the applicant in so far as the Commission concluded that the applicant participated in the infringement from 16 December 1996 to 27 January 1998 and from 1 January 1999 to 9 February 2000. As to the remainder, and thus in so far as concerns the Commission's conclusion relating to the applicant's participation in the infringement from 28 January 1998 to 31 December 1998, that plea must be rejected as unfounded.

249 The Court therefore annuls Article 1(g) of the contested decision in part in so far as the Commission found therein that the applicant participated in the infringement at issue from 16 December 1996 to 27 January 1998 and from 1 January 1999 to 9 February 2000.

2. *The second plea, alleging errors of law and assessment committed by the Commission when calculating the amount of the fine imposed on the applicant*

(a) Arguments of the parties

250 The applicant submits that the Commission committed errors of law and assessment in calculating the amount of the fine imposed on it. The second plea is divided into three parts alleging, respectively, that the fine imposed was disproportionate and discriminatory, that an error was made in calculating the duration of the infringement at issue, and that mitigating circumstances specific to the applicant were not considered.

251 In the first place, as regards the alleged disproportionate and discriminatory character of the fine imposed on it, the applicant submits that the Commission, first, incorrectly assessed the gravity of the infringement committed by it by attributing to it the same degree of gravity as it did to the cartel ringleaders to whom the decision was also addressed. The infringement committed by the applicant is not comparable to the infringement committed by the other participants to the cartel at issue. Thus, the Commission failed to take account of the fact that, in accordance with the Commission's conclusions, its participation in the infringement at issue did not last more than three and a half years, that it concerned only three national geographical markets of the EEA, that its market share was only 5 %, that it had not participated in a single and continuous infringement, and that several indications suggest that it did not actually follow the alleged agreements.

252 Second, on the basis of the same considerations as those set out in paragraph 251 above, the Commission should not have included in the basic amount of its fine an entry fee pursuant to point 25 of the 2006 Guidelines or, at the very least, it should have applied an entry fee identical to that applied to the other addressees of the contested decision.

253 Therefore, third, by applying the same level of gravity for the infringement committed by the applicant and the same entry fee as those applied to the other participants in the cartel at issue to determine the basic amount of the fine to be imposed on them, the Commission did not take account of the circumstances specific to the applicant's participation in the infringement as compared with those of the other participants. Consequently, it infringed the principle of non-discrimination.

254 In the second place, as regards the error allegedly committed by the Commission in the calculation of the duration of the infringement at issue, the applicant reiterates the arguments which it raised on the same subject in the context of its first plea. It adds that, if the Court were to find that the applicant participated in the cartel at issue, first, the starting date of its participation should be determined in line with the

date of its first and only participation in a meeting with its competitors, namely at the unlawful meeting of 28 January 1998 and, second, the end date of its participation should be December 1998.

255 In the third place, the applicant accuses the Commission of failing to take account, in accordance with point 2B of the 2006 Guidelines, of mitigating circumstances in its favour which justified a reduction in the starting amount of the fine imposed on it.

256 In particular, it is apparent from several passages produced by companies applying for leniency that the applicant did not actually follow the alleged agreements concluded by the cartel ringleaders. Moreover, it points out that some of the information submitted by those companies concerning the price and volume levels attributed to it do not reflect its conduct on the market.

257 The Commission disputes all the arguments raised by the applicant in support of its second plea.

(b) Findings of the Court

258 At the outset and in the light of the conclusions drawn in paragraph 247 above, the Court upholds as founded the second part of the second plea, alleging that the Commission committed an error of assessment in calculating the duration of the applicant's participation in the infringement.

The infringement of the principles of proportionality and non-discrimination in the calculation of the basic amount of the fine

259 By the first part of the second plea, the applicant alleges that the principles of proportionality and non-discrimination were infringed when determining the basic amount of the fine imposed on the applicant, as compared with the basic amounts of the fines imposed on the other participants in the cartel at issue.

260 In the first place, the Court notes that, under points 9 to 11 of the Guidelines, the Commission's methodology when calculating fines consists of two stages. First, the Commission determines a basic amount for each undertaking or association of undertakings. Second, it may adjust that basic amount upwards or downwards and, in that regard, take account of aggravating or mitigating circumstances which characterise the participation of each of the undertakings concerned.

261 As regards, more specifically, the first stage of the methodology for calculating fines, it can be seen from points 13 to 25 of the 2006 Guidelines that the basic amount of the fine is related to a proportion of the value, during the last full business year of its participation, of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement. As a general rule, that proportion of the value of sales, which reflects the degree of gravity of the infringement, may be set at a level of up to 30 %, regard being had to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented. Point 23 of the 2006 Guidelines states that horizontal price-fixing, market-sharing and output-limitation agreements, which are usually secret, are, by their very nature, among the most serious restrictions on competition, with the result that the proportion of the value of sales taken into account for such infringements will generally be close to 30 %. Finally, pursuant to point 25 of the 2006 Guidelines, irrespective of the duration of the undertaking's participation in the infringement, the Commission will or may include in the basic amount of a fine an additional amount or 'entry fee' of a

sum of between 15 % and 25 % of the value of sales. That fee is included in the case of horizontal price-fixing, market-sharing and output-limitation agreements in order to deter undertakings from participating in such agreements. However, it may be included by the Commission in the case of other infringements. Pursuant to point 25 of the 2006 Guidelines, the proportion of the entry fee, whether it be imposed for horizontal price-fixing, market-sharing and output-limitation agreements, or a fee which may be imposed in the other cases, is determined by taking account of a number of factors, among which those listed in point 22 of those Guidelines.

262 Point 24 of the 2006 Guidelines states the following:

'In order to take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales … will be multiplied by the number of years of participation in the infringement. Periods of less than six months will be counted as half a year; periods longer than six months but shorter than one year will be counted as a full year.'

263 In the second place, in the present case, the applicant complains, in essence, that the Commission, on the basis of several characteristics specific to the applicant, determined the basic amount of its fine by applying the same coefficient to evaluate the gravity of the infringement, namely 19 % (see recital 521 of the contested decision),

and the same entry fee of 19 % as those applied in relation to the basic amount of the fines imposes on the other competitors (see recital 523 of the contested decision).

264 In that regard, the Court notes that it is apparent from the contested decision and the 2006 Guidelines, the principles of which are applied in that decision, as well as from the case-law, that, whilst the gravity of the infringement is initially assessed on the basis of the particular characteristics of the infringement, such as its nature, the cumulative market share of all the undertakings involved, the geographical scope of the infringement and whether it was implemented, that assessment is subsequently adjusted according to the individual circumstances of each undertaking which participated in the infringement, to take account of aggravating and mitigating circumstances specific to each of the undertakings which participated in the infringement (see, to that effect, Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, paragraph 109; Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 401; and Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 1530).

265 Thus, in the light of paragraphs 261 and 264 above, the first stage of the Commission's methodology for setting a fine aims to determine the basic amount of the fine to be imposed on each undertaking concerned, by applying to the value of the sales of the goods and services concerned on the relevant geographical market of each of the undertakings an initial multiplier reflecting the gravity of the infringement, and a second multiplier aimed at deterring them from undertaking unlawful conduct in the future. As is apparent from the 2006 Guidelines, each of those multipliers is determined in the light of factors which reflect the characteristics of the infringement as a whole, that is to say inasmuch as it combines all of the anti-competitive conduct of all of the participants.

266 Therefore, contrary to what the applicant claims, in determining the amount of those two multipliers, it is not necessary to take account of the specific characteristics of

the infringement committed by each of the participants taken individually. In addition, that finding is supported by the very purpose of the second stage of the method for setting fines, the precise aim of which is to take account of the aggravating or attenuating circumstances which characterise the individual anti-competitive conduct of each of the participants to the infringement at issue. Thus, the applicant's interpretation of the criteria for determining the two multipliers, as applied during the first stage of the methodology for setting fines, is manifestly erroneous since it would amount to taking account, during both stages, of the same characteristics specific to each of the participants.

267 Consequently, the factors listed in point 22 of the 2006 Guidelines to determine both the multiplier for 'gravity of the infringement' (point 21 of the 2006 Guidelines) and the multiplier for the 'entry fee' (point 25 of the 2006 Guidelines), all aim to evaluate the infringement of the competition rules of the European Union, taken as a whole.

268 Thus, in the present case, first, as regards the nature of the infringement committed by the competitors as a whole, the Commission found, in recital 512 of the contested decision, that they concluded market sharing and price fixing arrangements, which constitute the most harmful restrictions of competition. Next, as regards the cumulative market share of all the parties concerned, in recital 513 of the contested decision, the Commission found that market share to be 90 % in the EEA. Moreover, in so far as concerns the geographic scope of the infringement, the Commission noted, in recital 514 of the contested decision, that its effects were felt in a substantial part of the territory of the EEA. Finally, regarding whether the infringement was implemented or not, the Commission stated, in recital 515 of the contested decision, that, although the desired results were not always achieved, in general the agreements were implemented and their implementation was monitored within the cartel.

269 Moreover, the Court notes that certain parameters for the calculation of the basic amount of the fine, which are used in the first stage of the method for calculating fines, take account of the specific circumstances of each of the parties concerned. There are two objective parameters which relate, first, to the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA and, second, to the duration of the participation of each undertaking in the infringement as a whole. Therefore, as is apparent from point 6 of the 2006 Guidelines, the combination of the value of the undertakings' sales to which the infringement relates and the duration of their respective participation makes it possible as of the first stage of the method to calculate the fine to reflect both the economic importance of the infringement, taken as a whole, and the relative weight of each undertaking participating in the infringement.

270 In the third place, in the light of the above considerations, the Court must assess the merits of the applicant's complaints regarding the failure to take account, during the first stage of the method for determining its fine, of several characteristics specific to its participation in the infringement at issue.

271 First, as regards the duration of the applicant's participation in the infringement, its economic weight on the relevant market in terms of market share, and the fact that it was present on only three national markets in the EEA, the Court finds that, by multiplying the value of the goods sold by the applicant in the EEA in 1999, and therefore on the three national markets in the EEA on which it sold sodium chlorate, by the duration of its participation in the infringement at issue, as the Commission did in the contested decision, in accordance with point 24 of the 2006 Guidelines, that is to say by three and a half years, as of the first stage of the method for setting fines, the Commission took account of the applicant's relevant weight, in terms of market share, its presence on the territory of the EEA and the duration of its participation in the infringement, in relation to the infringement taken as a whole. Moreover, and in the light of the conclusions drawn in paragraph 247 above, when examining the

application to amend the contested decision, the Court must take account of the error made by the Commission in determining the duration of the applicant's participation in the infringement at issue.

272 Consequently, the applicant's argument that the Commission essentially failed to take account, during the first stage of the method for setting the fine imposed on it, of its relative weight in the infringement as a whole must be rejected as unfounded.

273 Second, in so far as concerns the applicant's complaints regarding the Commission's failure, during the first stage of the method for setting its fine, to take account of the fact that, (i) it participated in only one of the 72 anti-competitive contacts and (ii) that it did not implement the agreements concluded among the cartel ringleaders, it is sufficient to find, in the light of the considerations set out in paragraph 264 above, that it is not apparent from the 2006 Guidelines that the Commission is required, during the first stage of the method for setting fines, to take account of such specific factors relating to a participant in an infringement of the competition rules of the European Union. Indeed, the Commission does not take account of such factors until the second stage of that method and does so by taking account of aggravating or mitigating circumstances specific to each of the undertakings which participated in the infringement. Consequently, those complaints must be rejected as being irrelevant.

274 Finally, and in any event, the Court notes that, since, when calculating the basic amount of each of the fines, the Commission applied the same multipliers, for the gravity of the infringement and the entry fee, to all the undertakings to which the contested decision was addressed, the applicant's claim that the Commission infringed the principle of equal treatment lacks any factual basis.

275 In the light of all the foregoing considerations, the arguments raised by the applicant in support of the first part of its second plea, alleging an infringement of the principles of proportionality and non-discrimination, must be rejected, in part, as being irrelevant and, in part, as being unfounded.

The mitigating circumstances

276 The merits of the third part of the second plea, alleging that the Commission failed to take account of mitigating circumstances in the applicant's favour, need to be examined.

277 In that regard, it is clear from the case-law that, where an infringement has been committed by several undertakings, the relative gravity of the participation of each of them must be examined (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 623, and *Commission* v *Anic Partecipazioni*, paragraph 90 above, paragraph 150) in order to determine whether aggravating or mitigating circumstances exist in relation to them (Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 165).

278 That conclusion follows logically from the principle that penalties must be specific to the offender and the offence, according to which an undertaking may be penalised only for acts imputed to it individually. That principle applies in any administrative procedure that may lead to the imposition of sanctions under European Union competition law (*Cheil Jedang* v *Commission*, paragraph 277 above, paragraph 185; see,

as regards imputing fines, Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 63).

279 In that regard, the Court notes that points 28 and 29 of the 2006 Guidelines provide for the basic amount of fines to be varied in accordance with certain aggravating and mitigating circumstances particular to each undertaking concerned.

280 In particular, point 29 of the 2006 Guidelines establishes a non-exhaustive list of mitigating circumstances which, under certain conditions, may lead to a reduction in the basic amount of a fine.

281 It is true that that list no longer refers, among the mitigating circumstances which may be taken into account, to the passive role of an undertaking. However, in so far as the list set out in point 29 of the 2006 Guidelines is not exhaustive, such a situation cannot, in principle, be excluded from the circumstances which might lead to a reduction in the basic amount of a fine.

282 In the present case, the Court notes, first of all, that the Commission rightly concluded that the applicant participated in the infringement from 28 January 1998 to 31 December 1998.

283 Moreover, the applicant relies, in essence, in respect of the mitigating circumstances which may be taken into account, on the fact that it played a minor role in the cartel and thus its passive participation in the infringement and on the fact that it did not actually implement the anti-competitive agreements concluded by the cartel ringleaders.

— The applicant's passive role

284 It is clear from the case-law that a passive role implies that the undertaking adopted a 'low profile', that is to say, that it did not actively participate in the creation of any anti-competitive agreements (*Cheil Jedang* v *Commission*, paragraph 277 above, paragraph 167).

285 Again, according to the case-law, among the factors likely to demonstrate an undertaking's passive role in a cartel, a significantly more sporadic participation in meetings than that of the other ordinary members of the cartel can be taken into account (see, to that effect, Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 343) as well as its late entry on the market which is the subject of the infringement, independently of the duration of the undertaking's participation (see, to that effect, Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraph 100), or even the existence of statements dealing specifically with that point from other representatives of undertakings which participated in the infringement (see, to that effect, Case T-317/94 *Weig* v *Commission* [1998] ECR II-1235, paragraph 264).

286 Indeed, in the present case, it is clear from the contested decision that contacts which did not involve the applicant took place between the various members of the cartel, with a view to coordinating their negotiation efforts in respect of 1998, both before and after the unlawful meeting of 28 January 1998, and did so in relation to the Spanish, Portuguese and French markets.

287 Accordingly, in recital 172 of the contested decision, the Commission concluded, inter alia, that '… at the end of 1997, EKA Finnish Chemicals and Atochem reviewed their sales volumes and market shares in Portugal, Spain and France …'. Similarly, in

recitals 177 to 180 of the contested decision, the Commission sets out, on the basis of the notes of Mr S. (FC), the content of the four telephone conversations which took place in January, February and March 1998 between Mr S. (EKA) and Mr S. (FC) or between Mr L. (Arkema France) and Mr S. (FC), during which, as concluded by the Commission in recital 181 of the contested decision, first, [CONFIDENTIAL] and, second, [CONFIDENTIAL].

288 However, the Commission rightly submits that, during the unlawful meeting of 28 January 1998, the participants, among whom the applicant, exchanged sensitive information and, in any event, attempted to fix product prices and to divide up among themselves market shares on the various EEA markets and that, consequently, the object of that meeting constitutes a particularly serious restriction of competition.

289 It is clear from both the contested decision and the information in the Commission's file that, in relation to 1998, the discussions held during the unlawful meeting of 28 January 1998 played a decisive role in the negotiations between the cartel members present on the Spanish, Portuguese and French markets, including Aragonesas, concerning the distribution of their sales volumes on those markets and their price policies on the Spanish and Portuguese markets.

290 In addition, it can be seen from the notes of Mr S. (FC) that, although the applicant's participation in the unlawful meeting of 28 January 1998 constituted, as its first participation in a cartel meeting, a new event, it none the less participated actively in that Mr A. (Aragonesas), as is apparent from the findings set out in paragraphs 230 to 233 above, clearly intervened and contributed significantly, and in any event at a level comparable to that of the other participants in the meeting, in the negotiations aimed at concluding anti-competitive agreements in relation to each of the Spanish, Portuguese and French markets. Consequently, although the applicant did not participate directly in the other contacts with the cartel members in relation to 1998, the Court finds that the nature of the applicant's participation in the unlawful meeting

of 28 January 1998 clearly does not suggest that the applicant played a passive role therein.

291 Moreover, the Court notes that neither in the Commission's file nor in the contested decision is there any express statement of a representative of another undertaking which participated in the infringement which might indicate that the applicant's role in the cartel throughout 1998 was a passive one.

292 Furthermore, supposing that the applicant intended to rely on the mitigating circumstance of the late entry, within the meaning of the case-law set out in paragraph 285 above, of one of the undertakings concerned on the market which is the subject of the infringement, such an argument would be manifestly irrelevant in this case. Although, as concluded above, the applicant's participation in the infringement did not begin until 28 January 1998, whereas, according to the contested decision, that of the other undertakings dates back to 21 September 1994, it is not clear from the file or the contested decision, by contrast, that it entered the sodium chlorate market late. On the contrary, according to recitals 25 to 33 of the contested decision, when it was established in 1992, Aragonesas formed part of the division of the Uralita group responsible for chemical products, which dealt with sodium chlorate.

293 Similarly, the reliance by Aragonesas on the Commission's previous practice in taking decisions also cannot be accepted. It is settled case-law that the Commission has a margin of discretion when fixing the amount of fines in order that it may channel the conduct of undertakings towards observance of the competition rules (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59; Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 53; and Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127). The fact that the Commission, in the past, imposed fines of a certain level for certain types of infringements

does not mean that it is prevented from raising that level within the limits indicated in Regulation No 1/2003 if that is necessary to ensure the implementation of European Union competition policy (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 109; Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 309; and Case T-304/94 *Europa Carton* v *Commission* [1998] ECR II-869, paragraph 89). On the contrary, the proper application of the European Union competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy (*Musique Diffusion française and Others* v *Commission*, paragraph 109, and Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 237).

294 In any event, the Court notes that, in the present case and unlike the other undertakings referred to by the applicant as having been able, in its opinion, to participate in the cartel, it explicitly recognised having participated in the unlawful meeting of 28 January 1998 and did not provide any evidence of having distanced itself from the anti-competitive object of that meeting.

295 Consequently, the applicant's argument that, as a minor player, it played a passive role within the cartel throughout 1998 must be rejected.

— The non-implementation of the agreements

296 It is necessary to ascertain whether the circumstances referred to by the applicant are such as to establish that, during the period in which it was a party to the offending agreements, namely from 28 January 1998 to 31 December 1998, it actually declined to apply them by adopting competitive conduct on the market (see, to that effect,

Cimenteries CBR and Others v *Commission*, paragraph 103 above, paragraphs 4872 to 4874, and *Cheil Jedang* v *Commission*, paragraph 277 above, paragraph 192).

297 It is settled case-law that, when the amount of a fine to be imposed is being determined, the fact that an undertaking proven to have participated in collusion on prices with its competitors did not behave on the market in the manner agreed with those competitors is not necessarily a matter which must be taken into account as a mitigating circumstance. An undertaking which, despite colluding with its competitors, follows a more or less independent policy in the market may simply be trying to exploit the cartel for its own benefit (Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 230, and *Cheil Jedang* v *Commission*, paragraph 277 above, paragraph 190).

298 In this case, the evidence adduced by the applicant does not show that its actual conduct on the market was likely to defeat the anti-competitive effects of the infringement found. In particular, the applicant submits, in support of the present complaint, that it is clear from several excerpts from statements of undertakings which made leniency applications that the applicant did not actually adhere to the alleged agreements concluded between the cartel ringleaders on the market.

299 Yet, the only excerpt from those statements, cited by the applicant, which might support the wording of a contact which might have had an effect in relation to 1998 is one in EKA's 2006 statements and concerns the Turku meeting of 14 October 1997 between EKA and FC, during which it is said that the parties agreed [CONFIDENTIAL]. However, as has already been noted in paragraphs 209 to 213 above, first, the wording of that statement only shows that EKA and FC agreed to observe the reactions of the other competitors in the event that they (EKA and FC) increased their prices and, second, that it could not be ruled out that, as a result of the conduct of

operators on a competitive market, if one of them were to lose some of its market share as a result of the entry of a competitor onto the market, it would naturally try to find customers on neighbouring markets.

300 Moreover, the Court points out that the applicant stated explicitly in its pleadings, as noted in paragraph 254 above, that, if the Court were to find that the applicant participated in the cartel, its starting date could not be earlier than 28 January 1998 and its end date would be December 1998. However, it has not provided the Court with any evidence capable of showing that, during the period from 28 January 1998 to 31 December 1998, the applicant acted competitively on the market and actually refrained from applying the anti-competitive agreements. The evidence furnished to that end by the applicant concerns only its sales volumes to its customers in France, Portugal and Spain in 1999 and 2000 and the prices which it charged its various customers in Spain and Portugal during those years.

301 Consequently, the argument alleging that the agreements were not implemented during the period during which the applicant participated in the infringement must be rejected.

302 It follows from all of the above considerations that the second plea must be upheld in part, in so far the duration of the infringement committed by the applicant, as determined by the Commission for the purpose of calculating the fine to be imposed on it, is erroneous. The second plea must be rejected as to the remainder.

303 In conclusion, the application for the annulment of the contested decision must be upheld in part in so far as (i) the Commission found in Article 1 thereof that the applicant participated in the infringement from 16 December 1996 to 27 January 1998 and from 1 January 1999 to 9 February 2000, and (ii) it set the applicant's fine, in Article 2 of the contested decision, at EUR 9 900 000.

B — *The application for amendment of Articles 1 and 2 of the contested decision*

1. *Arguments of the parties*

304 In the alternative, in its second head of claim, the applicant requests, in the event that the Court does not uphold the application for annulment in its entirety, that Articles 1 and 2 of the contested decision be amended so as to reduce substantially the fine imposed on it.

305 The Commission contests the applicant's requests.

2. *Findings of the Court*

306 It is apparent from the case-law that the fact that the examination of the pleas challenging the lawfulness of a Commission decision imposing a fine for infringement of the competition rules of the European Union has revealed an illegality does not dispense the Court from examining whether, in the light of the consequences of that illegality and in exercising its unlimited jurisdiction, it is required to amend the contested decision (see, to that effect, Case T-59/02 *Archer Daniels Midland* v *Commission* [2006] ECR II-3627, paragraph 443).

307 Given the illegality which has been found in relation to the duration of the applicant's participation in the cartel at issue and, consequently, the conclusions drawn by the

Court in paragraph 303 above as to the partial annulment of the contested decision, to which the Commission is required to give due effect when implementing this judgment, there is no need, in the present case, to grant the form of order by which the applicant requests that the contested decision be amended.

308 Consequently, the Court is not required to exercise its unlimited jurisdiction in the present case and amend Article 2(f) of the contested decision.

Costs

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

310 In the present case, since the applicant has obtained partial annulment of the contested decision, almost to the extent sought in its action, it must be found that that action has been upheld, to a significant extent, by the Court.

311 Consequently, in the light of the circumstances of the present case, it is appropriate to order the Commission to bear two thirds of the costs incurred by the applicant and half of its own costs. The applicant is to bear a third of its own costs and half of those incurred by the Commission.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Annuls Article 1(g) of Commission Decision C(2008) 2626 final of 11 June 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.695 — Sodium chlorate) in so far as the Commission of the European Communities found therein an infringement by Aragonesas Industrias y Energía, SAU, from 16 December 1996 to 27 January 1998 and from 1 January 1999 to 9 February 2000;**

2. **Annuls Article 2(f) of Decision C(2008) 2626 final in so far as its sets the amount of the fine at EUR 9 900 000;**

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

4. **Orders Aragonesas Industrias y Energía to bear a third of its own costs and half of those incurred by the Commission;**

5. Orders the Commission to bear half of its own costs and two thirds of those incurred by Aragonesas Industrias y Energía.

Pelikánová Jürimäe Soldevila Fragoso

Delivered in open court in Luxembourg on 25 October 2011.

[Signatures]

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